

Chapter 16:

Appeals

16.1 Overview	251
16.2 Notice of Appeal	252
16.3 Right to Appeal	252
A. Who Can Appeal	
B. Appeal of Final Order	
C. Appeal of Finding of Probable Cause	
D. Appeal of Order Transferring Jurisdiction	
E. Appeal of Order Finding Capacity to Proceed	
F. Writ of Certiorari	
16.4 Disposition Pending Appeal	254
16.5 Disposition Following Resolution of Appeal	254
16.6 Cost of Appeal	255
Appendix 16-1 Sample Notice of Appeal	257

16.1

Overview

Juveniles who do not have retained counsel are represented subsequent to the filing of a notice of appeal in the appellate division by the Office of the Appellate Defender of the Office of Indigent Defense Services or an attorney assigned by that office. Discussion of appeals in this manual is therefore limited to the rights of the parties and participants to appeal, and what orders may be appealed.

It is the responsibility of appointed counsel in district court to protect the record for appeal by presenting evidence on behalf of the juvenile, making an offer of proof if the court finds evidence for the juvenile inadmissible, cross-examining the State's witnesses, and making appropriate objections and motions. *See* Preserving the Record on Appeal (2006 Spring Public Defender Conference), at www.ncids.org (Training and Reference Materials). The appointed attorney must advise the juvenile of the right to appeal and must file a timely notice of appeal if the juvenile decides to appeal. *See infra* § 16.2 (Notice of Appeal); *see also infra* Appendix 16-1 (Sample Notice of Appeal). Counsel should communicate with the appellate attorney to ensure that all necessary information is transmitted for representation of the juvenile on appeal.

16.2 Notice of Appeal

Notice of appeal must be given in open court at the time of the hearing or in writing within 10 days after entry of the order. Filing a written notice is preferable as it establishes a written record that the appeal was timely filed. If no disposition is made within 60 days after entry of the order, written notice of appeal of the adjudication may be given within 70 days after entry of the order. G.S. 7B-2602. Counsel should maintain a calendaring system to ensure that appeals are filed within the strict statutory limits.

If both the adjudicatory and dispositional orders are being appealed, the dates of each order must be included in the oral or written notice. Counsel should always enter notice of appeal from both the adjudication and disposition, even when the adjudication is based on the juvenile's admission of responsibility. Doing so will aid appellate counsel who discovers a defect in the adjudication that appellate counsel determines should be litigated on appeal. Following notice of appeal, counsel must complete Form AOC-J-470 (Appellate Entries) (April 2006), online at www.nccourts.org/Forms/Documents/753.pdf.

16.3 Right to Appeal

A. Who Can Appeal

The juvenile, the juvenile's parent, guardian, or custodian and, in limited circumstances, the State and county, can appeal. G.S. 7B-2604. This statute imposes no limitation on appeals by the juvenile or the juvenile's parent, guardian, or custodian.

Counsel should advise the juvenile of the right to appeal following an adjudication and disposition, as well as discuss the strengths and weaknesses of an appeal. A juvenile who has been committed or is otherwise detained should also be advised of the right to release pending appeal. *See infra* § 16.4 (Disposition Pending Appeal). The juvenile must make the decision whether to appeal.

Pursuant to G.S. 7B-2604(b)(1) and (2), appeal by the State is limited to appeal of an order:

- finding a State statute unconstitutional; or
- terminating the prosecution of a petition by upholding the defense of double jeopardy, by holding that a cause of action is not stated under a statute, or by granting a motion to suppress.

Appeal by a county is limited to an order requiring the county to pay for medical, surgical, psychiatric, psychological, or other evaluation or treatment pursuant to G.S. 7B-2502 (Evaluation and treatment of undisciplined and delinquent juveniles) or pursuant to G.S. 7B-2702 (Medical, surgical, psychiatric, psychological evaluation or treatment of juvenile or parent). G.S. 7B-2604(c); *see also supra* § 13.5B (Court-Ordered Evaluation and Treatment).

