
GAL LEGAL NEWSLETTER

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Last Order of Business: Minor Changes to the New Expedited Appellate Rules

Alexi Gruber, GAL Appellate Coordinator

On November 3, 2005, Chief Justice Lake of the North Carolina Supreme Court signed an order creating a new, expedited appeals process for 7B juvenile (abuse/neglect/dependency) cases. On January 26, 2006, the former Chief Justice amended the new appellate rule slightly, in part based upon recommendations from the Guardian ad Litem State Office. This article will recap some of the changes to appellate procedures the new rule creates, and will highlight the amendments to the Rule that the Chief Justice ordered before his departure from the Supreme Court on January 31, 2006.

The new Rule 3A of the North Carolina Rules of Appellate Procedure is effective March 1, 2006 and will, in theory, decrease the length of GAL appeals by a year or more. The most important timesaving

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A Reminder about Nonsecure Custody

Deana Fleming, GAL Associate Counsel

Although not seen on a frequent basis, a recurring issue is the authority of the trial court when the proceedings are only at the nonsecure custody stage. Nonsecure custody hearings are not hearings on the merit, but a means to protect due process rights of the parties regarding placement of the child or children. As a result of this specified purpose, the trial court is confined to the statutory provisions. The Court of Appeals has consistently held that the authority of the trial court at this stage is limited to child placement—nonsecure custody may be continued or the child may be returned to the parent pending the adjudication; however, the trial court may not

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Spotlight on Federal Legislation: McKinney- Vento Act & Amendments

Deana Fleming, GAL Associate Counsel

The McKinney-Vento Homeless Assistance Act was originally passed in 1987 to assist people experiencing homelessness, and was amended in December 2001 to give more rights to children, youth and families. Currently introduced in Congress is a bill (H.R. 2695) to amend the Act to protect personally identifying information about victims of domestic violence, dating violence, sexual assault, and stalking. The amendment is called the “Safe Housing Identity

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feature of the new Rule is with respect to the record on appeal and production of the transcript. As of March 1st, transcriptionists will be assigned by the AOC Court Reporting Coordinator and will have 35 days to prepare and deliver transcripts to the Court of Appeals and the parties. The revised Rule 3A then provides that appellants have ten days from receipt of the transcript to prepare and serve the proposed record on parties to the appeal. Objections by opposing counsel are to be submitted within ten days after service of the proposed record. The settled record must then be filed within twenty days after receipt of the transcript, and appellants must file multiple copies of the settled record with the Court of Appeals (eliminating the need for the Court to print copies of the record).

Rule 3A requires that both the party appealing and his/her attorney must sign the notice of appeal. The rule also prohibits trial counsel from withdrawing from the case until the record has been filed with the appellate court. This applies to both counsel for appellants and appellees!

Perhaps most importantly, extensions of time to prepare the transcript, record, and briefs will not be allowed "absent extraordinary circumstances." Given the huge delays in producing the transcript and the record on appeal, this provision represents a giant step forward in expediting permanency for GAL's children.

The rule provides that GAL cases will be given "calendaring priority" in the Court of Appeals and cases will be heard on the record and briefs only without oral argument. It is unclear what this "priority" will mean in terms of decreasing the amount of time it now takes for the appellate courts to rule on GAL appeals. At a minimum, it reflects the Court's awareness of the problems in issuing opinions in 7B cases.

Under Rule 3A, the briefing schedule remains essentially the same as under the current appellate rules: both sides have 30 days in which to draft their briefs. The only change here is that the

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dismiss the juvenile petition at this stage nor can it make a permanent award of custody.

In re Guarante

The case *In re Guarante*, 109 N.C. App. 598, 427 S.E.2d 883 (1993), involved juvenile petitions on five children alleging abuse, neglect and dependency in which DSS obtained a nonsecure custody order after an investigation earlier in the day that revealed an alleged physical injury and exposure to substantial risk of further injury. The nonsecure custody hearing was also held on the same day. After evidence was presented, the judge ordered that the children be returned to the parents and dismissed all of the petitions. DSS appealed and argued that the judge did not have authority to dismiss the petitions at the nonsecure stage. By dismissing the petition, the judge made a determination of the merits of the case without express statutory authority to do so. The Court of Appeals agreed recognizing that preparation for a temporary custody hearing is much different than for an adjudication in which the Rules of Evidence apply. It would have been just as detrimental to the respondents had the trial judge ruled against their position on the merits of the case. Please note that the holding in this case does not change the fact that DSS as petitioner can take a voluntary dismissal of a petition prior to the hearing on the merits.

