OPD OFFICE OF THE PARENT DEFENDER

TUESDAY'S TIP #29 - MANDAMUS IN CHILD WELFARE CASES

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Situation: The hearing keeps getting delayed or the order hasn't been prepared long after the hearing.

The Problem: Your client is confused as to what they were ordered to do because there is no order in effect. A delay in reaching a hearing causes all kinds of issues for your client, including forcing them to take off from work or miss programs that could help them get their child back faster, especially if the petition is dismissed.

Law: On August 27, 2008, the North Carolina Supreme Court issued its decision in the case of In re T.H.T., 362 N.C. 446, 665 S.E.2d 54 (2008). In that decision, the Supreme Court indicated that the proper remedy for the court's disregard of the timelines imposed by N.C.G.S. § 7B is not reversal. Instead, the Supreme Court decision directs that the appropriate remedy is mandamus and that parties who have been harmed by a court's failure to abide by the timelines should file a writ of mandamus enforcing the timelines.

Effect: Any future appeals involving flagrant disregard for the timelines set out in 7B will no longer be reversed. Trial counsel will be tasked with identifying when the court is out of compliance with the timeline and obtaining appropriate remedy for their clients. Most trial counsel are not familiar with appellate procedures and would probably not know how to file a writ of mandamus, thereby resulting in prejudice to the client.

Action Steps:
Once the deadline has passed (whether it is 30 days for entry of the order or violation of timelines for holding a hearing):

1. If a hearing has not been held within the correct timelines, trial counsel should file their own notice of hearing (Form AOC-J-141):
   - N.C.G.S. § 7B-801(c) [adjudications, 60 days from petition],
   - N.C.G.S. § 7B-901(a) [dispositions, concluded within 30 days from adjudication hearing],
   - N.C.G.S. § 7B-906.1 [reviews and permanency planning, within 90 days from initial disposition and at least every six months thereafter], and
   - N.C.G.S. § 7B-1109(a) [TPR adjudications, 90 days from petition or motion][1].
2. If an order is missing, notify the juvenile clerk to schedule the hearing for entry of judgment pursuant to N.C.G.S. §§ 7B-807(b) [adjudications], 7B-905(a) [dispositions], 7B-906.1(h) [reviews and permanency planning], 7B-1109(e) [TPR adjudication] and 7B-1110(a) [TPR disposition]. It would be a better practice to have such communication in writing so that the record is preserved.

[1] Counsel should consider filing a Motion to Dismiss for Failure to Prosecute, particularly on grounds that are based on a time factor such as child support, paternity, or abandonment, and schedule it for hearing simultaneously with the TPR.

3. In the alternative, file a Notice of Hearing for Entry of Judgment and schedule as soon as possible.
4. Notify Annick Lenoir-Peek, Deputy Parent Defender, with the following details:
    - County
    - Case Name, Juvenile Case Number
    - Identification of all counsel involved
    - A brief description of the facts of the case and the delay involved, including attempts by trial counsel to rectify the situation.

The Office of the Parent Defender will take the following steps in filing a *writ of mandamus*:

- Confer with trial counsel on the facts;
- Assign the matter to in-house or roster counsel, as appropriate;
- Send a letter to the trial judge advising that a *writ of mandamus* may be filed if the hearing is not held or order is not entered within a short timeframe;
- File the *writ of mandamus* if no resolution has been achieved.

Conclusion: Don't let your client's rights be hurt by too full calendars that result in cases being continued over multiple dates or lack of clarity from missing orders. Let's talk mandamus!

Please contact Annick Lenoir-Peek at 919-354-7246 or Annick.lenoir-peek@nccourts.org with any questions.

The following resources may also be helpful:

- Tuesday's Tip 1 – Delay in Entry
- Tuesday's Tip 5 – Delay in Hearing
- On the Civil Side – Tick Tock: Mandatory Time Requirements to Enter A/N/D and TPR Orders
- Notice of Hearing – AOC-J-141