

## Using DSS Custody in Delinquency Cases – Key Takeaways

My colleague, Sara DePasquale, and I were excited to release a new Juvenile Law Bulletin two weeks ago—[Delinquency and DSS Custody without Abuse, Neglect, or Dependency: How Does that Work?](#) We were also exhausted. While the laws that allow for courts to order juveniles into DSS custody in a delinquency proceeding are short, their implications are broad and complex. Sara’s blog announcing the bulletin, [Extra! Extra! Read All About It! New Juvenile Law Bulletin – Delinquency and DSS Custody without Abuse, Neglect, or Dependency: How Does that Work?](#), provides some suggestions about reading the bulletin in bite-sized chunks. Now that readers have had a chance to do that, let’s focus on a few of the key points for delinquency practitioners.

- the proceeding remains a delinquency proceeding although the juvenile is in the custody of DSS;
- the only attorney who will represent a juvenile placed in DSS custody through a delinquency proceeding is the juvenile's counsel in the delinquency matter;
- termination of probation does not automatically terminate DSS custody; and
- implementation of the Juvenile Justice Reinvestment Act (a.k.a. “raise the age”) could result in a new challenge for DSS placements.

### Once a delinquency matter, always a delinquency matter

Placement of a juvenile into DSS custody in the context of a delinquency matter is the one way that juveniles can end up in a foster care setting without an accompanying abuse, neglect, or dependency proceeding. It is certainly possible that a juvenile is first placed into DSS custody as the result of an abuse, neglect, or dependency action and then subsequently the subject of a delinquency proceeding. It is also possible for a report of abuse, neglect, or dependency to be made while a juvenile is under juvenile jurisdiction for a delinquency matter. Both of these scenarios can result in the placement of a juvenile into DSS custody in the context of an abuse, neglect, or dependency proceeding, under Subchapter I of Chapter 7B of the Juvenile Code, while the juvenile is simultaneously involved in a delinquency proceeding (often referred to as “crossover youth” or “dual jurisdiction youth”). The focus of the bulletin and this blog is different. It is only about the placement of juveniles into DSS custody through the delinquency provisions in Subchapter II of Chapter 7B of the Juvenile Code, without any corresponding abuse, neglect, or dependency proceeding.

There are three separate mechanisms in Subchapter II of Chapter 7B that allow for a juvenile to be placed in the custody of DSS in a delinquency proceeding: (1) a nonsecure custody order ([G.S. 7B-1903\(a\)](#) and [7B-1905\(a\)](#)); (2) an order of disposition ([G.S. 7B-2506\(1\)c.](#)); and (3) an order appointing DSS as guardian ([G.S. 7B-2001](#)). None of these mechanisms result in the initiation of an abuse, neglect, or dependency action under Subchapter I of Chapter 7B. Therefore, while the juvenile is functionally in the foster care system, the legal framework for that placement is driven by

the delinquency provisions in the Juvenile Code.

Those delinquency provisions do connect to some of the foster care statutes in the context of delinquency dispositional orders. The provision in Subchapter I of Chapter 7B that governs review and permanency hearings for youth in foster care ([G.S. 7B-906.1](#)) is included in G.S. 7B-2506(1)c., above, the delinquency statute that allows for a disposition to include a DSS custody order. The review and permanency hearing statute, in turn, incorporates several other provisions from the abuse, neglect, and dependency law in Subchapter I of Chapter 7B. This is where things get quite complicated. You can read Part Four, Section Two of the bulletin for in-depth analysis.

**Key takeaway:** if the juvenile was placed into DSS custody as the result of an order issued in a delinquency proceeding, the law that governs the delinquency proceeding will continue to be the governing procedural law even after the juvenile is in the custody of DSS.

### **The attorney for the juvenile will always be the juvenile defense attorney**

Juveniles in delinquency proceedings are presumed indigent, have a right to counsel, and, in fact, are not allowed to represent themselves. [G.S. 7B-200](#) and [7B-2405\(6\)](#). Attorneys who represent juveniles in delinquency proceedings are required to advocate for the interests of the juvenile as expressed by that juvenile. See [N.C. Comm'n on Indigent Def. Servs., Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Guideline 2.1\(a\) \(2007\)](#).

