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# GAL LEGAL NEWSLETTER

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Issue No. 5

August 2005 – September 2005

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## Amendments to Rules of Appellate Procedure Effective September 1, 2005

Alexi Gruber, GAL Appellate Coordinator

On August 23, 2005, the NC Supreme Court amended the North Carolina Rules of Appellate Procedure, which take effect on September 1, 2005. Although the changes are relatively minor, you should be aware of them. The 2005 changes affect Rules 13, 14, 15, 28 and 30 of the NCRAP. Below is a listing of the changes that directly affect GAL appeals.

### Rule 13(a)(1)

The amendment to this Rule is two-fold:

1) Rule 13(a)(1) now clearly states that mailing of the printed record by the appellate clerk does not constitute “service” under NCRAP 27(b), so the Appellant does not have the benefit of the additional three (3) days in which to file the Appellant’s brief.

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## Session Laws Amend North Carolina Juvenile Code As of October 1, 2005

Deana Fleming, GAL Associate Counsel

Several amendments to Chapter 7B were passed during the General Assembly’s 2005 Long Session. Four sets of session laws became effective on October 1, 2005 and generally apply to actions or proceedings filed on or after that date.

Session Law 2005-55 (House Bill 277) makes changes to juvenile code where necessary to comport with the trend from a strict investigative response to allegations of neglect to the multiple response system (MRS). The revisions are mostly semantic, changing “investigation” to

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## Spotlight on Federal Legislation: “Kinship Caregiver Support Act”

Deana Fleming, GAL Associate Counsel

Introduced on May 10, 2005 by Senator Hillary Rodham Clinton, the Kinship Caregiver Support Act (S. 985) is legislation to assist children raised and cared for by relatives because their parents are unable to care for them. The bill is currently pending after referral to the Committee on Finance.

The Act consists of four steps: (1) establishes Kinship Navigator Program; (2) establishes a

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If the Appellant's brief is not timely filed, I recommend GAL appellate counsel file a motion to dismiss the appeal with the appellate court based upon the Supreme Court's decision in *Viar* (an electronic copy of a sample motion to dismiss is available from the State GAL Office upon request).

2) The Rule also does away with the 14-day language with respect to reply briefs. The Rule then refers to NCRAP 28(h), which generally provides 14 days for filing a reply brief.

Rule 14(d)

Same change as to reply briefs in Rule 13(a)(1).

Rule 15(g)(2)

Same change as to reply briefs in Rule 13(a)(1).

Rule 28(b)(6)

There are two changes to this Rule, both of which clarify the Appellant's briefing requirements:

1) Rule 28(b)(6) now unequivocally states that arguments must "contain a concise statement of the applicable standard(s) of review for each question presented," and directs the attorney where to locate these statements in the brief.

2) The Rule extends the requirement so that now both the argument and the statement of applicable standard(s) of review be supported by proper authority and citations.

Rule 28(c)

This Rule also has two changes, which track the Rule 28(b)(6) changes:

1) The new language in this Rule follows the change to Rule 28(b)(6) regarding the standard of review, and specifically exempts the appellee from having to include a statement of the standard of review, unless the appellee disagrees with the statement contained in the appellant's brief.

2) The Rule requires the appellee to state the applicable standard of review for any question

"assessment" when referencing the type of response under Article 3, Screening of Abuse and Neglect Complaints. Definitions are added to distinguish a family assessment response under MRS from an investigative assessment response of the traditional model that is still applicable in certain cases.

**Session Law 2005-320** (House Bill 801) allows for statutory preference of juvenile orders over custody proceedings and orders in domestic court under Chapter 50. Custody actions in domestic court are stayed as long as the juvenile court continues to exercise jurisdiction, unless the two proceedings are consolidated. The amendments also call for a new dispositional alternative to allow a civil child custody order be entered via juvenile court. The juvenile order is essentially transformed into a custody order under Chapter 50. If a civil proceeding already exists, the juvenile order is filed in that action and any enforcement or modification of the order is in domestic court. In cases that do not have an open custody case, the juvenile order would be treated as the commencement of a civil child custody action. The statute specifies requisite findings of fact to assure permanency with the child custody order.

**Session Law 2005-399** (House Bill 661) enacts due process protective procedures for individuals placed on the central registry after DSS has substantiated abuse or neglect. Individuals can essentially appeal the decision first to the DSS director; then to the District Attorney; and finally by filing an action in district court. If a determination is made that there was not substantial evidence to support the substantiation, then the individual's name is expunged from the central registry. Prior to the enactment of this legislation, individuals did not have judicial review of DSS substantiations.

