
GAL LEGAL NEWSLETTER

Issue No. 1

December 2004-January 2005

Appointment of Parents' Guardians ad Litem

Although their role is unclear, they must be appointed nonetheless (at least for the near future...)

Deana Fleming

GAL Associate Counsel

We can all agree and understand that when a minor parent is involved in an abuse, neglect or dependency proceeding, that the minor parent is appointed both defense counsel and a guardian ad litem pursuant to Rule 17 of the Rules of Civil Procedure. However, when dependency is alleged due to a parent's incapability resulting from substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition, NCGS § 7B-602(b)(1) requires the appointment of a Rule 17 GAL for the parent in addition to defense counsel. In a termination of parental rights, NCGS § 7B-1101 also requires such an appointment. The Juvenile Code is silent as to the role of this GAL for parents, and unfortunately, Rule 17 gives little more guidance.

continued on page 2

Electronic Filing in North Carolina

Making life easier for the appellate attorney

Alexandra (Alexi) Gruber

GAL Appellate Coordinator

Want to speed up the appeals process? Consider signing up for electronic filing at http://www.ncappellatecourts.org/nc_main_1.nsf. This service will allow you to submit documents electronically to the NC Court of Appeals and Supreme Court at any time of the day or night.

In order to participate in the online filing process, you will need: (1) access to a computer; (2) internet access; (3) adobe acrobat; and (4) access to a scanner for attachments. If you have the prerequisites on hand, head to the site listed above, and apply to participate in online filing. Within a day or two of applying, you will receive a notice confirming your registration. After that, you're good to go!

Once you log into the e-filing website, you will be prompted to type in your user ID and password, and then information regarding the particular case the submission is regarding, names of counsel of record, etc. Finally, you will be prompted to upload your document in pdf format. After you have submitted the document, you will be able to print out a record of your transaction. You should continue to serve all documents on counsel of record by mail, even if filing electronically.

The catch? You must convert your submission

continued on page 3

INSIDE THIS ISSUE

- 1 Appointment of Parents' Guardians ad Litem
- 1 Electronic Filing in North Carolina
- 2 Handling Appeals
- 3 Appellate Kudos
- 4 Pro Bono Corner; Ethics Reminder
- 6 Questions and Answers

What we do know is that the Court of Appeals is reversing TPR's consistently on the basis that dependency has been alleged due to one of the listed conditions, and failure to follow the statute is reversible error due to the statutes' mandatory language. At this point, the prudent practice is to appoint a guardian ad litem for a parent when the initial petition alleges dependency due to the above listed grounds, or if a TPR petition or motion alleges such dependency.

The only guidance the Court of Appeals has given regarding the role of this guardian ad litem is *In re Shepard*, 162 N.C. App. 215, 591 S.E.2d 1 (2004). The Court explained the role as "guardian of procedural due process for that parent, to assist in explaining and executing her rights." If that is the case, then you might ask what is the role of defense counsel? The Court further held that it is permissible for a Rule 17 GAL to testify against the parent regarding parental capacity that ultimately assisted to establish TPR grounds. At this point I would venture to guess that most defense attorneys do not even want their client to talk to their appointed GAL.

To complicate matters more, the State Bar has issued Proposed Ethics Opinion #11 that allows the dual appointment of defense counsel *and* guardian ad litem for the same parent unless and until there is a conflict. This opinion can be found at http://www.ncbar.com/eth_op/propeth.asp (scroll down to #11). This dual appointment may assist the state in fewer fee applications, but does little more to shed light on the issue.

As we are all so keenly aware, nearly all of our cases have some element of substance abuse or mental illness. The appointment of a GAL for parents is cumbersome, unnecessary, and a waste of state funds. Luckily the Juvenile Code Revision Committee of the Court Improvement Project, of which I co-chair, is attempting to tackle this issue head on through revised legislation during the 2005 General Assembly. It is our goal to limit the appointment of GAL for parents since the present statute is over-inclusive. In the meantime, make sure the trial court appoints a GAL for parents when dependency is alleged. For specific cases on this issue, please review the 2004 Case Summaries: <http://www.nccourts.org/Citizens/GAL/ResAtt.asp>

