

### 16.3 Right to Appeal

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### 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, may 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, as well as discuss the strengths and weaknesses of an appeal. *See generally Becton v. Barnett*, 920 F.2d 1190, 1194 (4th Cir. 1990) (trial attorney's failure to give notice of appeal prevented the defendant from demonstrating that "his conviction was unlawful through the appellate process"). A juvenile who has been committed or is otherwise detained should also be advised of the right to release pending appeal. *See infra* § 16.5, Disposition Pending Appeal. The juvenile makes 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; and
- any order modifying custodial rights.

**Appeal from dispositional order.** Even where counsel intends to appeal only the adjudication, the appeal under G.S. 7B-2602(3) must be from the *dispositional order* following the adjudication. For instance, the Court of Appeals dismissed the juvenile’s appeal in *In re A.L.*, 166 N.C. App. 276, 277–78 (2004) because the juvenile’s written notice of appeal referred only to the “adjudication of delinquency,” which was not an appealable order under G.S. 7B-2602. In *In re D.K.L.*, 201 N.C. App. 443, 444 (2009), the juvenile’s attorney stated at the beginning of the dispositional hearing that he “intended to appeal from the adjudication of delinquency.” Although the court did not issue a dispositional order during the hearing, the juvenile’s attorney gave oral notice of appeal when the hearing ended. The Court of Appeals later dismissed the juvenile’s appeal because the oral notice of appeal given during the dispositional hearing was premature. *Id.* at 445.

**Appeal of adjudication if no dispositional order entered.** An adjudicatory order is not a final order under G.S. 7B-2602. However, the statute permits a juvenile to appeal an adjudicatory order by written notice of appeal within 70 days of adjudication if no disposition is made within 60 days after entry of the adjudicatory order. *Id.*; *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); *In re T.E.B.*, 241 N.C. App. 175 (2015) (unpublished) (dismissing the juvenile’s appeal because the juvenile “did not wait until after the 60-day period had expired before appealing”). If the court does not enter disposition within 60 days of the adjudicatory order and the juvenile wants to appeal the adjudicatory order, counsel should be sure to give notice of appeal during the 10-day window between the 60th and 70th day after the adjudicatory order is entered. Failure to do so may subject the appeal to dismissal.

If the juvenile properly appeals an adjudication order under G.S. 7B-2602 when there has been no disposition within 60 days, the trial court is divested of jurisdiction and may not conduct a dispositional hearing while the appeal is pending. *In re J.F.*, 237 N.C. App. 218, 228 (2014); *In re Rikard*, 161 N.C. App. 150, 153–54 (2003). If the juvenile does not appeal the adjudicatory order during the 10-day window, the juvenile may still appeal

if the court enters disposition at a later date. *In re M.W.*, 204 N.C. App. 210 (2010) (unpublished).

**Appeal from other final orders.** There are no opinions in any juvenile delinquency appeals that involve orders finding an absence of jurisdiction, orders determining the action and preventing a judgment from which appeal might be taken, or orders modifying custodial rights, which are appealable under G.S. 7B-2602. Instead, the vast majority of juvenile delinquency appeals are from dispositional orders. These provisions in G.S. 7B-2602 authorize appeal, although they appear to be a vestige of when juvenile delinquency and juvenile abuse, neglect, and dependency cases were combined in a single code.

### **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.R.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. *But see* 1 NORTH CAROLINA DEFENDER MANUAL § 2.7E, Objection to Finding of Capacity (2d ed. 2013) (suggesting that failure to object may not waive issue).

### **F. Appeal Involving an Admission by a Juvenile**

In adult criminal appeals, the defendant has a limited right to appeal from a judgment entered on a guilty plea. *See* G.S. 15A-1444; *State v. Royster*, 239 N.C. App. 196, 200 (2015) (dismissing the defendant's appeal because the only argument he presented did not involve any of the issues under G.S. 15A-1444 that can be raised in an appeal from a guilty plea). In contrast, G.S. 7B-2602 does not impose limitations on juvenile delinquency appeals involving admissions. Thus, if the juvenile properly appeals under

G.S. 7B-2602, there are no statutory limitations on issues that juveniles can raise in the appeal after entering an admission.

