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# GAL LEGAL NEWSLETTER

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## Court of Appeals Dismisses Appeal from Permanency Planning Hearing as Interlocutory

*In re B.N.H., No. COA04-846 (May 3, 2005)*

Deana Fleming, GAL Associate Counsel

With the mounting number of juvenile appeals from abuse/neglect cases, the Court of Appeals has finally issued an opinion that reigns in the number of orders from which appeal may be taken. Do appellate judges in North Carolina finally understand the need to expeditiously resolve juvenile cases, and that allowing repeated appeals simply delays permanency for children?

Three days after the birth of B.N.H., the Catawba County Department of Social Services (hereinafter “DSS”) filed a juvenile petition alleging neglect and dependency. Subsequently, the trial court

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## Appellate Brief Writing (Part Two and Three of Five in Series)

*Five Tips from a Clerk’s Perspective*

Alexi Gruber, GAL Appellate Coordinator

This is the second in a series of articles on improving brief writing, written from my perspective as a former attorney clerk on the Tennessee Court of Appeals. As always, my disclaimer: For those of you who are experienced appellate attorneys, this is probably “old news,” but for new appellate advocates, I hope this will give you some simple tools for drafting better, more persuasive appellate briefs.

### **Rule #2: Brevity is Key**

There are fifteen judges on the North Carolina Court of Appeals and seven justices on the Supreme Court. The judges and justices value their time. Given the huge volume of appeals, a brief that is short and to the point will be much better received than one that restates the same argument over and over (regardless of whether that brief is within the page limitation). If you are able to state your case effectively in fifteen pages, stop there. The court will appreciate it. This rule also applies to oral argument.

Don’t “embellish” your brief by citing literature or by making references to popular culture. My favorite story along these lines from my clerkship was a brief in which an attorney quoted Pink Floyd’s album, “The Wall,” and Sir Arthur Conan Doyle’s, “The Hound of the Baskervilles” to illustrate a point. I still can’t

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adjudicated B.N.H. neglected and dependent, granted DSS custody and continued placement with the child's maternal grandmother. At the second review hearing, the trial court ordered that reunification efforts cease; however, respondent mother did not appeal from this order. Within the statutorily mandated time period, the trial court held its initial permanency planning hearing and ordered that B.N.H. remain in his placement and that the permanent plan be adoption. It was from this order that respondent mother appealed.

DSS filed a motion to dismiss the appeal as interlocutory and the Court of Appeals agreed with this assessment. NCGS § 7B-1001 specifies that appeal may be taken from any *final* order and enumerates four examples of final orders. DSS asserted that not all permanency planning orders and review orders are "final". Specifically, the permanency planning order in this case did not modify "custodial rights" as required by NCGS § 7B-1001(4) and is not an "order of disposition after an adjudication" pursuant to NCGS § 7B-1001(3).

The Court previously held that a permanency planning order was a type of dispositional order subject to appeal [see *In re Weiler*, 158 N.C. App. 473, 581 S.E.2d 134 (2003)]. However, in order to reach the proper result, the Court specifically distinguished the facts of *B.N.H.* from *Weiler* that involved an appeal from a permanency planning order that changed the permanent plan from reunification to adoption. The order in *B.N.H.* was not only the initial permanency planning order, but merely reiterated the prior order that reunification efforts cease and delineated the permanent plan as adoption. As a result, the Court declined to expand its previous holding that all permanency planning orders are subject to appeal as final orders. In fact Judge Levinson is adamant that such an expansive interpretation is illogical and contrary to the purpose of the Juvenile Code:

In sum, the suggestion that parents have an immediate appeal of right from every review order, or every initial and subsequent permanency planning order,

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## What Constitutes a Proper Juvenile Order Anyway?

*How to Avoid the Dreaded Reversed & Remanded Case*

Deana Fleming, GAL Associate Counsel

One of the most common pitfalls that can result in the reversal of many abuse/neglect cases is the failure to draft a proper order. Typically, it is the DSS attorney that drafts orders in juvenile court. Often the DSS attorney will circulate a proposed order to all parties' attorneys to assure that all parties are in agreement with the draft. This initial review of a proposed order is the GAL attorney advocate's window of opportunity to call attention to errors, omissions, or other issues that may impact appellate review. The purpose of this article is to highlight problems in drafting that can lead to orders being reversed or vacated despite the presentation of sufficient evidence.

