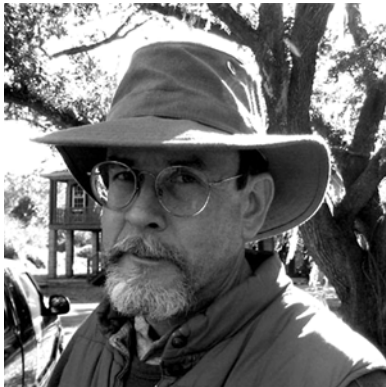


House Bill 1150, Appellate Rule 3A, and Chapter 7B: What You Should Know to Help Your Parent Client and Protect the Record for Appeal

by Staples S. Hughes



Staples Hughes is North Carolina's appellate defender. He previously served for seven years as an assistant public defender in Cumberland County, for 10 years as assistant appellate defender, and for three years as a staff attorney with the trial assistance unit of the Center for Death Penalty Litigation in Durham. He lobbies the Office of Indigent Defense Services weekly to establish a parents' defender for North Carolina.

House Bill 1150, which became effective October 1, 2005, for "petitions or actions filed on or after that date[.]" changed Chapter 7B of the North Carolina General Statutes in fundamental ways.¹ Generally speaking, the legislature's aim in passing the bill was to expedite trial and appellate court decisions in child welfare actions. Adopted by the North Carolina Supreme Court on November 3, 2005, and made effective March 1, 2006, Appellate Rule 3A also directly affects what counsel must do to litigate effectively in Chapter 7B cases.²

If you represent parent-respondents in Chapter 7B cases, you should be aware of these changes in the procedural landscape to protect your clients' interests.³ This article is intended to be a quick guide to the bill and the relevant provisions of the new rule, emphasizing major changes affecting the representation of parents, and briefly noting other changes.

However, there is no substitute for actually reading the text of a statute or rule, so it is suggested that you download a copy of H.B. 1150 in legislative markup form from the North Carolina General Assembly Web site and get a copy of new Appellate Rule 3A from the North Carolina Courts' Web site.⁴ Consult the text of these documents as you go through this article, which is organized around the sections of the bill. The advantage of the legislative markup format for the bill is that it shows what was added and what was deleted in Chapter 7B, making the changes easier to assimilate.

This article assumes some familiarity with litigation under Chapter 7B, and it obviously is not a comprehensive guide to the entire statute or to overall trial litigation and negotiation strategy in these cases. By and large, this is not an attempt to track the origins and history of the legislation or the new rule, but to focus on the end prod-

ucts and their implications for the litigator. Because virtually all statutory cites are to Chapter 7B, *Blue Book* citation format is not observed; thus, G.S. § 7B-507(c), for example, becomes 507(c).

SECTION 1 of H.B. 1150 amends 507(c).

Currently, when a judge announces her decision to cease efforts to reunify a family, a respondent must give a special notice in order to preserve the right to litigate the decision on appeal and, subject to two unusual circumstances, the issue only can be litigated in the appeal of a subsequent termination of parental rights (TPR). Without this notice, there is no right to appeal the cease reunification decision.^e

This notice is *not* the same as a notice of appeal from all decisions made in the hearing. After H.B. 1150, it is entirely possible—and, in fact, probable—that there will be no right of immediate appeal from any issue in a hearing in which a judge ceases reunification efforts (see discussion of Section 10 below).

The respondent can give notice under 507(c) either: (1) orally, at the hearing in which the judge announces the cease reunification decision; or (2) in writing, within 10 days of the hearing. Note that there is no guidance in 507(c) for how a respondent gives notice when the judge announces the cease reunification decision by written order following the hearing. Given the 10-day limit for written 507(c) notice following the hearing, prudence dictates filing the 507(c) notice as soon as possible after the filing and service of a written order in which a cease reunification decision is made, and certainly within 10 days of filing and service.

A brief digression and reminder: Absent some very extraordinary and nigh unto infinitely improbable circumstances, serve anything you would serve on one

party on *all* the parties. This includes the 507(c) notice and notice of appeal. Appeals have been dismissed over failure to serve all parties with the notice of appeal.

cannot adequately act in his or her own interest.” However, the statute constrains the activity of the GAL appointed for the adult parent. Section 602(d) now mandates that

dication hearing. In most cases, the adjudication and disposition orders will be in the same document, as is the current prevailing practice. The bill did not impose a second hearing requirement for a separate disposition order. If there are two separate orders, appealing counsel and respondent will have to enter two notices of appeal (see discussion of Section 10 below).

Provisional counsel should make a real effort to contact the respondent before the first hearing to begin establishing the foundation for a positive attorney-client relationship.

SECTION 2 of H.B. 1150 amends 602.

