

# Chapter 14

## Probation

<b>14.1</b>	<b>Overview</b>	<b>14-2</b>
<b>14.2</b>	<b>Terminology Used in this Chapter</b>	<b>14-2</b>
<b>14.3</b>	<b>When Probation May Be Ordered</b>	<b>14-3</b>
	A. Generally	
	B. Advocacy at Dispositional Hearing when Probation Is Ordered	
<b>14.4</b>	<b>Conditions of Probation</b>	<b>14-4</b>
	A. Generally	
	B. As Directed by Chief Court Counselor: Generally	
	C. As Directed by Chief Court Counselor: Level 2	
<b>14.5</b>	<b>Conditions of Probation: Case Law</b>	<b>14-6</b>
	A. Restitution	
	B. Submission to Urinalysis, Blood, or Breathalyzer Testing	
	C. Other Conditions	
<b>14.6</b>	<b>Intensive Probation</b>	<b>14-9</b>
<b>14.7</b>	<b>Term of Probation</b>	<b>14-9</b>
	A. Generally	
	B. Extending Probation	
<b>14.8</b>	<b>Violation of Probation</b>	<b>14-11</b>
	A. Motion and Notice Required	
	B. Secure Custody Pending Hearing	
	C. Preparation for Hearing	
	D. Burden of Proof	
	E. Alternatives on Finding of a Violation	
	F. Use of Previously Adjudicated Violations at Subsequent Proceedings	
<b>14.9</b>	<b>Termination of Probation</b>	<b>14-14</b>

---

## 14.1 Overview

Probation is a dispositional alternative that may be ordered by the court pursuant to either a Level 1 or Level 2 disposition. A juvenile who is on probation is placed under the supervision of a juvenile court counselor and may be subject to a number of statutory conditions.

Violation of a condition of probation may subject a juvenile to extension of probation, modification of the conditions of probation, or in some cases entry of disposition at the next higher level. A juvenile who is moved from a Level 2 to Level 3 disposition as a result of a probation violation will usually receive a commitment to the Division of Adult Correction and Juvenile Justice for confinement in a locked facility.

## 14.2 Terminology Used in this Chapter

**Division** is the Division of Adult Correction and Juvenile Justice.

**Intensive probation** is a dispositional alternative under G.S. 7B-2506(15), although the term is not defined by either statute or policy. Under Division policy, intensive probation is treated as a form of intensive supervision.

**Intensive supervision** is court-ordered supervision by a juvenile court counselor. G.S. 7B-2510(b)(5). The intensive supervision counselor maintains a small caseload and makes frequent contacts with the juvenile, the juvenile's parent, guardian, or custodian, and others involved with the juvenile. *See infra* "Intensive Supervision" in § 14.4C, As Directed by Chief Court Counselor: Level 2.

**Motion for review hearing** is a hearing pursuant to G.S. 7B-2510(d) to review the progress of a juvenile on probation at any time during probation or at the end of probation. Although a motion for review may contain an allegation of a violation of probation, a review hearing should not be a probation violation hearing unless proper notice has been given. *See infra* § 14.8A, Motion and Notice Required.

**Probation** is a dispositional alternative in which the juvenile is ordered to comply with specified conditions under the supervision of a juvenile court counselor. A juvenile may be returned to court for violation of those conditions during the probationary period. G.S. 7B-1501(22).

**Probation violation hearing** is a hearing to review a juvenile's probation on motion and notice pursuant to G.S. 7B-2510(d), alleging a specific violation of probation. *See infra* § 14.8, Violation of Probation.

## 14.3 When Probation May Be Ordered

### A. Generally

Probation is a dispositional alternative after an adjudication of delinquency if the juvenile is eligible for a Level 1 or Level 2 disposition. *See supra* § 13.8, Dispositional Limits for Each Class of Offense and History Level. Under Level 1 (community disposition), regular probation may be ordered. G.S. 7B-2506(8), 7B-2508(c). Under Level 2 (intermediate disposition), the juvenile may be placed on either regular or intensive probation. G.S. 7B-2506(8), (15); 7B-2508(d).