HANDLING APEALS

A Guide for Attorney Advocates

Alexandra (Alexi) Gruber

GAL Appellate Coordinator

GAL now pays its contract attorney advocates for their time handling appeals, or assisting pro bono attorneys who are handling appeals for GAL up to a total of 15 hours per case. In order to receive payment, attorney advocates must follow a few simple steps:

- 1) Send a letter requesting authorization to participate in a particular case on appeal to Jane Volland in the State Office. Letters may be emailed, faxed, or mailed.
- 2) Upon receipt of an authorization letter from the State Office, you are permitted to bill for up to 15 hours of appellate work on that particular case. This work would include settling of the record on appeal and communications with pro bono attorneys, even if you are not going to be drafting the appellate brief.
- 3) Send copies of documents served or received in the appeal such as motions for extensions of time, orders on same, and all briefs filed to Alexi Gruber in the State Office, so that we may update our appeals tracking system. Copies of the record on appeal and transcripts do not need to be sent. Documents may be mailed, emailed or faxed to the State Office. If you have specific questions about which documents to send, please contact Alexi by phone, 919-571-4799, or email, Alexandra.S.Gruber@nccourts.org.
- 4) If a particular case needs more than 15 hours of attorney time, send an additional request for authorization to the State Office with a brief explanation

continued on page 6

APPELLATE UPDATE

Did you know that the GAL State Office is participating as *amicus curiae* in the Supreme Court Case of *In the Matter of R.T.W.*, Case No. 79PA04, which is scheduled for oral argument on February 9, 2005? This case addresses the Court of Appeals' split of authority in the *Stratton* line of cases. Specifically, the Court will address the issue of whether the trial court retains jurisdiction to hear a TPR if an appeal of a prior hearing is pending. We will keep you updated on this important case as it develops.

CALENDAR OF EVENTS

NEW ATTORNEY TRAINING VIDEO REPLAY

PLACE STATESVILLE, NC

DATE FRIDAY, FEBRUARY 11, 2005

THIS PROGRAM IS A VIDEO REPLAY OF THE LIVE PROGRAM HELD IN RALEIGH ON OCTOBER 29, 2004. NEW ATTORNEY TRAINING IS REQUIRED FOR ALL NEW ATTORNEY ADVOCATES, BUT IS ALSO A GREAT WAY FOR SEASONED ATTORNEY ADVOCATES TO GET CLE CREDIT.

NATIONAL CASA CONFERENCE

PLACE ATLANTA, GA

DATES APRIL 16-19, 2005

THIS CONFERENCE WILL COVER A VARIETY OF TOPICS RELEVANT TO ALL COURT APPOINTED CHILD ADVOCATES IN ABUSE AND NEGLECT PROCEEDINGS.

APPELLATE TRAINING FOR ATTORNEYS

PLACE RALEIGH, NC

DATE MAY 13, 2005 (TENTATIVE), TIME TBA

FULL-DAY PROGRAM FOR NEW AND EXPERIENCED ATTORNEYS CURRENTLY HANDLING, OR INTERESTED IN HANDLING GAL APPEALS. CLE CREDIT WILL BE AVAILABLE FOR THIS TRAINING SESSION. TUITION: FREE

Electronic Filing in North Carolina

(Continued from page 1)

to pdf (Acrobat) format, which requires the "full version" of Adobe Acrobat. You must also be able to scan in any attachments for submission in pdf form. Don't have Acrobat? You can send Alexi or Deana your document(s) in Word format, and we can convert them to you and email them back.

Filing electronically can save you a great deal of time and headache, but don't put off filing a document until the last minute if you've never filed electronically before! We recommend trying e-filing early enough that you can still file the "old fashioned" way if you encounter any unforeseen problems with the online system.

APPELLATE KUDOS

(December/January Appeals)

Alexandra (Alexi) Gruber

GAL Appellate Coordinator

Kudos to:

John Kirby, of McDaniel & Anderson, L.L.P., who served as pro bono appellate counsel in *In the Matter of M.K.*, Case No. COA03-1605 (appeal of TPR). The NC Court of Appeals affirmed the case on December 21, 2004. A copy of the Court's opinion can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/031605-1.htm>

Laura Beck, Attorney Advocate for Davidson County, for her work in *In the Matter of D.D.H.*, Case No. COA04-390 (appeal of TPR). The NC Court of Appeals affirmed the case on January 18, 2005. A copy of the Court's opinion can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2005/unpub/040390-1.htm>

continued on page 5

PRO BONO CORNER

Spotlighting the work of Chuck Hollowell

Kurt Stephenson

GAL Volunteer Resource Coordinator

Chuck Hollowell practices in the Raleigh office of Nelson Mullins Riley & Scarborough, LLP and is a stellar example of the increased commitment and involvement we are seeing from not only his firm but also others across the state. As a pro bono attorney, he is committed to the work—he treats our cases as a regular part of his caseload, not a case of any less importance than one with a billable retainer.

