CHAPTER 6
MOTIONS, APPEALS, AND OTHER PROCEDURAL TOOLS FOR GAL REPRESENTATION

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§ 6.1 Motions Generally [1]

A. Introduction

Asking the trial court to make an order or ruling involving a specific issue in a case may require a formal motion to the court. The appropriate mechanism for asking the court for an order in civil juvenile court proceedings is to make a motion. Rule 7(b) of the **Rules of Civil Procedure in N.C.G.S. 1A-1** and Rule 6 of the General Rules of Practice (as well as any pertinent local rules) lay out the requirements for motions practice in district and superior court. Many different types of motions are used in GAL representation, some standard and some the brainchild of the applicant. Several motions relating to GAL representation will be discussed in this chapter.

Many motions and orders can be done by using forms available from the Administrative Office of the Courts. It is typically preferable to use AOC forms (when they are available) since such forms are designed to address issues or contain specific language that is required by statute and often can save time in drafting.. Relevant AOC forms are available on the AOC website at http://www.nccourts.org/Form/FormSearch.aspand most are in a format that is fillable.

Please see the Appendix in this manual for a variety of sample motions and an index of relevant AOC forms.

B. Requirements for Motions [G.S. 1A-1, Rule 7(b); Rule 6, N.C. Gen. R. Prac.]

1. **Written/Oral Motions**: The motion may be oral only if it is made during a hearing or trial or at a session at which a cause is on the calendar for that session. Otherwise the motion must be in writing. (The requirement for writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.)

2. **Grounds for the motion and the relief or order that is sought must be stated in a written motion.** Furthermore, a motion, whether written or oral, must state the rule number or numbers under which the movant is proceeding (e.g. Rule 45(c)(1) to quash a subpoena).

3. **The rules applicable to form of pleadings** (G.S. 1A-1, Rule 10) apply to all motions.

4. **Service and filing of motions** is made pursuant to G.S. 1A-1, Rule 5.

5. **The timing of motions** is governed by G.S. 1A-1, Rule 6 and generally requires service no later than five days prior to hearing. However in emergency situations when service five days in advance is impossible, other remedies may be sought. For example, when there is an immediate need to remove a child from his or her present placement, one can request that a temporary order be granted pending a hearing and opportunity for opposing parties to prepare, under 7B-500. It is also possible to request that parties waive the notice requirement. Remember that communication and collaboration can sometimes solve issues.

6. **Evidence on motions**: When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. [G.S. 1A-1, Rule 43(e)]

[1] Some of the information pertaining to pretrial motions was initially obtained from conference materials titled "Pretrial Proceedings" by Judith Kornegay and Jayne Norwood.

7. **For an ex parte motion**, which can be made only under certain circumstances, the above requirements may differ.

C. Motions in the Appellate Court[2]

Motions in the appellate courts are governed by N.C. Appellate Rule 37. This is the appropriate rule to cite in seeking an extension of time. It is also the rule to use if you believe that an appeal is subject to dismissal. Motions may be filed at any time up until the date of the case's hearing. The motion must be written. *Hoyle v. Bagby*, 253 N.C. 778, 780, 117 S.E.2d 760, 761 (1961). Motions may not be in a brief, but instead must be contained in a separate filed document. *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858, *disc. rev. and cert. denied*, 343 N.C. 511, 472 S.E.2d 8 (1996).

1. **Format**. In the caption of a motion address to an appellate court should specifically state the type of motion. A generic "Motion to Dismiss" is not sufficient. See below:

NO. COA07-000 5th JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

IN RE A.B.C.,) From Wake County
) 07 J 123
Minor Child.)

****

APPELLEE GUARDIAN AD LITEM'S MOTION TO DISMISS APPELLANT'S APPEAL AS INTERLOCUTORY

****

Just underneath the caption, the reason for the motion should be cited along with the rule to which it is pursuant. For example:

NOW COMES the Guardian ad Litem ("GAL"), pursuant to N.C.G.S. § 7B-1001 and Rule 37 of the North Carolina Rules of Appellate Procedure, and respectfully moves this Court to dismiss Appellant's appeal from the trial court's 21 April 2006 permanency planning order.

After this introduction, it is customary to explain the reasons for the motion in detail in enumerated paragraphs. For example:

[2] This section was drafted by Pamela N. Williams, GAL Appellate Coordinator.

1. Section 7B-1001 provides for a right to appeal from "any final order of the court in a juvenile matter." N.C. Gen. Stat. § 7B-1001 (2005). A "final order" is defined as any order: (1) finding absence of jurisdiction; (2) which determines the action and prevents a judgment from which appeal might be taken; (3) of disposition after an adjudication that a juvenile is abused, neglected, or dependent; or (4) modifying custodial rights. *Id.*

2. This Court has held that not every juvenile permanency planning order is subject to immediate appeal. *See e.g., In re B.N.H.*, 170 N.C. App. 157, 611 S.E.2d 888 (2005).

3. The April 21, 2006 permanency planning order in this case does not change custody of the juvenile, nor does it modify Appellant's custodial rights. The order is, therefore, interlocutory in nature and not subject to appeal under N.C.G.S. § 7B-1001.

After the reasons for the motion have been adequately explained, the motion should conclude with language indicating that a respectful request for the Court to rule in your favor. An attorney should be specific with the remedy that he/she are seeking. For example:

For these reasons, the Guardian ad Litem respectfully asks this Court to dismiss Respondent's appeal pursuant to N.C. Gen. Stat. § 7B-1001 of the North Carolina Juvenile Code because the order from which Respondent appeals is interlocutory.

Respectfully submitted this ___ day of Month 2007.

By:
Your Name
Bar Number
Address
Telephone Number
Guardian ad Litem Attorney for Child

2. Service

You must serve a copy of your motion on every party and include a certificate or service page. Motions may be filed electronically at the Supreme Court. N.C.R. App. P. 26 (a). However, at the Court of Appeals, motions must be mailed in. A motion is deemed filed on the date of mailing as evidenced by the proof of service or, if filed by electronic means, at the time it is received electronically. *Id*. Motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court. *Id*.

Service of motions can be accomplished by hand delivery, by mail, or by electronic mail. Service can be accomplished by electronic mail only if the motion was filed electronically. N.C.R. App. P. 26 (c). Service by hand delivery can be made to the attorney of record or the party or by leaving a copy of the motion at the attorney's office with a partner or employee. Id. Service by mail is deemed complete when the motion, enclosed in a postpaid, properly addressed wrapper is deposited in a Post Office or official depository under the exclusive care and custody of the United States Post Office. Id. Service should be at or before the time of filing. N.C.R. App. P. 26(b). A certificate of service indicating the date and manner of service and the person served must be attached to the copy of the motion filed in the appellate court. N.C.R. App. P. 26(d). Absent such a certificate, the appellate court is likely to dismiss the motion. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. N.C.R. App. P. 37(a).

3. Types of Appellate Motions

a. Motions to Dismiss. This is, perhaps, the most common of the motions filed at the appellate courts. A motion to dismiss for rule violations should specifically set out each and every violation of the N.C. Rules of Appellate Procedure found in an opponent's brief.

