

# **Special Immigrant Juvenile Status (SIJS) in the North Carolina State Courts**

*February 27, 2015*

*CLE Sponsored by the*

**US Committee for Refugees and Immigrants**

*Held at*

**Shaw University, Raleigh, NC**

## Detailed Outline of Presentation:

### **I. NC STATE LAW, SUBJECT MATTER JURISDICTION, LEGAL BASES, VENUES WHERE SIJS FINDINGS MAY BE MADE**

#### **A. North Carolina Public Policy shows that every Child needs and deserves a Guardian or Custodian who has full legal authority to act in their best interests, during each and every day of their childhood, and if both parents are not available/willing to assist, for just one of them to be able to act alone:**

1. § 35A-1201(6) The General Assembly of North Carolina recognizes that: Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.
2. For children with parents, if both parents are not available, willing, and able to exercise custody, one of them should have the right to act alone.

#### **B. What is Child Custody?**

1. Child custody is a “bundle” of rights and responsibilities relating to the care, custody, and control of a minor child.
2. Prior to any court involvement or other binding legal action, biology controls and the parents share equal custody rights (regardless of whether a child is legitimated or any formal paternity determination)
3. Child custody may be shared by multiple individuals/entities, and some, all, or none of whom may be the biological parents.
4. Child custody consists of both legal custody (decisionmaking authority) and physical custody (physical care, visits, delegated care)
5. Mere physical custody or possession (caretaking) of a child does not constitute the kind of legal custody required for SIJS.
6. What Kinds of Custodians Exist?
  - a) A biological parent or an adoptive parent (Ch 48)
  - b) A general guardian or guardian of the person (Ch 35A or 7B)
  - c) A custodian appointed by a court (Ch 50 or, rarely Ch 7B)
7. What categories are not custodians?
  - a) Caretakers
  - b) Individuals appointed by ORR as voluntary ‘sponsors’
  - c) Individuals with (revocable) powers of attorney over the child

#### **C. Juvenile Court Actions**

1. **7B Article 1-10, Juvenile Abuse/Neglect/Dependency Actions**

- a) Only a County Department of Social Services (“DSS”) may initiate a juvenile petition regarding a child who meets the statutory criteria of Abuse, Neglect, or Dependency
  - b) DSS involvement is based on a confidential Child Protective Services (“CPS”) report.
  - c) Court may award custody or guardianship to non-parents.
  - d) If a one-parent home, SIJ may still be appropriate.\*
  - e) The Court’s File is confidential - Make sure any SIJS order is released by a court order (including the SIJS order itself)
- 2. 7B Article 11, Termination of Parental Rights (“TPR”)**
- a) may be brought by DSS, a GAL for the child, a guardian, one parent against another, a long-term custodian or caretaker, or anyone who has filed a petition to adopt the child. [N.C. Gen. Stat. § 7B-1103](#).
  - b) The TPR is a more severe deprivation of rights than a mere custody determination and involves significantly more procedural hurdles than other actions.
  - c) It is not normally NC public policy to sever parental rights except in extreme cases or where an adoptive placement is viable.
  - d) Provisional Counsel is appointed pursuant to [§ 7B-1101.1](#), but if the parent doesn't show after having been duly served with summons under [§ 7B-1106](#) and noticed of the [§ 7B-1108.1](#) Pretrial hearing, counsel will normally be discharged.
  - e) A Termination order, based on finding that the termination is in the child’s best interests, the court should make suitable changes in custody in favor of the petitioner/movant: § 7B-1112. Effects of termination order... “(2) Except as provided in subdivision (1) above, upon entering an order terminating the parental rights of one or both parents, the court may place the juvenile in the custody of the petitioner or movant, or some other suitable person, or in the custody of the department of social services or licensed child-placing agency, as may appear to be in the best interests of the juvenile.”
- 3. Definitions in Child Welfare Proceedings (A-N-D and TPR): these statutes were drafted to the meet state’s due-process burdens, representing a high standard**
- a) **Definitions** for “Abused Juvenile,” “Neglected Juvenile,” and “Dependent Juvenile,” for purposes of Juvenile A/N/D (“DSS Court”) Proceedings: [N.C. Gen. Stat. § 7B-101](#)
  - b) **Definitions** for “Abandonment” and other related grounds for purposes of Termination of Parental Rights Proceedings: [N.C. Gen. Stat. § 7B-1111](#)
- 4. 7B Article 15-27, Juvenile Undisciplined/Delinquent Actions**
- a) These actions qualify under the federal statute, where the court makes an award of custody of the minor.
  - b) Note that certain crimes may eliminate the possibility of obtaining

legal immigration status - USCIS will carefully examine and evaluate these before granting status

#### D. Chapter 50 Child Custody Actions

1. Often this is one parent versus another, showing that only one should have right to legal custody
2. [N.C. Gen. Stat. § 50-13.1](#) allows non-parents to petition for custody of a minor child, *so long as* they have standing with respect to the particular child, and can show unfitness of the parents
3. In 3rd party custody cases, Unfitness (general) OR Acts inconsistent with the parental status (specific, includes yielding parental authority/acquiescing) must be shown by clear and convincing evidence
4. [N.C. Gen. Stat. § 50-13.2](#) codifies that a best interest standard applies (“the court *shall* consider *all relevant factors...* and *shall make findings accordingly...* which support **the determination of what is in the best interest of the child.**”)
5. and [N.C. Gen. Stat. § 50-13.5](#) provides for the detailed procedure, including grounds for *ex parte* or temporary orders prior to service of process.
  - a) [N.C. Gen. Stat. § 50-13.5\(d\)\(2\)](#) states that the court may enter orders prior to service of process in appropriate cases.
  - b) A temporary or ex parte order for custody solidifying status quo may normally be ordered.
  - c) To changes the living arrangements ex parte, the child must be exposed to:
    - (1) a substantial risk of bodily injury/sexual abuse
    - (2) a substantial risk of abduction/removal from the State (to evade the jurisdiction of North Carolina courts).
6. Temporary Orders require a specific time for reconvening, and convert to permanent orders if that doesn’t happen within a reasonable period of time
7. *N.B. ex parte* orders take the form of TRO’s under [NC Rule of Civil Procedure Rule 65](#) and require 10-day turnarounds for review until a more settled hearing - normally temporary custody - occurs after at least some opportunity for the other side to be heard.
8. Also of note, [N.C. Gen. Stat. § 50-13.8](#) provides for custody of individuals past 18 where they are physically or mentally incapable of self-support. There are no binding statutory definitions provided for these courts, as they make determinations based on common law principles and in performing their role in determining the best interests of minor children.
  - a) This is applicable where a child was already under the jurisdiction of the court as a minor; a new action for that 18+ year old would have to be through an adult guardianship, [N.C. Gen. Stat. Ch. 35](#) Articles 1-5, as with other incompetent adults.

#### E. Guardianship Proceedings

1. These special proceedings under [N.C. Gen. Stat. Ch. 35, Art., 6](#) are available to appoint a guardian of the person or general guardian (types of custodian) only where the minor has no “natural guardian.” (Confusingly,

a guardian of the estate, which handles the child's money, can be instituted even when the parents are alive.)

2. These informal "special proceeding" are handled by the Clerk's office, not by judges, and are conducted informally.
3. In all instances the Clerk must hold a hearing or determine the facts, however informally and may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to ***determine the minor's best interest.***" G.S. § 35A-1223
4. In all instances the Clerk must determine the facts in order to determine the best interests of the minor child, and "the clerk shall in every instance base the appointment of a guardian or guardians on ***the minor's best interest.***" G.S. § 35A-1224
5. In practice, it is rarer for a guardianship proceeding to be practicable as vehicles for a custody determination, but is an option available for orphans (this is also the appropriate vehicle for effectuating the testamentary recommendations of deceased parents for some particular person to act as guardian).
6. The clerk may appoint separate guardians of the estate and of the person for the minor child, which is acceptable per § 35A-1224: "Criteria for appointment of guardians. (a) The clerk may appoint a guardian of the estate for any minor. The clerk may appoint a guardian of the person or a general guardian only for a minor who has no natural guardian."
  - a) The type of guardian that will qualify under federal law as a 'custodian' for SIJS purposes is the guardian of the person charged with care, custody, and control.
  - b) A guardian of the estate, which handles the child's money, does not exercise the relevant type of custody. Therefore, a child with a guardian of the estate and no guardian of the person would likely not be eligible for SIJS.
7. If a child has just aged-out, a new action for that 18+ year old would have to be through an adult incompetency petition and application for guardianship under [N.C. Gen. Stat. Ch. 35](#) Articles 1-5, as with other incompetents who are no longer minors under NC Law.
8. N.B. that 18-20 year olds may be adults for the purposes of guardianship proceedings under NC law, but those individuals remain children under federal immigration law. It appears that adult competency/guardianship proceedings do determine the kind of legal custody and caretaking that would be awarded if the person were still a child, using the same kinds of best interests determinations, and therefore it stands to reason that an order of adult guardianship could fulfill SIJ requirements for 18-20 year olds. See, e.g. § 35A-1214. Priorities for appointment. "The clerk shall consider appointing a guardian according to the following order of priority: an individual recommended under G.S. 35A-1212.1; an individual; a corporation; or a disinterested public agent. No public agent shall be appointed guardian until diligent efforts have been made to find an appropriate individual or corporation to serve as guardian, but in every

instance the clerk shall base the appointment of a guardian or guardians on the best interest of the ward.”