Chuck exemplifies the ability of our pro bono attorneys to make a statewide impact with GAL appellate cases. You see, Chuck's first case wasn't in his local community but in District 12, and according to District Administrator Val Haynes his work discredits the common misconception that an attorney should be working in the district to represent the appellate case appropriately. According to Val, he always kept the program in the loop and answered questions promptly: "Chuck handled our case like it had been his from the time the children were taken into protective custody. We believe he demonstrated personal emotional investment in the outcome of our appeal and we will be eternally grateful for his strong effective representation."

Pro bono attorneys are an asset to the GAL program as they allow us to redistribute our current resources with the assurance that the best interests of children will always be represented. We, in the state office, hope to continue recognizing and highlighting the work of our pro bono attorneys in each issue of this newsletter. So, in closing, I hope you will join me in thanking our pro bono attorneys, like Chuck Hollowell, while also utilizing all of our available resources for appeals, which includes sample briefs and other materials in the state office, an appellate training video, and our new GAL Appellate Coordinator, Alexi Gruber.

ETHICS REMINDER

2003 Formal Ethics Opinion 16

Deana Fleming

GAL Associate Counsel

Although this Opinion is written to give instruction to parents' counsel, knowledge of its ruling will surely serve our child clients in cases where the parent disappears. All too often a parent who was gone at the commencement of a case has slipped back into old drug habits or detrimental relationships that take precedent over his or her child. Unfortunately, the parent's attorney is still fighting tooth and nail for the client who is not even present for the hearing.

This Opinion states that an attorney appointed to represent a parent in an abuse, neglect, or dependency proceeding must seek to withdraw if the client disappears without communicating his or her objectives of the representation. Of course, the attorney must use due diligence in attempting to locate the client, but if unsuccessful, make a motion to withdraw. If the motion is denied, the attorney must then refrain from advocating for a particular outcome.

The Opinion is clear that if the client is not present to give instructions regarding objectives or representation, the attorney may not substitute his or her own objectives, even if the facts appear to support a particular position. Further, the attorney does not have a duty to file an appeal.

I feel certain that many defense attorneys and juvenile court judges are unaware of this Formal Ethics Opinion. It may be advantageous to the outcome of a particular proceeding in your continued representation of children's best interests. To access this Opinion, visit the following link:

http://www.ncbar.com/eth_op/ethics_sel.asp?ID=709&LIST=number&BACK='ethics_o.asp'

THE GAL STATE OFFICE LEGAL TEAM IS:

Deana Fleming, Associate Counsel

Deana.K.Fleming@nccourts.org (919) 789-3634

Alexi Gruber, Appellate Coordinator

Alexandra.S.Gruber@nccourts.org (919) 571-4799

Kurt Stephenson, Volunteer Resource Coordinator

Kurt.D.Stephenson@nccourts.org (919) 789-3633

APPELLATE KUDOS

(Continued from page 3)

Victoria Bost, Attorney Advocate for Cabarrus County, for her work in In the Matter of T.H. and T.H., Case No. COA03-1388, which was affirmed on December 7, 2004. A copy of the Court's opinion can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/031388-1.htm>

Joyce Terres, Attorney Advocate for Guildford County, for her work in In re: M.L.B., Case No. COA04-186, which was affirmed on December 7, 2004. A copy of the Court's opinion can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/040186-1.htm>

Patricia Gibbons, Attorney Advocate in Wake County, for her work in In the Matter of F.M.L.W. and F.J.S., Case No. COA04-18, which was affirmed on December 7, 2004. A copy of the Court's opinion can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/040018-1.htm>

George Simpson, IV of Cranfill, Sumner & Hartzog, L.L.P., for his pro bono work in In re: N.A.B., Case No. COA03-1707, which was affirmed on December 7, 2004. A copy of the Court's opinion can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/031707-1.htm>