1. Parent failing to sign the notice of appeal.
2. Opponent's brief filed untimely.
3. Overly argumentative statement of facts.
4. No notice of appeal filed.
5. Appeal is interlocutory.
6. No legal authority cited within the argument.

b. Motions for extension of time. GAL appellate attorney should generally disfavor motions for extensions of time out of respect for the child client's sense of time. Further Rule 3A of the Rules of Appellate Procedure that governs appeals in abuse, neglect and dependency proceedings also disfavors motions for an extension of time.

c. Motion to treat brief as timely filed. This motion can be used if a filing deadline is missed.

d. Motion to amend the record on appeal. This motion can be utilized if the GAL appellate attorney realizes that a significant document has been omitted from the record.

4. Responses to Motions

A non moving party has 10 days after a motion is served upon him or until the appeal is called for oral argument, whichever period is shorter, to file and serve copies of a response in opposition to the motion. N.C.R. App. P. 37(a). If the motion was served by mail, three additional days are added to the response time pursuant to N.C. R. App. P. 27(b). A response to a motion is considered filed pursuant to N.C. R. App. P. 26(a)(1) when it is received in the clerk's office. The appellate court may shorten or extend the time for responding to a motion either upon request by a party or on its own motion. N.C. R. App. P. 37(a).

The appellate courts routinely rule upon motions for extensions of time ex parte, see N.C. R. App. P. 27(d), and routinely hold motions to dismiss appeal for the requisite response period. Other motions may be ruled upon immediately or held for a response at the discretion of the appellate courts depending upon the specifics of the motions.

The appellate court can also act upon a motion at any time even if not all the parties were given notice and even without waiting for responses. N.C. R. App. P. 37(b). Except in extraordinary circumstances, however, the court is unlikely to allow a motion without affording the adverse parties an opportunity to respond. *See* N.C. R. App. P. 37(b) Drafting Committee Note. If a party did not receive notice of a motion or the appellate court ruled upon a motion without awaiting a response, that part may file a motion for reconsideration, vacation, or modification if adversely affected by the ruling. Id.

Any response to a motion filed in the appellate courts cannot include the name of a juvenile, in compliance with Rule 3(b). N.C. R. App. P. 37(c).

5. Rulings by the Appellate Court

The appellate courts endeavor to rule upon motions in a prompt fashion. The amount of time it takes to obtain a ruling depends on whether the motion is held for a response and on the complexity of the motion. Motions for the extension of time (except those held for responses) are often ruled upon by the next business day after receipt by the appellate court, but they sometimes take longer. Motions that are held for a response typically are ruled upon within a few days after all responses have been received or after the response time has expired.

At the Court of Appeals, motions filed after a case has been calendared may not be ruled upon as promptly as those filed before calendaring. Depending on the type of motion filed, motions filed after a case has been calendared may not be ruled upon until the panel assigned to the case has filed an opinion.

Motions to dismiss appeal filed in the Court of Appeals take longer for ruling because they are held for a response and because the rulings are made with much deliberation. If the Court chooses to make a final determination on a motion to dismiss appeal rather than entering an interim order referring to the motion to the panel assigned after the case is calendared, it will ordinarily try to do so prior to any then existing deadlines for the filing of briefs by the parties.

When it is apparent that the Court will not be able to rule upon a motion to dismiss appeal prior to the deadline for the filing of a brief (because of the required response time or some other reason), the party who is to file that brief should file a motion for extension of time in order to avoid the potential waste of time and money in drafting and filing the brief. The party could ask for an extension of a certain length or to be allowed to file a certain amount of days after the Court has ruled on the motion to dismiss. Even if an extension is granted until a certain number of days after a ruling is made on the motion to dismiss, the party seeking the extension should be aware that an order of the Court referring the motion to the panel assigned to the case is a "ruling" which begins the time running for the filing of the brief.

6. Meanings of Rulings.

Allowed: if the Appellate Court simply "allows" the motion, the requests in the motion are considered to have been granted in full. However, appellate court rulings commonly include additional language explaining or limiting the ruling. For example, the motion for extension of time may be "allowed," but additional language in the order may indicate that only a portion of the time requested has been granted.

Denied: the appellate court has ruled upon the motion on its merits. Occasionally, a motion will be "denied without prejudice to refile" upon the fulfillment of certain conditions. The appellate courts do not ordinarily explain in an order why a motion was denied.

Dismissed: A dismissal is not a ruling on the merits of a motion. Instead, a dismissal indicates that the appellate court will not consider the motion for one of a number of reasons. Some of those reasons—the appellate court's lack of jurisdiction is one example—may not be correctable. Other reasons—the motion is premature or some other prerequisite for filing has not been met—are probably correctable. The appellate court's order may not explain the reason for the dismissal but occasionally will specify that the motion has been "dismissed without prejudice" upon the fulfillment of certain conditions

Referred: At the Court of Appeals, some motions are "referred to the panel to which the case is assigned." This interim ruling means the ultimate disposition of the motion is deferred until all briefs have been filed and the case has been calendared. The panel of judges assigned to hear the appeal will then rule upon the motion while it has the entire case under consideration and may not do so until the opinion is filed. There is no reason to contact the Clerk's Office inquiring as to a ruling on the motion if the case has not yet been assigned to a panel for hearing.

This interim hearing is made most often with regard to motions to dismiss appeal. However, the ruling is not automatic when a motion to dismiss has been made. The Court of Appeals strives to dispose of motions to dismiss appeal at the earliest time in order to spare the parties the expense and time of filing briefs if this is unnecessary. The interim deferral is made only when the Court of Appeals believes a more thorough consideration of the entire case is needed before entering a ruling on a motion to dismiss. Since an appellee may file a motion to dismiss an appeal prior to the filing of its brief (or even prior to the filing of the appellant's brief), the practical effect of the interim ruling is that all briefs, including appellee's brief, must be filed before a final ruling is made.

D. Extraordinary Writs [3]

1. Writ of Certiorari

A writ of certiorari is appropriate in the following circumstances: (a) when the right to appeal has been lost for failure to take timely action; (b) when no right of appeal from an interlocutory order exists; or (c) for review of an order denying a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1422(c)(3).

Rule 21 of the N.C. Appellate Rules addresses writs of certiorari. Rules 21(b) and (c) address the filing and content requirements of a petition for a writ of certiorari as well as which court should receive the petition. Under Rule 21(b), the petition should be filed in the appellate court to which an appeal "might lie from final judgment." While Rule 21(c) does not impose a time limitation for filing the petition, it does state that it "shall be filed without unreasonable delay." The petition must also be accompanied by proof of service upon all parties. The petition for writ of certiorari must contain the following: (1) statement of facts, (2) statement of reasons why the writ should be issued and (3) certified copies of the judgment, order or portions of the record which are necessary to an understanding of the matters presented in the petition. Counsel or petitioner must verify the petition.

2. Writ of Mandamus and Prohibition

A writ of mandamus is proper when a party seeks to have the appellate court compel the trial court to perform a particular act, usually a mandatory duty or ministerial act. It is usually issued in response to abuses of judicial power or "compel a judicial action erroneously refused." *Stevens v. Guzman*, 140 N.C. App. 780, 538 S.E.2d 590 (2000) (citations omitted).

[3] This section was drafted by Pamela N. Williams, GAL Appellate Coordinator.