### I. Findings of Fact versus Conclusions of Law

NCGS § 1A-1, Rule 52(a)(1) provides, "In all actions tried upon the facts without a jury ... **the court shall find the facts specially and state separately its conclusions of law** thereon and direct the entry of the appropriate judgment." (emphasis added) The difficulty comes in distinguishing between findings of fact and conclusions of law. The general rule is that "any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified as a finding of fact." *In re Helms*, 127 N.C.App. 505, 491 S.E.2d 672 (1997). A properly drafted order should set forth specific findings of fact on which the court relied to make its conclusions of law. For example, a finding of fact may state that a respondent parent was working part-time and therefore, he had the ability to pay some amount toward child support. If a TPR hearing, the proper conclusion of law would be that the child has been placed in DSS custody and the parent has willfully failed to pay for six months prior to the filing of the petition, a reasonable portion of the cost of care although able to do so. The conclusion of law is the statutory ground for TPR and the finding of fact is evidence presented that supports this ground.

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## APPELLATE UPDATE

As a reminder, there is an appellate **Brief Bank** at the GAL State Office. Please feel free to contact Alexi to review a sample GAL, DSS, or parent's brief on a particular issue.

## CALENDAR OF EVENTS

### STATE OF THE ART ADVOCACY FOR CHILDREN, YOUTH AND FAMILIES

28<sup>TH</sup> NATIONAL CHILDREN'S LAW CONFERENCE OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

Conference is comprised of General Sessions and Workshops along four tracks: (1) Abuse/Neglect; (2) Juvenile Justice; (3) Family Law; (4) Policy Advocacy

PLACE: RENAISSANCE HOLLYWOOD HOTEL, LOS ANGELES, CA

DATE: THURSDAY, AUGUST 25<sup>TH</sup> – SUNDAY, AUGUST 28<sup>TH</sup>

TUITION: \$325 NACC MEMBERS/\$425 NON-MEMBER (BY 7/25)  
\$350/\$450 FOR REGISTRATION AFTER 7/25

Visit [www.NACCchildlaw.org](http://www.NACCchildlaw.org) for more information

### N.C. ASSOCIATION OF COUNTY COMMISSIONERS COUNTY ATTORNEYS & SOCIAL SERVICES ATTORNEYS 2005 SUMMER CONFERENCE

Sessions for Social Services Attorneys will include the following topics: Service of Process; ICWA; Case & Legislative Updates; Immigration Issues; and Juvenile Delinquency & Child Welfare

PLACE: SHERATON HOTEL, ATLANTIC BEACH, NC

DATE: JULY 21<sup>ST</sup> – JULY 22<sup>ND</sup> FOR SOCIAL SERVICES TRACK

TUITION: \$145 FOR SOCIAL SERVICES TRACK

CONTACT PENNY CUMMINGS OR LINA IMES AT (919) 715-2893 FOR REGISTRATION INFORMATION

DEADLINE: JULY 8, 2005

#### THE GAL STATE OFFICE LEGAL TEAM IS:

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*Brief Writing continued from page 1*

figure out what point those references were meant to illustrate – but we all had a good laugh over it. Needless to say, it added nothing to the attorney's case, and did not serve his client well.

### **Rule #3: Keep it Clear**

You may have heard this in your legal methods class back in law school, but it's still good advice: Use short sentences in your brief writing. Long, compound sentences are hard to follow, and have less "punch."

Keep legalese to a bare minimum. Judges are generally not impressed with Latin, and their clerks will greatly appreciate not having to look up phrases such as, "Quicquid demonstratae rei additur satis demonstratae frustra est" ("Whatever is added to demonstrate anything already sufficiently demonstrated is surplusage"). Here, I speak from experience! Also along these lines, it's best to avoid using words such as "thus," "therefore," "heretofore," "thusly," etc. The word "therefore" is great for signaling a conclusion, but when it's overused, it loses its impact.