B. Appeal of Final Order

Final order. Any “final order” may be appealed to the North Carolina Court of Appeals. G.S. 7B-2602. Under G.S. 7B-2602(1)–(4), a final order is defined to include the following:

- any order finding absence of jurisdiction;
- any order that in effect determines the action and prevents a judgment from which appeal might be taken;
- any order of disposition after an adjudication that a juvenile is delinquent;
- any order modifying custodial rights.

Appeal from dispositional order. Even where counsel only intends to appeal the adjudication, the appeal under G.S. 7B-2602(3) must be from the *dispositional order* following an adjudication of delinquency and must also specify the adjudicatory order being appealed. *In re A.L.*, 166 N.C. App. 276 (2004) (notice of appeal that referenced only order of adjudication and not the dispositional order required that appeal be dismissed for lack of jurisdiction); *In re M.B.B.*, 183 N.C. App. 155 (2007) (unpublished) (notice of appeal of dispositional order following two separate adjudications of delinquency that referenced only one order of adjudication was insufficient to give Court jurisdiction to hear appeal of second order of adjudication). The Office of the Appellate Defender recommends that counsel always enter notice of appeal from both the adjudication and disposition.

Appeal of adjudication if no dispositional order entered. An adjudicatory order is not a final order under the statute. An adjudication may be appealed by written notice of appeal within 70 days of adjudication if no disposition is made within 60 days after entry of the adjudicatory order. G.S. 7B-2602; *In re D.F.-M.*, 176 N.C. App. 189 (2006) (unpublished) (appeal of adjudication not premature where notice of appeal was filed 65 days after entry of order of adjudication and court terminated jurisdiction over juvenile without order of disposition); *compare In re Taylor*, 57 N.C. App. 213 (1982) (appeal of adjudication dismissed as premature where notice of appeal was filed eight days after adjudication and no disposition was made).

C. Appeal of Finding of Probable Cause

A finding of probable cause is not a final order for the purpose of an appeal. *In re K.B.B.*, 134 N.C. App. 328, 331 (1999) (finding of probable cause is not a final order that is immediately appealable; proper time for appeal is following entry of dispositional order); *see supra* § 9.7 (Appeal of Finding of Probable Cause).

D. Appeal of Order Transferring Jurisdiction

An order transferring jurisdiction to superior court may be immediately appealed to superior court. G.S. 7B-2603(a). The order must be appealed to superior court to preserve the issue for review by the Court of Appeals. *State v. Wilson*, 151 N.C. App. 219, 222 (2002); *see supra* § 9.10 (Appeal of Order of Transfer).

E. Appeal of Order Finding Capacity to Proceed

An order finding a juvenile capable of proceeding is not a final order that may be immediately appealed pursuant to G.S. 7B-2602. Counsel should make an objection on the record to the finding of capacity to proceed and should renew the objection at the outset of the adjudicatory hearing to preserve the issue for appeal. *In re Pope*, 151 N.C. App. 117, 119 (2002) (failure of juvenile to object to court's finding of capacity to proceed or at adjudicatory hearing waived issue on appeal); *see supra* § 7.11D (Objection to Finding of Capacity).

F. Writ of Certiorari

Counsel may petition by writ of certiorari for review of a judgment or order from a trial court when the right to appeal has been lost by failure to file timely notice of appeal or when no right of appeal from an interlocutory order exists. N.C. Rules of Appellate Procedure, Rule 21(a)(1). It is rarely advisable to petition for certiorari review, however; there are few circumstances in which it is appropriate, and there is a significant likelihood that the appellate courts will deny the writ. Counsel should contact the North Carolina Office of the Appellate Defender when considering whether to petition for review by writ of certiorari.

