

**Trial Court Jurisdiction during Appeal:  
Abuse, Neglect, Dependency, and Termination of Parental Rights**

**Chapter 7B.**

**Article 10.**

**Modification and Enforcement of Dispositional Orders; Appeals.**

**§ 7B-1003. Disposition pending appeal.**

(a) During an appeal of an order entered under this Subchapter, the trial court may enforce the order unless the trial court or an appellate court orders a stay.

(b) Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:

- (1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and
- (2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

(c) Pending disposition of an appeal of an order entered under Article 11 of this Chapter where the petition for termination of parental rights was not filed as a motion in a juvenile matter initiated under Article 4 of this Chapter, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile. Upon the affirmation of the order of adjudication or disposition of the court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of an appeal, the court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interests of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the case on appeal was pending, provided that if the modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if there be any, within 10 days thereafter, as to why the modifying order should be vacated or altered.

(d) When the court has found that a juvenile has suffered physical abuse and that the individual responsible for the abuse has a history of violent behavior, the court shall consider the opinion of the mental health professional who performed the evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that individual pending resolution of an appeal.

(e) The provisions of subsections (b), (c), and (d) of G.S. 7B-905 shall apply to any order entered during an appeal that provides for the placement or continued placement of a juvenile in foster care.

**§ 7B-1004. Disposition after appeal.**

When an order of the court is affirmed by the Court of Appeals or by the Supreme Court, the trial court may modify or alter the original order as the court finds to be in the best interests of the juvenile to reflect any change in circumstances during the period of time the appeal was pending. If the modifying order is entered ex parte, the court shall give notice to interested parties to show cause within 10 days thereafter as to why the modifying order should be vacated or altered.

- The trial court may not proceed in a termination of parental rights action filed on or after 10/1/05, when an appeal in an underlying abuse, neglect, or dependency case is pending.

**In re Z.J.T.B., 183 N.C. App. 380 (2007).**

**Facts:** In May, 2006, the trial court entered a permanency planning order ceasing reunification efforts and changing the plan to adoption. Respondent appealed. In February, 2007, the trial court entered an order terminating respondent's rights, and DSS moved to dismiss the appeal of the permanency planning order on the basis that it was moot.

**Held:** The appeal was not moot. The order terminating respondent's rights was void ab initio because the trial court, under G.S. 7B-1003(b)(1), did not have jurisdiction to proceed in the termination matter while the appeal of the permanency planning order was pending.

- The trial court did not have jurisdiction to amend its order after notice of appeal was given, when the amendment changed the effect of the order.

**In re C.N.C.B., 197 N.C. App. 553 (2009).**

**Facts:** The trial court entered its order terminating respondent's rights on the basis of the only ground alleged, the parent's inability to provide proper care for the child. Respondent filed notice of appeal, and three days later the trial court entered a "corrected order" purporting to correct "clerical mistakes and errors arising from oversight or omission." This order added a finding of fact that respondent lacked an appropriate alternative child care arrangement, which was not in the original order or the court's oral rendition.

**Held:** Reversed and remanded.

1. The trial court did not have jurisdiction to enter the amended order under G.S. 1A-1, Rule 60(a). The added finding of fact was essential to a conclusion that the ground existed, and without the "correction" the order did not support an adjudication of the ground.
2. Under Rule 60 a trial court may correct clerical errors arising from oversight or omission, up to the time an appeal is docketed in the court of appeals, but here the change was substantive.

- During the appeal from a termination of parental rights order, the trial court's jurisdiction is limited to entering temporary orders affecting the child's custody or placement.

**In re K.L. 196 N.C. App. 272 (2009).**

**Facts:** In an appeal from an order terminating her parental rights, respondent asserted that the trial court lacked subject matter jurisdiction because the summons in the underlying neglect proceeding had not been signed by the clerk. While the appeal of the termination order was pending, the trial court granted a motion by DSS in the underlying neglect case to amend the summons by allowing the clerk to sign it. The court of appeals granted respondent's petition for a writ of certiorari to consider the issue of whether the trial court had jurisdiction to amend the order in the underlying neglect case during the pendency of an appeal in the termination case.

