

What Can the District Court Do in an A/N/D or TPR Action when an Appeal Is Pending?

The North Carolina Juvenile Code (G.S. Chapter 7B) establishes the substantive law for abuse, neglect, dependency (A/N/D) and termination of parental rights (TPR) actions and also sets forth specific procedures. Although A/N/D and TPR cases are civil proceedings, many of the juvenile procedures differ from the general rules that apply to civil actions. One of the procedural differences applies to the district court's jurisdiction in the underlying action when an appeal is pending.

The Relevant Statutes

The Juvenile Code identifies which final orders may be appealed and who has standing to appeal in an A/N/D and TPR action. See G.S. [7B-1001](#); [-1002](#). The district court's authority to act during an appeal is addressed in [G.S. 7B-1003](#) – disposition pending appeal. G.S. 7B-1003 is an exception to the general statute, [G.S. 1-294](#), that perfection of an appeal divests a trial court of jurisdiction over matters that are related to the issues on appeal until the mandate issues. *In re M.I.W.*, 365 N.C. 374 (2012).

Jurisdiction Pending an Appeal of an A/N/D Order

When an appeal of a final order entered in the A/N/D action is pending, the district court has the authority to enforce that order, unless a stay has been ordered by the trial or appellate court. G.S. 7B-1003(a). Absent a stay, the district court continues to exercise jurisdiction and conduct hearings in the A/N/D action while an appeal is pending. G.S. 7B-1003(b). But there are limitations on what the court can do.

Orders Affecting Custody or Placement

G.S. 7B-1003(b)(2) explicitly states that “the trial court shall ... enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile” unless (1) an appellate court directs or (2) an appeal of a TPR order initiated by a TPR petition (not by motion) is pending. That statutory language is limiting and raises several questions.

What are orders that affect the custody or placement of the juvenile? Although custody is not defined by statute, the appellate courts have held that legal custody includes decision-making authority regarding important long-term implications for a child's best interests and welfare such as education, health care, religion, discipline, and people with whom the juvenile may associate. See e.g., *In re M.M.*, 795 S.E.2d 222 (2016); *Diehl v. Diehl*, 177 N.C. App. 642 (2006); *Petersen v. Rogers*, 337 N.C. 397 (1994). Physical custody involves the physical care and supervision of the juvenile and includes decision making about the child's daily routine (versus matters with long-

range consequences). See *Diehl*; [In re H.S.F.](#), 177 N.C. App. 193 (2006).

The plain language referring to custody and placement is unambiguous as applied to the district court's authority to enter orders that address the child's placement, physical custody, legal custody, and visitation. See [In re D.E.M.](#), 802 S.E.2d 766 (2017), *aff'd per curiam*, 370 N.C. 463 (2018) (addressing visitation). Additionally, G.S. 7B-1003(e) makes clear that an order that provides for the placement of a juvenile in foster care and is entered while an appeal is pending must comply with [G.S. 7B-905\(b\)](#), which addresses the timing of a review hearing.

But does the language of G.S. 7B-1003(b) mean that the district court may only address placement, custody, and visitation? Are services and conditions for the parent, guardian, custodian, or caretaker and reasonable efforts issues that "affect the custody or placement of the juvenile" such that the court can address those? Those services, conditions, and efforts are designed for reunification such that there is an argument that they affect custody and placement decisions made by the district court, but what would an appellate court decide? What about ordering a paternity test? The results would impact who the father and paternal relatives are, which could affect custody and placement, but is that what was intended? As the NC Supreme Court has repeatedly stated, "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star." *In re A.P.*, 812 S.E.2d 840, 845 (2018) (citations omitted). That best interests lens appears to allow for a more expansive interpretation of issues that affect the juvenile's custody and placement.