### B. Advocacy at Dispositional Hearing when Probation Is Ordered

Although probation is not a required dispositional alternative, it is routinely ordered. Counsel should work to create a dispositional plan that meets the juvenile's expressed interests and limits exposure to further sanctions. Counsel should argue against an order of probation when not warranted by the evidence to avoid exposing the juvenile to a possible allegation of violation of probation in the future, which could lead to commitment to a youth development center on revocation of probation in a case with a Level 2 disposition.

G.S. 7B-2510(a) authorizes courts to impose conditions of probation that are "related to the needs of the juvenile" and that are "reasonably necessary to ensure that the juvenile will lead a law-abiding life . . . ." *See also infra* § 14.5, Conditions of Probation: Case Law. If the juvenile does not have a significant record in juvenile court and the predisposition report and risk and needs assessment indicate that the juvenile has a supportive family, counsel should argue that probation would not address the juvenile's needs and is not necessary to ensure that the juvenile leads a law-abiding life.

If the court orders probation, counsel should seek to limit the conditions imposed as part of probation. Any conditions must be related to the adjudicated offense and the needs of the juvenile. *See* G.S. 7B-2501(c) (requiring court to select disposition that protects the public but also meets the needs and best interests of the juvenile). Also, if the court imposes multiple conditions, there is a risk that the juvenile will not understand all of the conditions and will be more likely to violate them. "Research shows that young adolescents have lower cognitive capacities, particularly in stressful situations, than adults." Theresa Hughes, [\*A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children's Advocates\*](#), 40 COLUM. J.L. & SOC. PROBS. 551, 566 (2007). A "long recitation of rules" may also be difficult to understand by a person with impaired language skills, regardless of whether it is oral or in writing. Michele LaVigne & Gregory J. Van Rybroek, [\*Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters\*](#), 15 U.C. DAVIS J. JUV. L. & POL'Y 37, 80 (2011). Additionally, some of the conditions that the court can impose, such as remaining on "good behavior," are vague. Others, such as making "specified financial restitution," involve legal terminology. If the court imposes multiple conditions, there is a risk that the juvenile will not understand all

of the conditions and will be more likely to be found in violation of the conditions of probation.

The risk is greater as the number of conditions increases. A court may impose 14 conditions of probation, plus community service, substance abuse monitoring, life skills or educational skills programs, electronic monitoring, and intensive supervision. G.S. 7B-2510. These conditions are in addition to the 14 dispositional alternatives that a court may impose for a Level 1 Disposition and the 23 dispositional alternatives that a court may impose for a Level 2 Disposition. G.S. 7B-2508(c), (d). Additionally, the forms that courts use to impose dispositional alternatives and conditions of probation reflect the language used in the statutes and do not provide simplified language that can be understood by juveniles. *See e.g.*, [AOC-J-464](#) (Supplemental Order for Conditions of Probation) (Dec. 2015). The court should explain each condition of probation to the juvenile in developmentally appropriate language during the dispositional hearing. Counsel should also carefully explain the conditions to the juvenile after the hearing and ensure that the juvenile understands each condition.

## 14.4 Conditions of Probation

This section describes statutorily authorized conditions of probation. Limitations on certain conditions of probation are discussed *infra* in § 14.5, Conditions of Probation: Case Law.

### A. Generally

A juvenile court counselor has the authority to visit a juvenile's residence if the juvenile is on probation. G.S. 7B-2510(a). In addition, the court may order a juvenile to comply with regular conditions of probation that are "related to the needs of the juvenile and that are reasonably necessary to ensure that the juvenile will lead a law-abiding life . . . ." G.S. 7B-2510(a). The statute lists 14 regular conditions that are specifically authorized. The court may order that a juvenile:

- remain on good behavior;
- not violate any laws;
- not violate any reasonable and lawful rules of a parent, guardian, or custodian;
- attend school regularly;
- maintain passing grades in up to four courses and cooperate with planning for such;
- not associate with specified people or be in specified places;
- refrain from use or possession of any controlled substance, refrain from use or possession of any alcoholic beverage, and submit to random drug testing;
- abide by a prescribed curfew;
- submit to a warrantless search at reasonable times;
- possess no firearm, explosive device, or other deadly weapon;
- report to a juvenile court counselor as required by the counselor;
- make specified financial restitution;

- be employed regularly if not attending school; and
- satisfy any other conditions determined appropriate by the court.