A writ of prohibition is the process by which a court of superior jurisdiction prevents an inferior court from exceeding its jurisdiction in matters over which it has powers or usurping matters not within its jurisdiction to determine. The writ of prohibition is directed to the judge, commanding him/her to cease performing certain actions. A writ of prohibition is proper where a motion for a judge to recuse herself on the basis of interest or bias and the judge has refused to do so. *See In re Alamance County Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991).

Rule 22 of the N.C. Appellate Rules addresses writs of mandamus and prohibition. Petitions for writs of mandamus and prohibition must contain: (1) statement of the facts, (2) statement of the issues and relief sought, (3) statement of the reasons why the writ should be issued and (4) certified copies of the opinion, order or portions of the record that are necessary to an understanding of the matters presented in the petition. Counsel or petitioner must verify the petition.

3. Writ of Supersedeas

A writ of supersedeas stays the execution of judgments, orders or other trial court determinations where an action is not automatically stayed by filing an appeal or a petition for writ of certiorari, mandamus or prohibition. Rule 23(a) addresses the petition for writ of supersedeas that arises from the trial court proceedings. The party seeking the writ must have either (1) motioned the trial court for a stay or (2) demonstrated "extraordinary circumstances" which render a motion for a stay to the trial court "impracticable." Unless the Supreme Court initially dockets the case, the writ of supersedeas must be made to the Court of Appeals.

Rule 23(b) addresses the writ of supersedeas that arises from a decision of the Court of Appeals. In this case, no motion for a stay in the Court of Appeals is necessary before petitioning the Supreme Court. Rule 23(c) describes the requirements for the petition. Similar to the other extraordinary writs, the petition must be verified and accompanied by proof of service on all parties to the action. If the petition is filed in the Court of Appeals, it must include a statement showing either: (1) the impracticability of a motion for a stay in the trial court; or (2) the order granting or denying the stay. Rule 23(c) also requires the following contents: (1) statement of facts needed to understand the basis upon which the writ is sought; (2) statement of the reasons why the court should issue the writ "in justice to the applicant;" and (3) supporting affidavits and certified portions of the record that support issuance of the writ.

Rule 23(d) permits other parties to respond to the petition within 10 days of service. Responses must be accompanied by affidavits or certified copies of documents not filed with the original petition as needed. The response must include proof of service of the response on all parties. The rule does not allow a brief or oral argument in response to a petition for writ of supersedeas unless the appellate court so orders.

Under Rule 23(e), applicants for a writ of supersedeas may also apply for a temporary stay of enforcement of the underlying order. This application can be made separately or in the petition for writ of mandamus. If the application for temporary stay is made separately from the petition for writ of mandamus, the application must comport with the filing and service requirements of Rule 23. This order may be issued *ex parte*.

For additional information on appeals, see §6.8 below.

§ 6.2 Motions and Tools Related to Evidence and Witnesses

A. Motion to Quash or Modify a Subpoena

1. When this motion might be used: If the GAL or child has been subpoenaed to testify and the attorney advocate (AA) believes that testifying is not in the best interest of the child, the AA can file a motion to quash or modify the subpoena pursuant to G.S. 1A-1, Rule 45(c)(1), (3) and (5). Such a motion also could be filed if there is an issue with a witness other than the child that would make it problematic for that person to testify or if the GAL or child is subpoenaed to testify at a non-juvenile hearing.

2. Evidence for the motion: The AA will probably need compelling evidence, most likely from a professional, to show why the child or other witness should not have to testify. If the AA has an opportunity to be heard on this motion, he or she would want to call as a witness anyone who could present reasons that the witness should not testify. Whether or not the AA has an opportunity to be heard, the AA should attach to the motion an affidavit of statements by certain professionals or individuals stating why the witness should not testify. In addition, some of the information being sought may be considered work product and therefore privileged in any event. See Volume 1, § 7.2 in this manual relating to the child witness for more information about children's testimony and alternatives to courtroom testimony, such as allowing the child to testify in chambers. In drafting and arguing the motion, it is often effective to follow the statutory (rule)language.

See Appendix for sample motions to quash.

B. Motion for Expert Witness [G.S.7A-454]

The GAL may petition the court to allow the GAL to call an expert witness to be paid by the state if such an expert is necessary for some contemplated dispositional purpose. Normally DSS would call and pay for expert witnesses for its case in chief, but there could be circumstances in which the GAL would need an expert other than the DSS expert at adjudication. The motion must be made in advance of hearing, and the motion must be granted in order for the state to set and pay for the expert's fees. Thus, the AA should identify the expert in advance and get the expert's fee rate. The expert may agree to allow the fee to be set at or after the hearing. This information should be provided to the court with the motion. (See Appendix for samples.)

C. Motion in Limine

Motions in limine are used when there are issues that any party considers not competent or relevant to the child protection case, but which may be brought up in the case. However, a major drawback to using a motion in limine is that the *judge who will hear the case will rule on the motion, thereby giving the judge the very information sought to be excluded.*

D. Motion for Order to Show Cause Why Person Should Not Be Held in Contempt

(See samples in Appendix.)

1. For failure to produce records: This can be used for service providers who refuse to honor the GAL's appointment order powers and turn over records pursuant to a subpoena. Note that the GAL's appointment order itself is not an order directing a specific third party to turn over specific documents. When someone will not turn over documents on the basis of the GAL's appointment order alone, the GAL should address this by issuing a subpoena or a subpoena duces tecum.[4] Until a subpoena has been issued and ignored, the GAL cannot make a motion to show cause.

2. For failure to appear or comply with court orders: G.S. 7B-904(e) addresses the issue of contempt for parents who don't comply with certain court orders under 7B-904. This tool also can be used against a parent who disobeys a juvenile summons and fails to show up in court. A juvenile form is available from the AOC expressly for this purpose.

3. For failure to provide services: When the court orders certain services to be provided by an agency and the agency fails to provide such services, the attorney can consider an order to show cause to compel service delivery.

4. Advantages and disadvantages: An order to show cause may get the parent's (or agency's) attention and prevent further problems. When it comes to a parent who fails to appear, taking this step may be preferable to adjudicating without the parent's presence. Having the real opportunity to be heard and confront witnesses as well as to hear the judgment of the court can prevent problems later. One disadvantage, however, is that some parents do not find a few days in jail to be much of a deterrent; fines and other punitive measures can be substituted for jail in such cases.

E. Depositions

Depositions are governed by Rules 27 - 32 in the Rules of Civil Procedure. Rule 32 and G.S. 8-83 set out the circumstances under which a deposition may be used in court. A deposition may be used as a fact-finding tool and can be helpful in preparing to examine or cross-examine witnesses, or in determining whether a potential witness should be subpoenaed. Sometimes a parent's attorney will wish to depose the child. In most cases subjecting a child to a deposition is not in the best interest; however, it may be that a deposition could prevent the child's testimony at trial and can be done in a more relaxed setting.

F. Notice of Intention to Introduce Hearsay

If any party intends to introduce hearsay that is not or may not be covered by the standard exceptions to the hearsay rule, that party must give advance notice of the intention to introduce hearsay if proceeding under the residual hearsay rule. If the district requires a pretrial conference, this matter should be addressed at that time. The requirements of notice are primarily set out by case law and are covered in § 7.3.E of this manual. See Rules of Evidence 803(24) and 804(5).

[4] See §6.3.F below.