#### F. Adoption Proceedings

1. They are special proceedings under [N.C. Gen. Stat. Ch. 48](#) which may be brought by a narrower class of individuals and under narrower circumstances, with many procedural barriers.
2. These informal “special proceedings” are handled by the Clerk’s office, not by judges (unless referred to the district court), and are conducted with somewhat less formality.
3. § 48-2-601. Hearing on, or disposition of, adoption petition; transfer of adoption proceeding; timing... (a1) If an issue of fact, an equitable defense, or a request for equitable relief is raised before the clerk, the clerk shall transfer the proceeding to the district court under G.S. 1-301.2.<sup>1</sup>
4. The clerk is charged with determining the best interests of the child and potentially awarding the most powerful/permanent form of custody, legal parenthood:
  - a) § 48-2-603(a). Hearing on, or disposition of, petition to adopt a minor.  
...the court shall grant the petition upon finding by a preponderance of the evidence that the adoption will serve the best interest of the adoptee
  - b) § 48-2-606. Decree of adoption.
    - (a) A decree of adoption must state at least:  
...  
(7) That the adoption is in the best interest of the adoptee.

**G. Declaratory Judgments:** Speaking broadly, any NC court may interpret any question of law or matter in dispute between the parties already before it, including the foregoing types of custody matters, and therefore those courts have an additional mechanism in which to answer the questions required about the

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<sup>1</sup> § 1-301.2. Transfer or appeal of special proceedings; exceptions.

(a) Applicability. - This section applies to special proceedings heard by the clerk of superior court in the exercise of the judicial powers of that office. If this section conflicts with a specific provision of the General Statutes, that specific provision of the General Statutes controls.

(b) Transfer. - Except as provided in subsections (g) and (h) of this section, when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding or in a pleading or written motion in an adoption proceeding, the clerk shall transfer the proceeding to the appropriate court. In court, the proceeding is subject to the provisions in the General Statutes and to the rules that apply to actions initially filed in that court.

(c) Duty of Judge on Transfer. - Whenever a special proceeding is transferred to a court pursuant to subsection (b) of this section, the judge may hear and determine all matters in controversy in the special proceeding, unless it appears to the judge that justice would be more efficiently administered by the judge's disposing of only the matter leading to the transfer and remanding the special proceeding to the clerk.

(d) Clerk to Decide All Issues. - If a special proceeding is not transferred or is remanded to the clerk after an appeal or transfer, the clerk shall decide all matters in controversy to dispose of the proceeding.

(e) Appeal of Clerk's Decisions. - Except as provided in G.S. 46-28.1(f), a party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing de novo. Notice of appeal shall be in writing and shall be filed with the clerk. The order or judgment of the clerk remains in effect until it is modified or replaced by an order or judgment of a judge. A judge of the court to which the appeal lies or the clerk may issue a stay of the order or judgment upon the appellant's posting of an appropriate bond set by the judge or clerk issuing the stay. Any matter previously transferred and determined by the court shall not be relitigated in a hearing de novo under this subsection.

(f) Service. - Notwithstanding the service requirement of G.S. 1A-1, Rule 58, orders of the clerk shall be served on other parties only if otherwise required by law.

...

child's best interests and reunification with parents.

1. Per [N.C. Gen. Stat. Ch. 1, Art. 26](#): Any division and any court of record within the General Court of Justice may, in an action pending before it solely for a declaratory judgment or for other matters wherein it has jurisdiction over the parties, may make a determination of facts and law applicable to settling a controversy between the parties.
2. [N.C. Gen. Stat. § 1-254](#) **Courts given power of construction of all instruments.** Any person... *whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise*, may have determined *any question* of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and *obtain a declaration of rights, status, or other legal relations* thereunder.
3. [N.C. Gen. Stat. § 1-264](#) **Liberal construction and administration.** This Article is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered.

#### H. **Verification of Pleadings:**

1. All pleadings relating to child custody have to be sworn-to and include an affidavit regarding compliance with the UCCJEA. The typical scenario for Civil Actions is that the pleading needs to be verified as required by law.
2. [N.C. Gen. Stat. § 1-148](#) **Verification before what officer:** Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes.

#### I. **Venue:**

1. The general rule is that the Defendant must raise a venue defense in the pleadings, or it is waived.
2. **Specific Child Custody Venue Statute:** Any County in which any parent or the child resides, or where the child “is physically present” [N.C. Gen. Stat. § 50-13.5\(f\)](#)

#### J. **Subject Matter Jurisdiction:**

1. § 50-13.5. Procedure in actions for custody or support of minor children.
  - (c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody. -
    - (1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.
    - (2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child under the provisions of G.S. 50A-201, 50A-202, and 50A-204.

#### K. **Uniform Child Custody Jurisdiction and Enforcement Act:** [N.C. Gen. Stat. § 50A-101 et seq.](#) Applicable to all child custody proceedings of any sort, this statutory provision deprives a custody court of subject-matter jurisdiction unless and until North Carolina meets the definition of a “Home State” or the court at

least has temporary emergency jurisdiction under [§ 50A-204](#) when the child is present in North Carolina and has been abandoned or threatened with abuse or mistreatment (which may ripen into non-temporary jurisdiction with passage of time). UCCJEA vests NC courts with the jurisdiction to render custody determinations regarding minor children after six months of residence and arguably sooner, treating a foreign country like another state, and the information that must be included with any new filing: [N.C. Gen. Stat. § 50A-102, -105, -201, -209](#) (and [50A-204](#) allows the state court to act in emergency circumstances involving abuse or abandonment, prior to NC becoming the ‘home state,’ after which point it can ripen into a permanent order.)

1. Home State is defined under [§ 50A-102 Definitions](#) as follows: "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.
2. This article treats foreign countries as though they were other states for purposes of these definitions, per [§ 50A-105 International application of Article:](#)
  - (a) A court of this State shall treat a foreign country as if it were a state of the United States for the purpose of applying Parts 1 and 2.
  - (b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this Article must be recognized and enforced under Part 3.
  - (c) A court of this State need not apply this Article if the child-custody law of a foreign country violates fundamental principles of human rights.
3. The UCCJEA also addresses Service of Process & Personal Jurisdiction
  - a) Notice (Service) to persons outside State: [§ 50A-108 \(a\)](#) “Notice required for the exercise of jurisdiction when a person is outside this State may be given in a manner prescribed by the law of this State for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.”
  - b) [§ 50A-201\(c\)](#) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

## II. PERSONAL JURISDICTION - INTERNATIONAL SERVICE OF PROCESS

- A. **N.C. Rules of Civil Procedure** for International Service of Process or Service of Process by Publication: [N.C. Gen. Stat. § 1A-1, Rules 4\(j1\) and 4\(j3\)](#) (also note requirements for proof of service contained in [N.C. Gen. Stat. § 1-75.10](#))
- B. Use the Department of State [country information widget](#) as the first tool to check on which treaties apply
- C. Review [this helpful article on International Service of Process.](#)

- D. Due process likely requires translation of the summons and complaint into a language spoken by the defendant, even if an international agreement does not govern or specify that the documents must be translated.
- E. **Hague Service Convention**
  - 1. This convention governs service in many countries around the world
  - 2. The US is a full party to the convention
  - 3. You may wish to read the [Full Text of the Treaty](#) and determine whether the other country is also a party by looking in the [Status Table](#).
  - 4. See also W. Mark C. Weidemaier, [International Service of Process Under the Hague Convention](#).
- F. **Inter-American Service Convention and Additional Protocol** governing service in certain Western Hemisphere Countries, as the US is a full party to the convention (and considers parties who adopted the original convention but not the additional protocol not to be full parties): you may wish to read the text of the [Additional Protocol](#) and refer for further information to the

### III. OTHER CONSIDERATIONS:

- A. **Mandatory Reporting Law:** [N.C. Gen. Stat. § 7B-301](#) (also note Immunity from liability for reporters: [N.C. Gen. Stat. § 7B-309](#))
- B. **NC State Bar Ethics Opinion** indicating that a lawyer may violate client confidence to comply with the reporting statute (substantially the same language exists in the current statute, but the references in the opinion are to the version prior to recodification into Ch. 7B): [RPC 175 January 13, 1995](#) (see also consistent prior opinion [RPC 120 July 17, 1992](#))
- C. **NC State Bar Ethics Opinion** indicating that attorneys may not report opposing parties to ICE: [2009 FEO 5 January 22, 2009](#).
- D. **NC State Bar Ethics Opinion** that attorneys may prepare an *acceptance of service document*, but **not** a *waiver of the right to answer* or an *answer* or other responsive pleading: [CPR 296 July 15, 1981](#) (see also [CPR 121 July 15, 1977](#))