### **B. As Directed by Chief Court Counselor: Generally**

The juvenile may also be ordered to comply with other conditions “if directed to comply by the chief court counselor.” G.S. 7B-2510(b). Under G.S. 7B-2510(b)(1)–(3), the juvenile may be required by the chief juvenile court counselor to:

- perform up to 20 hours of community service,
- submit to substance abuse monitoring and treatment, and
- participate in a life skills or educational skills program administered by the Division.

### **C. As Directed by Chief Court Counselor: Level 2**

Under G.S. 7B-2510(b)(4)–(5), a juvenile who is eligible for a Level 2 disposition may be ordered to comply with the following conditions at the direction of the chief court counselor:

- cooperate with electronic monitoring, and
- cooperate with intensive supervision.

**Electronic monitoring.** Electronic monitoring is a form of supervision over a juvenile that involves checking the juvenile’s location through an electronic monitoring device that is fastened to the juvenile’s body. *See* Number CS 13.1, “Electronic Monitoring Requirements and Procedures (R&P) Document,” Department of Juvenile Justice and Delinquency Prevention (Oct. 3, 2013). Electronic monitoring is not the same as a dispositional order for house arrest under G.S. 7B-2506(18). If the court orders electronic monitoring as part of probation, the juvenile court counselor must oversee the installation of electronic monitoring equipment in the juvenile’s residence. The juvenile court counselor must then establish exclusion and inclusion zones for the juvenile. Exclusion zones are geographic areas that the juvenile is prohibited from entering, such as a victim’s home or a particular neighborhood. Inclusion zones are geographic areas where the juvenile is required to be during specific time periods, such as a school or business where the juvenile works. The juvenile court counselor must monitor notifications from the electronic monitoring equipment and respond when there are alerts involving tampering with the electronic monitoring device or violations of exclusion or inclusion zones by the juvenile.

**Intensive supervision.** The requirements for intensive supervision are outlined by Division policy, but are not defined by statute. *See* Number CS 3.1, “Supervision,” Department of Juvenile Justice and Delinquency Prevention (Oct. 17, 2006). Under Division policy, a juvenile court counselor may supervise a maximum of 12 juveniles on intensive supervision. The counselor must contact the juvenile and the juvenile’s parent, guardian, or custodian immediately after the juvenile is assigned to intensive supervision. Face-to-face contact must be made by the counselor with the juvenile at least three times

every seven days, with at least one contact to be on the weekend or outside of regular school hours. In addition, contact with the parent must be made in person at least once every seven days, with a visit to the juvenile's residence at least every seven days. Finally, the counselor is required to make one contact per week with someone at the juvenile's school, the juvenile's work, or others involved significantly with the juvenile.

Contacts may gradually become less frequent with the approval of the chief court counselor. At a minimum, the counselor must have contact with the juvenile at least once every seven days, with the parent, guardian, or custodian every 14 days, and with school personnel and others at least once every 21 calendar days. Counsel will generally have to ask the juvenile court counselor or review the juvenile court counselor's file to learn if less frequent contacts have been approved.

## 14.5 Conditions of Probation: Case Law

North Carolina appellate courts have considered the propriety of some of the regular conditions of probation, including the provision under G.S. 7B-2510(a)(14) permitting courts to impose "other conditions determined appropriate by the court." This section contains a brief review of some of these cases as well as pertinent statutory limitations.

Although courts in some districts routinely order certain regular conditions of probation, G.S. 7B-2510(a) states that courts can only impose regular conditions that are "related to the needs of the juvenile" and that are "reasonably necessary to ensure that the juvenile will lead a law-abiding life." In adult criminal cases, courts are permitted to impose non-statutory special conditions of probation that are "reasonably related" to the defendant's rehabilitation. G.S. 15A-1343(b1)(10). This language "operates as a check on the discretion of trial judges." *State v. Lambert*, 146 N.C. App. 360, 367 (2001). Likewise, where appropriate, counsel should argue that the statutory language in G.S. 7B-2510(a) limits the discretion of judges to impose certain regular conditions of probation in juvenile cases.