**Held:** Vacated.

Construing G.S. 7B-1003, the court held that

1. subsection (c) applied because the action was initiated by petition, not motion; and

2. the statute provides that during the appeal of a termination order, “the trial court has jurisdiction – in both the TPR action and the underlying abuse, neglect, and dependency action – *only* to ‘enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.’”

The court reasoned that reading the statute to create a broader exception to the general rule restricting a trial court’s jurisdiction during an appeal (G.S. 1-294), would contradict legislative intent, which was to “authorize continued jurisdiction for a limited purpose: protection of the child pending appeal.”

- During an appeal, the trial court
  - may conduct a hearing to determine how it *would* rule on a Rule 60 motion.
  - may not conduct a new disposition hearing.

***In re L.H.*, \_\_ N.C. App. \_\_, 708 S.E.2d 191 (2011)**

**Facts:** The child was adjudicated dependent and the permanent plan became adoption by the grandmother. DSS petitioned to terminate both parents’ rights, and the court did so. The father appealed. During the appeal, the father filed a Rule 60(b)(2) motion, asking the trial court to set aside the termination order based on newly discovered evidence relating to abusive conditions in the grandmother’s home and the child’s removal from that home and placement in foster care. Pursuant to *Bell v. Martin*, 43 N.C. App 134 (1979), *rev’d on other grounds*, 299 N.C. 715 (1980), respondent (i) asked the trial court to indicate how it would rule on the motion if an appeal were not pending, and (ii) filed a motion with the court of appeals to delay consideration of the appeal, which was granted. The trial court conducted a hearing on the Rule 60 motion in combination with a review hearing, but did not consider specific allegations in the motion or whether they would have affected the initial decision. The trial court noted that the placement had disrupted, found that it would terminate parental rights even if the appeal were not pending, and denied the Rule 60 motion.

**Held:** Affirmed in part, reversed in part, and remanded.

1. The court reversed both the ruling on the Rule 60 motion and the disposition portion of the termination order, and remanded for a new hearing on whether termination was in the child’s best interest.
2. The trial court had jurisdiction, during the appeal, to indicate how it *would* rule on a Rule 60 motion if an appeal were not pending, and the court of appeals had jurisdiction to review the trial court’s decision that the motion should be denied.
3. In considering the Rule 60 motion, the trial court failed to determine
  - a. whether any evidence of abusive conditions in the grandmother’s home existed at the time of the termination hearing, and
  - b. whether respondent, with due diligence, could have discovered information about those conditions.
4. The trial court in effect conducted a new dispositional hearing, for which notice had not been given and which the court had no jurisdiction to conduct unless the prior order was set aside.

After remand, the trial court may not hold a new hearing until the opinion of the appellate court is certified, but may schedule the hearing before certification.

**In re T.S., III, 178 N.C. App. 110 (2006), *aff'd per curiam*, 361 N.C. 231 (2007).**

**Facts:** The trial court adjudicated respondent's children neglected and dependent and placed them in DSS custody. Then:

April 20 the court of appeals remanded the case with instructions to make ultimate findings of fact and clear conclusions of law.

\_\_\_\_\_ the district court set the case for hearing and sent respondent a notice of hearing.

May 10 the opinion of the court of appeals was certified.

May 13 the district court hearing was held.

Oct. 18 the district court entered an order adjudicating the children neglected and dependent and placing them in DSS custody.

**Held:** Affirmed.

The trial court was not "exercising jurisdiction" when it set the case for hearing and sent notice to the respondent. The court had jurisdiction because it did not actually hold the hearing until after the court of appeals' opinion had been certified.

- The trial court erred by failing to carry out the mandate of the court of appeals after the permanency planning order was vacated and remanded.

