

NC Association of DSS Attorneys

Appellate Practice in Juvenile
Abuse, Neglect and Dependency
Cases

Winter Conference
UNC School of Government
Chapel Hill, NC
February 20, 2014

Quick Quiz?

Who promulgates the NC
Rules of Civil Procedure?

- 1) NC State Bar
- 2) General Assembly
- 3) NC Rules Commission
- 4) NC Supreme Court

Who promulgates the NC
Rules of Appellate
Procedure?

- 1) NC General Assembly
- 2) Appellate Certification
Committee
- 3) NC Supreme Court
- 4) Bar Association

N.C. Rule of Appellate Procedure 3.1

Filing the Notice of Appeal. Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to N.C.G.S. § 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

Protecting the Identity of Juveniles. For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which this rule applies, the identity of involved persons under the age of eighteen at the time of the proceedings in the trial division (covered juveniles) shall be referenced only by the use of initials or pseudonyms in briefs, petitions, and all other filings, and shall be similarly redacted from all documents, exhibits, appendixes, or arguments submitted with such filings. If the parties desire to use pseudonyms, they shall stipulate in the record on appeal to the pseudonym to be used for each covered juvenile. Courts of the appellate division are not bound by the stipulation, and case captions will utilize initials. Further, the addresses and social security numbers of all covered juveniles shall be excluded from all filings and documents, exhibits, appendixes, and arguments. In cases subject to this rule, the first document filed in the appellate courts and the record on appeal shall contain the notice required by Rule 9(a).

Redaction In Action

NOTE: Redaction rule does not apply to

- a) Settled Records on Appeal;
- b) Supplements filed under Rule 11(c);
- c) Objections, amendments, or proposed alternative records on appeal;
- d) Verbatim transcripts. However, this notice must be placed on first page of the document immediately underneath the caption (title) and in all uppercase:

**FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)];
SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF
A COURT OF THE APPELLATE DIVISION.**

OTHER IDENTIFICATION ISSUES TO WATCH OUT FOR

- *FILINGS ARE NOT AVAILABLE ONLINE AS ARE ALL OTHER CASES*
- *JUVENILE'S SOCIAL SECURITY NUMBER AND ADDRESS ARE TO BE EXCLUDED FROM ALL FILINGS EXCEPT TRANSCRIPTS*
- *YOU CANNOT ELECTRONICALLY FILE A TPR BRIEF (MOTIONS OK)*
- *PARTIES CAN STIPULATE TO PSEUDONYM IN RECORD –INITIALS WILL BE USED BY THE COURT*
- *TPR BRIEFS IN THE NC COURT OF APPEALS SHOULD BE THREE (3) ORIGINALS*
- *NO RULE ADDRESSES THE IDENTITY OF THE PARENT*
- *TRANSCRIPT IS TO COURT AND APPELLANT BY COURT REPORTER*

Deadline Smeadline –The Record on Appeal

- One (1) day after NOA clerk to notify Court Reporter coordinator at AOC – within 2 days of that notice, AOC to assign transcriptionist
- Transcriptionist to deliver transcript within 35 days (if indigent)
- If not indigent, appellant has 10 days to make written arrangement report for delivery of transcript and then reporter has 45 days
- In both cases, transcriptionist sends electronic copy directly to COA
- Appellee has to pay for transcript, indigent parent does not
- Within 10 days after transcript is delivered, appellant shall serve proposed ROA
- Within 10 days after service of proposed ROA appellee may serve notice of approval, objections or amendments or proposed alternative ROA
- If all agree, appellant files 3 original ROAs within 5 days of settlement of ROA
- If all cannot agree within 30 days after delivery of transcript, then you file your 3 originals and I file my 3 objections, amendments or alternative ROA within 5 business days of the last day upon which record can be settled.



Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

SO SAYETH THE NORTH CAROLINA SUPREME COURT

The importance of timely resolution of cases involving the welfare of children cannot be overstated. A child's perception of time differs from that of an adult. This Court has recognized that justice delayed in custody cases is too often justice denied. Notably, our Rules of Appellate Procedure provide for expedited appeals in cases involving termination of parental rights and issues of juvenile abuse, neglect, and dependency. N.C. R.App. P. 3A. Thus, in almost all cases, delay is directly contrary to the best interests of children, which is the "polar star" of the North Carolina Juvenile Code. In re Montgomery, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984)

In re T.H.T., 362 N.C. 446, 450, 665 S.E.2d 54, 57 (2008)



A Brief Overview-of a Brief Overview

NOTICE OF APPELLATE COUNSEL (NORTH CAROLINA RULES OF APPELLATE PROCEDURE)

Cases will be heard in the approximate order in which the records on appeal are docketed.