### A. Restitution

The court may require the juvenile to pay restitution as a condition of probation, G.S. 7B-2510(a)(12). However, the following limitations apply to any order of restitution:

1. If the court imposes a Level 1 disposition, it may not order more than \$500.00 of restitution. G.S. 7B-2506(4), 7B-2508(c). The court may order more than \$500.00 if the court imposes a Level 2 disposition. G.S. 7B-2506(22), 7B-2508(d).
2. The court may not order restitution without finding that payment of restitution is in the juvenile's best interest. *In re Z.A.K.*, 189 N.C. App. 354, 362 (2008).
3. The court may not order restitution if the juvenile is unable to pay the restitution amount. G.S. 7B-2506(4). The burden is on the juvenile to establish an inability to pay. *Id.*; see also *In re Schrimpsher*, 143 N.C. App. 461, 464 (2001) (holding that

- imposition of restitution was proper where the juvenile, when given an opportunity to be heard, presented no evidence that he lacked the means to pay restitution).
4. Unless the juvenile stipulates to the amount of restitution, an order of restitution must be supported by findings of fact, which in turn must be supported by some evidence in the record. *In re McDonald*, 133 N.C. App. 433, 436 (1999).
  5. The period within which the court may require the juvenile to pay restitution may not exceed 12 months. G.S. 7B-2506(4); *In re Heil*, 145 N.C. App. 24, 31–33 (2001).

The court may hold multiple individuals jointly and severally liable for payment of restitution. G.S. 7B-2506(4), (22). However, restitution will not be upheld even if the record indicates that the others participated in the crime if the court fails to make any findings from which the appellate court can determine that the others “acted jointly in causing harm.” *In re Schrimpsheer*, 143 N.C. App. 461, 465–66 (2001).

### **B. Submission to Urinalysis, Blood, or Breathalyzer Testing**

The trial court may require the juvenile to submit to random drug testing as a condition of probation. G.S. 7B-2510(a)(7)c. However, as with other probation conditions, any testing must be “related to the needs of the juvenile” and “reasonably necessary to ensure that the juvenile will lead a law-abiding life.” G.S. 7B-2510(a). Counsel should carefully review the predisposition report and risk and needs assessment. If the predisposition report and risk and needs assessment indicate that the juvenile has not used alcohol or drugs, and the juvenile has not been adjudicated of an offense involving alcohol or drugs, counsel should argue that testing is not warranted. If the court imposes drug testing, it may not require the juvenile to submit to testing requested by “any law enforcement.” *In re Schrimpsheer*, 143 N.C. App. 461, 466–67 (2001). Any testing must instead be requested by the juvenile court counselor. *Id.*

The trial court also may impose substance abuse monitoring and treatment as a condition of probation under G.S. 7B-2510(b)(2). However, monitoring and treatment under this provision may only occur if it is directed by the chief court counselor. G.S. 7B-2510(b).

If it is unclear whether the court has ordered random drug testing under G.S. 7B-2510(a)(7)c. or substance abuse monitoring and treatment under G.S. 7B-2510(b)(2), counsel should ask the court to clarify which condition it intended to impose and the basis for doing so.

### **C. Other Conditions**

**Requiring others to consent to warrantless searches.** Pursuant to G.S. 7B-2510(a)(6), the court may order that the juvenile “not associate with specified persons or be in specified places.” That authority does not extend, however, to ordering that those with whom the juvenile resides or rides consent to warrantless searches. *In re Schrimpsheer*, 143 N.C. App. 461, 468–69 (2001). The Court found that it was “unfair and unreasonable” to require those not under the court’s jurisdiction to consent to warrantless

searches. Additionally, such a requirement would give people other than the juvenile control over the success or failure of the probation.

**Wearing sign.** The court may not order a juvenile to wear a sign in public that identifies the juvenile as delinquent. *In re MEB*, 153 N.C. App. 278, 282 (2002). In *MEB*, the juvenile was ordered to wear a large sign in public stating “I am a juvenile criminal.” This requirement was held to violate the juvenile’s right to confidentiality pursuant to G.S. 7B-3001(b), and to subject the juvenile to a choice between public ridicule and de facto house arrest in violation of the Juvenile Code and public policy.