16.4

Disposition Pending Appeal

Pending appeal of a final order, the juvenile must be released, with or without conditions, unless the court enters a temporary order affecting custody or placement. Such an order must be in writing and must state “compelling reasons” that the placement or custody is in the best interests of the juvenile or the State. G.S. 7B-2605; *In re J.J.D.L.*, ___ N.C. App. ___, 659 S.E.2d 757 (2008) (no error in denying motion for release from custody pending appeal where the trial court found as a compelling reason that the juvenile had committed first degree sex offenses with a child); *In re K.T.L.*, 177 N.C. App. 365 (2006) (temporary order pending appeal that placed juvenile in custody of Department of Social Services met requirement of G.S. 7B-2605 in that order was in writing and court stated reasons held to be compelling for placement); *In re W.H.*, 166 N.C. App. 643, 648 (2004) (although issue was moot because juvenile had served and been released from Level 3 disposition, conclusions of law in dispositional order would have sufficed as compelling reasons for continued custody pending appeal if separate order had been entered pursuant to G.S. 7B-2605); *but cf. In re Rikard*, 161 N.C. App. 150, 153–54 (2003) (district court lacked jurisdiction to enter dispositional order after notice of appeal of adjudicatory order was properly filed more than 60 days after adjudication).

16.5

Disposition Following Resolution of Appeal

If the appellate court upholds the adjudicatory or dispositional order, the juvenile court has authority to modify the original order of adjudication or disposition. The court may make

changes found to be in the best interest of the juvenile “to reflect any adjustment made by the juvenile or change in circumstances during the period of time the appeal was pending.” The statute makes provision for this order to be entered *ex parte*, with notice given to interested parties to show cause within 10 days why the modifying order should be vacated or altered. G.S. 7B-2606.

Several due process issues are raised by this statute, and it is therefore unlikely to be used. Counsel should object to a modifying order that imposes a more onerous disposition absent a subsequent adjudication and should request an opportunity to be heard. The statute provides counsel opportunity to inform the court of progress made by the juvenile during the appellate process that warrants a more favorable adjudication or disposition.

16.6 Cost of Appeal

A juvenile has the right to appointed counsel on appeal in delinquency proceedings. The juvenile is presumed to be indigent. G.S. 7B-2000. In some circumstances, the court may order reimbursement of appointed attorney’s fees, including those of the appellate defender, from a parent, guardian, or trustee in possession of funds or property for the benefit of the juvenile. *See* G.S. 7B-2002; 7A-450.1, -450.2, -450.3. Although a parent or guardian who may be ordered to pay the cost of appeal might exert pressure on a juvenile not to appeal, the decision to appeal is the juvenile’s. Counsel has a duty to be a zealous advocate for the juvenile, which includes filing an appeal on request of the juvenile.

Appendix 16-1

Sample Notice of Appeal

STATE OF NORTH CAROLINA
 [] COUNTY

IN THE GENERAL COURT OF JUSTICE
 DISTRICT COURT DIVISION
 FILE NO.[]

IN THE MATTER OF)
) NOTICE OF APPEAL
)
 [JS, A JUVENILE])

NOW COMES the juvenile by and through his attorney, [NAME], pursuant to N.C. Gen. Stat. § 7B-2602, and hereby notifies the Court of the intent of the juvenile to appeal his adjudication of delinquency entered [DATE], to the Court of Appeals. The juvenile appeals adjudication pursuant to the Court's order filed [DATE].

AND THAT the [COUNSEL FOR THE JUVENILE] respectfully requests that the Office of Appellate Defender be appointed to represent the juvenile in the matter before the Court of Appeals.

This the [] day of [], [].

 [ATTORNEY]
 [ADDRESS]
 [CITY, STATE, ZIP]
 [TELEPHONE]

Certificate of Service

I hereby certify that a copy of the foregoing Notice of Appeal was served on the District Attorney for the [NUMBER], Judicial District by deposit of said copy with [NAME], Assistant District Attorney.

This the [] day of [], [].

 [ATTORNEY]