IV. Hypotheticals for Discussion:

- A. Eduardo, age 15, comes from El Salvador. His father died when he was 5, and he was raised by his mother, Alina. Ever since Eduardo was about 6 years old, Alina had a live-in boyfriend named Fausto. Both Alina and Fausto hit Eduardo on a regular basis. Fausto would lash Eduardo with a belt when Eduardo did something as simple as spilling water. Fausto also drank heavily and used drugs, and he became extremely violent on these occasions, at times throwing chairs at Eduardo. Also, once when Eduardo was about 8 years old, Fausto picked him up and hurled him across the room while yelling curses at him. Eduardo's mother Alina did nothing to prevent Fausto from harming Eduardo; in fact, she also cursed at Eduardo, told him he was "good for nothing", and hit him regularly with her hands or with household items such as shoes. Finally, when Eduardo was 14, he could no longer stand the domestic violence and he fled to the United States, hoping to live with his uncle Reynaldo, with whom he had had a relationship through phone conversations since he was very young. Eduardo now lives with Reynaldo in NC.
- B. Julisa is sixteen and was born in Guatemala. Her family is from the Quiche indigenous group. Her father left Julisa, her mother, and her four siblings when she was two years old. Julisa's mother later remarried. Julisa left school after the sixth grade to work and help her family. She worked at a butcher shop arriving at 4:30 a.m. Monday through Saturday. She chopped meat, cleaned, and served at the shop. Last year, her stepfather was told to leave his small farm by a group of young men. Julisa thinks the men were part of a gang that picks on the "indios." Her stepfather said he had no way to feed his family if he didn't have his land. The gang came back and shot her stepfather. He died a few days later. Julisa's mother told Julisa she had to go to the US to find work and to help her family. Julisa was apprehended at the border and was released to her Aunt Juana. Julisa's biological father's whereabouts are completely unknown.
- C. Hector is 17 years old. He came from Honduras, and is currently living with his mother, Theresa, in NC. Hector's mother was never married to his father, Juan, and she was unable to convince him to put his name on the birth certificate as Hector's father. Juan left Hector's mother when Hector was a few months old, and has never had any contact with Hector. When Hector was nine years old, his mother came to the US and left him in the care of her own mother, his maternal grandmother. When Hector was 14, he began to be targeted by organized criminal gangs and was told he would be killed if he didn't begin working for them. Feeling unsafe and hoping to find a source of protection, Hector asked his grandmother about his father's whereabouts, and learned that the father lived in the next town over. Hector went to visit his father, Juan. Juan would not let Hector come to live with him unless he stopped attending school and went to work to help support the household, so he remained with his Grandmother, though he was threatened several times at school. When Hector was 15, his grandmother died. Having no other relatives who were willing to house and care for him,

Hector left Honduras and made his way to the US, hoping to reunite with his mother. Hector was apprehended in Texas and released to his mother Theresa.

## V. OPEN FLOOR: ADDITIONAL QUESTIONS AND ANSWERS

## VI. MATERIALS DISTRIBUTED

- A. Electronic Copy of Powerpoint (based on this outline)
- B. Relevant Statutes and Code Sections, Administrative and Court Opinions, Ethics Opinions, and other Miscellaneous Materials referenced *supra*, available via links within the online version of this agenda (the agenda to be distributed by email to individuals)
- C. SIJS Whole-Process Checklist
- D. International Service of Process Protocol (for most typical case)
- E. Additional Resource: *Podcast on SIJS with Attorneys Derrick Hensley, Joanna Gaughan, and Prof. Lenni Benson (New York Law School)* [Listen to the audio file & review the handout](#)
- F. Additional SIJS Resource: [Dropbox.com folder from another CLE \(held at Elon University School of Law in 2014\) with various SIJS materials.](#)
- G. Derrick's website [www.LODJH.com](http://www.LODJH.com) has a section on legal resources that includes permanent links to today's materials and will be updated with future additions on this subject

## VII. CONTACT INFORMATION & BIOGRAPHIES

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*Summary: Derrick is the GAL Attorney Advocate for Alamance County (Dist. 15A) and maintains a solo practice focusing on family law, child welfare, and immigration law. He graduated from the NCCU Law Evening Program in 2011 and has practiced law for three years. He is admitted to practice in the State Courts in NC, the three Federal District Courts of NC, the US Court of Appeals for the Fourth Circuit (where he recently had oral arguments on an immigration case), and the Supreme Court of the United States.*

**Special Immigrant Juvenile Status**  
**Comprehensive Checklist for Legal Service Provider**  
**(Child in Removal Proceedings)**

1. \_\_\_ Consultation Agreement; have Consultation and determine whether SIJS relief is viable
2. \_\_\_ Sliding Scale Fee Application. (Only where requested by client or patently appropriate)
3. \_\_\_ Completed and signed [Client Questionnaire with SIJS/Immigration focus](#).
4. \_\_\_ Agreement for Legal Services.
5. \_\_\_ Requests for Information, scanned to client file upon receipt.
  - a. \_\_\_ [ORR Release of Information Form](#) + [Representation Letter](#) signed by child/guardian and witnessed; emailed to DHHS at [requests.ducs@acf.hhs.gov](mailto:requests.ducs@acf.hhs.gov)
  - b. \_\_\_ USCIS Release of Information: [Forms G-28](#) (USCIS Box checked) and [G-639](#) scanned and emailed to FOIA office at [uscis.foia@uscis.dhs.gov](mailto:uscis.foia@uscis.dhs.gov)
  - c. \_\_\_ CPB Release of Information: [Forms G-28](#) (CPB Box checked) and [G-639](#) scanned and uploaded to online FOIA request website [foiaonline.regulations.gov](http://foiaonline.regulations.gov)
6. \_\_\_ HIPAA-compliant Requests for records of current Medical & Mental Health Providers
7. \_\_\_ General Bilingual Release Form - scan & email or fax to other educational, legal, etc., providers
8. \_\_\_ Determine next EOIR court date via paperwork and confirm with “the Robot,” (1-800-898-7180) the calendar date, immediately move to continue/adjourn if coming less than 45 days on basis of having been retained to pursue SIJS
9. \_\_\_ Determine 18 y.o. age-out date and mark prominently on file and calendar, mark to expedite if less than 8 months
10. \_\_\_ Obtain Required Documentation
  - a. \_\_\_ Flag for translation & set aside Birth Certificate
  - b. \_\_\_ Photo ID - if none possessed or unofficial only, advise client to obtain passport/matricula immediately
11. \_\_\_ Obtain child client’s affidavit
12. \_\_\_ Executed [Green EOIR-28](#) and file by mail or online to EOIR, copy to OCC
13. \_\_\_ If clients moved since last address in EOIR record, have client execute [Blue EOIR-33](#)/EOIR Change of Address form and file by mail to EOIR, copy to OCC
14. \_\_\_ Execute [Blue G-28](#) forms for (1) ICE, (2) [I-360](#), (3) [I-485](#)
15. \_\_\_ Prepare District-Family Court Filing Documents (see [separate checklist](#))
16. \_\_\_ File Case & Pay Filing Fee (\$150 + \$20 per additional hearing, or Petition & Affidavit of Indigency)
17. \_\_\_ Translate Filed Documents (this may be with private translation service or pro bono translator, depending on case status and client’s ability to pay)
18. \_\_\_ Set Temporary/SIJS hearing (confirm date with case coordinator first if a family

court district) & file [Notice of Hearing](#), pay fee, and serve on opposing party with translation

