GAL LEGAL NEWSLETTER

Issue No. 8 February /March 2006

At Long Last: Expedited Appeals for GAL Cases

Alexi Gruber, GAL Appellate Coordinator

It's been a long and rocky road for expedited appeals in abuse and neglect cases, but the new North Carolina Appellate Rule 3A is finally a reality. All notices of appeal filed in GAL cases on or after May 1, 2006, will trigger the fast-track provisions Rule 3A. The end result of the new rule is that we should see the amount of time to conclude an appeal reduced from an average of 18 months to a reasonable 6-month period.

The new appellate procedure should, as discussed above, result in no more than a total of six months between the filing of the notice of appeal and the issuance of an opinion in the matter. The new rule requires the transcript be produced approximately 40 days from the date the notice of appeal is filed. After the transcriptionist delivers the transcript to the parties, the appealing party (appellant) has only 10 days to prepare and serve the proposed record on

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New Appellate Trend for Parents' Rule 17 GAL

Deana Fleming, GAL Associate Counsel

An ever evolving issue on appeal is the appointment of a Guardian ad Litem for a parent pursuant to Rule 17 of the Rules of Civil Procedure ("Rule 17 GAL"). The Court of Appeals interpreted N.C.G.S. §§ 7B-602(b)(1) and 7B-1101 to mandate the appointment of a Rule 17 GAL for a parent when the juvenile petition or TPR petition (or motion) *alleged* the ground of dependency due to incapacity from substance abuse, mental retardation, mental illness, organic brain syndrome or other similar condition. Many TPR orders were reversed on appeal because the dependency ground was alleged, but no Rule 17

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Spotlight on Federal Legislation: The Unaccompanied Alien Child Protection Act

Deana Fleming, GAL Associate Counsel

The Unaccompanied Alien Child Protection Act of 2005 was introduced in the Senate by Dianne Feinstein to provide procedures for immigration officers who find an unaccompanied alien child at a U.S. land border or port of entry. It passed unanimously in the Senate on December 22, 2005 and is currently referred to the House Subcommittee on Immigration, Border Security, and Claims.

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appeal to the parties. The responding party (appellee) then has 10 days to file objections to the proposed record. The appellant then must file three copies of the proposed record with the office of the Clerk of the Court of Appeals (the Court will no longer make its own copies and distribute them to the parties).

The briefing process under the new rule remains essentially the same; each party has 30 days to produce a brief. The main difference in the expedited procedure is that the triggering event for the appealing party's brief is now the filing of the proposed record on appeal with the Court. GAL cases are given "calendaring priority" at the Court, which probably means that the Court will attempt to hear and decide upon GAL cases before hearing other types of cases. The new rule also makes it very clear that extensions of time, at any juncture of an appeal in 7B cases, "will not be allowed absent extraordinary circumstances."

The new Rule 3A may result in fewer appeals of GAL cases in large part because of one provision. That provision, found in section (a) of the rule, requires the appealing party to <u>sign the notice of appeal</u>. If a parent not in contact with his/her attorney, no notice of appeal can be filed. Along with the more stringent timelines for preparing documents on appeal, another disincentive to appeal is that trial counsel cannot withdraw from the case until after the record on appeal is filed. This means that trial counsel (for all parties, including GAL and DSS) will not be relieved of any responsibility for the appeal until the briefing stage.

The new appeals procedure will change the way the GAL State Office will assign attorney advocates and pro bono attorneys are assigned to cases. Starting May 1st, districts will no longer be required to notify the GAL State Office of an appeal. Instead, the State Office will receive notification directly from the AOC court reporting coordinator's office within 3 days of the filing of the notice of appeal. The State Office will then contact the district to inform them of the appeal.