Confusion can arise regarding who should represent the juvenile during the review and permanency hearings required following a disposition to DSS custody. This confusion stems from the fact that juveniles in abuse and neglect proceedings are always represented by a [G.S. 7B-601](#) guardian ad litem (GAL) and juveniles in dependency actions may be represented by a 7B-601 GAL. The 7B-601 GAL plays a role different from the juvenile defense attorney. The GAL role is focused on protecting and promoting the juvenile's best interests and legal rights. G.S. 7B-601(a). Most review and permanency hearings under G.S. 7B-906.1 involve a 7B-601 GAL because those hearings usually arise in the context of abuse, neglect or dependency proceedings. However, when a review or permanency hearing occurs as a result of a delinquency dispositional order, there is no 7B-601 GAL involved in the case. The only attorney for the juvenile is his or her defense attorney in the delinquency matter. You can find further discussion of this on pages 27–28 of the bulletin.

**Key takeaway:** the juvenile in a delinquency proceeding has a right to counsel. His or her counsel must be part of any proceeding related to the delinquency matter, including a review and permanency hearing pursuant to G.S. 7B-906.1.

### **Termination of probation does not automatically terminate DSS custody**

Delinquency dispositional orders often contain multiple dispositional alternatives. For example,

juveniles placed in DSS custody as a dispositional alternative are often also placed on a term of probation supervision. By statute, terms of probation can only be for a maximum of one year and can be extended or terminated at the end of the ordered term. [G.S. 7B-2510\(c\)](#) and [7B-2511](#). The portion of a dispositional order that includes DSS custody, however, has no such statutorily mandated time limit. Instead, this component of a dispositional order lasts until it is either modified, the court terminates jurisdiction in the delinquency matter, or jurisdiction over the delinquency matter automatically ends because the juvenile ages out of juvenile jurisdiction. Thus, in order to terminate DSS custody at the same time that probation is terminated, the court has to take additional affirmative steps. You can find a detailed discussion of termination of delinquency DSS custody dispositional orders beginning on page 42 of the bulletin.

**Key takeaway:** To terminate a delinquency dispositional order to DSS custody at the same time that probation terminates, and before the juvenile ages out of juvenile court jurisdiction, the court must either (1) modify the dispositional order to eliminate the DSS custody order or (2) order termination of jurisdiction over the entire delinquency matter.

### The JJRA and DSS custody orders in delinquency proceedings

Once the JJRA goes into effect on December 1, 2019, juvenile court will gain new jurisdiction over many acts of delinquency committed by juveniles at ages 16 and 17. Juvenile jurisdiction over youth adjudicated for an act of delinquency committed at age 16 will extend until the juvenile turns 19 and until age 20 for juveniles adjudicated for acts of delinquency committed at age 17. [S.L. 2017-57, §16D.4.\(b\)](#). DSS custody is a dispositional alternative for any juvenile who receives a Level 1 or Level 2 disposition in a delinquency matter, no matter the age of that juvenile. [G.S. 7B-2506\(1\)c](#).

Technically, this means that juveniles who are under juvenile court jurisdiction at ages 18 and 19 could be ordered into DSS custody. As discussed on pages 44–45 of the bulletin, this raises a novel question for the foster care system. Can someone age 18 or 19 be ordered into DSS custody? While the foster care system currently allows youth between the ages of 18 and 21 to participate voluntarily in foster care, there are restrictions on eligibility for that program and it is operated under a separate voluntary placement agreement between the eligible young adult and a county DSS. [G.S. 108A-48\(c\)](#). A court-ordered foster care population comprised of 18 and 19 year-olds would be a new population in the foster care system. How this would interact with the existing legal structure and capacity of the foster care system is unclear.

**Key takeaway:** the JJRA has the potential to introduce a new, young adult population of youth into court-ordered foster care placements. The ramifications of this are not clear both in terms of the legal structure that governs the existing foster care system and foster care system placement capacity.

### In conclusion

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The bulletin contains a lot more important information beyond the content of this blog. This blog gives you a jumping off point for the few topics that are included. Take it in bite-sized pieces and feel free to reach out to Sara or me if you have questions.