The record on appeal in this case was filed on the 23rd day of January 2014, and was docketed on the 24th day of January 2014. Within thirty (30) days after the record on appeal has been filed with the Court of Appeals (24th day of February 2014), the appellant shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty (30) days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record (Rule 3.1, North Carolina Rules of Appellate Procedure). If permitted by Rule 28(h), the appellant may file and serve a reply brief within the times set out in Rules 13 and 28(h)(2) of the appellate rules.

You will be notified by a copy of the calendar of the date your case is scheduled for argument. The calendar will be mailed to you not less than twenty (20) days before your case is scheduled for argument.

This the 24th day of January 2014.

Office of the Clerk
North Carolina Court of Appeals

cc:
Mr. Roger Askew, Attorney at Law, For Wake County Human Services
Ms. Towanda Natasha Foster, Attorney at Law, For GAL

Note:
Rule 28(f) requires that principal briefs filed in the Court of Appeals shall be limited to 35 pages of text, exclusive of tables of contents, tables of authorities, and appendices.
Rule 26(f) requires that briefs filed with the Court of Appeals be typed with double spacing between each line of text.

What Does a Good Brief Look Like?



It is all listed in Appellate Rule 28 (b) for appellant and 28(c) for appellee. The appellant 's brief is required to have some things not required of appellee, such as statement of grounds of appellate review (including reasons why interlocutory review is permitted – in TPR cases, almost always N.C.G.S. § 7B-1001), procedural history and full and complete facts and standard of review of each issue (ie: abuse of discretion, de novo, etc) . Look at appendices to the Rules! Great cheat sheet can be found within!

Content of Brief

Lots of Facts

- Appellant has more content-See Rule 28(b)
- Appellee is not required to restate the facts- BUT, you should. Particularity if appeal is based on sufficiency of evidence – but also gives reviewing panel a flavor of the case that a cold record will not otherwise reveal.
- Facts must be non argumentative
- Never cite outside of the record
- Reference to Record particularly with the facts
- Appendix is allowed but not always required –See Rule 28(d)

A little Less Law-But enough

- In A/N/D cases, the law is pretty well settled (except In Re: E.H.)
- Respond to all arguments raised in appellant's brief.
- Judicious use of unpublished opinions !
- Reply brief is allowed 14 days after Appellee's brief
- Affirmative duty to cite controlling legal authority

Recent Admonition by Court of Appeals

As plaintiffs failed to cite *Locust* in their brief, we remind counsel of the duty of candor toward the trial tribunal which requires disclosure of known, controlling and directly adverse legal authority. See R.P.C. 3.3(a)

“A lawyer shall not . . . knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel”

While the duty to disclose *Locust* rests with the plaintiff, defendants also failed to cite the case. We remind counsel of the need to be diligent in finding controlling legal authority