**Session Law 2005-398** (House Bill 1150) provides the most amendments to the Juvenile Code that directly impacts GAL representation. One of the most significant changes is the appointment of a

## CALENDAR OF EVENTS

### **New GAL Attorney Training**

This training is specifically designed for new Attorney Advocates. The format is both video replay of the 2004 training and live instruction. Space is limited to allow for a seminar-style training for new attorneys to address issues and answer questions. There is no tuition fee with 6.25 hours (0.5 ethics) of CLE credit. The training is offered at two times & locations:

- (1) Date: Friday, October 21, 2005  
Place: Greenville, NC
- (2) Date: Friday, October 28, 2005  
Place: Newton, NC

### **GAL Appellate Training 2005 Video Replays**

This training is a replay of the live GAL Appellate Training held in May. There is no tuition fee and CLE credit is offered. Two times & locations:

- (1) Date: Thursday, November 17, 2005  
Place: Statesville, NC
- (2) Date: Thursday, December 1, 2005  
Place: Raleigh, NC

### **GAL Appeals by the Numbers**

This training offers a more in depth look at the N.C. Appellate Rules and strategies for GAL appeals. This training is live and will be offered at two times and locations, on the Fridays following the video replays:

- (1) Date: Friday, November 18, 2005  
Place: Statesville, NC
- (2) Date: Friday, December 2, 2005  
Place: Raleigh, NC

### **District Administrators and Program Supervisors**

The legal team looks forward to seeing you at the Statewide Conference in Charlotte Nov. 2<sup>nd</sup> – 3<sup>rd</sup>

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

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Kinship Guardianship Assistance Program; (3) ensures notices to relatives when children enter foster care; and (4) permits states to institute separate licensing standards for relative and non-relative foster parents.

#### I. Kinship Navigator Program

The purpose of the Kinship Navigator Program is to link relative caregivers to support groups, respite care programs, and any special services to incarcerated parents. The Program will also provide information about education, mental health, housing assistance, childcare, child support, legal assistance, and eligibility of federal benefits (Medicaid, TANF). Information will be disseminated via toll free hotlines, resource guides, and other referral services. Partnerships between agencies are encouraged for effectiveness and efficiency in providing services. Federal grants will be given to organizations or agencies to offer the necessary services to connect kinship caregivers to assistance.

#### II. Kinship Guardianship Assistance Program (KinGAP)

The purpose of KinGAP is to give states the option of using federal Title IV-E funds to subsidize guardianship payments to relatives. Although ASFA established appropriate relative placements and legal guardianship as permanency options, unlike adoption, no federal funds are available to assist the relatives financially to assure the child's needs are met. Funds through the KinGAP program would allow states to offer ongoing assistance to families in order that they permanently care for children. To receive the funds, the child must be eligible to receive IV-E foster care funds and have been in an out of home placement for at least 12 months. Further, reunification and adoption have been determined not to be the permanent plan. Relative placement should be in the child's best interest. The child would be automatically eligible for KinGAP payments equal the foster care maintenance payments; non-recurring legal and other expenses associated with obtaining legal guardianship; and, Medicaid eligibility. Individual states could offer additional assistance.

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## AN EVOLVING PRO BONO PROJECT...

**Kurt Stephenson**, Advocacy Enhancement Specialist

By the end of 2004 more than 10,000 North Carolina children were living in foster care and at least one-third were teenagers facing the tremendous threat of having no permanent home and simply aging out of the system unprepared without a long-term support system. Many of these children and others served by the Guardian ad Litem Program also face an increased risk of their case entering a lengthy appellate battle in the courts.

Thanks to a grant from the Governor's Crime Commission, the GAL Program's Pro Bono Project will evolve into the Advocacy Enhancement Project. This new endeavor will work to increase the effectiveness of services provided to all children served by the GAL Program, particularly teens at risk of aging out of the foster care system. Accordingly, this project will continue to recruit private sector attorneys who will provide pro bono services to many of the program's appellate cases. In addition, the project will select two judicial districts as pilot sites to begin training youth living in foster care about their legal, educational, and health care rights, including how they can access resources and how to best prepare for adulthood. Many of these same youth will be encouraged to assist in the development of educational materials that can be used to train adult GAL volunteers, attorneys, judges, and others in the child welfare system in ways to more appropriately work with teens.

Finally, in an additional effort to train volunteers and other adults, the project will develop a curriculum based on adult learning principles and facilitate workshops in limited areas for those who wish to specialize in advocating for adolescents.

presented which the appellee raises (e.g., cross appeal or similar situation).