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Rule 17 GAL, continued from page 1

GAL was appointed for the parent. To avoid this technicality, one strategy used by DSS as petitioner was not to proceed to TPR under dependency, but to allege and prove other grounds, often neglect. However, the Court of Appeals began to consider the facts and circumstances of the case to determine whether a Rule 17 GAL was necessary despite the lack of an allegation of dependency. In cases where a respondent's mental instability due to illness or drug use is so intertwined with the child's neglect, the Court of Appeals held that it was reversible error to fail to appoint the respondent a Rule 17 GAL. [See *In re J.D.*, 164 N.C. App. 176, 605 S.E.2d 643, *disc. rev. denied*, 358 N.C. 732, 601 S.E.2d 531 (2004)]

Due to the high number of reversals on appeal and questions regarding the responsibility of the Rule 17 GAL, the North Carolina Legislature amended the governing statutes with Session Law 2005-398 applying to petitions or actions filed on or after October 1, 2005. N.C.G.S. §§ 7B-602(b) was amended and 7B-1101.1 was enacted with identical provisions that now require appointment only upon motion of any party or on the court's own motion if the court determines that there is a reasonable factual basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own best interest. This amendment leaves discretion with the trial court to determine whether a Rule 17 GAL is necessary. Although cases decided by the Court of Appeals are not yet impacted by this new legislation, a new trend in appellate decisions on this issue indicate that perhaps the legislation is already having some impact.

In December 2005, the Court of Appeals affirmed a termination of parental rights order in *In re J.A.A. & S.A.A.*, -- N.C. App. --, 623 S.E.2d 45 (2005) despite respondent mother's argument that she should have been appointed a Rule 17 GAL. The petition did not allege dependency as a ground; however, the trial judge did inquire as to whether any party was requesting a Rule 17 GAL. Her counsel acknowledged that he did not see a

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Alien Child Protection, continued from page 1

Title I of the Act ,entitled "Custody, Release, Family Reunification, and Detention," defines the subject of the Act as children under 18 without lawful immigration status and no parent or legal guardian in the United States who is available to provide care and custody. Prior to repatriation, children have the right to consult with their consulate and with the Office of Refugee Resettlement at the Department of Health and Human Services. The Act specifically includes children who are victims of human trafficking. The only exclusion applies to children charged with or convicted of felonies, or who otherwise threaten national security.

The Act includes a hierarchy of child placement preferences: (1) parents seeking to establish custody; (2) legal guardians seeking to establish custody; (3) adult relatives; (4) individuals or entities designated by the parent or legal guardian that are capable and willing to care for the child's well-being; (5) state-licensed juvenile shelters, group homes, or foster care programs; or (6) qualified adults or entities seeking custody when there is no other likely alternative to long-term detention and family reunification is not a reasonable alternative. Further, the placement of children in adult detention or juvenile delinquent facilities is prohibited unless a child exhibits violent or criminal behavior.

Title II of the Act authorizes the appointment of qualified trained advocate, similar to a guardian ad litem, and requires training be developed and offered with a pilot program for implementation. Unaccompanied children will also be appointed immigration counsel. Attorneys will have reasonable access to the children; be given 24 hours notice of transfers, unless there are compelling circumstances; and be given prompt notice of all immigration matters affecting the child client.

Of note, juvenile court orders declaring a child dependent or placing them in state custody due to abuse, neglect, abandonment or similar grounds shall be binding for purposes of Special Immigrant Juvenile Statuts (SIJS) adjudications in federal immigration courts.

CALENDAR OF EVENTS

Supreme Court Oral Arguments

On Wednesday, April 19, 2006 the North Carolina Supreme Court will consider two termination of parental rights appeals involving violation of statutory timelines by the Department of Social Services. The Court of Appeals did not find prejudice in either case.

- In the Matter of C.L.C. et al. (COA 04-471) (Buncombe Co.)(7/19/05) Judge Tyson dissented. Attorney Advocate Judy Rudolph, will represent the best interests of the children on appeal.
- In the Matter of As.L.G. & Au.R.G. (COA 04-1226) (Wilkes Co.) (10/4/05) Former GAL Associate Counsel Tracie Jordan will represent the best interests of the children 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

For registration, please visit this website: http://www.nccourts.org/Citizens/CPrograms/Improvement/Training/Default.asp

PRO BONO CORNER:

Kurt Stephenson, Advocacy Enhancement Specialist

Well, it has been another record-breaking two-month period for the Pro Bono Project. If you look at the list of pro bono attorneys assigned cases, you'll see sixteen names representing seven different North Carolina law firms. This reveals the ongoing commitment that these attorneys and others continue to make to represent the best interests of children in Guardian ad Litem appellate matters. With the presence of each attorney our program receives hours of dedicated service, not only from the attorney but also from paralegals, legal assistants, and other staff. Furthermore, each hour expended working on an appeal exhibits a significant financial contribution to the Guardian ad Litem Program and our state's children.