19. \_\_\_ Provide Courtesy Copy of Initial Filing Documents to Client with Explanatory Note & request for their (and child's) attendance
20. \_\_\_ Serve Documents pursuant to Rule 4(j3) or Hague/Inter-American & obtain proof of service of process ([see separate checklist](#)) - File with Court
21. \_\_\_ Prepare, file, and serve (via Rule 5) [Memorandum of Law](#) regarding SIJS to be received at least 3 days in advance of hearing (so if postal mail, minimum six business days), file certificate of service with memorandum
22. \_\_\_ Prepare proposed [Child Custody order with SIJS findings](#)
23. \_\_\_ Prepare note(s) to excuse child, caretaker from school/work/etc.
24. \_\_\_ File Hard Copy of [Affidavit\(s\) of Service of Process](#) if not previously submitted (or [Acceptance\(s\) of Service](#))
25. \_\_\_ Attend Temporary/SIJS hearing (may also get school/work notes from clerk)
26. \_\_\_ Serve any order(s) upon opposing party(ies) by Rule 5 service (regular mail) & file certificate of service to comply with [Rule 58](#)
27. \_\_\_ Prepare I-360 Filing Package
  - a. \_\_\_ [G-1145](#)
  - b. \_\_\_ Cover Letter
  - c. \_\_\_ Blue [G-28](#)
  - d. \_\_\_ [I-360](#) Petition with following attachments:
    - i. \_\_\_ Addendum explaining Removal Proceedings, any other questions on I-360 where space did not permit full answer
    - ii. \_\_\_ EOIR docs
      1. \_\_\_ Copy of Notice to Appear
      2. \_\_\_ Copy of Most Recent Notice of Hearing (or Venue Change if no date yet at current court)
    - iii. \_\_\_ Copy of Birth Certificate + Certified Translation
    - iv. \_\_\_ Copy of Photo ID (if available) or other available, current proof of identity, age, nationality etc.
    - v. \_\_\_ Copy of State Court SIJS Order
    - vi. \_\_\_ Copy of Release from ORR Custody
  - e. \_\_\_ [Form G-325A](#) (with addendum if inadequate space on form for answers)
  - f. \_\_\_ Passport-style photos
28. \_\_\_ Submit I-360 by Mail to USCIS (Currently Chicago Lockbox<sup>2</sup>)
29. \_\_\_ Obtain Receipt Notice from USCIS
30. \_\_\_ Put all receipt numbers into the firm's [USCIS online account](#) to receive email/text updates with every processing stage

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<sup>2</sup>Current Address: USCIS P.O. Box 804625 Chicago, IL 60680-4107  
For Express mail and courier deliveries: USCIS Attn: I-360 131 South Dearborn-3<sup>rd</sup> Floor Chicago, IL 60603-5517

31. \_\_\_ Move to Adjourn/[Continue](#) EOIR Proceedings to allow processing of I-360 (include copy of receipt notice)
32. \_\_\_ Receive Biometrics/ASC Notice from USCIS and ensure client attends appointment
33. \_\_\_ Receive Interview Notice from USCIS and make arrangements for attendance of client, interpreter, and attorney on Interview Date and at at least one preparation session in advance. (N.B. I-360 interview is often waived based on a USCIS decision, case-by-case)
34. \_\_\_ Attend I-360 Interview
35. \_\_\_ Receive I-360 Approval Notice
36. \_\_\_ Move to [Terminate Removal Proceedings without prejudice for Remand to USCIS](#) (jointly with OCC Charlotte)<sup>3</sup>
37. \_\_\_ Prepare I-485 Filing Packet
  - a. \_\_\_ [G-1145](#)
  - b. \_\_\_ [Fee Waiver Request](#) (or filing fee)
  - c. \_\_\_ [Cover Letter](#)
  - d. \_\_\_ Blue [G-28](#)
  - e. \_\_\_ [I-485](#) Application with following attachments:
    - i. \_\_\_ Addendum explaining Removal Proceedings, any other questions on I-485 where space did not permit full answer
    - ii. \_\_\_ Copy of Order Terminating EOIR Jurisdiction without prejudice (thereby Remanding to USCIS)
    - iii. \_\_\_ Copy of Birth Certificate + Certified Translation
    - iv. \_\_\_ Copy of Photo ID (if available) or other available, current proof of identity, age, nationality etc.
    - v. \_\_\_ Copy of I-360 Approval Notice
  - f. \_\_\_ [Form G-325A](#) (with addendum if inadequate space on form for answers)
  - g. \_\_\_ [Form I-131](#) (With possible addendum stating that alien does anticipate travel and understands if there is travel it must be for “humanitarian reasons” etc)
  - h. \_\_\_ [Form I-765](#)
  - i. \_\_\_ Passport-style photos
  - j. \_\_\_ Sealed Envelope containing [Form I-693](#) completed by Civil Surgeon
38. \_\_\_ Upon receipt of biometrics/ASC notice, if applicable (depending on length of time since last fingerprinting), calendar matter and ensure client attendance.
39. \_\_\_ Upon receipt of appointment notice, calendar matter and set meeting time in

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<sup>3</sup> The IJ at this point would have jurisdiction to adjudicate an adjustment of status. However, the best legal-defense strategy is to terminate the removal proceedings first, even if adjudication in immigration court could be done in a timely fashion (not always true), because the risk of deportation is reduced/deferred, as not all AOS applications are approved. Depending on the circumstances, even if USCIS eventually denied the AOS, the child’s removal case may be delayed significantly before being reopened, and there may be other options to prevent removal that could have ripened or other ways to get another ‘bite at the apple.’

advance to prepare and arrange for interpreter for each.

40. \_\_\_ Attend I-485/Adjustment of Status interview, normally at USCIS on Roycroft Drive in Durham.

## **NORTH CAROLINA CHILD CUSTODY (Ch. 50) CIVIL ACTION CHECKLIST**

### Stage One: Initial Filing

1. \_\_\_ Law Office or Cashier's check for \$150 filing fee for District Court Action, plus \$20 Hearing Fee for every noticed hearing date
2. \_\_\_ *Optional*: [Petition to Sue-Appeal as Indigent AOC-G-106](#) (Can be substituted for Filing Fee, if approved by higher-level clerk's office staff)
3. \_\_\_ *Optional*: [Civil Affidavit of Indigency AOC-CV-226](#) (Needed to support Petition to Sue as Indigent if all criteria not met per the Petition's instructions)
4. \_\_\_ [Civil Summons](#)\*†‡ *AOC-CV-100 customarily on canary paper, need 2x copies*
5. \_\_\_ [Domestic Civil Action Cover Sheet AOC-CV-750](#)
6. \_\_\_ [Motion Cover Sheet AOC-CV-752](#)
7. \_\_\_ *Optional*: [Notice of Limited Appearance](#) to match any fee agreement or restrictions on services, e.g. does not include counter-claims or related actions; may indicate whether case is *Pro Bono*
8. \_\_\_ [Affidavit of Judicial Assignment](#) [if a district assigns judges; VARIES LOCALLY]
9. \_\_\_ [VERIFIED Complaint](#)\*
10. \_\_\_ [Motion & Order to Waive Mediation AOC-CV-632](#) [*Some Jurisdictions require a mediation cover sheet*]
11. \_\_\_ [Affidavit as to Status of Minor Child AOC-CV-609](#) for each minor child within case
12. \_\_\_ [Notice Of Hearing](#) which should set a date [Repeat at each subsequent hearing]

Stage Two: First/Temporary Hearing (preferably after service, but not necessarily before time to Answer has expired)

13. \_\_\_ Interpreter Request form (AOC-supplied interpreter at State expense) available at <http://www.nccourts.org/LanguageAccess/> Submit the appropriate type of request form (no form number) depending on which language and whether the district has a staff interpreter [Repeat at each subsequent hearing]
14. \_\_\_ *Optional*: SIJ Memorandum of Law [Can be submitted anytime before final hearing, but ideally o.p./o.c. should actually receive it 3 days before the hearing]
15. \_\_\_ Temporary Custody Order

Stage Three: Subsequent/Final Hearing (if necessary)

16. \_\_\_ [Permanent Custody Order with SIJS Findings](#)

### Notes

- You should generally prepare at least three copies of each document for filing, more if there are multiple defendants (one original for Court, one copy for you, and one copy for each defendant).
- All documents must be served on opposing party (opposing counsel if party is

represented), and those not served with the initial summons and complaint, will each need a Certificate of Service [per NC Gen. Stat. § 1A-1, Rule 5] identifying the document and attached to it when served (may and should be filed with Court as well)

- Notice of Hearing identifying each next court date and nature of matters to be decided, delivered by postal mail (use a COS) and giving more than 5 business' days notice plus 3 days' notice for receipt by mail. Upon filing each notice of hearing, the clerks should collect a \$20 fee payable by law firm check or cashier check/money order.
- You will want to request an interpreter at least a week in advance of each hearing
- You will want to provide translations of documents into the other party's language if that is a custom or expectation of the local court

*Many of these documents are available as forms at the NC Administrative Office of the Court's website [www.nccourts.org](http://www.nccourts.org) - you may type in the form number*

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**key:**

*\*Summons and Complaint must be served in a manner compliant with N.C. Gen Stat. 1A-1, Rule 4 and require a formal return of service by government official or verification/proof of that service sworn to by a private individual - all other documents thereafter may be served by Rule 5 with the attorney/staff signing the certificate of service*

*\*\*Optional, can be signed without hearing, and will set the time for a return order/temporary custody hearing; not appropriate under most circumstances*

*†N.B. That a copy of the Summons may be returned by a law enforcement official to indicate service, but where law enforcement did not serve the summons, some other document, such as an **AFFIDAVIT OF SERVICE**, must be submitted to the Court to prove service in conformity with Rule 4.*

*‡ N. B. NC AOC Has already developed a Spanish-Language version of this form that can be used. Some other documents may soon be translated - always check [www.nccourts.org](http://www.nccourts.org) for the most current standard forms. Generally, all documents served internationally will need translations to the receiving country's official language, which is normally a time consuming and/or expensive process*