### Rule 28(h)(4)

The change to this rule provides that the 14 days a party has to file a reply brief when oral argument is set is triggered by service of the notification of oral argument, not mailing.

### APPENDIX A

This appendix now shows time to serve objections to the proposed record on appeal is 30 days (formerly 21 days).

### APPENDIX B

This appendix now makes it clear that, in addition to the Bluebook citation, citations must include parallel cites to the official state reporters (i.e., "N.C. App.," etc.).

### APPENDIX E

Adds language regarding the standard of review, as discussed above with reference to 28(b)(6)

If you have any questions regarding these changes, or any questions about appeals in general, please feel free to call me at (919) 571-4799 or email me at [Alexandra.S.Gruber@nccourts.org](mailto:Alexandra.S.Gruber@nccourts.org).

### *Pro Bono Attorneys Assigned Cases Since the Last Newsletter:*

#### Klein & Freeman, PLLC

Katherine Freeman

#### McDaniel, Anderson & Stephenson, LLP

John Kirby

#### Nelson, Mullins, Riley & Scarborough, LLP

Chris Kindel

#### Parker, Poe, Adams & Bernstein, LLP

Susan Dunathan

#### Poyner & Spruill, LLP

Bryn Wilson

#### Womble, Carlyle, Sandridge & Rice, PLLC

Richard Caira

Christopher Daniel

Matt Healey

Kathy Lange

Wriston Marshburn

*Our Child Clients Thank You!*

## APPELLATE HOLDINGS

(2005 Published Appellate Opinions, Aug. 2 – Sept. 20)

**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.B.D., COA 04-941 (9/6/05).** The TPR order in this case was reversed for insufficient service of process that rendered the order void for lack of subject matter jurisdiction. Respondent father was served with the summons 41 days after its issuance with no extension, endorsement, alias or pluries summons. The outcome is a reminder that compliance with the Rules of Civil Procedure is pertinent in juvenile abuse/neglect cases, including TPR.

**In re C.C. & J.C., COA 04-1448 (9/20/05).** The Court reversed the termination of respondent mother's parental rights holding that insufficient evidence supported the finding of fact that the children were neglected at the time of the termination proceeding, and that she willfully left the children in foster care without making reasonable progress. Evidence presented on the neglect issue was based on the initial juvenile petition and there were no findings that of the mother's willfulness to support the conclusion of law. One preliminary issue decided was that despite J.C.'s suicide, respondent's parental rights survive his death; therefore, the appeal is not moot.

**In re D.R., COA 04-953 (8/2/05).** The order that terminated parental rights was affirmed. The Court held that the 6<sup>th</sup> amendment right to confrontation does not apply in civil juvenile cases; therefore, the holding in *Crawford v. Washington* is inapplicable. (See full article on this case in the GAL Legal Newsletter Issue No. 4 posted on the GAL website under resources for attorneys)

**In re J.A.G., COA 04-1257 (8/16/05).** The adjudication of abuse was affirmed after J.A.G. suffered traumatic brain injury by his father, but neglect and dependency were reversed. Evidence did not show that the mother had neglected her child nor was the child dependent as the mother had given DSS several relative placement option. As a result, the disposition that kept the child in DSS custody was reversed. Concurring opinion sets clarifies that an adjudication is the status of the child—not the parents; therefore, orders that adjudicate a child abused, neglected or dependent “as to” a party should be avoided.

**In re J.B., COA 04-579 (8/2/05).** The Court affirmed the TPR order. Jurisdictional arguments made by respondent mother were overruled. Numerous evidentiary arguments were also overruled including motions to exclude the mother from the courtroom; denial of her motion to interview the child; and admission of prior disposition orders.

### III. Notice to Relatives

As a condition of federal foster care funding, the Act would require that state child welfare agencies provide notice to all grandparents and other relatives of the child recommended by the child's parents or otherwise know within 60 days of removal. The notice must specify that the child has been removed from the parents' custody and explain options available to the relative to participate in the child's placement and care. The notice is required of to all children who enter foster care, regardless of Title IV-E eligibility.

### IV. Separate Foster Licensing Standards

Currently states only receive federal funds for foster care room and board payments for children living with relatives if the relatives are licensed according to the same standards as non-relative foster parents. This Act would give states the option of setting up separate licensing standards for relatives as long as both standards promote child safety and include criminal record checks. This separate licensure takes into consideration the differences in relative and non-relative placements while allowing states to receive federal foster care funds for children living with relatives under either standard. To view the bill, visit <http://thomas.loc.gov/> and put in bill # S985.