Of course, as you might suspect, a greater need for pro bono attorney participation reflects an increased number of GAL appeals. In fact, with more than two months remaining in this fiscal year, we have already increased the number of appeals covered by pro bono attorneys by more than 65%, and overall, the volunteer efforts of private sector attorneys account for nearly one third of all GAL appeals. However, as I write this article, more appeals are being filed throughout the state. In just the last two weeks, we have received five more appeals that need the assistance of pro bono attorneys. In addition, when the appellate rules change, it will certainly benefit the children we all serve, but in all likelihood the number of appeals will remain constant while the time to act will decrease.

With this in mind, our goal is to have any appeal filed before May 1st, assigned before the new rules take effect. As I mentioned, we currently have five appeals that need to be assigned, and so, if you are available to handle an appeal please contact me via email at kurt.d.stephenson@nccourts.org or by telephone at 919-789-3633 for more details.

Pro Bono Attorneys Assigned Cases Since the Last Newsletter:

Hunton & Williams, LLP
Bryan Powell
Ray Starling
Eric Zion

Kilpatrick Stockton, LLP
Susan Boyles
Alan McConnell
Bret Winterle

Manning, Fulton, & Skinner, P.A.
Leanor Hodge

McCullers & Whitaker, PLLC
Joshua Whitaker

Parker, Poe, Adams, & Bernstein, LLP
Deborah Edney
Bobby Sullivan

Smith, Anderson, Blount, Dorsett, Mitchell, & Jernigan, LLP
Mitch Armbruster
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Sarah Buthe
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APPELLATE HOLDINGS

(Published Appellate Opinions, 2/7/06 – 3/21/06)*

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 A.C.F., COA 05-764, Catawba Co. (3/7/06). The termination of parental rights was based on willfully leaving the child in out of home placement for more than 12 months without making reasonable progress in correcting the conditions leading to removal. Initially respondent mother entered a voluntary placement agreement. Subsequently DSS filed a petition requesting nonsecure custody that was granted on November 26, 2002, but filed its motion for TPR on September 11, 2003—short of the requisite 12 months. The Court ruled that the time the child was in a voluntary placement was not "removal" or "placement" under the statute.

In re A.L.A., COA 05-505, Durham Co. (2/7/06). The joint motion by DSS and GAL to dismiss this appeal as interlocutory was granted because the father only appealed from the adjudication order—not the disposition.

In re C.D.A.W., COA 04-1610, Guilford Co. (2/7/06). The termination of parental rights order based on neglect was affirmed. The majority overruled the respondent mother's argument that she should have been appointed a Rule 17 GAL. Judge Tyson dissented on the basis that her drug and mental health issues were so intertwined with the neglect that a Rule 17 GAL was necessary.

In re K.D.L., COA 05-773, Watauga Co. (2/21/06). The Court affirmed this private termination of parental rights. Respondent father was incarcerated in Tennessee and through counsel, made a motion for deposition costs. The motion was denied and affirmed on appeal on the basis of collateral estoppel. Petitioner mother alleged that father subjected the child to domestic violence. A prior domestic order that was not appealed found as fact that the father was not fit for visitation due to domestic violence.

In re L.D.B., COA 05-519, Johnston Co. (3/7/06). Respondent father appealed the initial permanency planning order that maintained legal custody of the child with her mother; denied visitation to respondent; and repeated previous court rulings that reunification efforts cease. The Court dismissed the appeal as interlocutory based on the precedent set in *In re B.N.H.* The key to this line of cases is that the order appealed merely repeats previous directives of the trial court regarding the permanent plan. Although the trial court waived further reviews in this order pursuant to statute, it did not change anything that had previously been ordered. Respondent father should have appealed an earlier order.