In the Matter of O.S.

This week the Court of Appeals handed down its decision in *In the Matter of O.S.*, 2006 N.C. LEXIS 269 (Feb. 7, 2006), again addressing the authority of the trial court at the nonsecure custody stage. In this case Union County DSS filed a juvenile petition alleging neglect and dependency after the mother left her child with the family in which she and the child had been staying without any way to contact the respondent mother. The respondent father approached the family and expressed his desire to take custody of the child. The family contacted DSS who in turn, filed the petition and obtained a nonsecure custody order. At the first nonsecure hearing, respondent mother was absent

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CALENDAR OF EVENTS

Supreme Court Oral Arguments

- **Tuesday, February 14th:** *In the Matter of P.L.P* (Buncombe County) involves an incarcerated father. Judge Tyson dissented as to whether the evidence supported the TPR of the father. Attorney Advocate Judy Rudolph represent the child on appeal.
- **Wednesday, February 15th:** *In re J.W. & K.W.* (Harnett County) is essentially a question of whether the evidence supported the TPR. Judge Levinson dissented at the Court of Appeals level on the basis that the evidence did not support the conclusions of law. Attorney Advocate Elizabeth Boone represents the child on appeal.

Improving Outcomes for Older Youth What Judges & Attorneys Should Know

The training and accompanying publication is a combined effort of the National Child Welfare Resource Center for Youth Development and the American Bar Association Center on Children and the Law.

This regional training is offered in three locations for a cost of \$50 if you register before April 1, 2006 and \$100 for registration after that date:

- Friday, April 21, 2006 in Morganton
- Friday, April 28, 2006 in Greensboro
- Friday, May 5 in Kinston

6 Hours CLE credit is requested

For registration materials, please contact Deana via email at Deana.K.Fleming@nccourts.org or Lana Dial with the AOC Court Improvement Project at Lana.T.Dial@nccourts.org.

Exception for the Lives of Domestic Violence Victims Act” or “SHIELD Act.” The amendment recognizes the fact that victims of domestic violence who flee their situations may find themselves in a transient state while securing a permanent, safe residence.

Applications of the McKinney-Vento Act (MVA)

Generally, the MVA allows for children and youth who are “homeless” to receive a free, appropriate education including the removal of obstacles of enrollment, such as residency and record requirements, as well as providing transportation. Under the MVA, homeless children and youth are defined as those who lack a fixed, regular and adequate nighttime residence. It is immaterial whether the student is living with parents or separated from parents. Each school district has a “McKinney-Vento Liason” who is responsible for for facilitating enrollment, transfer, or school stability. While the MVA specifically includes youth “awaiting foster care,” it is the qualifier “awaiting” that may prevent MVA application for the majority of GAL clients.

An Oxymoron: “Permanent” Foster Care?

From a child advocacy standpoint, it is necessary to understand the applicability of the MVA to determine whether it can be used in a particular case to allow a child to at least have educational stability. Clearly it appears that a child placed in a so-called emergency foster placement until a regular placement can be ascertained would invoke the MVA. For example, when DSS takes emergency non-secure custody of a child, the child may be placed temporarily with a foster family that agrees to take such placement on little notice. Once the home study is complete on a relative, the child will be moved. While the child is in the emergency foster placement, MVA kicks in to allow the child to remain in his or her school; however, if the relative is in another school district, the child may need to be enrolled in a different school. Although the relative placement may only last a few months while the

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PRO BONO CORNER:

Kurt Stephenson, Advocacy Enhancement Specialist

If you review the list of pro bono attorneys who have taken cases since our last newsletter you'll notice 18 names! As you might suspect, if we have 18 attorneys taking on cases that also means we have been flooded with appeals over the last couple of months. This is due in part to the seemingly ever-increasing number of appeals filed in our courts throughout the state, but it also speaks to the success of the Guardian ad Litem's Pro Bono Project. What started as a select-few attorneys helping with a small number of appeals has blossomed into a group recognized, by GAL staff and the state's appellate courts, for their passionate and dedicated advocacy on behalf of the best interests of North Carolina's abused and neglected children in nearly 100 appeals each year.