**In re P.P., 183 N.C. App. 423 (2007).**

**Facts:** In 2003, after respondent filed notice of appeal from a permanency planning order, DSS filed petitions to terminate respondent's rights. The court of appeals vacated the permanency planning order and remanded for additional findings and conclusions. At a hearing after the mandate issued, the trial court did not address the mandate, but continued the case. The trial court denied later motions by respondent asking the court to conduct a remand hearing. In 2006 DSS filed new petitions to terminate respondent's rights, and after a hearing the court entered an order terminating her rights. On appeal, the parties did not dispute that the trial court should have granted respondent's motion for a review hearing or that the trial court did not comply with the mandate of the court of appeals with respect to the remanded permanency planning order.

**Held:** Vacated.

1. Because DSS filed new termination petitions after 10/1/05, the trial court could not proceed with the termination hearing during the appeal of the permanency planning order.
2. Even though the termination hearing occurred after remand in the earlier case, so that the appeal technically was not still "pending," the court of appeals held that applying the statute literally in this case would violate clear legislative intent.
3. The trial court erred in failing to carry out the mandate of the court of appeals after remand of the permanency planning order.

## **Unpublished**

### Termination motion filed while appeal pending in underlying case

**In re M.I.W., \_\_\_ N.C. App. \_\_\_, 708 S.E.2d 216 (unpublished), cert. allowed, \_\_\_ N.C. \_\_\_, 710 S.E.2d 5 (2011).**

The court of appeals held that the trial court did not lack subject matter jurisdiction to terminate parental rights where the motion in the cause was filed during the pendency of an appeal of the trial court's disposition order, but the termination hearing did not occur until after the court of appeals decided the appeal and the mandate issued.

The Supreme Court granted certiorari to address this question: "Did the trial court possess subject matter jurisdiction to terminate parental rights when the motion in the cause was filed during the pendency of an appeal?"

### Termination hearing held while appeal pending in underlying case

**In re N.F., 200 N.C. App. 617 (2009) (unpublished).**

The trial court lacked subject matter jurisdiction to terminate parental rights, because the termination proceedings were conducted while appeal from the adjudication order was pending.

### Order granting guardianship entered during appeal

- **In re D.S.A., 198 N.C. App. 702 (2009) (unpublished).**

The trial court's permanency planning order granting guardianship to relatives during the pendency of an appeal was expressly authorized by G.S. 7B-1003(b).

- **In re I.N.B., 193 N.C. App. 246 (2008) (unpublished).**

The trial court did not err when it granted legal guardianship to the foster parent while the appeal of the adjudication and disposition order was pending.

### Motion for new trial.

**In re H.C., 178 N.C. App. 389 (2006) (unpublished).**

The trial court properly denied a motion for a new trial, where the motion was made after another party had given notice of appeal.

### Complying with mandate

**In re P.C.H., \_\_\_ N.C. App. \_\_\_ (August 16, 2011) (unpublished).**

When the court of appeals remanded a case to the trial court for additional findings as to whether the respondent had an appropriate alternative child care arrangement, the trial court erred by adding, deleting, and changing findings that were unrelated to that issue. The error was harmless, however, because the original order contained sufficient findings related to other matters.

With respect to complying with the mandate, the court of appeals said: "The general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure. However, the general rule only applies to issues actually decided by the appellate court", citing *Condellone v. Condellone*, 137 N.C. App. 547, 551 (2000). The court also said: "On remand from an appellate court, the trial court 'may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the [appellate court's] opinion'", citing *Heath v. Heath*, 132 N.C. App. 36, 38 (1999).

## Trial Court Jurisdiction during Appeal: Delinquency

### § 7B-2605. Disposition pending appeal.

Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

*[See also Appellate Entries form, AOC-J-470 (rev. 6/11)]*

### § 7B-2606. Disposition after appeal.

Upon the affirmation of the order of adjudication or disposition of the court by the Court of Appeals or by the Supreme Court in the event of an appeal, the court shall have authority to modify or alter the original order of adjudication or disposition as the court finds to be in the best interests of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the appeal was pending. If the modifying order is entered ex parte, the court shall give notice to interested parties to show cause within 10 days thereafter as to why the modifying order should be vacated or altered.