Paula Greene, Attorney Advocate for Brunswick County, for her work in In the Matter of T.D.C., Case No. COA03-1564, which was affirmed on December 21, 2004. A copy of the Court's opinion can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/031564-1.htm>

Judy Rudolph, Attorney Advocate in Buncombe County, for her work in In the Matter of N.M.B., Case No. COA04-355, which was affirmed on January 4, 2005. A copy of the Court's opinion can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2005/unpub/040355-1.htm>

Lora Greene, Attorney Advocate in Yadkin County, for her work in In the Matter of J.B.C and C.L.C., Case No. COA03-1628, and In the Matter of F.L.R., Case No. COA04-48, affirmed on December 21, 2004 and January 4, 2005, respectively. A copy of the Court's opinions can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/031628-1.htm> and <http://www.aoc.state.nc.us/www/public/coa/opinions/2005/unpub/040048-1.htm>

Michael Tousey, Attorney Advocate in Buncombe County, for his work in In the Matter of E.L., Case No. COA04-13, In re: C.D.M. and J.A.F.D., Case No. COA03-1701, and In the Matter of D.C. and M.L., Case No. COA04-569, all affirmed on December 21, 2004. Copies of the Court's opinions in these cases can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/040013-1.htm>, <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/031701-1.htm>, and <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/040569-1.htm> respectively

Stan Green, of Womble Carlyle Sandridge & Rice, for his pro bono work in In re: R.H., Case No. COA04-486, which was affirmed on December 21, 2004. A copy of the Court's opinion in this case can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/040486-1.htm>

continued on page 6

APPELLATE KUDOS

(Continued from page 5)

Eddie Winstead, III, Attorney Advocate for Harnett County, for his work in In re: L.G., Case No. COA04-456, which was affirmed on December 21, 2004 and In the Matter of T.S., S.S. and L.R., Case No. COA04-638, which was affirmed on January 18, 2005. Copies of the Court's opinions can be found at <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/unpub/040456-1.htm> and <http://www.aoc.state.nc.us/www/public/coa/opinions/2005/unpub/040638-1.htm> respectively

Editor's Note: This list covers appeals found on the AOC Courts website listing of opinions from December, 2004 and January, 2005 in the Court of Appeals and Supreme Court. If you have additional "kudos," big or small, we would love to hear about them and recognize them here!

HANDLING APPEALS

(Continued)

of why approval for additional time is necessary. While we will do our best to accommodate these requests, payment is dependent upon the availability of funding at the state level, and we cannot guarantee that you will be paid for additional hours billed.

- 5) When you have filed the appellate brief, send a copy of the brief, along with a bill for services, to the State Office, attention Sandra Paul.

If you have any questions regarding an appeal, please feel free to contact Alexi Gruber by phone, 919-571-4799, or email, Alexandra.S.Gruber@nccourts.org

QUESTIONS AND ANSWERS

Q: What, exactly, does an appellate coordinator do?

A: The appellate coordinator assists attorneys with appeals, maintains the appeals tracking database, drafts and files amicus curiae briefs on the part of the State GAL Program, and serves as an advocate for an expedited appeals process in North Carolina.

Q: How does the appellate coordinator assist attorneys with appeals?

A: The appellate coordinator has access to Lexis, and can research specific legal issues for appellate advocates. The appellate coordinator can also assist in drafting and filing court documents, including briefs, and can check on the status of authorization requests and payment of attorney bills.

Q: What do I do if a Guardian ad Litem volunteer is served a subpoena to testify in a proceeding outside of abuse/neglect court?

A: You should file a Motion to Quash on the basis of the duty of confidentiality pursuant to NCGS § 7B-601. If the Motion is denied, request that the Judge sign an Order to Disclose Confidential Information specific to the proceeding at hand. If you need a sample Motion and Order, please email Deana.K.Fleming@nccourts.org.

Q: Can we proceed to terminate parental rights of an incarcerated parent?

A: Absolutely. Although "incarceration" is not specifically listed as a ground, the inclusive wording to NCGS § 7B-1111(a)(6) "or any other cause or condition that renders the parent unable or unavailable to parent" that was recently adopted was intended to include incarcerated parents. Other grounds may often be established due to the parent's incarcerated status i.e. abandonment; child still in foster care; failure to pay support, etc.