In re M.N.C., COA 05-829, Cabarrus Co. (2/21/06). The termination of parental rights order was affirmed. Respondent father argued that the findings of fact were not supported by clear and convincing evidence; that the findings of fact did not support the conclusions of law; and that it was an abuse of discretion to terminate his rights. In a lengthy finding of fact including many subparts, the trial court essentially took judicial notice of the underlying file and its history. Although the judge did not explicitly inform the parties that she was taking judicial notice, the findings of fact indicate judicial notice was taken. Although it is better practice to notice the parties in open court, it is not necessary to do so in order to take judicial notice.

In re O.S., COA 05-492, Union Co. (2/7/06). The order granting the father custody entered at nonsecure was vacated. Respondent mother argued that it was error to transfer custody without an adjudication of the petition. The Court held that the trial court did not have statutory authority to permanently remove custody from respondent prior to the adjudication on the merits.

In re S.W., COA 05-596, Durham Co. (2/7/06). The termination of parental rights order was affirmed. Respondent failed to show prejudice where statutory timelines were not met. Arguments regarding the admissibility of medical records as a business records exception to hearsay and judicial notice of the underlying file were overruled.

** Please note that there were no published juvenile opinions issued on March 21, 2006.*

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need and other parties' counsel agreed. The Court of Appeals found no abuse of discretion of the trial judge, and in fact pointed out that the court appropriately considered the competency of the respondent mother pursuant to Rule 17. Unlike previous juvenile cases on this issue, the Court of Appeals reviewed case law pertinent to Rule 17. A trial judge has a duty to inquire into a litigant's competency in a civil trial in which circumstances are brought to the judge's attention that raises a substantial question as to competency. *Rutledge v. Rutledge,* 10 N.C. App. 427, 432, 179 S.E.2d 163, 166 (1971). The Court also cited Chapter 35A as the procedure for determining incompetency for which the trial judge must comply when conducting a hearing under Rule17. This analysis indicating the need for what is essentially a "Rule 17 hearing" is the first time the Court has analyzed this issue in the context of a juvenile case.

Subsequent opinions handed down in 2006 have followed this hearing analysis. The Court of Appeals reversed a termination of parental rights order in *In the Matter of L.W.*, -- N.C. App. --, 623 S.E.2d 626 (2006) for failure to appoint a Rule 17 GAL for respondent mother. What is significant is the Court's wording of the issue: "The dispostive issue presented on appeal is whether the court committed reversible error by *failing to hold a hearing* to determine mother's entitlement to the appointment of a guardian ad litem at the termination hearing where L.W. was adjudicated neglected." *Id.* at 628. (emphasis added) Despite clear consideration of the mother's mental health issues, the trial court did not even consider the need for a Rule 17 GAL, resulting in reversible error.

The Court of Appeals has expanded its analysis of the issue of a Rule 17 for a parent to determine whether the trial court properly considered competency at a hearing, however informal. This analysis is a departure from previous cases in which only dependency was alleged or where the evidence indicated an inability to parent due to some mental defect. For other cases using this analysis see *In the Matter of K.H. & P.D.D.*, 2006 N.C. App. Lexis 710 (2006) and *In re S.N.H. & L.J.H.*, 2006 N.C. App. Lexis 717 (2006.)

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District administrators will have 5 business days from the date they are notified by the State Office in which to decide if their attorney advocate will handle the appeal or, alternatively, 5 business days to submit an electronic fact memo to Kurt Stephenson requesting a pro bono attorney.

Although the initial turn-around time for the districts will be short, this early notification process will ensure that the attorney handling the appeal (attorney advocate or pro bono attorney) will receive the transcript as soon as it is completed. For trial attorneys, this will mean less hassle in forwarding documents to appellate attorneys (they will no longer receive copies of the transcript and record on appeal). Additionally, with the exception of the GAL case file, district administrators will no longer be responsible for forwarding documents to the State Office after the case has been assigned to the appellate attorney.

We expect that the new GAL procedures for handling appeals will need some "tweaking" as we see how the entire process plays out. In the meantime, if you have any concerns about the State Office procedures, any suggestions as to how we might improve our assignment process, or any problems in implementing the new procedures, please call Kurt or me in the State Office. We'll be happy to work with you to make this transition as easy as possible so you can get back to the work at hand – advocating for North Carolina's abused and neglected children!