**In re L.L., COA 04-783 (8/16/05).** The review order in this case was reversed & remanded for failure to enter the order on appeal for 8 months to the prejudice of all parties except the intervenor-appellees. On remand the trial court must first consider placement with L.L.'s relatives in Virginia and make the necessary statutory findings under 7B-906.

**In re P.L.P. COA 04-1150 (9/6/05).** TPR affirmed. Both parents argued lack of notice of the motion in the cause because there was more than one juvenile petition, but this argument was overruled. Respondent mother argued that the order was not entered timely, but failed to show prejudice. Respondent father was incarcerated on a murder charge and will remain so until the child is 18. The majority found sufficient evidence to support the TPR of the father based on lack of reasonable progress and neglect, but the dissent held that DSS contributed to the lack of relationship with the father and would have reversed his TPR.

**In re T.W. et al., COA 04-1204 (9/6/05).** Respondent mother appealed the termination of her parental rights and the court reversed based on failure to appoint her a GAL after a court-ordered psychological evaluation diagnosed her as bipolar and stated concern that she would be unable to raised her children without assistance. Further the TPR order was entered nearly a year after the hearing.

Rule 17 GAL for respondents. Prior statutory language mandated the appointment of a Rule 17 GAL for respondents upon an allegation of dependency for both juvenile petitions and termination of parental rights. Many orders have been reversed and remanded for failure to follow this statutory mandate; however, it has remained unclear the role of the Rule 17 GAL. Under the new legislation, appointment of a Rule 17 GAL is brought by motion and appointed if the court determines the respondent is incompetent or has a diminished capacity. The statute specifies the role of the Rule 17 GAL in assuring due process.

Another issue that has resulted in reversals on appeal is failure to file timely orders. The Juvenile Code mandates that orders be entered within 30 days; however, many orders are not entered timely. To assure that orders are entered properly, amendments to each statute addressing entry of orders requires the clerk to notice a case for hearing on the entry issue if not entered timely. The hearing is to sort out questions regarding the order, and it is then to be entered within 10 days of that hearing. The goal would be to avoid extra hearings by entering juvenile orders timely.

There is finally a statutory requirement that DSS notify the GAL of its intention to change a child's placement. If emergency circumstances exist, then DSS must notify GAL within 72 hours of the move. In the even the GAL believes the move would not be in the child's best interest, the notification would give GAL time to file a motion for review on the placement issue. [See 7B-905(d)]

Significant changes have been made to the statutes governing appeals. NCGS §7B-1001 specifies the orders from which parties can appeal and will cut down on the number of reviews and permanency planning orders that can be reviewed. Notices of appeal must be filed within 30 days only if the client instructs his attorney to appeal. Changes to disposition pending appeal unfortunately undermine the ruling in *In re R.T.W.* to allow TPR despite an underlying order on appeal. Hopefully amendments can be made in the short session to codify the holding of *R.T.W.* Further, an expediting appeals procedure is being pursued.

## 2005 Session Laws of Interest

**S.L. 2005-121:** Makes solicitation by of a person that the perpetrator believes to be a child a felony requiring sex offender registration.

**S.L. 2005-146:** Amendment to 7B-1111(a)(8) that expands ground for TPR to include that the parent committed murder or voluntary manslaughter of the other parent.

**S.L. 2005-161:** Increases the minimum age for motorboat operation from 12 to 14.

**S.L. 2005-166:** Amends adoption statutes with new section 48-2-207 to allow for hearings to determine the necessity of consent after the petition is filed and the person fails to respond.

**S.L. 2005-254:** Amends recoupment of legal fees for indigents financially able to pay a portion of the value of services. New sections are added under 7B-603 to clarify respondents' duty to pay for services in civil juvenile cases.

**S.L. 2005-282:** Prohibits operation of ATVs if under 8; restricts engine capacity for operators ages 8-12 to less than 70 cc; ages 12-16 less than 90 cc; & requires safety training for all operators.

**S.L. 2005-434:** Entitled the "Methamphetamine Lab Prevention Act of 2005," the legislation calls for control of precursors to methamphetamine that can be purchased as over the counter cold medicine with pseudoephedrine as the active ingredient. Customers are limited to the number of packages per transaction and within a 30-day time period. Limitations on pretrial release for certain offenders and the creation of a Legislative Commission on Methamphetamine Abuse are also included.

## Appellate Reminders

- ✓ Remember that **Motions to Dismiss** an Appeal can be filed in the trial court if the case has not yet been docketed at the Court of Appeals. Contact Alexi for a form motion.
- ✓ Don't forget that the State Office has a **Brief Bank** of appellate briefs filed by DSS, GAL and Parents.