**Wearing necklace with victim’s picture and visiting gravesite on anniversaries of victim’s birth and death.** The court distinguished the condition in *MEB* from requirements that a juvenile wear a necklace containing the victim’s picture and place flowers on the victim’s grave on the anniversaries of the victim’s birth and death. *In re J.B.*, 172 N.C. App. 747, 751–53 (2005). In *J.B.*, which involved the offense of involuntary manslaughter, the Court found that the special conditions of probation, unlike those in *MEB*, did not expose the juvenile’s record of delinquency to the public and did not amount to de facto house arrest. The juvenile could wear the victim’s picture enclosed in a locket, which could be worn under clothing; visiting the gravesite was not addressed. The Court found that there was no requirement that the lower court solicit or consider a therapist’s opinion regarding the potential for either benefit or damage to the juvenile from these conditions.

**Restricting participation in activities.** A prohibition on watching television for one year has been upheld as a condition of probation. *In re McDonald*, 133 N.C. App. 433, 435 (1999). In *McDonald*, the juvenile stated in court that she spray-painted the words “Charles Manson Rules” on someone else’s property because she had recently watched a television documentary about him. Because the condition was related to the juvenile’s misconduct, the injury to property, and her need to be free of negative influences, the Court found that the special condition was proper.

A restriction on participating in school activities, such as football or dances, was held to be proper where the court had evidence that the juvenile had difficulty engaging in age-appropriate behavior during complex social interactions. *In re J.B.*, 172 N.C. App. 747, 753 (2005). The Court noted that the juvenile could continue to interact with his peers in more structured settings, such as during regular school hours and at church, and was restricted only from those activities that posed the greatest danger for inappropriate or delinquent conduct.

**Requiring admission of sex offense.** The decision of the U.S. Supreme Court in *Minnesota v. Murphy*, 465 U.S. 420 (1984), that the constitutional right against self-incrimination prohibits making a waiver of the right a condition of probation, has been held applicable to juvenile cases. *In re T.R.B.*, 157 N.C. App. 609, 620 (2003). In *T.R.B.*, the Court of Appeals held that under *Murphy* a condition of probation ordering that the juvenile complete a sex offender evaluation and treatment program, which required attendance at all meetings and admission of responsibility for the offense, was



impermissible. The Court noted that there may be an exception if the juvenile is granted immunity from use of the statements in subsequent prosecutions. *Id.* at 621–22 (quoting *Murphy*, 465 U.S. at 435 n.7).

## 14.6 Intensive Probation

Although the court may order intensive probation as a disposition pursuant to G.S. 7B-2506(15), the term is not defined by statute. The policies of the Division do not address the requirements for intensive probation, but appear to categorize it under court-ordered supervision as the same as intensive supervision. *See supra* “Intensive supervision” in § 14.4C, As Directed by Chief Court Counselor: Level 2; *see also* Number CS 3.1, “Supervision,” Department of Juvenile Justice and Delinquency Prevention (Oct. 17, 2006).

## 14.7 Term of Probation

### A. Generally

A term of probation is limited to one year but may be extended by the court. If the court orders probation or extends probation, counsel should ask the court to specify a date certain for the end of probation or a time for a review hearing before the period of probation expires to ensure that there is no confusion about when the juvenile’s probation ends.

### B. Extending Probation

There are two ways that a court can extend probation, discussed below.

**To protect community or safeguard juvenile.** The court may extend probation under G.S. 7B-2510(c) if the extension is “necessary to protect the community or to safeguard the welfare of the juvenile.” The juvenile must be provided notice and a hearing before probation is extended. Although G.S. 7B-2510(c) does not specify the type of notice that is required, G.S. 7B-1807 states that the clerk must give the juvenile five days written notice of the date and time of hearings unless the juvenile is notified in open court. The hearing under G.S. 7B-2510(c) should occur before probation expires. However, the court has discretion to extend probation after probation expires if the hearing occurs “at the next regularly scheduled court date or if the juvenile fails to appear in court.”

If the court extends probation, it must make findings to support the conclusion that the extension is necessary to protect the community or to safeguard the welfare of the juvenile. *See In re D.L.H.*, 198 N.C. App. 286, 296 (2009) (upholding extension order where the trial court made multiple findings indicating that the juvenile was absent from school and the juvenile’s mother was not willing to have the juvenile placed in her home), *overruled on other grounds*, 364 N.C. 214 (2010).