§ 6.3 Motions Related to Access to Information

A. Discovery Motions

If requests for information do not provide the desired results, any party can utilize standard discovery techniques as provided in the Rules of Civil Procedure. However, typical discovery tools are often too slow for child protection proceedings. Also see § 6.2.E above regarding depositions.

B. Regulation of Discovery and Protective Orders [7B-700 and 1A-1, Rule 26(c)]

1. Upon written motion of a party and a findings of good cause, the court may at any time order that discovery be denied, restricted, or deferred. **[7B-700(a)]**

2. The court may permit a party seeking relief under subsection (a) to submit supporting affidavits or statements to the court for in camera inspection. Thereafter, if the court enters a protective order, the material submitted in camera must be made available to the Court of Appeals in the event of an appeal. **[7B-700(b)]**

3. The GAL should consider the use of a protective order to protect the best interests of a child-client. A protective order can also be sought if a party is attempting to request information out of a confidential GAL file.

C. Motion and Order to Release Information

Attorney advocates are sometimes hampered by confidentiality constraints that prevent the sharing of information that could help a minor client. When there is doubt about whether certain information can be released and it is in the child's best interest to release such information, a motion should be made to obtain an order to release that information. This also can be handled by a specific or blanket clause in the nonsecure order (or any order) that provides for the sharing of certain information between specific individuals. [Also see 7B-3100, which permits certain agencies to share information in juvenile cases, as well as Chapter 1 in this manual relating to confidentiality, discovery, and 7B-3100.] (See samples in Appendix.)

D. Notifying Opposing Parties of Representation of the Child by a Guardian ad Litem

One of the most important roles the GAL may play is that of governing access by other attorneys to the juvenile. The North Carolina Revised Rules of Professional Responsibility, RPC 61 and RPC 249, prohibit certain individuals from talking to the minor victim represented by a GAL without the knowledge and consent of the GAL attorney. These individuals include the respondent parent's attorney, the district attorney and any law enforcement officers acting as agents of the DA, the DSS attorney, and the criminal attorney for a defendant in a criminal case arising from the same fact situation as the juvenile petition. To prevent attempts by counsel to talk to the juvenile, it is useful to send a formal notice of appointment, with a copy of the GAL appointment form and applicable RPCs attached, directly to any other attorneys involved in the case; a copy should be put in the criminal file and in the juvenile file. This clears up any questions later about whether the attorney knew that a GAL attorney represented the juvenile in a related case. (See sample letter in Appendix.)

E. Motion for Access to Substance Abuse Records

All medical records that identify or diagnose a person as a substance abuser, a term that includes alcoholics, or which contain substance abuse treatment records are protected by Title 42, Subchapter A, Part 2 of the Code of Federal Regulations (42 CFR Part 2). Section 42 prohibits the release of such records without an executed "consent to release records" form that conforms to the CFR or through court proceedings under the federal regulations. These federal laws supersede the state statutory investigatory powers of DSS and the GAL and standard discovery procedures. State courts do not have authority to override these regulations through court orders except as provided by 42 CFR, Chapter 1, Subchapter A, Part 2. See Chapter 11 for detailed information as well as § 1.9.A.2 for a recommended procedure to follow, and the Appendix for sample motions, orders, and forms.

F. Motion for Access to School Records and FERPA

The Family Educational Rights and Privacy Act (FERPA) is a federal law that protects the privacy interests of parents and students with regard to education records. It applies to public elementary and secondary schools and virtually every postsecondary institution in the country. FERPA protects educational records unless a parent of a child under 18 or a student 18 or older consents to release. However, the law states a number of exceptions setting forth circumstances under which educators do not need prior consent to release. FERPA does not govern an educator's decision to share information concerning students based on his or her personal knowledge or observation, provided the information does not rely on the contents of an education record. [FERPA: 20 U.S.C. Sec. 1232g][5] For detailed information on FERPA, see Chapter 11 in this manual, as well as the Appendix.

G. Subpoena for Production of Documentary Evidence ("Subpoena Duces Tecum")

[G.S. 1A-1, Rule 45(c)]

This kind of subpoena commands a person to appear and produce the records, books, papers, documents or tangible items designated therein. The details of such a subpoena are governed by G.S. 1A-1, Rule 45(c). To address problems getting witnesses to cooperate with a request to produce documentary evidence, or to simply ensure that witnesses bring all relevant documents with them to court, attorney advocates should issue this type of subpoena. It is important to remember, however, that such a subpoena still does not guarantee that a witness will produce the necessary evidence.[6]

§ 6.4 Motions Related to Services and Placement

A. Motions for Prehearing Services to Child or Parents

It is not unusual for children or families to need services prior to adjudication. This can be a difficult time because families may not want services, and, because the petition has not yet been adjudicated, the court does not have the same authority over parents that it has after adjudication. When DSS faces reluctant or uncooperative parents or is unsure whether a petition will be upheld by the court, the agency may be cautious about the extent to which it can provide services or obtain compliance with a protection or service plan. If there is a nonsecure custody order, any party can make a motion to the court under

[5] Resource for FERPA information: Shay Bilchik, "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs," Program Report released by the U.S. Department of Justice and the U.S. Department of Education, June, 1997.

[6] See § 6.2.D above regarding a motion to show cause why one should not be held in contempt for failure to respond to a subpoena.

G.S. 7B-506 for an order providing for services or other efforts aimed at returning the juvenile home promptly. Arguably, any party can make a motion for provision of any service that a juvenile under the jurisdiction of the court may need prior to adjudication under this provision. Note that in the absence of a nonsecure custody order, there is no authority or mechanism for such motion or order.

B. Motion for Review to Address Needed Services

If there is a need to have the court examine issues related to services, any party may make a motion to have the abuse, neglect, or dependency case reviewed. For example, if the GAL believes that a child is not getting necessary services and has been unable to obtain those services for the child, the GAL can make a motion to have the case heard. At the review hearing, the GAL could put on evidence concerning the needed services and seek a court order to obtain those services.

C. Motions and Tools to Address Placement

If the GAL wants to address the court concerning placement, the GAL may request a review hearing to address those issues. The GAL should not hesitate to subpoena witnesses who can testify about the best placement for the child. Remember that 7B-905(d) requires DSS to give the GAL notice of its **intent** to change placement of a child, unless *extraordinary circumstances* exist, in which case seventy-two (72) hours notice of the change must be given. In the event that the GAL disagrees with the placement change and is attempting to prevent DSS from moving a child and cannot get a regular review hearing soon enough, the GAL may want to consider other avenues such as those outlined in § 6.6 below.

§ 6.5 Motions and Tools to Address Procedural Issues

A. Amendment of Petitions

Amendment of petitions is controlled by G.S. 7B-800, which states, "The court may permit a petition to be amended when the amendment does not change the nature of the conditions upon which the petition is based." Note that the statute differs from Rule 15 of the Rules of Civil Procedure about amended and supplemental pleadings. The case law involves only delinquency proceedings under the old statute.

B. Pretrial Conference Order

If there is a pretrial conference, it is wise to put the matters covered and determined in the form of a pretrial conference order. Often the need to change the petition arises because further investigation reveals that the facts differ from what was alleged initially, or new information is discovered or revealed, giving rise to a different allegation. In these instances, it may be necessary to file a new petition.

C. Stipulation as to Facts

If the parties can agree in advance on any of the facts or issues, to save time in court, they should reduce the agreement in writing and provide it to the judge.

