Staycation All I Ever Wanted: Why Parent Attorneys Should Consider Requesting Stays of TPR Orders

I apologize for getting that song stuck in your head. Unless you like that song, in which case enjoy.

Scenario: You represent a respondent parent in an abuse, neglect, or dependency (A/N/D) proceeding. The permanent plan is adoption, and DSS (or your jurisdiction's equivalent agency) filed a petition for termination of parental rights (TPR). The trial court granted the TPR. Your client intends to appeal once the written order is entered. (Note that effective July 1, 2021, appeals of TPR orders are heard by the Court of Appeals pursuant to the newly amended G.S. 7B-1001(a)(7); *see* S.L. 2021-18).

A trial court can enforce a TPR order while an appeal is pending unless a stay has been entered. G.S. 7B-1003(a); G.S. 1A-1, Rule 62(d). As the trial attorney, you and your client should consider seeking a stay of the TPR order pending the appeal.

Does the Stay Occur at the Trial or Appellate Court?

A stay can be granted by either the trial or appellate court; however, the stay must ordinarily be sought from the trial court first. G.S. 7B-1003(a); N.C. R. App. P. 8(a). If the trial court denies the stay or enters a stay but later vacates it, a party may request the appellate court issue a temporary stay and writ of supersedeas. N.C. R. App. P. 8(a); N.C. R. App. P. 23(a). If extraordinary circumstances make seeking a stay from the trial court impracticable, the parent may request a stay and writ of supersedeas from the appellate court first. *Id.* Regardless of the issuing court, a stay merely suspends enforcement of a judgment; a stay does not vacate the judgment. G.S. 1-296.

A trial attorney should file the notice of appeal and the motion seeking a stay with the clerk of superior court.

Potential Benefits to a Stay

Notice of and participation in hearings. While an appeal of a TPR is pending, trial courts have limited ability to enter orders in any underlying A/N/D proceedings. *See In re K.L.*, 196 N.C. App. 272 (2009). The court may enter temporary orders that are in the juvenile's best interest and affect the juvenile's custody or placement. G.S. 7B-1003(c). Orders concerning the custody or placement of the juvenile includes visitation orders. *See In re D.E.M.*, 254 N.C. App. 401 (2017), *aff'd per curiam*, 370 N.C. 463 (2018); *see also* Sara DePasquale, "What Can the Court Do in an A/N/D or

TPR Action When an Appeal is Pending?", On the Civil Side, UNC Sch. Gov't Blog (Aug. 2, 2019). If the TPR order is stayed pending appeal, the respondent parent remains a party to the A/N/D and TPR proceedings. The TPR proceeding may involve additional hearings after the TPR adjudication and disposition hearings. You can read more about recent changes to the hearings that take place following a TPR here. The stay ensures the parent remains a party and is entitled to continue receiving notice of hearings—hearings the respondent can still attend and participate in because of the stay.

Continued visits. Staying the TPR order pending the appeal may allow the parent to continue to visit with their child. If the most recent order in the underlying A/N/D proceeding allows for visits, the parent will continue to receive visits while the appeal is pending (unless the trial court enters a temporary order to the contrary under 7B-1003(c)). These visits allow for continued time together and the opportunity to maintain and grow the familial bond. This bond may be critical if the TPR is overturned or remanded on appeal, if an adoptive placement later disrupts, or if the TPR is affirmed but the child chooses to have a relationship with the biological parent in adulthood.

Keeps parents informed and involved. The continued ability to attend hearings and visits gives the parent the chance to stay in the loop regarding their child—and the case in general—pending the appeal. While the stay is in effect, the respondent is still the child's parent. A parent should have access to important information about his or her child. Additionally, a parent's failure to remain involved in the child's life and failure to remain active as a party to the case can harm the parent's chances if the TPR is overturned or otherwise remanded. *See, e.g., In re D.E.M.*, 254 N.C. App. 401 (2017). *In re D.E.M.* was the second appeal of a TPR based on willful abandonment. The court of appeals held that despite having limited options "after she was divested of her parental rights," the mother—who did not seek a stay of the TPR order pending the first appeal—"was not absolved of the requirement that she take whatever measures possible to show an interest" in her child. *Id.* at 407. The mother "failed to exercise any of the options available to her" by not seeking a stay of the TPR order or otherwise requesting visits. *Id.* at 408. Requesting a stay of a TPR order is evidence of a parent's continued efforts to be involved. If the stay is granted, the parent has more opportunity to remain engaged.