## **NORTH CAROLINA: INTERNATIONAL SERVICE OF PROCESS PROTOCOL**

### Stage One: Prepare Initial Filing Packet

- See Stage One of [Custody Suit Checklist](#) for list of documents for initial filing

### Stage Two: Interpretation

- [Spanish Interpretation of Summons](#) (draft form available - my [fillable version is here](#))
- Spanish Interpretation of Complaint (obtain from private translator)
- File required Interpretation with [Affidavit of Translation](#) executed by the translator

### Stage Three: Determine the Ideal Method of Service under Rule 4 and any Applicable Treaties

- Check the [country information widget](#) from the US Department of State to determine whether any international service treaties apply to the country in which the Defendants are located.
- Double-check the Hague [Status Table](#) to determine whether the country is a signatory to that convention. If so, you must follow the very specific Hague protocols (not covered by this document).
- Double-check the Inter-American Service Convention and Additional Protocol [Status Table](#) to determine whether the country is a signatory to that convention (and not the Hague, which would supercede). If so, you must follow the specific protocol (not covered by this document).
- Determine whether your client has a reasonable knowledge of where the Defendants are located, after you and your client having made diligent efforts. If no reliable information is available after such efforts, consider serving by publication (not covered by this document).
- If the Defendants have been located and have a valid mailing address, you may wish to determine whether they are in a country in which service by signature-confirmed certified mail is legally sufficient. If it is not, then you must effect personal service. If service by signed mail is legal and sufficient in the receiving country, you may choose to serve by signature-confirmed mail under [Rule 4\(j\)\(3\)\(2\)\(c\)\(2\)](#); however, such service has to be addressed and mailed by the clerk's office.
- In many cases, the Defendants will have lousy mailing addresses (a hundred meters east of the Catholic Church, behind the clinic, etc.) or the home country will prohibit service by mail, and therefore personal service will be necessary.

### Stage Four: Prepare Packets for Process Server

- Discuss with your client whether the services of a local attorney in the vicinity of defendants would be appropriate, whether they know of other reliable adult individuals who would be willing to be a process server. This person will ideally have a viable mailing address or be willing to pick up the mail from some location that regularly receives international mail.
- Get the full contact information for the process server, including phone number.
- Create Cover Letter or [Instruction Sheet](#) explaining the steps to effectuate personal service
- Draft [Affidavit of Service of Process](#) (bilingual) for the process server to execute. It may be helpful to place little flags with explanations as clearly as possible on the form. (I generally include one extra blank copy, in case the first one is executed improperly.)
- If the Defendant is willing to accept service, you may also wish to prepare and include an

[Acceptance of Service](#) document

Stage Four: Mailing

- Send Packet via USPS, FedEx, or UPS (highly variable rates and speeds - and the speed of the private carriers is usually overstated). Provide them with the phone number of the individual receiving the mail.

Stage Five: Monitoring & Waiting

- The process server should follow the instruction document's first step and deliver a copy of everything, with translations, to each Defendant.
- The process server should present him/herself before a local notary and execute the Affidavit of Service of Process. The notary, who typically has a higher station as a provider of legal services than a notary public in the United States, and will tend to follow their own legal principles, and they may comply with their local law by executing their own verification or explanation of the process, and attaching such additional documents.

Stage Six: Return of Documents

- It is a helpful precaution to have copies of the executed Affidavit of Service of Process faxed to you before they are mailed-back to you, in case of loss/damage during shipping.
- Have the local process server or notary mail you the executed copies.

***N.C. Gen. Stat. § 1-75.10. Proof of service of summons, defendant appearing in action.***

*(a) Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:*

*(1) Personal Service or Substituted Personal Service. -*

*a. If served by the sheriff of the county or the lawful process officer in this State where the defendant was found, by the officer's certificate thereof, showing place, time and manner of service; or*

*b. If served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service under Rule 4(a) or Rule 4(j3) of the Rules of Civil Procedure; that he knew the person served to be the party mentioned in the summons and delivered to and left with him a copy; and if the defendant was not personally served, he shall state in such affidavit when, where and with whom such copy was left. If such service is made outside this State, the proof thereof may in the alternative be made in accordance with the law of the place where such service is made.*

***N.C. Gen. Stat. § 1A-1, NC Rules of Civil Procedure, Rule 4 Service of Process***

*(j3) Service in a foreign country. - Unless otherwise provided by federal law, service upon a defendant, other than an infant or an incompetent person, may be effected in a place not within the United States:*

*(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or*

*(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:*

*a. In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;*

b. As directed by the foreign authority in response to a letter rogatory or letter of request; or

c. Unless prohibited by the law of the foreign country, by

1. Delivery to the individual personally of a copy of the summons and the complaint and, upon a corporation, partnership, association or other such entity, by delivery to an officer or a managing or general agent;

2. Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) By other means not prohibited by international agreement as may be directed by the court.

Service under subdivision (2)c.1. or (3) of this subsection may be made by any person authorized by subsection (a) of this Rule or who is designated by order of the court or by the foreign court.

On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, by the order of the court, or by the law of the foreign country.

Proof of service by mail shall include an affidavit or certificate of addressing and mailing by the clerk of court.

### **Statutory Excerpts (condensed, emphasis added)**

8 U.S. Code § 1101  
8 C.F.R. § 204.11  
§ 50-13.2 (excerpt)  
§ 35A-1223-1224  
§ 7B-101  
§ 7B-1111  
§ 50-13.5  
§ 50A-102  
§ 50A-108, -201, -205  
§ 7B-301  
Rule 4(j1)-(j4)  
Rule 4(j5)  
§ 1-75.10

### 8 U.S. Code § 1101 - Definitions

(a) As used in this chapter—

(27) The term “**special immigrant**” means—

(J) an immigrant who is present in the United States—

(i) who has been declared dependent on a juvenile court located in the United States **or whom such a court has legally committed to, or placed under the custody of**, an agency or department of a State, **or an individual or entity appointed by a State or juvenile court** located in the United States, and *whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;*

(ii) for whom it has been determined in administrative or *judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country* of nationality or country of last habitual residence; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

## 8 C.F.R. § 204.11 - Special immigrant status for certain aliens declared dependent on a juvenile court

### (a) Definitions.

~~Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option. A child who is eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation. For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in guardianship situation after having been found dependent upon a juvenile court in the United States will continue to be considered to be eligible for long-term foster care. [Note: The requirement of long-term foster care was removed from the definition of Special Immigrant Juvenile pursuant to the TVPRA, which makes the foregoing definition irrelevant.]~~

Juvenile court means a *court* located in the United States *having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.*

(b) Petition for special immigrant juvenile. An alien may not be classified as a special immigrant juvenile unless the alien is the beneficiary of an approved petition to classify an alien as a special immigrant under section 101(a)(27) of the Act. The petition must be filed on Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. The alien, or any person acting on the alien's behalf, may file the petition for special immigrant juvenile status. The person filing the petition is not required to be a citizen or lawful permanent resident of the United States.

(c) Eligibility. An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien:

(1) Is under twenty-one years of age;

(2) Is unmarried;

(3) Has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, *while the alien was in the United States and under the jurisdiction of the court;*

~~(4) Has been deemed eligible by the juvenile court for long-term foster care;~~ [See Note, supra.]

~~(5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and [Id.]~~

(6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents; or

~~(7) On November 29, 1990, met all the eligibility requirements for special immigrant juvenile status in paragraphs (c)(1) through (c)(6) of this section, and for whom a petition for classification as a special immigrant juvenile is filed on Form I-360 before June 1, 1994. [Moot]~~

(d) Initial documents which must be submitted in support of the petition.

(1) Documentary evidence of the alien's age, in the form of a birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary's age; and

(2) One or more documents which include:

*(i) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary to be dependent upon that court;*

~~*(ii) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary eligible for long-term foster care; and*~~

*(iii) Evidence of a determination made in judicial or administrative proceedings by a court or agency recognized by the juvenile court and authorized by law to make such decisions, that it would not be in the beneficiary's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or of his or her parent or parents.*

(e) Decision. The petitioner will be notified of the director's decision, and, if the petition is denied, of the reasons for the denial. If the petition is denied, the petitioner will also be notified of the petitioner's right to appeal the decision to the Associate Commissioner, Examinations, in accordance with part 103 of this chapter.

**§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State; consideration of parent's military service.**

(a) An order for custody of a minor child entered pursuant to this section *shall award the custody of such child* to such person, agency, organization or institution as will *best promote the interest and welfare of the child*. In making the determination, the court *shall consider all relevant factors* including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and *shall make findings accordingly*. *An order for custody must include findings of fact which support the determination of what is in the best interest of the child*. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

(b) An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions. *Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child*. If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3). If a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation. Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child.

...