### **G. Appeal Involving the Denial of a Motion to Suppress**

G.S. 7B-2408.5(g) allows the juvenile to appeal the denial of a motion to suppress “upon an appeal of a final order of the court in a juvenile matter.” G.S. 7B-2408.5(g). Thus, the juvenile may not appeal from the order denying the motion to suppress but can challenge the order as part of an appeal from a final order. *See supra* § 16.3B, Appeal of Final Order. Additionally, the term “final order” under G.S. 7B-2602 includes a dispositional order, but not an adjudication order. *In re M.L.T.H.*, 200 N.C. App. 476, 480 (2009). A juvenile may appeal an adjudication order within 70 days if no dispositional order is entered within 60 days. G.S. 7B-2602. Although the juvenile may be able to challenge an order denying a suppression motion in an appeal from an adjudication order within the 10-day window if the court does not immediately order a disposition, the safer practice is to ask the court enter disposition within 60 days or enter notice of appeal when the court finally issues a dispositional order.

Although the juvenile may not appeal from an order denying a motion to suppress, counsel should give notice of the juvenile’s *intent to appeal* if the juvenile plans to enter an admission. In adult cases, a defendant who pleads guilty has the right to appeal an order denying a motion to suppress. G.S. 15A-979(b). However, courts have interpreted the statute to mean that the defendant must give notice to the prosecutor and the court of his intent to appeal the order denying the motion to suppress before pleading guilty. *State v. Tew*, 326 N.C. 732, 735 (1990); *State v. Brown*, 142 N.C. App. 491, 492 (2001). Courts have not imposed a similar requirement in juvenile delinquency appeals and may never do so because, unlike in adult cases, juveniles are not limited in the issues they may raise following an admission. As a best practice, however, counsel should include a statement in the written transcript of admission reserving the right to appeal the order denying the motion to suppress.

### **H. Appeals by the State**

G.S. 7B-2604 addresses the State’s right to appeal in a juvenile delinquency case. The State’s right is limited. Under G.S. 7B-2604(b)(2), the State may appeal an order granting a motion to suppress, but only if the order “terminates the prosecution of the petition.” In *In re P.K.M.*, 219 N.C. App. 543, 545 (2012), the Court of Appeals dismissed the State’s appeal from an order granting a motion to suppress. The Court reasoned that an order granting a motion to suppress “does not, standing alone, dispose of a juvenile delinquency case” and suggested that a finding of insufficient evidence might be necessary to satisfy the requirement that the order terminate the prosecution of a petition. *Id.* The Court also observed that the certification required under G.S. 15A-979(c) in State’s appeals in adult criminal cases does not apply to State’s appeals in juvenile delinquency cases. In adult cases, if the State wants to take an immediate appeal of an order granting a suppression motion, the prosecutor must certify that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

If the State appeals an order granting a motion to suppress, counsel should ensure that the trial court enters an order of appellate entries appointing the Appellate Defender to represent the juvenile in the appeal. *See generally infra* § 16.4, Transmitting the Appeal to the Appellate Defender.

### **I. 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). Appellate counsel may file a petition for writ of certiorari to address a defect in a notice of appeal. There are few circumstances in which it would be appropriate for trial counsel to file a petition for writ of certiorari from an interlocutory order, and there is a significant likelihood that the appellate courts would deny the petition. Counsel should contact the North Carolina Office of the Appellate Defender when considering whether to seek review by writ of certiorari.

### **J. Supreme Court Jurisdiction**

If there is a dissent in the Court of Appeals, appeal lies of right to the Supreme Court of North Carolina. G.S. 7A-30. If the opinion in the Court of Appeals is unanimous, a party may file a petition for discretionary review in the Supreme Court of North Carolina. G.S. 7A-31. The Supreme Court is under no obligation to hear the case and may deny the petition. If the Court grants the petition, the parties must file new briefs in the Supreme Court and present oral arguments.