Appellate courts have not interpreted this part of subsection (c). Some trial courts may interpret this language to mean that they can extend probation multiple times for up to a year. Regardless of how the language is interpreted, counsel should oppose any efforts to extend the juvenile's probation beyond a year.

**For probation violations.** The court may extend probation under G.S. 7B-2510(d) and (e) if it finds by the greater weight of the evidence that the juvenile has violated the conditions of probation. The juvenile must be given notice and a hearing before the court extends the juvenile's probation. G.S. 7B-2510(d). A stipulation by the juvenile at a later hearing that probation had previously been extended is not a substitute for the notice and hearing requirements of G.S. 7B-2510(d). *In re A.F.*, 231 N.C. App. 348, 356 (2013). Additionally, G.S. 7B-2510(d) provides that "the conditions or duration of probation may be modified *only as provided in this subchapter . . .*" (emphasis added). Under G.S. 7B-2510(c), probation may not be extended beyond a year. Based on the language in subsection (c), counsel should argue that an extension under subsections (d) and (e) should not exceed a year.

The court has limited authority to extend probation under G.S. 7B-2510(d) and (e) after the original term of probation expires. In *In re T.J.*, 146 N.C. App. 605 (2001), the juvenile court counselor filed a motion for review before the expiration of the probationary term. The court then held a hearing two weeks after the probationary period was set to end and extended the juvenile's probation for six months. Citing G.S. 7B-2510(d), which provides that the court may review the juvenile's progress "at any time during the period of probation or at the end of probation," the Court held that the court had limited discretion to modify probation within a reasonable time after its expiration. *Id.* at 607.

If the court counselor files a motion for review *after* the probationary term has ended, counsel should move to dismiss the motion on the ground that probation has expired. Counsel should distinguish *T.J.*, where the motion was filed during the probationary period, and assert that the court's jurisdiction to extend probation expired when the period of probation ended. *See, e.g., State v. Moore*, 148 N.C. App. 568, 570 (2002) (trial court did not have jurisdiction to modify the defendant's probation where the State failed to establish that the violation report was filed before the probationary period expired).

---

**Practice note:** Counsel should object if the State seeks to extend probation for a reason not provided in the notice for the hearing. For example, the juvenile court counselor might file a motion for review alleging that the juvenile violated the conditions of probation, but then argue at the hearing on the motion that probation should be extended to safeguard the welfare of the juvenile. Counsel should oppose the extension and argue that extending probation for a reason that was not included in the motion for review would violate the juvenile's rights to notice and due process.

---

## 14.8 Violation of Probation

### A. Motion and Notice Required

The progress of the juvenile on probation may be reviewed on motion of the juvenile court counselor, the juvenile, or the court. Conditions or the duration of probation may be modified only after notice and a hearing. G.S. 7B-2510(d). The juvenile and the juvenile's parent, guardian, or custodian are entitled to five days written notice before a hearing on an alleged violation of probation. G.S. 7B-1807. If the clerk gives less than five days notice of the violation hearing and counsel has not had sufficient time to prepare, counsel should ask for a continuance.

Counsel should also oppose any motion for review filed by the prosecutor. A sample motion to dismiss for lack of standing is available on the [Office of the Juvenile Defender website](#). According to G.S. 7B-2510(d), the only individuals who are permitted to file a motion for review are the juvenile court counselor, the juvenile, and the court, not the prosecutor. Based on G.S. 7B-2510(d), counsel should argue that any violations described in the prosecutor's motion for review that are not included in a motion for review filed by the juvenile court counselor cannot form the basis of a finding that the juvenile violated the conditions of probation.

Counsel should also object on notice and due process grounds to any other violations that were not included in the motion for review filed by the juvenile court counselor. Juveniles have the right to notice before a hearing on an alleged probation violation. G.S. 7B-2510(e). In criminal court, it is improper for a court to revoke probation based on conduct not alleged in the violation report. *State v. Cunningham*, 63 N.C. App. 470, 475 (1983); *cf. State v. Hubbard*, 198 N.C. App. 154 (2009) (trial court properly revoked probation based on a condition not described in the violation report because the report contained facts that supported the violation found by the court). Counsel should argue that the same principles apply to juvenile cases and that finding a violation that was not alleged would violate the juvenile's rights to notice and due process.