Section 602 is modified in two significant ways. First, 602 now requires the clerk of court to appoint “provisional” counsel for each respondent when a petition alleging abuse, neglect, or dependency is filed. The clerk must “indicate the appointment on the juvenile summons or attached notice.” Hopefully, this will include the name of the lawyer and his contact information. At the first hearing, counsel is discharged if the client does not appear, is not indigent, retains counsel, or waives counsel. Absent one of these four conditions, “[t]he court shall confirm the appointment of counsel[,]” which presumably means that provisional counsel becomes counsel for the duration of the action. Provisional counsel should make a real effort to contact the respondent before the first hearing to begin establishing the foundation for a positive attorney-client relationship. It is never too early to begin giving the client some idea of the lay of the land.

The second way in which Section 2 significantly amends 602 is that it eliminates automatic appointment of guardians ad litem (GALs) in cases in which a petition alleges dependency of a child due to a parent’s incapacity by reason of substance abuse, retardation, mental illness or brain damage, or some similar condition. The only automatic appointment of a GAL for a parent that remains in Chapter 7B is for a parent who is an unmarried or unemancipated minor.

Adult respondents now may be appointed a GAL only upon a showing per Rule 17 of the Rules of Civil Procedure of “a reasonable basis to believe that the parent is incompetent or has diminished capacity and

“[c]ommunications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent’s counsel shall be privileged and confidential to the same extent that communications between the parent and the parent’s counsel are privileged and confidential.” Further, 602(e)(4) now conditions the active participation of the GAL on the parent’s counsel’s request. Under previous case law, the parent’s GAL could testify contrary to the express goals of the respondent.⁶ This is no longer the case.

SECTIONS 3 and 4 amend 807(b) and 901.

The amendments speed up production of district court adjudication and disposition orders in abuse, neglect, and dependency cases. Under amended 807(b), if an adjudication order is not filed within 30 days after the adjudication hearing, the clerk must schedule another hearing “at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order.” An order “shall” then be entered within 10 days after this hearing. Under amended 901, the dispositional hearing “shall” take place “immediately” after the adjudicatory hearing.

These provisions were adopted in response to case law reversing orders in Chapter 7B cases for significant delay in the filing of orders.⁷ It is unclear exactly how the requirement for an adjudication order within 30 days of the conclusion of the adjudication hearing will interact with the requirement that the disposition hearing conclude within 30 days of the adju-

SECTION 5 amends 905.

Section 5 adds a new subdivision directing that where a Department of Social Services has custody or placement responsibility for a child, the department must notify the child’s GAL or attorney advocate within 72 hours of a change of placement.

SECTIONS 6 and 7 amend 906(d) and 907(c).

They are amended in the same way Section 3 amended 807(b) to speed up the filing of orders. Sections 906(d) and 907(c) deal with the production of orders following review and permanency planning hearings.

SECTIONS 8 and 9 amend 908(b)(1) and 909(c).

The amendments specify that a person whose rights have been terminated cannot be a party in post-termination proceedings unless the case has been appealed *and* a court has stayed the termination order.

SECTION 10 completely rewrites 1001 (“Right to appeal”).

Section 10 contains very significant changes. Section 1001(a) now specifically defines in a restrictive manner the types of final orders that are appealable of right in a Chapter 7B proceeding. Parties have the right to appeal the following orders: (1) an order that finds an absence of jurisdiction; (2) an order that “in effect determines the action and prevents a judgment from which appeal might be taken” (involuntary dismissal of a petition is given as an example); (3) an initial adjudication or disposition order; (4) an order that changes legal custody, other than a nonsecure custody order; and (5) an order granting or denying a petition or motion to terminate parental rights. Review and permanency planning hearings that do not change legal custody are *not* appealable, but note that review by certiorari might be possible.

The right to appellate review of a decision to cease reunification requires a notice under 507(c) as discussed above with regard to Section 1 of the bill. Additionally, in the new 1001(a)(5), the right to review of a cease reunification decision is made contingent on three further conditions: (1) the termination of the respondent's parental rights; (2) timely appeal of the TPR order; and (3) an assignment of error in the TPR appeal raising the cease reunification decision as an issue. Appellate counsel will need to confer with trial counsel in every appeal of a TPR to determine whether a cease reunification order was preserved for appellate review.

Section 10 also contains two exceptions to the requirements imposed in Sections 1 and 10 that a cease reunification decision be reviewed in a subsequent TPR appeal. First, 1001(a)(5)(b) permits "a party who is a parent" to appeal a cease reunification decision if no TPR petition or motion is filed "within 180 days of the order." The statute does not specify whether this lan-

guage means the announcement of the decision in open court or the filing of the order in which the decision is memorialized, although the latter is probably the safest reading.