- The court's findings about the nature of the offense and the age of the victim were sufficient to support the order declining to release the juvenile pending appeal.

#### **In re J.J.D.L., 189 N.C. App. 777 (2008).**

**Facts:** The juvenile was adjudicated delinquent for first degree sex offenses with a child, for offenses that occurred when the juvenile was fourteen and the child was seven.

**Held:** Affirmed.

On the appellate entries form, the court stated as a compelling reason for not releasing the juvenile pending the appeal, "first degree sex offenses with a child 14-27.4(a)(1)." That statement was sufficient to support the court's decision not to release the juvenile.

- Temporary order placing juvenile in DSS custody pending appeal was proper.

#### **In re K.T.L., 177 N.C. App. 365 (2006).**

**Facts:** After adjudicating the 8-year-old child delinquent for involuntary manslaughter, the court placed the juvenile in the custody of DSS for placement in a Level III or IV residential treatment facility for up to 90 days for evaluation. The juvenile appealed, and the court entered a "temporary order affecting custody" with written findings ordering that pending appeal the juvenile be in DSS custody and in a treatment facility for up to 90 days.

**Holding:** Affirmed. The trial court did not err in finding compelling reasons to place the juvenile in the custody of DSS for placement in a residential treatment facility pending appeal.

- The trial court erred in denying the juvenile's release pending the appeal without making a finding of compelling reasons.

**In re J.L.B.M., 176 N.C. App. 613 (2006).**

**Facts:** The trial court adjudicated the juvenile delinquent for various offenses, committed him to the Department of Juvenile Justice and Delinquency Prevention for an indefinite term, and denied his release pending appeal.

**Holding:** On appeal, the state conceded error with respect to the trial court's failure to make findings about compelling reasons for denying the juvenile's release pending the appeal. The court of appeals vacated and remanded the order that denied the juvenile's release.

- Findings about the brutality of the offense and the juvenile's refusal to cooperate with services would have been sufficient to constitute "compelling reasons" for not releasing the juvenile pending appeal.

**In re W.H., 166 N.C. App. 643 (2004).**

**Facts:** The juvenile asserted that the trial court erred in not ordering that the juvenile be released pending appeal, or for not stating compelling reasons, in writing, to support an order that the juvenile remain in custody pending appeal in accord with G.S. 7B-2605.

**Held:** The court of appeals held that the issue was moot because the juvenile had completed the commitment and been discharged. The court noted, however, that the trial court's conclusions of law, which specified the brutality of the juvenile's conduct and that he had failed to cooperate with out-of-home placement and other services, would have been sufficient "compelling reasons" if the court had properly ordered that the juvenile remain in custody pending appeal.

- In determining whether to release a juvenile pending an appeal, the court may not consider the juvenile's refusal to admit the offense as part of treatment.

**In re Lineberry, 154 N.C. App. 246 (2002).**

**Facts:** The juvenile refused during court-ordered therapeutic treatment to admit to the offenses for which he had been adjudicated delinquent. The trial judge used that refusal as a factor justifying the juvenile's continued custody pending his appeal.

**Held:** Reversed. In relying on this factor the trial judge violated the juvenile's Fifth Amendment privilege against compelled self-incrimination.

- After the juvenile gave notice of appeal, the trial court lacked jurisdiction to transfer the case to another county, correct an order, or conduct a disposition hearing.

**In re Rikard, 161 N.C. App. 150 (2003).**

**Facts:** At a hearing on a delinquency petition the court orally found beyond a reasonable doubt that the acts alleged in the petition were true and ordered the case transferred to the county of the juvenile's residence for disposition. The adjudication order, however, did not contain the

“beyond a reasonable doubt” language or findings that the allegations in the petition were true. The juvenile gave notice of appeal, and a month later the court in the county to which the case was sent for disposition sent the case back to the first county for correction of the adjudication order. The court in the original county entered an amended adjudication order and transferred the case back to the second county, where the court entered a disposition order.