### B. Secure Custody Pending Hearing

Where the juvenile is alleged to have violated probation, the court may order secure custody pending the probation violation hearing if the juvenile is alleged to have damaged property or injured persons. G.S. 7B-1903(d).

### C. Preparation for Hearing

Preparation for a hearing on a motion alleging a violation of probation is generally the same as for a hearing on a petition. Counsel should meet with the juvenile and prepare the juvenile to testify when helpful to the case, talk with the juvenile court counselor and review the counselor's records, and make other contacts as required to investigate and respond to the alleged violation. Witnesses and records should be subpoenaed as

necessary. If appropriate, counsel should explore negotiating an agreement with the juvenile court counselor or prosecutor.

Counsel should check the following items during hearing preparation to determine whether:

- the motion alleging violation of probation was filed within the probationary period;
- the juvenile was given adequate written notice of the alleged violation and hearing;
- the juvenile court counselor has correctly calculated the period of probation;
- the original order of probation was for a period of probation within the statutory provisions of G.S. 7B-2510(c); and
- the condition of probation that is alleged to have been violated was set forth in the dispositional order and was a condition of probation allowed under G.S. 7B-2510(a).

#### **D. Burden of Proof**

To establish that the juvenile violated the terms of probation, the State must prove the violation “by the greater weight of the evidence.” G.S. 7B-2510(e). If the State establishes a violation, the trial court may not revoke probation unless the violation was willful or without a lawful excuse. The juvenile has the burden of showing one of these grounds. *In re Z.T.W.*, 238 N.C. App. 365, 369–70 (2014). Evidence showing inability to comply satisfies this burden. *Id.* If the juvenile presents evidence of an inability to comply with the terms of probation, the court must consider and evaluate the evidence before ruling on the violation. *Id.*

The rules of evidence do not apply at probation violation hearings because they are considered “dispositional.” *In re D.J.M.*, 181 N.C. App. 126, 131 (2007); *see also* G.S. 7B-2501. The court therefore may rely on hearsay to find that the juvenile violated the terms of probation. *In re Z.T.W.*, 238 N.C. App. at 368–69. Counsel should still object to evidence that is not relevant or reliable, including hearsay, and argue that such evidence is insufficient to support a finding that the juvenile violated the terms of probation.

---

**Practice note:** Counsel should argue against an allegation that the juvenile has violated probation by virtue of having been alleged to be delinquent or charged with a new offense. Under G.S. 7B-2510(a)(2), the court may order the juvenile not to violate any laws. The juvenile is not in violation, however, by merely being accused of violating a law. The State must produce sufficient evidence to meet its burden of proof of the acts allegedly committed by the juvenile. *See State v. Seagraves*, 266 N.C. 112, 113 (1965) (per curiam) (holding that the “burden of proof is on the State to show that the defendant has violated one of the conditions of his probation”).

---

#### **E. Alternatives on Finding of a Violation**

If the court finds that the juvenile violated conditions of probation, it may keep in place the original conditions, modify the conditions or, with one exception, order a new disposition at the next higher level from the original disposition. G.S. 7B-2510(e). The

exception is that the court may not order a Level 3 disposition for a violation of probation if the original adjudication was for an offense classified as minor under G.S. 7B-2508. G.S. 7B-2510(f). Counsel should ask the court to enter a new disposition immediately rather than hold the juvenile in detention and continue the matter.

If the court orders a new disposition, it may order a period of confinement in a secure juvenile detention facility for up to twice the term authorized by G.S. 7B-2508, which sets forth dispositional limits for each class of offense and delinquency history level. G.S. 7B-2510(e). If the court orders detention, counsel should request that the juvenile be given credit for any time already served. Although the court is not required to give the juvenile credit for time served, *In re D.L.H.*, 364 N.C. 214, 216 (2010), counsel should advise the court that there is no prohibition against giving the juvenile credit. If the probation violation hearing was delayed and the juvenile spent a significant amount of time in detention, counsel should argue that many of the purposes of dispositions under G.S. 7B-2500, such as promoting public safety and emphasizing accountability, have already been met. *See supra* “Credit for time served” in § 8.6F, Secure Custody Hearing.