Second, 1001(a)(5)(c) permits a custodian or guardian immediately to appeal the cease reunification decision. Immediate appeal is granted because a custodian or guardian would never have the opportunity of a termination of parental rights action to litigate the decision.

Assume that a judge in a review hearing not only makes the cease reunification decision, but also changes legal custody. There certainly is a strong argument that the cease reunification decision can be reviewed in an appeal of right from the order that follows this hearing, since orders that change legal custody are appealable immediately under 1001(a)(4). Until this question is resolved in appellate litigation, however, the wise course of action would be to give the specific notice required by 507(c) as well. If that notice is given, and

the appellate courts decide that you only can have appellate review of the cease reunification decision in a TPR appeal, the issue is still preserved for review in a TPR proceeding.

Section 10 also changes the time limit for giving notice of appeal from an order for which there is an immediate appeal of right, and it places an important condition on the filing of a notice of appeal for a represented party. Under the new 1001(b), notice of appeal must be made in writing "within 30 days after entry and service of the order in accordance with G.S. § 1A-1, Rule 58." The previous time limit was 10 days. Use of the words "entry and service" and the citation to Rule 58 of the Rules of Civil Procedure should clarify the situation where an order is filed but is served on respondent's counsel sometime after the filing date. Rule 58 requires service within three days after entry of judgment by the party who prepared the judgment. The respondent should have 30 days after the service date to enter written notice of appeal, with an additional three days if service is by mail per G.S. § 1A-1, Rule 6(e). The 30 days in which the respondent now may give notice of appeal gives attorney and client an opportunity to consider carefully the decision to appeal after the heat and emotions of the hearing have cooled.

The new 1150(c) places conditions on the notice of appeal that previously were implicit by way of the Rules of Professional Responsibility and the State Bar's ethics decisions, but now are made explicit.⁸ Counsel can give notice of appeal "only by following direct instruction of the appealing party after the conclusion of the proceeding." Further, new Appellate Rule 3A, effective March 1, 2006, requires that *the client* also sign the notice of appeal. This resolves the dilemma some counsel perceived themselves to be in when a client was missing during and following a hearing: Should counsel appeal the result to preserve the appeal for the absent client? The answer now is clearly "No." Both 1150(c) and Appellate Rule 3A also require counsel to sign the notice of appeal.

A further word about Appellate Rule 3A—it makes trial counsel an active participant in the appellate representation. Section (b)(2) of the Rule ("Record on Appeal") states in part that "[t]rial counsel



"Our goal is to be the best investment firm in North Carolina that is focused on disability trusts, special needs trusts, and on asset protection for others such as children, recently divorced individuals, and older people."

Walt Sheffield,
JD, CLU, CFP®
Founder and
Managing Principal

Armor Investment Advisors, LLC

- Disability Trusts & Special Needs Trusts
- Workers' Comp, Litigation Support Trusts
- Asset Protection, Families & Divorces
- Asset Protection, Children & Seniors
- Medicare & Medicaid Coordination
- Stretching Structured Settlements

919.571.4382

4505 Fair Meadow Lane | Suite 222
Raleigh, NC 27607

wsheffield@armorinvestmentadvisors.com

Armor Investment Advisors, LLC is a Related Service of the Law Offices of Walter L. Sheffield III, PLLC. Investment Advisory Services provided through Armor Investment Advisors, LLC are not legal services and the protections of the lawyer-client privilege do not apply to them. Securities offered through Cambridge Investment Research, Inc., a Broker-Dealer. Member NASD/SIPC. Cambridge Investment Research, Inc. and Armor Investment Advisors, LLC are not affiliated.

for the appealing party, together with appellate counsel if separate counsel is appointed or retained for the appeal, shall have joint responsibility for preparing and serving a proposed record on appeal.” Later in the same section, the Rule also states that “[n]o counsel who has appeared as tri-

Appellate Rule 3A . . . requires that the client also sign the notice of appeal.

al counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals[.]” The Office of Indigent Defense Services has committed to paying a respondent’s trial counsel for time spent working on preparation of the proposed record.⁹ This directive by the supreme court will facilitate the relationship between trial and appellate counsel in these cases to the benefit of a respondent who appeals an adverse order.

Section 11 rewrites 1002.

This amendment concerns the parties who may appeal. The most significant change is that the definitions of a guardian who can appeal and of a custodian who can appeal have been narrowed to guardians appointed under G.S. 7B-600 and to custodians defined in G.S. 7B-101.

Sections 12 and 13 rewrite 1003 (“Disposition pending appeal.”) and 1004 (“Disposition after appeal.”).