§ 6.6 Seeking Immediate Action

[*In addition to the explanation below, see G.S. 1A-1, Rule 65, and case citations in an annotated version of this statute for more details and procedural requirements;* ***also see Appendix for samples****.]*

Relationship between an injunction and a restraining order: A party can try to obtain a temporary restraining order and also move for a preliminary injunction, in which case a hearing on the preliminary injunction should be heard as soon as possible. **(See G.S. 1A-1, Rule 65.)**

A. Injunctions [G.S. 1A-1, Rule 65(a)]

1. Notice to the adverse party and a hearing are required with a preliminary injunction (unlike a temporary restraining order).

2. The decision of whether to grant the injunction is within the judge's discretion. See *Lambe v. Smith,* 11 N.C. App. 580 (1971).

3. Purpose of a preliminary injunction is to preserve the status quo pending hearing on the merits. *Setzer v. Annas,* 286 N.C. 534 (1975), *Pruitt v. Williams,* 288 N.C. 368 (1975).

4. Distinction between prohibitory and mandatory injunctions: A prohibitory injunction seeks to preserve the status quo pending a determination of the issues by restraining the party from doing particular acts. A mandatory injunction restores the status quo and requires action by a party. A mandatory injunction is comparable in nature and function to a writ of mandamus and ordinarily will be granted only where the injury is immediate, pressing, irreparable, and clearly established. *Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co.*, 15 N.C. App. 634 (1972).

5. Grounds for preliminary injunction

a. Probable cause that plaintiff will be able to establish the right he asserts, and

b. Reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or appears reasonably necessary to protect plaintiffs' rights during the litigation. *See Setzer v. Annas*, 286 N.C. 534 (1975), *Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co*., 15 N.C. App. 634 (1972).

6. Example situations for utilizing an injunction: to prevent a parent from discussing allegations with a child so that the evidence will not be tainted or the child influenced; to prevent a caretaker or custodian from returning the child to a parent; to prevent DSS or others from placing the child in placement the GAL considers inappropriate or harmful; to prevent one from concealing or destroying evidence, or to prevent one from withholding information.

7. Advantages and disadvantages of utilizing injunctions: one advantage is that it can be an effective, forceful tool that sends a strong message that can prevent harm to children. The disadvantages include that they are time consuming with immediate deadlines, andcourts may be reluctant to enter injunctions, particularly against a public agency.

B. Temporary Restraining Order (TRO) [G.S. 1A-1, Rule 65(b)]

1. Purpose

To preserve the status quo pending a full hearing. See *Huff v. Huff*, 69 N.C. App. 447 (1984). [Note that G.S. Section 50B proceedings for domestic violence often involve restraining orders, and those statutes should be consulted where domestic violence is involved.]

2. Criteria

A TRO may be granted without notice to the adverse party but must meet the following criteria: If it is clear that **immediate and irreparable injury, loss, or damage** will result to the applicant before notice can be served and a hearing had thereon, shown from specific facts in an affidavit or verified complaint.

3. Duration of TRO must be specified and cannot exceed 10 days.

4. Example situations for utilizing a restraining order

This is a useful tool to prevent parents or caretakers from tainting evidence by talking to children about their alleged abuse, trying to get them to retract statements, or doing anything else that interferes with the case or is disruptive to the child**.** Other examples include prevention or removal of visitation; keeping the alleged perpetrator from having contact with the child or with a parent; preventing removal of a child from current placement or from school.

§ 6.7 Seeking Relief from a Ruling or Judgment

A. Modifying or Vacating a Judgment

1. Authority to modify or vacate. G.S. 7B-1000 states, "Upon motion in the cause or petition, and after notice, the judge may conduct a review hearing to determine whether the order of the court is in the best interest of the juvenile, and the judge may modify or vacate the order in light of changes in circumstances or the needs of the juvenile."

"In any case where the judge finds the juvenile to be abused, neglected, or dependent, the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile, until terminated by order of the court, or until the juvenile is otherwise emancipated." **[7B-1000(b)]**

Note that **G.S. 1A-1, Rule 59** provides an avenue for seeking to have the court open the judgment, hear new evidence, and make modifications on that judgment, but Rule 59 would be used only when the statute within the Juvenile Code, such as 7B-1000, is not applicable.

2. Motion to amend judgment. If the issue is that the order entered is missing necessary findings of fact, then a motion can be made pursuant to **G.S. 1A-1, Rule 52(b)** as follows: "Upon motion of any party made **not later than 10 days** after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion can be made with a motion for a new trial pursuant to Rule 59."

B. Relief from Judgment or Order [G.S. 1A-1, Rule 60]

1. Reasons for a motion for relief under Rule 60: An attorney can make a motion for relief from the operation of a final judgment under Rule 60. Rule 60(b) lists several reasons for such a motion, including the following:

a. mistake, inadvertence, surprise, or excusable neglect;
b. newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
c. fraud (whether intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
d. the judgment is void;
e. the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment have prospective application; or
f. any other reason justifying relief from the operation of the judgment.

2. Must be on a final judgment or order: A 60(b) motion can be made only on a "final" judgment or order. The Juvenile Code, in explaining the right to appeal (7B-1001), states that a final order includes any order modifying custodial rights; any order finding absence of jurisdiction; any order of disposition after an adjudication of abuse, neglect, or dependency; and any order that in effect determines the action and prevents a judgment from which appeal might be taken.

a. In *In re Brenner*, 83 N.C. App. 242 (1986), an order was considered final where it changed the custody of juveniles adjudicated neglected from the mother to the custody of DSS and scheduled another review.

b. In a domestic case involving a 60(b) motion, the Court of Appeals stated that a custody order was final even though it was changeable. *Dishman v. Dishman*, 37 N.C. App. 543 (1978), *overruled on other grounds*, *Pulliam v. Smith*, 348 N.C. 616 (1998).

c. There are also cases in which an appeal was made from an order entered in a review hearing, as opposed to a disposition hearing, and there was apparently no problem with the order being "final." See *In re Chasse*, 116 N.C. App. 52 (1994), *In re Reinhardt*, 121 N.C. App. 201 (1995) [overruled on other grounds]. In the case of *In re Hawkins*, however, the order was not considered "final" because the court "had not ruled on all matters raised in the petition," failing to refer to the dependency allegation raised in the petition. *In re Hawkins*, 120 N.C. App. 585 (1995). *But see In re B.N.H.*, 170 N.C. App. 157 (2005)(holding that a permanency planning order that did not modify custodial rights was not a final order under 7B-1001).

3. A 60(b) motion does not affect the finality of a judgment nor suspend its operation. (See G.S. 1A-1, Rule 62 regarding stay of proceedings pending a 60(b) motion.)

4. Criteria for deciding on a 60(b) motion: While 60(b)(6) appears to be a "catch-all" reason for relief from judgment, case law has stated that a trial judge should set aside judgment under 60(b)(6)

only "where (1) extraordinary circumstances exist and (2) there is a showing that justice demands it." *Howell v. Howell*, 321 N.C. 87, 91 (1987), *rev'd on other grounds* in *Stegall v. Stegall*, 336 N.C. 473 (1994); *Baylor v. Brown*, 46 N.C. App. 664, 670 (1980). *Baylor v. Brown* also sets out certain factors that a court should consider in granting a 60(b)(6) motion.