Finally, try to stay away from the use of passive voice in brief writing. Active voice is more persuasive and easier to follow. My personal passive favorites include, "the plaintiff was hit by the red car," (sounds like a Stephen King story) and "it was held by the court that..." (what is "it"?). Passive voice can be useful if you are trying to deflect attention from the actor, but this only works well if you use it sparingly.

***(Stay tuned... To be continued in the next issue)***

*B.N.P. Continued from Page 2*

because of the language of language in G.S. § 7B-1001(3): (1) contradicts the language and plain meaning of the statute; (2) frustrates the stated legislative purpose of achieving permanency for children in a timely manner; (3) does not serve the interests of children within the jurisdiction of our juvenile court; (4) is not essential to protect the rights and interests of parents; and (5) frustrates our court's ability to meet the needs of children.

It seems that the Court is finally beginning to understand the effect of countless appeals on the real party in interest in juvenile court—the child.

## PRO BONO CORNER

Kurt Stephenson, GAL Volunteer Resource Coordinator

As a quick update, since the last issue of the newsletter the Pro Bono Project has been quite busy. We have had eight requests for pro bono appellate assistance from GAL district offices across North Carolina, just in that short time. Luckily, our friends and supporters in private legal practices have been able to step in effortlessly, each time within a matter of days. Unfortunately, there seems to be a growing trend of seeing GAL cases appealed, with more than 200 open appeals at any one time.

Without the ongoing assistance of pro bono attorneys it is unlikely that the child's voice would be heard in all appellate proceedings. If the recent trend continues, we will likely see additional cases in need of the expertise of our pro bono attorneys in the coming weeks and months.

It would be quite helpful as we attempt to assign appeals to hear from our pro bono attorneys. Are there things about the current assignment process that are frustrating or perhaps unclear? Do you have any recommendations on ways to streamline the process? What additional ways can we help, either at the state office or in district offices, as the appeal proceeds? Also, to assign appeals to attorneys, it is always helpful to know if your schedule is particularly open for an appeal in the near future. Finally, if there are additional attorneys that you think would be interested in providing pro bono assistance on GAL appeals please let us know that as well.

Ideally, our program would never see another appeal, but until this happens, we want to advocate for children in the most effective and efficient manner. You already play a significant role in our efforts but we'd still like to hear from you so please email comments to [kurt.d.stephenson@nccourts.org](mailto:kurt.d.stephenson@nccourts.org).

*Juvenile Orders Cont. from page 2*

### **II. Reciting Testimony or Allegations as Findings of Fact**

It is the job of the trial court judge as fact finder to consider and weigh all competent evidence, and to determine the credibility of witnesses and the weight to give to testimony. The judge must make the ultimate findings of fact that resolves any disputed issues. An order that simply recites evidence presented at trial as its findings of fact will not withstand appellate muster. Instead of "the mother testified that the father was drunk and punched her in the mouth," the order should state "an incident of domestic violence occurred between the parties while the father was under the influence of alcohol," if the court determined the mother's testimony regarding the incident credible.

In this age of computers, it is tempting for drafters to simply "cut & paste" allegations from the petition. Although this practice certainly saves time, "the trial court's findings must consist of more than a recitation of allegations." *In re Anderson*, 151 N.C. App. 94, 564 S.E.2d 599 (2002). It is easy to include an allegation as a finding in an order where there was no evidence presented to support the allegation. Unless stipulated or consented to by the parties, evidence presented must support findings of fact.

### **III. The Incorporation of Documents as Findings of Fact**

With court summaries prepared by social workers and GAL court reports, it is particularly tempting to merely attach the reports to the order and incorporate them by reference. Although these reports are evidence to support findings of fact merely referencing the documents as findings is insufficient. As previously mentioned, the trial judge is the ultimate fact finder and cannot delegate this duty to social workers or guardians ad litem.