Estate of Joyner v. Joyner, Jan. 7, 2014



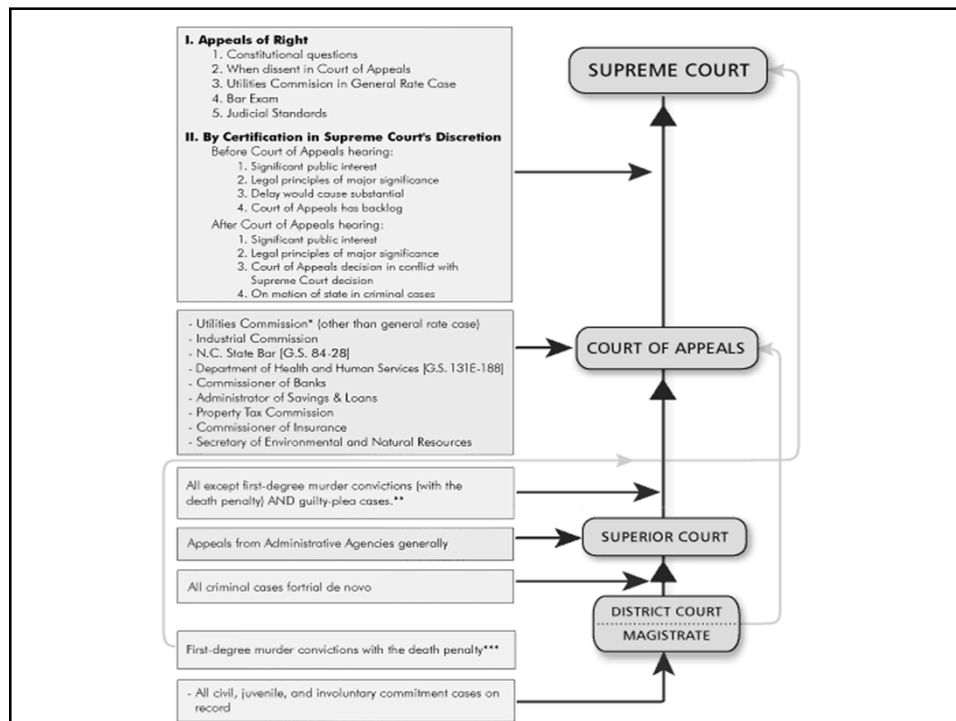
Evidentiary Issues on Appeal

- In a bench trial, it is presumed that the judge disregarded any incompetent evidence. *In re Paul*, 84 N.C.App. 491, 497, 353 S.E.2d 254, 258, *disc. cert. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 694, 98 L.Ed.2d 646 (1988).
- The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. *See Best v. Best*, 81 N.C.App. 337, 341, 344 S.E.2d 363, 366 (1986). “Rather, the appellant must also show that the incompetent evidence caused some prejudice.” *Id.* In the context of a bench trial, an appellant “must show that the court relied on the incompetent evidence in making its findings.” *Id.* at 342, 344 S.E.2d at 366 (citation omitted). “Where there is competent evidence in the record supporting the court’s findings, we presume that the court relied upon it and disregarded the incompetent evidence.” *Id.*



Time Sensitive issues after COA Decision

The mandate issues 20 days after an opinion, published or unpublished. Then, Petition for discretionary review must be filed within 15 days after mandate. PDR does not stay underlying proceeding, but proceed at your own peril. How long does decision of PDR take? 1) sixty days 2) 120 days 3) 1 year 4) your guess is as good as mine



The long and Narrow Road to the NC Supreme Court

- **APPEAL OF RIGHT** in only 2 instances: 1) If case directly involved a substantial question arising under the US or NC Constitution; or 2) there is a dissent, then only as to the issues raised in the dissent (PDR Necessary on other issues)
- **DISCRETIONARY REVIEW after COA** if, 1) significant public interest; 2) involves legal principles of major significance to the jurisprudence of the state; 3) The decision below appears likely in conflict with a decision of the Supreme Court



Miscellaneous issues

- Issues of a Stay on appeal?
- Is Parent still a party after termination ? – N.C.G.S. § 7B-1112 (no standing to seek custody after termination Krauss v. Wayne DSS)
- Motions to dismiss – Rule 25. Prior to filing of appeal in appellate court, motions to dismiss are made to the trial court. (docketing of record)
- Docket Sheet at www.nccourts.org
- RIL Appeals – N.C.G.S. § 7B-323 allows appeal under N.C.G.S. § 7A-27(c) (Repealed 7 months ago) (c) From any final judgment of a district court in a civil action appeal lies of right directly to the Court of Appeals.
- Motions Practice in General governed by Rule 37
- Rule allows response within 10 days after service of motion
- Motion to deem document timely filed
- Motions, Records on Appeal, Responses to Petitions and briefs are deemed filed on the day they are mailed – Rule 26. All others on the day the court receives them!
- Sign, date, include state bar no, name, address & email address
- Suspension of the Rules to prevent manifest injustice of a party -Rule 2
- Request or Motion for publication of opinion- Rule 30(e)(4)
- Oral Arguments – Rare in TPR cases, only when Chief Judge allows
- Stylistic issues? Proportional vs. non proportional type-Courier New 12 point or Times New Roman 14-

Trends in Appeal in A/N/D Cases

- 2011 there were 166 appeals statewide
- 2012 there were 165 appeals statewide
- 2013 there were 149 appeals statewide
- Percentage of A/N/D appeals of total of all appeals considered by the Court of Appeals is steady at approximately 10 %
- Average hearing time ?

In Re L.T. COA 13-1068

- 6/25/2013 Termination Order
- 6/30/2013 Notice of Appeal
- 9/18/2013 Record on Appeal Filed
- 10/22/2013 Appellant's Brief Filed
- 11/20/2013 Appellee's Brief
- 1/27/2013 Hearing date (no argument)
- 2/18/2014 Opinion (238 days from Termination or 153 days from Record exactly 5 months)

Sometimes, appealing isn't so appealing.