5. Appropriateness of motion

a. In the case *In re Wheeler*, 87 N.C. App. 189 (1987), the court stated that "the proper avenues for Respondent to attack the adjudication of neglect and abuse and the dispositional order granting custody to Petitioner were 1) appeal, pursuant to N.C. Gen. Stat. Sec. 7A-666 [now 7B-1001], or 2) a motion for relief pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 60."

b. For a private custody case involving a Rule 60 motion, a motion for temporary stay, and a writ of supersedeas, see *Sharp v. Sharp*, 124 N.C. App. 357 (1996).

6. Jurisdiction after appeal: Regarding jurisdiction to consider a Rule 60 motion after an appeal has been taken, see *In re Scearce*, 81 N.C. App. 662 (1986).

7. Timing

a. There is more leeway with a motion under this rule than under Rule 59. Under Rule 60, it can be made "within a reasonable time, and for reasons 1 - 3 not more than one year after the judgment, order or proceeding was entered or taken."

b. A motion made pursuant to Rule 60 does not toll the time for filing notice of appeal from the underlying judgment. *Mitchell County DSS v. Carpenter*, 127 N.C. App. 353 (1997). (Mitchell involved a situation where the mother in a termination of parental rights case was making a Rule 60(b) motion based on excusable neglect.)

There is a great deal of case law relating to Rule 60, and the reader should become familiar with such law when utilizing this rule. Consulting an annotated version of Rule 60 is recommended.

See G.S. 1A-1, Rule 62, Stay of Proceedings, below, for obtaining a stay pending the decision on a Rule 60 motion.

C. Motion for a New Trial [G.S. 1A-1, Rule 59]

1. Reasons for a New Trial: Rule 59 sets out specific reasons for getting a new trial on all or part of the issues, including the following:

a. any irregularity by which any party was prevented from having a fair trial;
b. misconduct of the jury or prevailing party;
c. accident or surprise that ordinary prudence could not have guarded against;
d. newly discovered evidence material for the party making the motion that he could not, with reasonable diligence, have discovered and produced at the trial;
e. manifest disregard by the jury of the instructions of the court;
f. excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
g. insufficiency of the evidence to justify the verdict or showing that the verdict is contrary to law;

h. error in law occurring at the trial and objected to by the party making the motion; or
i. any other reason heretofore recognized as grounds for new trial.

2. Advantages and disadvantages of a Rule 59 motion: One advantage is that in the event of an error that cannot be addressed any other way, a motion for a new trial may be the only possible relief. Obvious disadvantages of a completely new trial include the delay in the process and having the child wait longer, plus loss of witnesses and poorer recollection by witnesses. This remedy is probably not advisable if what is needed is another chance to argue the case or to argue reasons that the decision was wrong; such a motion essentially asks the judge who made the ruling to change his or her original judgment (an admission of error, in a sense), and the judge is unlikely to do so without a new reason.

3. Timing and service: A motion for a new trial or to amend the judgment shall be served not later than 10 days after entry of the judgment. See Rule 59 for details regarding timing and service.

There is a great deal of case law relating to Rule 59 which should be consulted when utilizing this rule.

See Rule 62, Stay of Proceedings, below, for obtaining a stay pending the decision on a Rule 59 motion.

D. Extraordinary Writs [7]

1. Writ of certiorari [Rule 21 of the Rules of Appellate Procedure]

a. A writ of certiorari is used for

i. review of the judgments and orders of trial tribunals by the court of appeals or the state supreme court in the following circumstances:
- when the right to appeal has been lost for failure to take timely action,
- when no right of appeal from an interlocutory order exists, or
- for review of an order denying a motion for appropriate relief pursuant to G.S. 15A-1422(c)(3).

ii. review of the judgments and orders of the court of appeals by the state Supreme Court
- when the right to appeal or petition for discretionary view has been lost by failure to take timely action;
- or when no right of appeal exists.

b. "Appropriate circumstances" are required, and cases under the old law discussed appropriate reasons for granting a writ (sometimes discussing whether an excuse for missing filing deadline was sufficient, etc. . . .) See annotations that follow Rule of Appellate Procedure 21.

c. Details regarding filing, service, and content are contained in Rule 21 of the Rules of Appellate Procedure.

2. Writ of mandamus and prohibition [Rule 22 of the Rules of Appellate Procedure]

[7] Also see § 6.1(D) covering appellate motions, including extraordinary writs.

a. Which court to petition: A petition for the writ of mandamus or prohibition is filed with the court to which appeal of right might lie from a final judgment. See Rule of Appellate Procedure 22 for details on service requirements, contents of the petition, and other procedural information.

b. Definition and reasons for a writ of mandamus

i. This writ may be sought in order to seek to have the appellate court compel or command the trial judge to perform a particular act specified, usually ministerial act or mandatory duty. It is usually issued in response to abuses of judicial power, where a judge refuses to take some action he or she is required to take, or takes some action he or she is not empowered to do.[8] An action for a writ of mandamus lies only where the plaintiff shows a clear legal right to the action demanded and has no other adequate remedy. *Snow v. N.C. Board of Architecture*, 273 N.C. 559, 570 (1968).

ii. *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 384 (1980): **"The technical distinction between a writ of mandamus and an injunction** is that ordinarily a writ will not issue unless there has been an actual default of a clear legal duty, as distinguished from a threatened or anticipated omission to act, in which case injunction, and not mandamus, is the appropriate remedy. 52 Am. Jur. 2d Mandamus s 9 (1970). Also, the mandatory injunction is distinguished from the mandamus, in that the former is an equitable remedy operating on a private person while the latter is a legal writ to compel the performance of an official duty." (citing *Ingle v. Stubbins*, 240 N.C. 382 (1954).)

iii. "Mandamus is the proper remedy to compel public officials to perform a purely ministerial duty imposed by law; it generally may not be invoked to review or control the acts of public officers respecting discretionary matters. (*Citing Hospital v. Joint Committee*, 234 N.C. 673 (1952)). However, mandamus will lie to review discretionary acts when the discretion appears to have been abused or the action taken arbitrarily, capriciously, or in disregard of law." (Citing *Ponder v. Joslin*, 262 N.C. 496 (1964); *Pue v. Hood*, 222 N.C. 310 (1942)). *In re Alamance County Court Facilities*, 329 N.C. 84, 104 (1991).

c. Definition and reasons for writ of prohibition

A writ of prohibition is the process by which a court of superior jurisdiction prevents an inferior court from exceeding its jurisdiction in matters over which it has powers, or usurping matters not within its jurisdiction to hear or determine. The writ of prohibition is directed to the judge, commanding him or her to cease from performing certain actions. A writ of prohibition might be applied for where a motion has been made to a trial judge to recuse himself or herself on the basis of interest or bias, and the judge has refused to do so.[9]

d. Timing: According to Rule of Appellate Procedure 22, the petition should be filed "without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused."

