

## “Catastrophic Conditions,” Statutory Timelines, and Other Issues in A/N/D Court Cases

These are not usual times for North Carolina, the U.S., or the world given the coronavirus (COVID-19) pandemic. In response to this pandemic, Chief Justice Beasley issued two Emergency Directives on Friday declaring that catastrophic conditions exist requiring changes to how the N.C. courts will operate. Yesterday, a clarifying memorandum was issued providing a “Coronavirus Update for Our Courts” (AOC Memo). These directives and other information may be accessed on the N.C. Judicial Branch website, which now has a page providing COVID-19 updates, [here](#). This page also includes administrative orders issued by chief district court judges of judicial districts and how those individual districts are operating.

How does all this affect abuse, neglect, and/or dependency (A/N/D) court cases? A/N/D cases impact a parent’s paramount constitutional rights to care, custody, and control of their child. See *Troxel v. Granville*, 530 U.S. 57 (2000); *Price v. Howard*, 346 N.C. 68 (1997); *In re R.R.N.*, 368 N.C. 167 (2015). Additionally, the Juvenile Code explicitly recognizes parents have constitutional rights that must be protected in these proceedings. G.S. 7B-100(1), -802. Emergency Directive 1 (paragraph 2) states that proceedings that are necessary to preserve the right to **due process of law** should continue to be held. Although the examples listed involve criminal proceedings, those examples do not exclude A/N/D actions where parents’ and children’s due process rights are affected.

### Guidance

As of the writing of this post, federal guidance about mandatory timelines for A/N/D cases has not been issued. Although the NC Department of Health and Human Service (NC DHHS) has not provided specific formal guidance or directives about the provision of protective services in A/N/D cases (see G.S. 7B-300), it does have a page on its website that provides information about the “[Coronavirus Disease 2019 \(COVID-19\) Response in North Carolina](#),” and the Division of Public Health also has a page addressing the coronavirus in N.C. [here](#).

Currently, the Chief Justice’s directive and clarifying memorandum along with Governor Cooper’s [Executive Order No. 117](#) are what the courts, the county department of social services (DSS), and involved parties (parents, children, guardians, custodians, and caretakers) must interpret and follow regarding A/N/D court cases and orders.

### Nonsecure Custody Orders and Hearings on the Need for Continued Nonsecure Custody: Timing Issues

Nonsecure custody orders are those court orders that remove a child from their parent, guardian, custodian, or caretaker, and initial orders are typically requested and issued ex parte. See G.S.

7B-502; -504. In addition to Emergency Directive paragraph 2, paragraph 3 explicitly states proceedings for emergency relief, including juvenile custody orders, should continue.

1. **First Hearing.** A child may not remain in nonsecure custody for more than 7 calendar days without a hearing (either a hearing on the need for continued nonsecure custody or the adjudicatory hearing). G.S. 7B-506(a). This first hearing may not be waived but may be continued for up to 10 business days if the parent, guardian, custodian, or caretaker and the child's guardian ad litem (GAL) (if one is appointed) consent. See G.S. 7B-506(e), (f). As a result, first hearings on the need for continued nonsecure custody should still be occurring within the designated time periods. These hearing may occur remotely for some or all of the parties and participants as per Emergency Directive 1 (paragraph 1).

If a judicial district has an administrative order that authorizes a magistrate or person other than a judge to issue the initial nonsecure custody order when a request is made at a time when the clerk's office is closed (see G.S. 7B-502), the first hearing on the need for continued nonsecure custody must occur at the next regularly scheduled session of the district court. G.S. 7B-506(a). This provision does not limit that regularly scheduled session to "juvenile" sessions, meaning it is the next day that court is held. Assuming the restrictions regarding what hearings are being conducted during this time are regularly scheduled sessions of the district court, these initial nonsecure custody hearings must be scheduled immediately.

Suggestion: One way to alleviate the potential strain on the court system for an immediate hearing when the initial nonsecure custody order is issued by someone other than a judge is for the chief district court judge to temporarily suspend the administrative order such that only a designated district court judge may approve any after-hours requests for nonsecure custody.

2. **Hearings on the Need for Continued Nonsecure Custody.** The Juvenile Code requires that hearings on the need for continued nonsecure custody are held at regular intervals (a second hearing is to be held within 7 business days of the first hearing and subsequent hearings every 30 days) unless these hearings are waived with the consent of the parent, guardian, custodian, caretaker and juvenile's GAL (if appointed). G.S. 7B-506(e), (f). Presumably, DSS as a party must also consent. Additionally, Emergency Directive 1 (paragraph 3) does not limit hearings addressing emergency relief that involves a "juvenile custody order" to the first hearing for continued nonsecure custody only. These hearings on the need for continued nonsecure custody should continue absent the parties' consent to waive them.

Suggestions:

- Seek consent of the parties to continue the initial hearing past the statutory deadlines and/or to waive the second and subsequent hearings. To facilitate consent, address at the first hearing for continued nonsecure custody all the issues that may arise: placement,

visitation (is it necessary to limit family contact to phone or electronic means in the short-term), medical consent if the child needs treatment that is more than routine or emergency treatment, etc.