**§ 35A-1223. Hearing before clerk on appointment of guardian.**

The clerk shall receive evidence necessary to determine whether a guardian of the person, a guardian of the estate, or a general guardian is required. If the court determines that a guardian or guardians are required, the court shall receive evidence necessary to determine the minor's assets, liabilities, and needs, and who the guardian or guardians shall be. The hearing may be informal and *the clerk may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to determine the minor's best interest.* (1987, c. 550, s. 1.)

**§ 35A-1224. Criteria for appointment of guardians.**

- (a) The clerk may appoint a guardian of the estate for any minor. The clerk may appoint a guardian of the person or a general guardian only for a minor who has no natural guardian.
- (b) The clerk may appoint as guardian of the person or general guardian only an adult individual whether or not that individual is a resident of the State of North Carolina.
- (c) The clerk may appoint as guardian of the estate an adult individual whether or not that individual is a resident of the State of North Carolina or a corporation that is authorized by its charter to serve as a guardian or in similar fiduciary capacities.
- (d) If the minor's parent or parents have made a testamentary recommendation pursuant to G.S. 35A-1225 for the appointment of a guardian, the clerk shall give substantial weight to such recommendation; provided, such recommendation may not affect the rights of a surviving parent who has not willfully abandoned the minor, and *the clerk shall in every instance base the appointment of a guardian or guardians on the minor's best interest.*
- (e) Notwithstanding any other provision of this section, an employee of a treatment facility, as defined in G.S. 35A-1101(16), may not serve as guardian for a ward who is an inpatient in or resident of the facility in which the employee works; provided, this subsection shall not apply to or affect the validity of any appointment of a guardian that occurred before October 1, 1987. (1987, c. 550, s. 1; 1989, c. 473, s. 1.)

**§ 7B-101. Definitions.** As used in this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings:

**(1) Abused juveniles.** - Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:

- a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
- b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
- c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;
- d. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first-degree rape, as provided in G.S. 14-27.2; rape of a child by an adult offender, as provided in G.S. 14-27.2A; second degree rape as provided in G.S. 14-27.3; first-degree sexual offense, as provided in G.S. 14-27.4; sexual offense with a child by an adult offender, as provided in G.S. 14-27.4A; second degree sexual offense, as provided in G.S. 14-27.5; sexual act by a custodian, as provided in G.S. 14-27.7; unlawful sale, surrender, or purchase of a minor, as provided in G.S. 14-43.14; crime against nature, as provided in G.S. 14-177; incest, as provided in G.S. 14-178; preparation of obscene photographs, slides, or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17; promoting the prostitution of the juvenile as provided in G.S. 14-205.3(b); and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1;
- e. Creates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others;
- f. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile; or
- g. Commits or allows to be committed an offense under G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), or G.S. 14-43.13 (sexual servitude) against the child.

...

**(9) Dependent juvenile.** - A juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

...

**(15) Neglected juvenile.** - A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has

died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

**§ 7B-1111. Grounds for terminating parental rights.**

(a) The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

...

(4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by said decree or custody agreement.

(5) The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights, done any of the following:

a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; provided, the petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.

b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.

c. Legitimated the juvenile by marriage to the mother of the juvenile.

d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

(6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

(7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion.

(8) The parent has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child residing in the home; has committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home; or has committed murder or voluntary manslaughter of the other parent of the child. The petitioner has the burden of proving any of these offenses in the termination of parental rights hearing by (i) proving the elements of the offense or (ii) offering proof that a court of competent jurisdiction has convicted the parent of the offense, whether or not the conviction was by way of a jury verdict or any kind

of plea. If the parent has committed the murder or voluntary manslaughter of the other parent of the child, the court shall consider whether the murder or voluntary manslaughter was committed in self-defense or in the defense of others, or whether there was substantial evidence of other justification.

...

(10) Where the juvenile has been relinquished to a county department of social services or a licensed child-placing agency for the purpose of adoption or placed with a prospective adoptive parent for adoption; the consent or relinquishment to adoption by the parent has become irrevocable except upon a showing of fraud, duress, or other circumstance as set forth in G.S. 48-3-609 or G.S. 48-3-707; termination of parental rights is a condition precedent to adoption in the jurisdiction where the adoption proceeding is to be filed; and the parent does not contest the termination of parental rights.

(11) The parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile.

...

**§ 50-13.5. Procedure in actions for custody or support of minor children.**

(a) Procedure. - The procedure in actions for custody and support of minor children shall be as in civil actions, except as provided in this section and in G.S. 50-19. In this G.S. 50-13.5 the words "custody and support" shall be deemed to include custody or support, or both.

....

(b)(7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody. -

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child under the provisions of G.S. 50A-201, 50A-202, and 50A-204...

(d) Service of Process; Notice; Interlocutory Orders. -

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions... Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

(3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.

(e) Notice to Additional Persons in Support Actions and Proceedings; Intervention. -

(1) The parents of the minor child whose addresses are reasonably ascertainable; any person, agency, organization or institution having actual care, control, or custody of a minor child; and any person, agency, organization or institution required by court order to provide for the support of a minor child, either in whole or in part, not named as parties and served with process in an action or proceeding for the support of such child, shall be given notice by the party raising the issue of support.

(2) The notice herein required shall be in the manner provided by the Rules of Civil Procedure for the service of notices in actions. Such notice shall advise the person to be notified of the name of the child, the names of the parties to the action or proceeding, the court in which the action or proceeding was instituted, and the date thereof.

(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.

(4) Any person required to be given notice as herein provided may intervene in an action or proceeding for support of a minor child by filing in apt time notice of appearance or other appropriate pleadings.

(f) **Venue.** - An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been

previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation is ordered, shall determine in which court such consolidated action or proceeding shall be heard.

...

*UCCJEA Definitions:*

**§ 50A-102. Definitions.** In this Article:

(1) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(2) "Child" means an individual who has not attained 18 years of age.

(3) "Child-custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(4) "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Part 3 of this Article.

...

(7) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child-custody determination concerning a particular child.

...

(13) "Person acting as a parent" means a person, other than a parent, who:

a. Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and

b. Has been awarded legal custody by a court or claims a right to legal custody under the law of this State.

(14) "Physical custody" means the physical care and supervision of a child.

...

*Service and Notice under the UCCJEA*

**§ 50A-108. Notice to persons outside State.**

- (a) Notice required for the exercise of jurisdiction when a person is outside this State may be given in a manner prescribed by the law of this State for service of process or by the law of the state in which the service is made. ***Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.***
- (b) Proof of service may be made in the manner prescribed by the law of this State or by the law of the state in which the service is made.
- (c) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court. (1999-223, s. 3.)

**§ 50A-205. Notice; opportunity to be heard; joinder.**

- (a) Before a child-custody determination is made under this Article, notice and an opportunity to be heard in accordance with the standards of G.S. 50A-108 must be given to all persons entitled to notice under the law of this State as in child-custody proceedings between residents of this State, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.
- (b) This Article does not govern the enforceability of a child-custody determination made without notice or an opportunity to be heard.
- (c) The obligation to join a party and the right to intervene as a party in a child-custody proceeding under this Article are governed by the law of this State as in child-custody proceedings between residents of this State. (1979, c. 110, s. 1; 1999-223, s. 3.)

*UCCJEA Part 2. Jurisdiction.*

**§ 50A-201. Initial child-custody jurisdiction.**

- (a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
  - (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
- ...
- (c) **Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.** (1979, c. 110, s. 1; 1999-223, s. 3.)

**§ 7B-301. Duty to report abuse, neglect, dependency, or death due to maltreatment.**

(a) Any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent, as defined by G.S. 7B-101, or has died as the result of maltreatment, shall report the case of that juvenile to the director of the department of social services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the names and ages of other juveniles in the home; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse, neglect, or dependency; and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give the person's name, address, and telephone number. Refusal of the person making the report to give a name shall not preclude the department's assessment of the alleged abuse, neglect, dependency, or death as a result of maltreatment.

Upon receipt of any report of sexual abuse of the juvenile in a child care facility, the director shall notify the State Bureau of Investigation within 24 hours or on the next workday. If sexual abuse in a child care facility is not alleged in the initial report, but during the course of the assessment there is reason to suspect that sexual abuse has occurred, the director shall immediately notify the State Bureau of Investigation. Upon notification that sexual abuse may have occurred in a child care facility, the State Bureau of Investigation may form a task force to investigate the report.

(b) Any person or institution who knowingly or wantonly fails to report the case of a juvenile as required by subsection (a) of this section, or who knowingly or wantonly prevents another person from making a report as required by subsection (a) of this section, is guilty of a Class 1 misdemeanor.

(c) A director of social services who receives a report of sexual abuse of a juvenile in a child care facility and who knowingly fails to notify the State Bureau of Investigation of the report pursuant to subsection (a) of this section is guilty of a Class 1 misdemeanor. (1979, c. 815, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 2; 1993, c. 516, s. 4; 1997-506, s. 32; 1998-202, s. 6; 1999-456, s. 60; 2005-55, s. 3; 2013-52, s. 7.)