[8] Janice Perrin Paul, *The Appealing Attorney: The Appellate Process in Juvenile Cases*, prepared for a conference titled "Collaboration on Behalf of the Child," sponsored by the Guardian ad Litem Program, July 1994.
[9] *Id.*

3. Writ of supersedeas [Rule 23 of the Rules of Appellate Procedure]

a. Which court to petition: Unless initially docketed in the supreme court, application for a writ of supersedeas must be made to the court of appeals (unless seeking relief from a ruling of the court of appeals). See specific language in Rule 23(a)(2) and (b).

b. Purpose/circumstances: The purpose for a writ of supersedeas is to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal under the following circumstances:

- when such judgment is not automatically stayed by the taking of appeal or a petition for mandamus, prohibition or certiorari has been filed **AND**
    - a stay order has been sought and denied in the trial court, **OR**
    - extraordinary circumstances make it impracticable to obtain a stay from the trial court.

c. Temporary stay: Pending a determination on the writ of supersedeas, an application can be made for a temporary stay, and for good cause shown, the court may issue an order for a temporary stay ex parte.

d. Details concerning filing, service, content, response, etc. are explained in Rule 23 of the Rules of Appellate Procedure.

E. Appeals

Obviously, an appeal is another avenue for seeking relief from a judgment. See Appeals in § 6.8, directly following this section.

§ 6.8 Appeals [10]

* This section on appeals is a summary of participation in a Guardian ad Litem appeal. For a comprehensive understanding of Guardian ad Litem appeals, please see Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals*, which is available from the Guardian ad Litem State Office. Attorney advocates should be aware that GAL Program Policy requires state office approval for appeals. In addition, the Guardian ad Litem Program has an Appellate Coordinator and a Pro Bono Project to help with appeals. Please contact the GAL State Office for assistance with appeals.

A. Expedited Appeals Procedure

A new expedited appeals process for Guardian ad Litem appeals became effective in May 2006. The new Rule 3A of the N.C. Rules of Appellate Procedure explains the changes of which you should be aware. In its entirety, Rule 3A provides the following:

[10] This section on Appeals was drafted and edited by Pamela N. Williams, GAL Appellate Coordinator. Some material remains from the 2002 edition from materials adapted from Janice Perrin Paul, *The Appealing Attorney: The Appellate Process in Juvenile Cases*, prepared for a conference titled "Collaboration on Behalf of the Child," sponsored by the Guardian ad Litem Program, July 1994.

Rule 3A. Appeal in qualifying juvenile cases -- How and when taken, special rules.

(a) 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/r neglect, appealable pursuant to 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 special pro visions 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.

(b) Special provisions. For appeals filed pursuant to this rule and for extraordinary writs filed incases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(1) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) Transcripts. Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcript to the case. Within thirty-five days from the date of the assignment, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the office of the Clerk of the Court of appeals and provide copies to the respective parties to the appeal at the addresses provided. Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) Record on Appeal. Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties:

1. a notice of approval of the proposed record;
2. specific objections or amendments to the proposed record on appeal, or
3. a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after receipt of the transcript, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement:

1. the appellant shall file his or her proposed record on appeal, and

2. an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial 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 as provided herein.

(3) Briefs. Within thirty days after the record on appeal has been filed with the Court of Appeals, 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 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. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(c) Calendaring priority. 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.

N.C. R. App. P. 3A (2007).

The new Rule 3A shortens the length of GAL appeals by a year or more, marking a major step forward in expediting permanency for the children GAL represents. GAL attorneys should pay particular attention to Rule 3A's two most important timesaving features: Production of the transcript under Rule 3A(b)(1) and of the record on appeal under Rule 3A(b)(2).

Under Rule 3A(b)(1), the AOC Court Reporting Coordinator assigns the transcriptionist to the appeal. The transcriptionist must then deliver the transcript within 35 days to both parties and the Court of

Appeals. Any motions for extension of time to complete the transcript are now filed in the Court of Appeals, rather than in the trial court. Although this requirement is not clearly stated in Rule 3A, it is implied in the text of the Rule. The Court of Appeals has, by ruling on such motions to extend even though the appeal has not yet been docketed in the Court, acknowledged this requirement. Motions to extend the time to produce the transcript are filed by counsel for appellants, not the transcriptionist.

Rule 3A(b)(2) requires the appellant to serve the proposed record on appeal upon all other parties on appeal within 10 days after receiving the transcript. These parties must then submit any objections to the proposed record within 10 days of receiving it from the appellant. If the parties agree to the settled record within 20 days after the appellant received the transcript, or if the appellee serves neither notice of approval nor objection to the proposed record, then the duty falls on the appellant to file three copies of the record with the Court of Appeals. However, if the parties cannot agree to a settled record within 30 days after the appellant's receipt of the transcript, then the appellant must file the proposed record, and the appellee must file any objections or amendments or the proposed alternative record on appeal.

The rule speeds up the appeals process in two other provisions. First, absent extraordinary circumstances, the court will not grant extensions of time to prepare the transcript, record and briefs. In the past, these areas led to huge delays. Also, Rule 3A gives "calendaring priority" to GAL cases. Unless otherwise ordered by the Court of Appeals, the rule limits cases to being heard only on the record and briefs – without oral argument.

The briefing schedule remains essentially the same as it was under Rule 3, with one important exception. Under Rule 3A(b)(3), the appellant's brief is due within 30 days after the settled record has been filed with the appellate court. In the past, the date the record was mailed to the parties triggered the 30-day briefing schedule. Finally, Rule 3A requires that both the appellant and the appellant's attorney sign the notice of appeal. The rule also prohibits trial counsel from withdrawing from the case until the record has been filed with the appellate court.

B. Preserving the Record on Appeal

1. The appellate court will only review a claim, defense, or theory that is presented in the trial court.

2. An error by the trial court will not be reviewed in the absence of a timely objection setting forth the specific grounds on which it is based. (See Rule of Appellate Procedure 10.)

a. Rule 46 of the Rules of Civil Procedure governs the instances in which objections must be made in order to preserve an exception on appeal. Objections need to be made regarding the admissibility of evidence. It is wise to be very familiar with Rule 46.

b. With respect to rulings and orders not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. A party need only apprise the court of the objection to the court's action or make known the action he/she desires the court to take and the ground therefor; however, if a party has no opportunity to object or except to a ruling when made, the absence of an objection/exception does not prejudice the party. G.S. 1A-1, Rule 46(b)

c. The "plain error doctrine" is not applicable to civil cases. *In re Gleisner*, 539 S.E.2d 362 (2000). (A "plain error" is a fundamental error that is so prejudicial as to result in a miscarriage of justice or in the denial to appellant of a fair trial, and justifies relief on appeal though not objected to in the trial court.) *Id*.