- Stagger times for the hearings. For example, schedule a set number of hearings for 9:00 a.m. and another set number for 10:00 a.m. Utilizing such a schedule will limit the number of people in the courtroom and hallways, allowing for social distancing as urged by the Governor's Executive Order No. 117, sec. 3.
- Given the number of parties in an A/N/D case, consider creative ways to encourage effective remote participation for some or all of them. For example, can clients meet their attorneys at the attorney's office and jointly call or zoom in?

### Other Hearings

If the judicial district determines that adjudicatory, review, and permanency planning hearings will continue to be held, remote participation is an option. These hearing should only be conducted in accordance with the mandates of Emergency Directive 1.

Adjudicatory hearings are to be held within 60 days of the filing of the A/N/D petition. G.S. 7B-801(c). However, the Juvenile Code allows for continuances of adjudicatory hearings in "extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile."

Review and Permanency Planning Hearings are also to be held within designated time frames that are set forth in G.S. 7B-906.1. Again, these hearings impact a parent's constitutional rights regarding their children and the movement toward reunification. The Juvenile Code does not address criteria for continuing these hearings; however, one can look to G.S. 7B-803 as a guide.

Consents are permissible for adjudicatory, initial dispositional, review, and permanency planning hearings. For those cases where consents exist, it is possible to for such consents to occur remotely. Under G.S. 7B-801(b1), the proper procedure for a consent order involves all of the following:

1. All parties are present *or represented by counsel who is present and authorized to consent for their client*;
2. The juvenile is represented by counsel. *This means a GAL under G.S. 7B-601 must be appointed for the juvenile (even in cases where dependency only is alleged); and*
3. The court makes sufficient findings of fact for the type of hearing and order (see checklists in the A/N/D TPR Manual, [here](#)).

During these times, attorney negotiations outside of court may play a crucial role for obtaining orders by consent that address each party's immediate concerns and needs. In the event that orders are entered by consent to address immediate issues, the parties may want to request or the

court may want to consider scheduling the next hearing in a shorter time frame, e.g., 60 days, rather than defer to the maximum statutory limits.

## **Court-Ordered Visitation Continues**

Current orders are still enforceable. A/N/D orders that have removed a child from the custody of a parent, guardian, or custodian or continue the child's placement outside of the home must include a provision about visitation. G.S. 7B-905.1. Although there may be logistical challenges and/or concerns about how to implement those visitation provisions, DSS is still obligated to ensure those orders are followed. There should not be an automatic DSS policy or directive that all visits are suspended. There is no authority under the Juvenile Code that authorizes the chief district court judge to issue an administrative order that suspends visitation or other provisions of entered orders in A/N/D cases. Instead, decisions must be made on a case-by-case basis.

If a child is in DSS custody, G.S. 7B-905.1(b) authorizes the DSS director to temporarily change visitation if a child or party is ill or there are extraordinary circumstances. Any such changes must be communicated in writing and provide the reason. For example, the location may need to be changed if a visitation center is closed. Can the visit occur outside in a public park? Can DSS provide an office that is sanitized between visits? The time of visit may be changed now that children are not in school with the closure of public schools. Can a parent attend a service appointment with the child (e.g., OT, PT, speech)?

Suggestion: In cases where the child's health and safety are a factor, determine whether parties through attorney negotiation can agree to any temporary suspension of visits and agreement to regular contact through phone and/or electronic means, with agreed-to in-person make-up time. Remember, phone or electronic contact is not visitation. *In re T.R.T.*, 225 N.C. App. 567 (2013).

## **Termination of Parental Rights (TPR) – Orders Eliminating Reunification**

Although adoption proceedings are postponed (see AOC Memo), the need for the commencement of a TPR action may be required under the Juvenile Code when adoption is the primary plan. See G.S. 7B-906.1(m). Time periods apply – a TPR must be filed within 60 calendar days of the date of the permanency planning order (PPO) that designated adoption as the primary plan, unless the court finds otherwise and sets a different time period. *Id.* However, if that PPO also eliminated reunification as a permanent plan, a TPR petition or motion must be filed within 65 days of that order's entry and service if DSS intends to pursue a TPR, without having a delay in the court exercising jurisdiction over the TPR. This is because a parent must file an appeal of the PPO that eliminates reunification after that order is entered and served when a TPR has not been initiated within 65 days. If the appeal of the PPO is timely filed because a TPR was not commenced within 65 days, the district court is unable to exercise jurisdiction in a TPR that is subsequently filed during the pendency of the PPO appeal. G.S. 7B-1001(a)(5); -1003(b)(1).

Assuming the TPR is filed within the 65-day time period, the TPR hearing must be held within 90 days. G.S. 7B-1109(a). However, like the A/N/D adjudication, TPR hearings may be continued for extraordinary circumstances when necessary for the proper administration of justice. G.S. 7B-1109(d).

## Resources

1. My colleagues at the School of Government and I have been working hard to provide resources and guidance during this time:
  - Coronavirus microsite, [here](#).
  - North Carolina Public Health Law: NC Legal Resources: Coronavirus Disease 2019, [here](#)
  - Teleworking Guidance: Best Practices, Sample Policies, and Cybersecurity, [here](#).
  - Our various blogs: [On the Civil Side](#), [NC Criminal Law](#), [Coates' Canons](#).
2. COVID-19 and Child Welfare on the Child Welfare Information Gateway website, [here](#).
3. Washington State Department of Children, Youth & Families Coronavirus – COVID-19 Updates, [here](#).