***SERVICE OF PROCESS N.C. Gen. Stat. 1A-1 Rules of Civil Procedure Rule 4***

(j1) Service by publication on party that cannot otherwise be served. - A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication

...

(j2) Proof of service. - Proof of service of process shall be as follows:

...

(3) Publication. - Before judgment by default may be had on service by publication, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by publication, information, if any, regarding the location of the party served which was used in determining the area in which service by publication was printed and proof of service in accordance with G.S. 1-75.10(a)(2).

(j3) Service in a foreign country. - Unless otherwise provided by federal law, service upon a defendant, other than an infant or an incompetent person, may be effected in a place not within the United States:

(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

a. In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

b. As directed by the foreign authority in response to a letter rogatory or letter of request; or

c. Unless prohibited by the law of the foreign country, by

1. Delivery to the individual personally of a copy of the summons and the complaint and, upon a corporation, partnership, association or other such entity, by delivery to an officer or a managing or general agent;

2. Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) By other means not prohibited by international agreement as may be directed by the court.

Service under subdivision (2)c.1. or (3) of this subsection may be made by any person authorized by subsection (a) of this Rule or who is designated by order of the court or by the foreign court.

On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, by the order of the court, or by the law of the foreign country.

Proof of service by mail shall include an affidavit or certificate of addressing and mailing by the clerk of court.

(j4) Process or judgment by default not to be attacked on certain grounds. - No party may attack service of process or a judgment of default on the basis that service should or could have been effected by personal service rather than service by registered or certified mail. No party that receives timely actual notice may attack a judgment by default on the basis that the statutory requirement of due diligence as a condition precedent to service by publication was not met.

(j5) Personal jurisdiction by acceptance of service. - Any party personally, or through the

persons provided in Rule 4(j), may accept service of process by notation of acceptance of service together with the signature of the party accepting service and the date thereof on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

**§ 1-75.10. Proof of service of summons, defendant appearing in action.**

(a) Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

(1) Personal Service or Substituted Personal Service. -

a. If served by the sheriff of the county or the lawful process officer in this State where the defendant was found, by the officer's certificate thereof, showing place, time and manner of service; or

b. If served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service under Rule 4(a) or Rule 4(j3) of the Rules of Civil Procedure; that he knew the person served to be the party mentioned in the summons and delivered to and left with him a copy; and if the defendant was not personally served, he shall state in such affidavit when, where and with whom such copy was left. If such service is made outside this State, the proof thereof may in the alternative be made in accordance with the law of the place where such service is made.

(2) Service of Publication. - In the case of publication, by the affidavit of the publisher or printer, or his foreman or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the complaint or notice, as the case may require, made by the person who mailed the same.

(3) Written Admission of Defendant. - The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness.

(4) Service by Registered or Certified Mail. - In the case of service by registered or certified mail, by affidavit of the serving party averring:

a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;

b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and

c. That the genuine receipt or other evidence of delivery is attached.

(5) Service by Designated Delivery Service. - In the case of service by designated delivery service, by affidavit of the serving party averring all of the following:

a. That a copy of the summons and complaint was deposited with a designated delivery service as authorized under G.S. 1A-1, Rule 4, delivery receipt requested.

b. That it was in fact received as evidenced by the attached delivery receipt or other evidence satisfactory to the court of delivery to the addressee.

c. That the delivery receipt or other evidence of delivery is attached.

(6) Service by Signature Confirmation. - In the case of service by signature confirmation as provided by the United States Postal Service, by affidavit of the serving party averring all of the following:

a. That a copy of the summons and complaint was deposited in the post office for mailing by signature confirmation.

b. That it was in fact received as evidenced by the attached proof of delivery

obtained from the United States Postal Service, or other evidence satisfactory to the court of delivery to the addressee.

c. That the copy of the signature confirmation or other evidence of delivery is attached.

(b) As used in subdivision (5) of subsection (a) of this section, "delivery receipt" includes a facsimile receipt and a printout of an electronic receipt.

## **Ethics Opinions**

RPC 175

2009 Formal Ethics Opinion 5

CPR 296

CPR 121

### **RPC 175**

January 13, 1995

Editor's Note: This opinion was originally published as RPC 175 (Revised).

#### Reporting Child Abuse

Opinion rules that a lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

#### Inquiry #1:

RPC 120 was adopted by the Council of the State Bar on July 17, 1992. The opinion provides that a lawyer may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement set forth in G.S. §7A-543 et seq. In 1993 the North Carolina General Assembly amended G.S. §7A-543 and G.S. §7A-551. G.S. §7A-543 now generally provides that as follows:

...any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent...or has died as a result of maltreatment shall report the case of that juvenile to the director of the Department of Social Services in the county where the juvenile resides or is found.

G.S. §7A-551 now generally provides as follows:

...[n]o privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect or dependency case.

Does Rule 4 of the Rules of Professional Conduct require an attorney to report his or her suspicion that a child is abused, neglected or dependent to the local Department of Social Services (DSS) if the information giving rise to the suspicion was gained during a professional relationship with a client, which is not for the purpose of representing the client in an abuse, neglect or dependency case, and the information would otherwise be considered confidential information under Rule 4?

#### Opinion #1:

No. Rule 4(b) prohibits a lawyer from revealing the confidential information of his or her client except as permitted under Rule 4(c). Rule 4(c) includes a number of circumstances under which a lawyer "may reveal" the confidential information of his or her client. Subsection (3) of Rule 4(c) allows a lawyer to reveal confidential information "when... required by law or court order."

The rule clearly places the decision regarding the disclosure of a client's confidential information within the lawyer's discretion. *While that discretion should not be exercised lightly, particularly in the face of a statute compelling disclosure, a lawyer may in good faith conclude that he or she should not reveal confidential information where to do so would substantially undermine the purpose of the representation or substantially damage the interests of his or her client.* See Rule 7.1(a)(3) (which prohibits actions by a lawyer which will intentionally "[p]rejudice or damage his client during the course of the professional relationship..."). For example, a lawyer may be unwilling to comply with the child abuse reporting statute because he or she believes that compliance would deprive a client charged with a crime of the constitutional right to effective assistance of counsel. *Under such circumstances, where a lawyer reasonably and in good faith concludes that revealing the confidential information will substantially harm the interests of his or her client and, as a matter of professional responsibility, declines to report confidential client information regarding suspected child abuse or neglect to DSS, the failure to report will not be deemed a violation of Rule 1.2(b) and (d) (respectively defining misconduct as committing a criminal act and engaging in conduct prejudicial to the administration of justice) or Rule 7.2(a)(3) (prohibiting a lawyer from concealing that which he is required by law to reveal). **It is recognized that the ethical rules may not protect a lawyer from criminal prosecution for failure to comply with the reporting statute.***<sup>4</sup>

Inquiry #2:

Is it ethical for a lawyer to reveal confidential information of a client regarding suspected child abuse or neglect to DSS pursuant to the requirements of the child abuse reporting statute?

Opinion #2:

**Yes, a lawyer may ethically report information gained during his or her professional relationship with a client to DSS in compliance with the statutory requirement even if to do so may result in substantial harm to the interests of the client. Rule 4(c)(3).**

Note: The foregoing opinion is limited to the specific inquiries set out therein. It should not be read to stand for the general proposition that an attorney's good faith is a bar to a disciplinary proceeding based upon the attorney's violation of a statute.

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<sup>4</sup> All Emphasis Added

## 2009 Formal Ethics Opinion 5

January 22, 2009

### Reporting Opposing Party's Citizenship Status to ICE

Opinion rules that a lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.

#### Inquiry #1:

Lawyer is defending a medical malpractice lawsuit in which a mother and her child are plaintiffs. The child is a natural born US citizen. Lawyer believes the mother is a Mexican citizen and suspects she is an undocumented alien.

The basis of the suit is injury to the child during birth. Plaintiff's counsel has forecast damages of over \$30,000,000. The amount of damages is based in part on the cost of medical care in the United States. The cost of the same medical care in Mexico would be substantially less.

May Lawyer serve plaintiffs with discovery requests that require Mother to reveal her manner of entry into the United States and the status of her citizenship or legal residence?

#### Opinion #1:

Yes. If the discovery requests are intended to uncover information that is relevant to the defense of the case and which is admissible evidence (or may lead to admissible evidence) and is not for the improper purpose of creating a file to use to threaten the plaintiff with deportation, to harass the plaintiff, or for some other improper purpose, lawyer is not prohibited from engaging in such discovery. See Rule 3.1, Rule 4.4, 2005 FEO 3.

#### Inquiry #2:

If Lawyer engages in the discovery and determines that Mother is in the country illegally, **may Lawyer call the US Immigration and Customs Enforcement (ICE) and report the mother's status?**

#### Opinion #2:

**No**, unless federal or state law requires Lawyer to report Mother's illegal status to ICE.

Rule 4.4(a) provides that, in representing a client, "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Comment [4] to Rule 8.4 provides that "paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings."