As another common practice, particularly in TPR proceedings, the judge will take judicial notice of the underlying file and perhaps incorporate by reference all previous court orders, including the findings of fact, and all submitted reports. Such incorporated documents are competent evidence to support findings of fact, but merely incorporating documents by reference is not of itself a sufficient finding of fact. "Findings of fact must show that the

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## APPELLATE HOLDINGS

(2005 Published Appellate Opinions, Apr. 19-May 17)

**Deana Fleming**, GAL Associate Counsel

For full opinions, please visit this website:

<http://www.aoc.state.nc.us/www/public/coa/opinions/coa2005.htm>

*In re A.D.L. et al.*, COA 03-1333 (4/19/05). The Court affirmed this termination of parental rights despite the fact that the order was entered sixteen days after the mandated thirty and held that the respondent-mother had failed to show prejudice by the delay. Furthermore, legislative intent of the thirty day mandate was for speedy resolution of juvenile custody cases, and reversal based on this untimely filing would further delay permanence. In his concurrence, Judge Tyson stated: "I agree with the majority's holding that a sixteen day delay, standing alone, is insufficient to warrant a reversal where respondent failed to argue or show prejudice. However, our decision does not condone the delay in entering the adjudication and disposition order beyond the time limits in the statutes."

*In re B.D.*, COA 03-1599 (4/19/05). The Court vacated the order terminating parental rights because the order was entered while a prior adjudication was pending on appeal. Although the Court subsequently affirmed the adjudication and disposition order, the issue on appeal was whether the TPR order was based on grounds independent as those challenged by the prior appeal as required by the holding in *In re Stratten*. Because the trial court terminated respondents' rights on grounds supported by the same evidence of the prior appeal, the Court vacated the TPR order.

*In re B.P., et al.*, COA 04-498 (4/19/05). The Court dismissed the appeal of the permanency planning order as to two of the juveniles as interlocutory because respondent's appeal was from a continuation of the permanent plan and not a dispositional change, but reversed the order as to the juvenile for whom the plan had changed. The court reversed because the order did not comply with NCGS §7B-905(a) and because it was delayed in entry.

*In re B.N.H.*, COA 04-846 (5/3/05). The Court dismissed as interlocutory respondent mother's appeal from an initial permanency planning order that ordered the permanent plan to be adoption after reunification efforts were ordered ceased at a prior review hearing. This case is pivotal at limiting the number of orders from which parents can appeal.

trial court has reviewed the evidence presented and through logical reasoning found the facts." *In re J.J.B.*, 161 N.C. App. 540 (2003).

### IV. Specific Findings for Permanency Planning

Finally, it is important to be familiar with the specifics of NCGS §7B-907 that governs permanency planning review hearings. Subsection (b) sets forth six specific criteria that must be considered by the trial court and requires written findings regarding each that is relevant to the case. The Court of Appeals has held that it is reversible error for a trial court to enter a permanency planning order that continues custody with DSS without making proper findings as to the relevant statutory criteria, and that this rule applies even if evidence and submitted reports would support the trial court's determination. See *In re Ledbetter*, 158 NC.App. 281, 580 S.E.2d 392 (2003).

## APPELLATE HOLDINGS (CONT.)

*In re I.S.*, COA 04-1091 (5/3/05). The Court reversed the termination of father's parental rights based upon insufficient findings of fact as to whether the father failed to legitimize I.S.

*In re J.D.S.*, COA04-213 (5/17/05). The Court affirmed this private termination of parental rights action against respondent father holding that failure to state that the petition was not filed to circumvent the UCCJEA does not compel dismissal for lack of subject matter jurisdiction. In addition, Respondent failed to assign error to the court's findings and although argued on appeal, the Court held that the issue was not properly before the Court and reiterated that an general assignment of error that challenges the sufficiency of the evidence to support numerous findings of fact is too broad and not effective. Judge Tyson dissented on this point.

*In re J.J.L., et al.*, COA04-1025 (5/17/05). The Court affirmed the permanency planning order that continued reunification efforts with a concurrent plan of adoption and held that a concurrent plan of reunification and adoption under NCGS § 7B-507(d) does not conflict with the requirement of permanency pursuant to NCGS § 7B-907(a).