It is difficult to provide a picture of our typical pro bono attorney because they come from such diverse backgrounds. For example, of the 18 folks listed in this issue, 12 are taking their first appeal while 2 attorneys have taken more than 4 appeals for the program. In fact, several of the attorneys listed are handling more than one GAL appeal as we speak. As you might guess, the primary area of practice for these folks is not juvenile law, and while some are partners with decades of experience others have only recently graduated from law school. Of course, the common factors shared by these attorneys provide the keys to the Pro Bono Project's success. Everyone is anxious to participate in the free CLE attorney training sessions we offer, they communicate with our state office and also help guide the local district office through the appellate process, they stay on top of their case actively working to expedite the appeal as much as possible, and they encourage other attorneys to take on Guardian ad Litem appeals.

However, the most important characteristic of our pro bono attorneys is the genuine concern they express for the children involved in these cases. At times, it is nearly impossible to fathom the tragic circumstances more than 16,000 of our state's children endure on a daily basis, but with fervent appellate advocacy these kids are closer to a safe and permanent home.

With all that said, a huge thanks goes out to all of our pro bono attorneys for their continued work. The project has grown in the last five years, but in order to maintain coverage of GAL appeals, particularly as the appellate rules evolve, it will be critical to enlist new attorneys who can assist our program with appeals. So, keep up the stellar work and send any new pro bono attorney referrals to kurt.d.stephenson@nccourts.org or 919-789-3633.

Pro Bono Attorneys Assigned Cases Since the Last Newsletter:

Amanda Volz, Attorney at Law

D.K. Maready, PLLC

Karen Maready

Hunt Law Group

James Hunt

McDaniel, Anderson, & Stephenson, LLP

John Kirby

Nelson, Mullins, Riley & Scarborough, LLP

Catharine Cummer

Steve Martin

Betsy Tucker

Parker, Poe, Adams, & Bernstein, LLP

Jay Butler

Amanda Cooley

Deborah Edney

Will Esser

Leigh Kite

Kristin Poolos

Bruce Thompson, II

Smith, James, Rowlett, & Cohen, LLP

Margaret Rowlett

Womble, Carlyle, Sandridge, & Rice, PLLC

Alison Bost

Stuart Brock

Christopher Daniel

APPELLATE HOLDINGS

(Published Appellate Opinions, 12/6/05- 1/17/06)

Deana Fleming, GAL Associate Counsel

For full opinions, please visit this website:

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

In re C.L.S., COA 05-308, McDowell Co. (12/20/05). Respondent mother's appeal from a permanency planning order was dismissed after the court found the order was not subject to appeal under NCGS § 7B-1001. The order appealed continued custody with DSS and only delineated the permanent plan to be adoption. The order did neither changed the disposition of the child nor changed the status quo relationship between respondent and the child—reunification efforts had previously been ceased.

In re E.T.S., COA 05-82, Guilford Co. (12/20/05). Private TPR was affirmed. Respondent mother was 15 when her child was born. Petitioner custodian obtained custody of the child via an adjudication of dependency in which DSS was granted custody, but at all times, the child remained with petitioner. On appeal respondent argued that the petitioner lacked standing to file the TPR, but this argument was overruled because the child had resided with petitioner for over two years. Respondent argued the TPR should be vacated because she did not have a Rule 17 GAL in the previous case, but the argument was overruled. Judge Tyson dissented based on the theory that the two year custodial period should have been tolled until the mother's majority removed her "disability" since no Rule 17 GAL was appointed.

In re J.A.A. et al., COA 05-105, Buncombe Co. (12/20/05). TPR order was affirmed after certiorari was granted. Minor child died in a group home after the TPR and her sister filed a wrongful death action. The appeal as to the deceased child was not moot because if the wrongful death action succeeds, she could be entitled damages. Mother's argument that she should have had a GAL was overruled. The court conducted an inquiry into the need for a GAL, but even her trial counsel

parents attempt to resolve their issues. A compelling argument can be made on behalf of a child who has been moved from several foster placements and is experiencing difficulty in school or has special needs that are already addressed at the original school. The problem with the MVA is that there is no attachment of funds to assist school districts with transportation. Although as a general rule, the MVA does not consistently apply to the children we represent, it is a resource to remember when school may be the only source of stability for a child. It does not hurt to confer with the local MVA liaison to see whether the application of the MVA can be broadened on behalf of an individual child.

agreed that incapacity was not the issue.