It is unlikely that Lawyer's impetus to report Mother to ICE is motivated by any purpose other than those prohibited under these principles. The Ethics Committee has already determined that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations. 2005 FEO 3. Similarly, Lawyer may not report Mother's illegal status to ICE in order to gain an advantage in the underlying medical malpractice action.

Inquiry #3:

Would the answer to either Inquiry #1 or Inquiry #2 change if Mother was not a party to the litigation?

Opinion #3:

No. See Rule 4.4(a).

## CPR 296

July 15, 1981

"Acceptance of Service and Waiver" Form

### INQUIRY:

Attorney A practices domestic relations law in Wake County . The Clerk of the Domestic Courtroom for Wake County District Court has available a document entitled "Acceptance of Service and **Waiver**" which is frequently used for uncontested divorces. The form states that the defendant, or defendant's attorney, accepts service of the summons and acknowledges receipt of a copy of the summons and a copy of the complaint. The form further states that the defendant waives service by an officer and further **waives the right to file an answer** or any other pleadings, the right to be notified of the time and place of the trial of the action, and waives the right to trial by jury, and further agrees that the court may proceed immediately with the trial of the action in question.

In view of CPR's 121 and 125, may Attorney A representing a plaintiff in a divorce or other action ethically prepare this form and make it available to a defendant? May he do so only at the request of the defendant? May he allow his client, the plaintiff, to provide such a form to the defendant?

### OPINION:

**No.** Attorney A may **not send to or directly make available** to a defendant the "Acceptance of Service and Waiver" form. To provide the form waiving the right to answer and to be notified of the date of trial has the **same effect as providing an answer for the defendant**. See CPR's 121 and 125. Similarly, Attorney A may not allow his client, the plaintiff, to provide such a form to the defendant. See CPR 125. Of course, Attorney A may send to defendant a form solely for acceptance of service. See CPR 121, Question 1.

**CPR 121**

July 15, 1977

Inquiry: Is it ethical for the attorney representing the plaintiff in a divorce action, with the plaintiff's consent, to:

1. Send to the defendant the summons, together with copy of summons and copy of complaint, for **acceptance of service** in a divorce action where no minor children are involved?

Opinion: **Yes**.

2. Send to defendant summons, together with copy of summons and copy of complaint, for acceptance of service and, in addition thereto, send to defendant a **form type answer** that may be used in admitting the allegations of the complaint where no children are involved?

Opinion: **No**. EC 7-18; DR 7-104(A) (2).

3. Send to defendant summons for acceptance of service, together with copy of summons and copy of complaint, and send to defendant an **answer admitting the allegations of the complaint**, suggesting that she may sign it, appearing in her own person, and verify it and return it to be filed to thus speed up the granting of a divorce where no children are involved?

Opinion: **No**. EC 7-18; DR 7-104(A) (2).

4. Draft a **consent order** concerning custody and support of children and sent to defendant in a divorce action summons for acceptance of service, together with copy thereof and copy of complaint and consent order concerning custody and support of children, suggesting that defendant, if the defendant finds the papers acceptable, may sign all of the papers and return them to be filed without the expense of engaging counsel?

Opinion: **No**. EC 7-18; DR 7-104(A) (2).

5. Permit the defendant to pay the balance of his fee in an uncontested divorce action to enable plaintiff to go forward and obtain a divorce?

Opinion: Yes. If the attorney has no role in inducing the defendant to pay such fee.

## Basic Vocabulary

### **Immigration Law Basic Definitions useful for a State/Family Court Practitioner**

1. **Adjustment of Status (“AOS”)** - The legal grant of lawful permanent residence (“LPR,” also colloquially known as a “green card”) to an alien.
2. **Alien** - A person who is not a US Citizen
3. **CBP** - US Customs and Border Patrol, a law enforcement agency which (among other things) processes individuals seeking entry to the US as well as apprehending aliens near the border
4. **Child** - for immigration purposes, an unmarried person under 21
5. **DHS** - the US Department of Homeland Security, a Department of the federal government tasked with enforcing the immigration laws, as well as administering benefits
6. **DOJ** - the US Department of Justice, the federal Department tasked with fairly administering the removal process for aliens, providing hearings for DHS and aliens
7. **EOIR** - Executive Office for Immigration Review - the federal agency, within the DOJ, which adjudicates the immigration cases of aliens who are in removal proceedings. The immigration courts, which fall under EOIR, may issue orders of removal (deportation) and may award certain immigration statuses
8. **Green card** - an ID indicating that the alien has lawful permanent resident status, usually first opportunity to get a SSN (instead of TIN) and then driver’s license
9. **Lawful Permanent Resident** - an alien who has been granted an adjustment of status, and who may remain in the US indefinitely, unless they commit certain crimes or abandon the US
10. **SIJS** - Special Immigrant Juvenile Status - a designation that may be given by USCIS to children who meet certain specific criteria, which may then be a basis to adjust status
11. **Sponsor** - With regard to UACs, an adult who agrees to provide care and physical custody of an Unaccompanied Alien Child, to provide for the child’s basic needs, and to ensure that the child attends any and all required hearings in EOIR’s immigration courts. Note: A sponsor does not necessarily have legal custody or guardianship of the child.
12. **TVRA** - William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which increased procedural protections for UACs and expanded the SIJS classification to eliminate the requirement that a child be designated eligible for long-term foster care and to include children whose reunification with just one parent is not viable due to abuse, abandonment, neglect or similar (rather than both parents)
13. **Unaccompanied Alien Child (“UAC”)** - an alien under age 18, who, at the time s/he first comes in contact with federal immigration agencies, is without lawful immigration status and lacks a parent or legal guardian who is available to provide care and physical custody (normally remains designated a UAC even if child later reunites with parent)
14. **USCIS** (or just CIS) - the Federal Agency, within DHS, which administers immigration benefits

## **NC State Law Basic, Custody-related Definitions useful for an Immigration Practitioner**

1. **Adoption** - the complete substitution of new legal parent(s) for a child
2. **Application** - the document that is drafted to request a guardian for a minor child.
3. **Complaint** - the document that contains the claims made in a civil action. In all family/custody/domestic cases, the complaint must be “Verified.”
4. **Custodian** - an individual or entity appointed by a court to exercise some portion of the duties and obligations of care, custody, and control of a minor child.
5. **Defendant** - the person against whom the Plaintiff is proceeding
6. **District Court** - A Division of the General Court of Justice (the unified court system exercising all the judicial power in this state) where certain types of civil actions can be heard by a **judge**, including family/domestic cases involving child custody under **Ch. 50**, as well as the different types of Juvenile proceedings under **Ch. 7B**
7. **Family Court** (aka Domestic Relations) - District Court proceedings under Ch. 50 regarding divorce, custody, or family finances
8. **Guardian** - a type of custodian and decisionmaker for a child appointed by a juvenile action (even when parents are alive) or by the clerk’s office (only when parents deceased)
9. **Juvenile Court** - Cases which are brought under and follow the procedures of the Juvenile Code, Ch. 7B, which has differences from other civil (and criminal) actions.
  - a. Juvenile Abuse/Neglect/Dependency action (aka “DSS Court”) - may only be filed by DSS and seeks to deem a child the status of “abused,” “neglected,” or “dependent,” which is a prerequisite for judicial involvement and oversight of the parents and department of social services, designed to protect the child and remedy any conditions preventing the child from safely returning home
  - b. Termination of Parental Rights (“TPR”) - an action to permanently sever the parent-child relationship, has high procedural hurdles to protect the constitutional rights of parents, and may be necessary to ‘clear the way’ for an adoption
  - c. Juvenile Delinquency/Undisciplined Action (“DJJ Court”) - an action brought against a child under 16 for corrective (and punitive) purposes, which may result in changes in custody (including appointing guardians for children who appear without parents) and actions needing to be taken by the parents.
10. **Minor Child or Juvenile** - unemancipated, unmarried, person under 18 years of age.
11. **Petition** - a description of the document that is drafted to start juvenile actions (abuse/neglect/dependency, undisciplined/delinquent, and termination of parental rights), as well as the document that is drafted to start an adoption.
12. **Petitioner** - the person/agency who files a petition.
13. **Plaintiff** - the person seeking relief via civil action, complaining of some Defendant(s)
14. **Respondent** - the persons whose legal rights/relationships are affected by a petition
15. **Special Proceeding** - Cases that are not civil actions, which are handled by the Clerk of Superior Court, exercising certain judicial powers in a (relatively) informal process.
16. **Summons** - the form, which is signed by a clerk, that indicates that a lawsuit has been filed and is active, and that the person being served therewith must defend their interests
17. **Verified** - relating to Complaints and Petitions, this means that the Plaintiff or Petitioner have reviewed the factual allegations in the document and under solemn oath or affirmation signed to indicate the veracity of those allegations, before a notary.
18. **Ward** - means a minor child for whom a guardian has been appointed.