New evidence on remand. A parent who has remained involved and informed thanks in part to a stay of a TPR order may be in a better position to offer new evidence if the TPR is remanded. If the appellate court remands the TPR, the trial court must act consistently with the higher court's mandate. *In re S.M.M.*, 374 N.C. 911 (2020). If the case is remanded to make additional findings, but the mandate does not specify whether the trial court should hear new evidence, the trial court has the discretion to hold a hearing and consider additional evidence. *Id*. A parent who has remained in the loop and learned of additional facts and evidence may be better able to convince the trial court to use its discretion to hear new evidence, which could result in more favorable findings for the parent based on evidence of circumstances that developed while the stay was in place. For example, when requesting that the court hear new evidence, the parent may proffer that the child's adoptive placement has disrupted if that has occurred. Even if the trial court declines to

consider new evidence, if the parent makes a valid proffer of new evidence, the trial court may later be found to have erred.

Similarly, if the TPR is reversed or is vacated and remanded, a parent will also benefit from having remained involved and informed. The parent will be better prepared if the underlying A/N/D proceeding resumes and if a new TPR petition is filed later.

Reunification efforts. If the primary or secondary plan was reunification at the time the TPR was initiated, the staying of the TPR order means DSS remains obligated to make reunification efforts pending the appeal. The continued assistance of those reunification efforts may put the parent in a better position if the TPR is overturned or remanded. If reunification was not the primary or secondary plan when the TPR was initiated, and reunification efforts were ceased, a stay would have no bearing on DSS' efforts; however, a stay would still give the parent more time to obtain services on their own.

Other Considerations

Motion vs Petition for TPR. The analysis of whether to seek a stay is the same regardless of whether the TPR was filed by petition or by motion in an underlying A/N/D proceeding pursuant to G.S. 7B-1102. The potential benefits to the parent, and the restrictions of a trial court to issuing temporary orders affecting the juvenile's custody and placement, remain the same. G.S. 7B-1003(b)(2); *See In re K.L.*, 196 N.C. App. 272 (2009).

Private TPR. Sometimes, TPRs are filed by petitioners other than DSS, with or without an underlying A/N/D action. G.S. 7B-1103. These are commonly referred to as private TPRs. How does the analysis of whether to request a stay of a TPR order change if it is a private TPR? If there is no underlying A/N/D proceeding, then a parent would not need to be concerned about remaining in the loop for purposes of future hearings in that proceeding. A stay, however, still offers many of the same potential benefits to a respondent in a private TPR. The parent may continue to visit or make important decisions for the child, subject to any custody orders already in effect. The parent remaining informed about the child's life may help if the TPR order is reversed or remanded. New developments affecting the TPR and whether it is in the child's best interests could potentially be introduced as evidence if the TPR is remanded.

The practicality of a stay. It is difficult to get a sense of how often stays of TPR orders are being requested and what the success rate of those requests has been. In some instances, an appellate court opinion may refer to a stay when discussing the procedural history of a case. An appellate opinion may also refer to a stay if the stay—or the lack of a stay—is an issue on appeal. There is no data, however, on how often stays are requested.

If few requests for stays of TPR orders are being granted, it is similarly difficult to know why that is. It may be that the facts in those cases did not warrant a stay. The more courts are asked to

consider granting stays of TPR orders, the more familiar and possibly comfortable officials will be with the concept. If a court does grant a stay, and that stay results in families spending more time together—particularly in cases where circumstances change, like when an adoptive placement disrupts, or a parent is successful on appeal—courts may be more open in the future to granting stays of TPR orders when the facts justify it.

Resources

The Office of the Parent Defender has a form motion to request a stay pending an appeal. Their website is currently undergoing renovations. When the new site is launched, the form motion will be available here. Please reach out to me anytime to discuss the issues in this post.