**Held:** The court reversed the adjudication order and remanded it for correction of the written order to include the required findings. The court vacated all orders entered after the adjudication order, because they were entered without jurisdiction. The two trial courts lacked jurisdiction to transfer the case back to the first county, amend the adjudication order, transfer the case back to the second county, conduct a disposition hearing, and order a disposition.

- The trial court erred in allowing the state to amend its petition after the juvenile was adjudicated and gave notice of appeal.

**In re B.D.W., 175 N.C. App. 760 (2006).**

**Facts:** The juvenile was adjudicated delinquent for multiple offenses, including kidnapping. After the juvenile perfected an appeal, the trial court granted the state’s motion to amend the kidnapping petitions to allege the purpose for which the juvenile unlawfully restrained the victims.

**Holding:** Vacated and remanded.

The trial court did not have jurisdiction to consider or grant the state’s motion to amend the kidnapping petition after the juvenile had perfected his appeal. Jurisdiction of the trial court during appeal is limited to orders affecting the custody or placement of the juvenile.

A juvenile’s probation continues during an appeal unless stayed.

**In re S.R.S., 180 N.C. App. 151 (2006).**

Before addressing the juvenile’s arguments relating to the conditions of probation imposed by the trial court, the court of appeals said the following:

“We note initially that the juvenile’s disposition order which placed the juvenile on twelve months of supervised probation was entered on 23 September 2005. As counsel for the juvenile has failed to notify this Court of the actual starting date of the juvenile’s probation, and the trial court properly found that it was without authority to stay the dispositional order pending the juvenile’s appeal, this Court is left to assume that the juvenile’s term of probation has since expired. *See* N.C. Gen. Stat. § 7B-2510(c) (2005) (‘An order of probation shall remain in force for a period not to exceed one year from the date entered.’). Similarly, neither party has submitted anything to this Court indicating that the juvenile’s probation has been extended. Thus, due to the passage of time, the juvenile’s appeal on this issue has become moot, as he has likely been released from his term of probation.”

The court proceeded to consider the merits of the juvenile’s appeal, however, since it could not be certain that the juvenile's probation had not been extended and had expired.

## Unpublished

### Limitations on orders entered during appeal

#### **In re T.P., 194 N.C. App. 200 (2008) (unpublished).**

- G.S. 7B-2600, which gives the trial court authority to modify or vacate a disposition order, does not permit the court to do so during the pendency of an appeal.
- During the pendency of an appeal, the trial court may only enter temporary orders affecting the custody or placement of the child.

### Sufficiency of order continuing custody during an appeal

#### • **In re D.K.B., 190 N.C. App. 205 (2008) (unpublished).**

Findings in a disposition order did not constitute entry of a temporary order or compelling reasons. The court remanded for more findings and entry of a written temporary custody order.

#### • **In re J.O.J., 178 N.C. App. 389 (2006) (unpublished).**

The court failed to find compelling reasons for not releasing the juvenile, but the issue was moot.

#### • **In re R.S.C., 175 N.C. App. 592 (2006) (unpublished).**

Denying juvenile's release pending appeal, without finding compelling reasons, was error.

#### • **In re H.D., 174 N.C. App. 839 (2005) (unpublished).**

The trial court's findings about the nature and seriousness of the offenses the juvenile committed were sufficient to constitute compelling reasons for not releasing the juvenile pending appeal.

#### • **In re T.B.M., 169 N.C. App. 455 (2005) (unpublished).**

Failure to find compelling reasons for not releasing the juvenile required remand for the addition of such findings. They could be made explicitly in the order affecting the juvenile's custody or placement pending appeal, or they could be incorporated by reference to the dispositional order.

#### • **In re W.G.C., 166 N.C. App. 516 (2004) (unpublished).**

The trial court's statement that there was "no appropriate placement where the juvenile may be held pending the appeal process," was conclusory and did not constitute compelling reasons.

#### • **In re R.A.S., 166 N.C. App. 515 (2004) (unpublished).**

Findings in the disposition order were sufficient to constitute compelling reasons for not releasing the juvenile.