The principal change is worked in 1003, which now explicitly defines the jurisdiction of the trial court while a case is on appeal. Section 1003(a)(2) prohibits a trial court from exercising jurisdiction and conducting a hearing in a proceeding to terminate parental rights while an appeal of a previous order concerning the same child is pending. The trial court has jurisdiction to conduct other post-adjudication

proceedings unless enforcement of a relevant order is stayed by the trial court or an appellate court.

Sections 14 and 15 make conforming changes.

These sections make conforming changes with other sections of the bill, and change the appointment of GALs for parents in TPR proceedings in a manner parallel to the changes made in Section 2 for GALs in abuse, neglect, and dependency proceedings.

Sections 16 and 17 impose expediting provisions.

These amendments impose the same expediting provisions on the filing of orders in TPR cases that Sections 3, 6, and 7 impose for orders in other Chapter 7B proceedings: a second hearing if no order has been filed 30 days after the conclusion of a hearing on the merits of an action, and the filing of the order within 10 days after the second hearing. Section 17 also rewrites 1110 to mandate trial court consideration of specific enumerated matters in the determination of the child’s best interest in a TPR proceeding, including: the child’s age; the likelihood of adoption; whether TPR aids a permanent plan for the child; the parent-child relationship, and; the relationship between the child and proposed adoptive parents, guardians, custodians, or other persons *in loco parentis*.

Section 18 makes conforming changes.

It repeals former section 1113.

Section 19 sets the effective date of the act.

It applies to “petitions or actions filed on or after” October 1, 2005. Actions initiated before the effective date of the act would be governed by the previous text of the statute, as construed by case law.¹⁰

If you are a trial lawyer representing a parent and you have a question about the provisions of the amended statute as they affect appeals, or a question about the preservation of issues for appeal, or about appellate procedure in general, please feel free to contact the Office of the Appellate Defender.¹¹ Together, we can brainstorm the issues. ■

¹ Session Law 2005-398. “An Act to Amend the Juvenile Code to Expedite Outcomes for Children and Families Involved in Welfare Cases and Appeals and to Limit the Appointment of Guardians Ad Litem for Parents in Abuse, Neglect, and Dependency Proceedings.” The bill will be referred to here as H.B. 1150.

² Chapter 7B also contains the statutes governing delinquency cases, which H.B. 1150 did not affect. For convenience, “Chapter 7B cases” in this article mean actions concerning allegations of abuse, neglect, or dependency, and termination of parental rights cases.

³ Although a custodian or guardian can be a respondent in a Chapter 7B action, this article will not repeat “custodian or guardian” when referring to respondents as “parents.”

⁴ The General Assembly’s Web site is at <http://www.ncga.state.nc.us/>. Use the “Bill Look Up” feature on the right hand side of the screen and enter “H1150.” From the next screen, choose the link to S2005-398 from the box of texts of the various versions of the bill, and then print from your browser. The page of the Courts’ Web site that contains the text of Appellate Rule 3A is at <http://www.aoc.state.nc.us/www/public/html/rules.htm>. Choose the link labeled “Effective 3-1-06 - Order Adopting Amendments to the Rules of Appellate Procedure—Last Updated 11/10/2005.” Then print from your browser.

⁵ Note that where an appeal of right is lost by failure to give timely and proper notice of appeal, discretionary review by petition for writ of certiorari may be available. *See* N.C. R. App. P. 21. A litigator who *relies* on the possibility of a grant of review by certiorari is a fool.

⁶ *See* *In re Shepard*, 162 N.C. App. 215, 591 S.E.2d 1 (2004).

⁷ *See, e.g.*, *In re T.W.*, ___ N.C. App. ___, 617 S.E.2d 702 (2005).

⁸ *See* Rev. Rules of Professional Conduct (2003), 27 N.C. Admin Code, Chapter 2, Rule 1.2; RPC 223; 2003 FEO 16.

⁹ Letter to The Honorable I. Beverly Lake, Jr., Chief Justice of the Supreme Court of North Carolina, from Malcolm Ray Hunter, Jr., Executive Director, Office of Indigent Defense Services, and Staples Hughes, Appellate Defender (November 16, 2005) (on file at the Office of Indigent Defense Services).

¹⁰ *See, e.g.*, *In re R.T.W.*, 359 N.C. 539; 614 S.E.2d 489 (2005) (district court has jurisdiction to terminate rights during appeal of previous order in the same case; decision filed July 1, 2005; judgment issued July 21, 2005, per Appellate Rule 32).

¹¹ Contact information for the Office of the Appellate Defender: 919.560.3334 and staples.s.hughes@nccourts.org. The Office of Indigent Defense Services maintains a listserv for attorneys who represent parents at trial in Chapter 7B proceedings. Contact Assistant Director Danielle Carman at 919.560.3380 or danielle.m.carman@nccourts.org for membership information.