3. See Rule of Appellate Procedure 9 regarding the composition of the record on appeal.

4. Practical advice on preserving the record

a. Admit all relevant evidence, both documentary and testimonial. Remember that argument is not evidence.

b. Object and state the grounds for the objection. A specific objection will preserve the evidentiary error on appeal to the extent of the particular objection; a general objection raises only the objection of relevancy and waives any other ground for exclusion. (See 1 Wigmore, Evidence, Sec. 18.)

c. Move to strike a question or answer when appropriate, especially when the question is asked and answered before you have a chance to object. Failure to do so will constitute a waiver on appeal.

d. Avoid producing evidence that you objected to as inadmissible. If you object to inadmissible evidence and then produce similar evidence through your own witnesses, you will be deemed to have waived your objection. However, you may object to the testimony of a witness and then cross-examine that witness to the extent that your cross is limited to explaining or rebutting the improper evidence.

e. Make an offer of proof to preserve for review an error in excluding evidence. When making an offer of proof, state for the record the legal basis for the admissibility of the evidence offered. This includes stating what the evidence would have tended to show or to what the witness would have testified. (See G.S. 1A-1, Rule 43.)

f. Don't use a motion in limine as a substitute for objections. A pretrial motion in limine cannot serve as a substitute for making timely trial objections.

g. Generally insist that everything be on the record. Politely resist "at the bench" or "in chambers" conferences – or make sure that such discussions are recorded by the court reporter, or have the court or a party summarize on the record the substance of the off-the-record conference.

h. Request a ruling if the judge fails to rule on a motion or objection, and ask for clarification of ambiguous rulings.

i. Make motions in writing whenever possible. File a supporting brief or memorandum of law if necessary.

j. Make an on-the-record checklist of exhibits admitted into evidence.

k. State your objection on the record to such things as egregious nonverbal behavior by opposing counsel or the trial judge.

l. Review proposed orders carefully. Make sure all relevant facts and conclusions are incorporated into the order.

m. Ensure that all reports are incorporated into the order and made a part of the record. Be sure that the GAL's recommendations are expressly made a part of the order. Even if the court does not order what the GAL recommended, or does not want to incorporate the report, ask that the order recite what the GAL recommended or objected to.

C. When Not to Appeal

Practical advice: Do not appeal just because you are angry with the other side. Don't appeal when you disagree with the judge's decision but are satisfied there are no grounds for reversible error. Don't appeal procedural or technical errors in a final order if the evidence would support the order, or on remand the judge would find the omitted facts. Don't appeal when the issue is not important and does not advance an ultimate goal in the case; appeal only if you would have a different result if you won the appeal.

D. Appropriate Courtesy to Trial Judge on Appeal

Practical advice: When possible, it is best to avoid surprising the judge in his or her courtroom at the end of the case with your intent to appeal. Filing a written motion for a court reporter or giving the judge a memorandum of law prior to hearing that indicates that the issue before the court is important might alert the judge to the possibility of an appeal. Send the judge a copy of the appellate documents and materials.

E. Appeals of Rulings Made Pursuant to Abuse, Neglect and Dependency Proceedings

1. Proper Parties to Appeal. Under §7B-1001, those who may appeal a final order under §7B-1001 include the juvenile, a county department of social services, a parent, guardian or custodian; and any party who sought but failed to obtain a termination of parental rights.

2. Proper Order to Appeal. Under § 7B-1001, only a final order can be appealed. These orders include the following: (a) any order finding absence of jurisdiction; (b) any order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a judgment from which appeal might be taken; (c) any initial order of disposition and the adjudication order upon which it is based; (d) any order, other than a nonsecure custody order, that changes legal custody of a juvenile; (e) any order relieving D.S.S. of reunification efforts; and (f) any order terminating parental rights or denying a petition/motion for termination of parental rights.

The order from which the appeal flows must be entered at the trial court, meaning it must be "reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2007).

3. Notice of Appeal. The notice of appeal must be signed by both the attorney (if any) and the appealing party. N.C. R. App. P. 3A. The appellant has 30 days to appeal an order.

F. Appeals from Termination of Parental Rights Orders

1. Right to Appeal. The following parties may appeal a termination of parental rights order: the juvenile, a county department of social services, a parent, guardian or custodian; and any party who sought but failed to obtain a termination of parental rights.

2. Timing and Notice. The appellant has 30 days to file a notice of appeal and must serve all parties as is customary.

G. Other Important Requirements for All Appeals: The Rules of Appellate Procedure [11]

The Rules of Appellate Procedure are mandatory and failure to follow them subjects an appeal to dismissal. *See State v. Hart*, 361 N.C. 309; 644 S.E.2d 201 (2007); *Viar v. N.C. Dept. of Transportation*, 359 N.C. 400, 610 S.E.2d 360 (2005).

1. Filing the Notice of Appeal. Pursuant to Rule 3A, as noted above, the appellant must also sign the notice of appeal, along with counsel, if any. In addition, all documents referring to the juvenile must not include his/her name, address, social security number and date of birth. Refer to the juvenile with his/her initials or use a pseudonym.

2. DSS and GAL Joining on Appeal. When GAL and DSS have the same position on appeal, it is appropriate and wise for them to join on appeal, which will lessen the time the appellate judge and clerks will spend learning that position. It is not uncommon for the two parties to join and share the duties in authoring the joint brief. However, if GAL differs at all from the DSS position, the GAL attorney advocate should prepare his/her own full-length brief, as GAL is a party to the action. The GAL brief is on behalf of the children involved in the case. *See* N.C. R. App. P. 28 for an explanation on what should be in an appellant and appellee brief.

3. Preparation of the transcript and record on appeal shall be pursuant to Rule 3A, as set out above, which provides timelines that are <u>different</u> from other civil appeals.

4. For pointers on how to write an effective GAL brief and what to do for oral arguments, please see Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals* (2007).

5. The appendices to the Rules of Appellate Procedure are extremely useful. They provide specific charts and examples to assist attorneys in meeting the requirements of the Rules. See also the timetables for juvenile appeals in Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals* (2007).

§ 6.9 Stay of Proceedings Pending Judgment

A. Stay of Proceedings, Disposition Pending Appeal

[See statutes for more details.]

1. Disposition pending appeal

a. In nontermination proceedings: Pending disposition of an appeal, the judge may enter a temporary order affecting the custody or placement of the juvenile for compelling reasons, which must be stated in writing, as the judge finds to be in the best interest of the juvenile. When the child has suffered physical abuse by one with a history of violent behavior, the court shall consider the opinion of the mental health professional who performed an evaluation under 7B-503(b) before returning the juvenile to the custody of that individual. For placement in foster care, the provisions of subsections (b), (c), and (d) of G.S. 7B-905 shall apply to such order. **[7B-1003]**

[11] For an in-depth discussion of the Rules of Appellate Procedure and Guardian ad Litem appeals, please consult Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals* (2007).

b. In termination proceedings: "Pending disposition of an appeal, the court may enter such temporary order affecting the custody or placement of the child as the court finds to be in the best interest of the child or the best interest of the State." **[7B-1113]**

2. Automatic stay of proceedings for all judgments until time to appeal has expired [G.S. 1A-1, Rule 62(a)]

Judgments shall not be executed nor proceedings be taken for enforcement of judgment until expiration of the time provided in the controlling statute or rule of appellate procedure for giving notice of appeal from the judgment.

3. Stay upon appeal, application for relief from denial of stay [G.S. 1A-1, Rule 62(d), Rule of Appellate Procedure 8]

a. When an appeal is taken, the appellant may obtain a stay of execution. (See G.S. 1A-1, Rule 62(a) and G.S. 7B-1003.)

b. Procedure for seeking relief for denial of a stay is set out in Rule 8 of the Rules of Appellate Procedure.

B. Stay on Motion in the Trial Court for New Trial, Amendment, or Relief from Judgment [Rule of Civil Procedure 62(b)]

The trial court may stay the execution of proceedings in its discretion and on such conditions for the security of the adverse party as are proper, pending the disposition of a motion made under the following rules:

- New trial or to amend a judgment (Rule 59)
- Motion for relief from a judgment (Rule 60)
- Motion for judgment (Rule 50)
- Motion for amendment to the findings (Rule 52(b))