Improper Delegation of Authority and Intermittent Confinement

Last month, I wrote a blog post about the recently enacted Juvenile Code Reform legislation (S.L. 2015-58, HB 879), which creates several new laws affecting delinquent juveniles. The last section of the bill amends G.S. 7B-2506(12) and (20), which authorize intermittent confinement in a juvenile detention facility as a Level 1 or Level 2 dispositional alternative. Currently, the trial court must determine the timing of the intermittent confinement, but beginning December 1, 2015, it must also determine the imposition of the confinement. Although this change appears to be minor, it addresses a major issue related to juvenile dispositions – the improper delegation of the trial court's authority, typically, to court counselors. Most of the calls I get about improper delegation of authority in juvenile court concern intermittent confinement, and particularly, how it is imposed. This post will examine how the new legislation was designed to address these concerns by changing the way district court judges *impose* intermittent confinement.

What is an Improper Delegation of Authority?

District court judges have wide discretion under G.S. 7B-2506 to determine appropriate dispositional alternatives for delinquent juveniles, including imposing up to five days of intermittent confinement for a Level 1 disposition, G.S. 7B-2506(12), or up to 14 days as a Level 2 disposition, G.S. 7B-2506(20). This discretion may not be delegated to others.

The rule was first established by a 2003 case in which the disposition order required a juvenile to "cooperate with placement in a residential treatment facility *if deemed necessary by MAJORS counselor or Juvenile Court Counselor*." *In re Hartsock*, 158 N.C. App. 287, 291 (2003). The appellate court reversed the disposition, concluding that "[t]he statute does not contemplate the court vesting its discretion in another person or entity, therefore, the court, and the court alone, must determine which dispositional alternatives to utilize with each delinquent juvenile." *Id.* at 292. The court also reversed the requirement that the juvenile comply with intermittent confinement because the trial court failed to specify the timing of the confinement, and "any delegation of authority [to determine the timing] would have been contrary to the express language of [the] statute." *Id.*

Note that not every delegation of authority by the court is improper. The Juvenile Code specifically authorizes district court judges to delegate certain functions to court counselors, such as issuing secure and nonsecure custody orders under G.S. 7B-1902, and imposing certain conditions of probation under G.S. 7B-2510(b). However, unless statutorily authorized, any delegation of the trial court's discretional authority is probably improper.

How Does this Relate to the Imposition of Intermittent Confinement?

In NC, it has become common practice for judges to order intermittent confinement as a dispositional alternative, but suspend the imposition of those days, upon the juvenile's compliance with the other terms of

the disposition. *See, e.g.*, In re D.L.H., 198 N.C. App. 286, 288 (2009) (trial court imposed 14 days of intermittent confinement, which were stayed upon the juvenile's compliance with special and general conditions of probation), *rev'd in part*, 364 N.C. 214 (2010).

Is this conditional disposition proper? Arguably, yes. In *Hartsock*, the Court of Appeals said that under G.S. 7B-2506, "a judge could order [that] certain dispositional alternatives apply upon the happening of a condition, since *the court,* and not another person or entity, would be exercising its discretion." *Hartsock*, 158 N.C. App. at 292.

The issue with conditional orders is that when the juvenile violates a condition that triggers the intermittent confinement, it's unclear whether a court counselor may immediately place the juvenile in detention or first be required to obtain a court order authorizing the detention. For example, consider the following disposition:

"The juvenile shall comply with intermittent confinement in an approved detention facility for up to 5 days, to be completed upon the juvenile's violation of electronic monitoring."

In the example above (which is from an actual order), many juvenile advocates would argue that authorizing a court counselor to unilaterally impose the intermittent confinement based on the juvenile's noncompliance is an improper delegation. (See this blog post on *"Preventing and Handling Illegal Confinement"* from the NC Office of the Juvenile Defender). Instead, they argue the court counselor must file a motion for review requesting a hearing, with notice to the juvenile, to allow the court to impose the confinement and to protect the juvenile's due process rights. An opposing view would be that the court imposed the intermittent confinement at the time it entered the disposition, when the juvenile had an opportunity to be heard and was represented by counsel. The noncompliance simply triggers a consequence already imposed by the court.

Of course, one problem with the latter position is that the juvenile's noncompliance is akin to a probation violation, which normally requires that juveniles receive notice, an opportunity to be heard, and be represented by an attorney before the court may impose consequences, including confinement. *See generally* G.S. 7B-2000 and G.S. 7B-2510(e). The legislature may not have intended for courts to avoid these due process requirements by imposing dispositional alternatives in this manner.

Does the New Legislation Resolve this Conflict?

The amendments to G.S. 7B-2506 are designed to prevent judges from improperly delegating their authority to court counselors to impose intermittent confinement. As rewritten by Section 3.2 of S.L. 2015-58, G.S. 7B-2506 requires the court to determine both the timing and imposition of intermittent confinement.

It's now clear that only the court may *impose* the confinement, but what exactly does this mean? The statute doesn't specifically address whether a motion for review or hearing is required when intermittent confinement days are stayed, although I believe that was the intended result. Considering that courts throughout the state vary widely in the way that intermittent confinement is currently being imposed, I'm

interested to see how these changes will be implemented.

I anticipate receiving lots of questions once the new statutes become effective in December. So, please share any thoughts about this legislation and how you think it will impact the practice in your district.