#### **F. Use of Previously-Adjudicated Violations at Subsequent Proceedings**

**Subsequent adjudication proceedings.** A finding by the court of a violation of probation for a certain act does not bar the filing of a petition and an adjudication of delinquency based on the same act. In *In re O’Neal*, 160 N.C. App. 409 (2003), the trial court found that the juvenile willfully violated the conditions of probation by becoming “physically aggressive” with another juvenile. The State later filed a petition for misdemeanor assault based on the same conduct and the juvenile was adjudicated delinquent for the offense. The Court of Appeals rejected the juvenile’s argument that the adjudication for the assault charge after the probation determination violated the protection against double jeopardy. The Court held that double jeopardy protections do not apply to probation revocation proceedings.

**Subsequent probation hearings.** A separate question is whether the court may modify probation or enter a new disposition for conduct that was the subject of a previous probation hearing. If the juvenile court counselor files a motion for review alleging a violation that was adjudicated at a prior probation violation hearing, counsel should move to dismiss on res judicata and collateral estoppel grounds.

Under the doctrine of res judicata, “a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties.” *Whitacre P’ship v. BioSignia, Inc.*, 358 N.C. 1, 15 (2004). Under the doctrine of collateral estoppel, the determination of an issue in a prior proceeding “precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.” *Id.* Counsel must assert res judicata and collateral estoppel at the hearing on the alleged violation; otherwise, the claims are waived. *State v. McKenzie*, 292 N.C. 170, 177 (1977).

Appellate courts elsewhere have reversed probation revocation orders in adult cases based on res judicata and collateral estoppel grounds. *See People v. Quarterman*, 136 Cal. Rptr. 3d 419 (Cal. Ct. App. 2012); *Shumate v. State*, 718 N.E.2d 1133 (Ind. Ct. App. 1999); *Knox v. Pennsylvania Bd. of Probation and Parole*, 588 A.2d 79, 82 (Pa. Commw. Ct. 1991).

In *State v. Powell*, \_\_\_ N.C. App. \_\_\_, 793 S.E.2d 282 (2016) (unpublished), the North Carolina Court of Appeals refused to recognize that collateral estoppel barred revocation at a later probation hearing based on a violation decided at an earlier hearing. In *Powell*, the defendant violated a condition of his probation by possessing a firearm in March 2015. The probation officer filed a violation report and, after a hearing, the trial court extended the defendant's probation based on the violation. In August 2015, the probation officer filed another violation report based on the March 2015 possession of a firearm and on absconding, but the State presented no evidence on absconding. The trial court revoked the defendant's probation based on the March 2015 possession of a firearm alone. The Court of Appeals held that collateral estoppel did not apply because the State was not contesting the finding from the prior probation hearing that the defendant possessed a firearm. Rather, the State was relying on it. The Court of Appeals did not consider whether the trial court's earlier judgment to extend probation barred the State from relitigating that judgment and requesting revocation. Counsel should continue to argue that both the judgment as well as findings from a prior probation hearing should be given res judicata and collateral estoppel effect.

The *O'Neal* decision, discussed at the beginning of this subsection G., is distinguishable from a case in which the State seeks to revoke a juvenile's probation based on a violation decided at previous probation hearing. *O'Neal* held only that double jeopardy principles do not apply to probation violation hearings and do not bar a subsequent adjudication of delinquency for the same act. The argument here is based on the separate doctrines of res judicata and collateral estoppel. *But see State v. Powell*, \_\_\_ N.C. App. \_\_\_, 793 S.E.2d 282 (2016) (unpublished) (stating without analysis that the defendant's collateral estoppel argument was in essence a double jeopardy argument despite their differences).

## 14.9 Termination of Probation

The court may enter a written order terminating probation on finding that there is no further need for supervision, either at the end of the probationary term originally ordered or at any time during probation. G.S. 7B-2511. At the election of the court, an order may be entered in chambers based on a report of the juvenile court counselor or may be entered after notice and a hearing with the juvenile's attendance. *Id.* Termination of probation does not terminate the court's jurisdiction unless ordered by the court, or when statutory conditions ending jurisdiction are met. G.S. 7B-1601(b); *see supra* § 3.3, Jurisdiction. Counsel should therefore request that the court terminate jurisdiction as well as probation, which may be done by checking a box on the order terminating probation. *See Form AOC-J-465* (Order to Terminate Supervision (Undisciplined/Delinquent)) (Apr. 2000).