

Clerks, Adoptions and Division Review (Part I)

Ask most any clerk of superior court in North Carolina and they will likely tell you that one of the highlights of their job is presiding over the finalization of adoptions. However, the clerk's role does not end upon entry of the final decree. Within 10 days of the entry of the final decree, the clerk must transmit all of the original records filed in connection with the adoption (except the petition and final decree, of which only copies are sent) to the Division of Social Services of the North Carolina Department of Health and Human Services. [G.S. 48-9-102\(d\)](#). The Division is charged with permanently indexing and filing the papers received from the clerk. [G.S. 48-9-102\(e\)](#). Included in these documents is the original Report to Vital Records ([DSS Form 1815](#)) signed by the clerk. Once the Division completes the indexing process, the Division sends the Report to the [State Registrar](#) and retains and seals the remaining documents from the adoption file. [G.S. 48-9-102\(f\)](#). The Report authorizes the State Registrar to issue a new birth certificate for the adoptive child with the child's adoptive name and the names of the adoptive parents.

Chapter 48 contemplates an administrative role by the Division after the final decree is entered by the clerk and before the new birth certificate is issued. [G.S. 48-9-102](#). Over time, the Division's role has expanded to add a review function. In practice, upon receipt of the adoption file from the clerk, the Division reviews the file to ensure that it complies with Chapter 48. The review process can take up to 12 weeks after the Division receives the file from the clerk. This review may include everything from technical elements of the file such as reviewing for name inconsistencies, proper notary seals, date of birth inconsistencies, or missing signatures to more substantive elements that go to the clerk's discretion as a judge such as the decision to waive the requirement of a report to the court, accept a certain form of consent, or determine the suitability of the adoptive parent. It is unclear how far this review extends as the process is not set forth in the General Statutes.

If the Division does not find any problems with the adoption file, the Division sends the Report to the State Registrar. However, if the Division flags something in the file that it determines does not comply with Chapter 48, the Division returns the file to the clerk along with a letter highlighting the issues identified. The Division does not have authority to change any court record, including the Report to Vital Records, even if there is a minor technical error or inconsistency in the documents. The reports, consents, and other documents contained in the adoption file constitute court records that may not be changed by the executive branch. [Hamilton v. Freeman, 147 N.C. App. 195, 204 \(2001\)](#).

The adoption statutes do not authorize the Division to conduct this review of the adoption file or the judicial decree of the clerk. It is unclear whether this review would be upheld if challenged. In at least one other context, the court of appeals upheld an order from the trial court that instructed the Department of Corrections to notify the sentencing judge, the district attorney, the defendant, and the defendant's counsel where the DOC determined the judge's sentencing order did not comport with state law rather than modify or refuse to implement the order. [Hamilton v. Freeman, 147 N.C.](#)

[App. 195, 200 \(2001\)](#). It is important to note that the trial court also required the agency to notice all of the parties to the court proceeding. In the context of adoptions, the Division currently only notices the clerk. Furthermore, the role of the DOC, carrying out sentences and thus determining when a prisoner may be eligible for parole, among other things, is quite different from the indexing and record retention responsibilities of the Division.

If the clerk receives a letter and file back from the Division, the clerk has two options: (1) stand by the original order, or (2) address the issues raised by the Division.

Option #1: Stand by the Order

The entry of the decree by the clerk is a judicial act. [G.S. 48-1-106](#). The proper mechanism for challenging the entry of the decree is by appeal. [G.S. 48-2-607](#). The ways to challenge an adoption after the entry of a final decree are very limited. A person who is not a party, including parents whose consent was validly obtained, may never attack an adoption based upon a procedural or other defect. [G.S. 48-2-607\(a\)](#). An appeal from the decree may only be made:

1. By a party (which includes only the petitioner, the adoptee, and persons whose consent was required and not obtained) within 10 days of the entry of the final decree by a clerk,
2. By a parent or guardian whose consent was obtained by fraud or duress within six months of the time of the fraud or duress is or ought to have reasonably been discovered, or
3. By a parent whose consent was necessary but not obtained within six months of the time the omission is or ought to have reasonably been discovered.

[G.S. 48-2-607\(b\) and \(c\)](#).

The purpose of this circumscribed right of appeal is to promote the finality and integrity of adoptions and to ensure the prompt, conclusive disposition of adoption proceedings. [G.S. 48-1-100\(a\)](#). For this reason or any other number of reasons, the clerk may elect to stand by his or her original order even after receiving a letter and the file back from the Division highlighting issues with the adoption file. The clerk is not required to agree with or obligated to address any of the issues raised by the Division in the letter. The clerk exercised discretion as a judicial officer by entering the decree. If the clerk stands by his or her original order, the clerk may send the file back to the Division instructing the Division to index the file as is.

In the unlikely event that the Division refuses to index the file the second time and returns it to the clerk again, the proper mechanism is for the parties to seek a *writ of mandamus* to order the public officials of the Division to index the file. [State v. Bowes, 159 N.C. App. 18, 28 \(2003\) \(CJ Eagles, dissenting\)](#).

Option #2: Address the Issues Raised by the Division

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Over time, clerks have come to rely on the Division as a second set of eyes to review the adoption files and often will choose to address the issues raised by the Division. The question then becomes what process should the clerk follow to do this? Should the clerk hold a hearing? Do the parties need to be noticed? Who else, if anyone, needs to be noticed? These and other issues will be discussed in Part Two on this blog, so make sure to check back and keep reading. I hope you are enjoying “On the Civil Side!”