What about other orders, like a motion to withdraw made by a respondent attorney or a motion to amend? Those types of issues appear to be plainly outside the scope of G.S. 7B-1003. In one case addressing an appeal of an A/N/D order that permitted a motion to amend a summons while an appeal of a TPR was pending, the court of appeals held that the trial court lacked jurisdiction to amend the summons because it did not affect the juvenile's custody or placement. [In re K.L.](#), 196 N.C. App. 272 (2009). The court of appeals stated, "our appellate courts have long recognized that N.C. Gen Stat. 7B-1003 and its predecessors were intended to authorize continued jurisdiction for a limited purpose: protection of the child pending appeal." *Id.* at 278.

No Jurisdiction to Proceed with a TPR

While an appeal of an A/N/D order is pending, the district court may not exercise jurisdiction or conduct hearings in a TPR. G.S. 7B-1003(b)(1). It does not matter whether the TPR is initiated by a petition or a motion. See *In re K.L.*

The language of G.S. 7B-1003(b) does not divest the court of jurisdiction over a TPR pending an appeal but instead limits the court's ability to act. *In re M.I.W.*, 365 N.C. 374 (2012). This means that a TPR petition or motion may be filed during the pendency of an A/N/D appeal but the court cannot hold a hearing until after the mandate resolving the appeal has issued. *Id.*

This delay in exercising jurisdiction over a TPR can have a significant impact on the time to permanency for a child who requires a TPR on one or both parents to achieve a permanent plan of adoption. Recent changes that were made to G.S. 7B-1001, the statute that addresses which orders may be appealed, reduce the time a parent must wait to file a notice of appeal of an order that eliminates reunification as a permanent plan. To appeal a permanency planning order that eliminates reunification as a permanent plan, one condition placed on a parent is that he or she must wait 65 days (reduced from 180 days) from entry and service of that order to see if a TPR is initiated. G.S. 7B-1001(a)(5), (a1)(2). If a TPR is initiated within that 65-day time period, the parent must wait to appeal the permanency planning order with the TPR if the TPR is granted. G.S. 7B-1001(a1)(2). However, if a TPR is not initiated within that 65-day time period, the parent may appeal the permanency planning order within 30 days of the expiration of that 65-day time period. G.S. 7B-1001(a)(5). While that appeal is pending, DSS, the child's guardian ad litem, or another person/agency with standing may initiate a TPR proceeding by filing a TPR petition or motion, but the court cannot exercise jurisdiction over the TPR proceeding until the appeal of the permanency planning order is no longer pending, meaning the mandate has issued. *In re M.I.W.* By failing to file a TPR petition or motion within the 65-day time period, if a parent appeals the permanency planning order that eliminated reunification as a permanent plan, the TPR hearing must be delayed until the completion of that appeal. And, after that appeal is resolved if the TPR is ultimately granted, that order may be appealed. Without all the required consents, relinquishments, or TPR orders, the child's adoption cannot be granted. See [G.S. 48-2-603\(a\)\(4\)](#).

Jurisdiction Pending Appeal of a TPR Order Initiated by Petition

G.S. 7B-1003(c) addresses the district court's jurisdiction pending an appeal of a TPR order based on a TPR petition and not a motion in an A/N/D proceeding. (Note, if a TPR motion is filed and the order is granted, the provisions of G.S. 7B-1003(b)(2) apply. *In re K.L.*, 196 N.C. App. 272 (2009)).

Pending the TPR appeal, the district court "may enter a temporary order affecting the custody and placement of the juvenile as the court finds to be in the best interests of the juvenile." G.S. 7B-1003(c). The same questions about "affecting the custody and placement of the juvenile" based on the language of G.S. 7B-1003(b)(2) arise.

As with an appeal of an A/N/D order, the district court has authority to enforce the order entered unless the trial or appellate court has ordered otherwise. G.S. 7B-1003(a).

Conclusion and Reminder

When an appeal is pending, the parties and court should be mindful of the limitations imposed by the Juvenile Code pending an appeal. Although this post did not discuss appellate procedure, it referenced a procedural change effective January 1, 2019. To learn more about 2019 procedural changes to appeals of orders entered in A/N/D and TPR actions, read my earlier blog post [here](#).

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