In re L.W., COA 05-192, Person Co. (01/03/06). TPR ordered was reversed and remanded for failure to appoint a Rule 17 GAL to a mother despite no dependency allegation due to the fact that the mother's mental health was such a huge factor in the neglect. As seen in more recent cases on this issue, the court alludes to the trial court having a hearing on this issue as opposed to an automatic appointment.

In re O.S.W., COA 05-466, New Hanover Co. (01/03/06). TPR order was vacated and remanded for failure to enter the order within the statutorily mandated thirty days. The order in this case was over six months old, and the respondent father asserted prejudice because he had to wait to give notice of the appeal while the legal relationship with his son was severed, and the delay prejudiced the child and foster parents who could not proceed with adoption.

THE GAL STATE OFFICE LEGAL TEAM

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but respondent father expressed his desire for placement of the child; however, paternity had never been established. Legal custody and placement authority was continued with DSS. Two subsequent nonsecure custody hearings were held and the mother continually failed to attend. In the meantime, paternity testing confirmed that the putative father was indeed the biological father of the child, and after a positive home study, DSS recommended that the child be placed with the father. At another nonsecure custody hearing, the mother was present. The trial court did not take evidence, but merely reviewed the petition and a DSS report. At the conclusion of the hearing, the trial court made a determination that there was a “reasonable factual basis” to support the allegations and that the court had authority under the UCCJEA to issue a custody order. As a result, the court entered an order that it was in the child’s best interest to be placed in the father’s custody with the mother’s visitation in his discretion. DSS then took a voluntary dismissal of the petition, and the court informed the mother that she would have to file a civil custody action to regain custody.

On appeal the respondent mother argued that the trial court did not have jurisdiction to grant legal custody to the father without an adjudication or disposition of the juvenile petition. Citing to *In re Guarante*, the Court of Appeals agreed with her assertion and held that the trial court lacked jurisdiction and authority to grant the father permanent custody before an adjudication of the petition. Once DSS dismissed the petition, the court no longer had any jurisdiction over the case. Further, by making an order granting permanent custody, the trial court evaluated the merits of the case without ever receiving any direct evidence. Essentially the mother lost custody without any allegations against her even proven. As a result, the custody order was vacated.

Appellate Review of Nonsecure Custody Orders

The new legislation that became effective on October 1, 2005 (House Bill 1150) specifies that nonsecure custody orders are not subject to appellate review [see new NCGS § 7B-1001(a)(4)] despite a change in legal custody. Under the new legislation, conceivably a nonsecure order such as

appellant’s brief is now due 30 days from the date the settled record is filed in the Court of Appeals, whereas in the past, that 30 day period was triggered by the Court of Appeals clerk’s office mailing the record to the parties.

The URL for the website with the amended Rule 3A is:

<http://www.aoc.state.nc.us/www/public/aoc/AmendedRule-3-01-26-06.pdf>

If you have any questions regarding the new expedited appeals procedure, please feel free to call me at (919) 571-4799 or email me at

Nonsecure Custody, Conclusion

the examples in *In re Guarante* and *In the Matter of O.C.* are subject to appellate review if the order “in effect determines the action and prevents a judgment from which appeal might be taken.” [see new NCGS § 7B-1001(a)(2)].

Reasonable Efforts at Nonsecure

NCGS § 7B-507 that governs the requirement that DSS make reasonable efforts to eliminate the need for out of home placement is specifically applicable to nonsecure orders. Interestingly, subsection (b) that governs the cessation of reunification efforts is applicable to nonsecure custody orders. Although it is unlikely that the petitioner will be advocating for the cessation of reasonable efforts so early in a juvenile proceeding, it can certainly be requested and ordered if the evidence supports the necessary findings of fact. Asking that reasonable efforts cease at nonsecure can be an appropriate remedy depending on the facts of a case, particularly in the event of previous adjudications of abuse or neglect or under other egregious circumstances. It is important to remember that the GAL can advocate for such a ruling as early as nonsecure. DSS and parents’ attorneys may have missed the specific provisions of NCGS § 7B-507 that allow such extreme measures—the GAL can remind them.