*In re T.L.T.*, COA04-1084 (5/17/05). Following the holding of *In re B.D.P.*, The Court reversed the order terminating mother's parental rights because the seven-month delay in entry of the order prejudiced all parties.

## MAINTAINING INDEPENDENCE AS A VOLUNTEER, AN ATTORNEY, AND A PROGRAM

Michelle O'Leary, GAL State Office Law Intern

In cases relating to abuse, neglect and dependency, the courtroom workgroup consists of a district court judge, the county department of social services agency (DSS), the Guardian ad Litem Program (GAL), and the attorneys of respondents. The number of parties in the courtroom at any given time often leads to confusion as to roles. From the outside looking in, it is often natural and actually logical to classify the parties consistently as petitioner, DSS and GAL joined, versus respondent, parent, guardian, custodian or caretaker. In many courtrooms DSS and GAL share a table, share notes, and more often than not, share recommendations. It is understandable as to how someone unfamiliar with the system can see it as an "us" versus "them" system. However, in reality, even though DSS and GAL are not necessarily adversaries, they are not joined; they are two separate parties conducting independent investigations and preparing independent reports. The classification as one party becomes problematic when the view of those outside the workgroup becomes the view of those inside.

Through my experience as a volunteer and an intern at the state office, one thing has become very clear—it is very easy to internalize the categorization of the roles of the parties according to those outside of the system. We, as volunteers and as attorney advocates, work very closely with DSS in their capacity as fact finders, and there is an underlying assumption that both parties are working towards promoting child welfare. However, when we take the agency's findings and recommendations for face value and neglect to scrutinize and question the choices in placement, services and recommendations, we have failed to meet our statutory duty to "...make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs...and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court." N.C. Gen. Stat. § 7B-601(a)(2004).

Since GAL does not have the authority to file a juvenile petition, there is an initial reliance on DSS to make the first move. The GAL Program, although in a sense dependent upon DSS, is in no way constrained by the investigations and recommendations made and actions taken by any department or employee or attorney

thereof. In fact, once a petition has been filed and a guardian appointed, that GAL and attorney advocate have standing to represent the juvenile. *See* N.C. Gen. Stat. § 7B-601(a). The juvenile is our client, and GAL is properly before the court to make motions, file a petition to terminate parental rights and even appeal dispositional orders. *See* N.C. Gen. Stat. § 7B-1103(a)(6)(2004), N.C. Gen. Stat. § 7B-1113(2004). All of this can occur without the assistance of DSS.

Volunteers and attorney advocates must be clear that although cases will be handled most efficiently and promoting the best interests of the juvenile is better facilitated when there is a positive working relationship between the GAL and DSS, their role is to advocate for the best interests of the juvenile or juveniles. The reality of it is that the caseload of DSS often exceeds their resources; GAL should not hesitate to express disagreement or follow instincts because we may have more information on which to base our opinion. Making independent and possibly different findings does not disrespect or discredit the social worker involved. In fact, law mandates doing so if it relates to the juvenile's best interests. Giving too much deference to DSS where we feel we should not has real life implications.

A concrete example is in foster care placement. Nine times out of ten a juvenile's placement with a foster family will be an improvement over the juvenile's previous living conditions. However, it is possible that the placement is not in the best interests of the juvenile for one reason or another. As a volunteer or as an attorney, if you feel as though a foster placement is contrary or even detrimental to the juvenile(s) in your case, it is your duty to express those concerns. It is our hope that DSS would never intentionally place a juvenile into the care of someone who would compromise his or her well being. It is particularly comfortable to trust that a foster family is a safe placement simply because DSS trusts the same, but sometimes it is not. That being said, each GAL has a responsibility to rely on one's own investigation and voice concerns.

Sadly, the number of abuse, neglect and dependency cases is growing. In order to accommodate caseloads and promote and protect the best interests of the juvenile's involved, it is imperative that the GAL Program and each county's DSS work together. Due to the nature of the system, there will always be misconceptions about the role of GAL and DSS from those on the outside. Nonetheless, we must maintain independence on the inside as volunteers, as attorneys and as a program to ensure the protection of the best interests of the juveniles, the heart of the system.