
GAL LEGAL NEWSLETTER

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Court of Appeals Reverses TPR Based Upon Failure of Court to Enter a Written Order In A Timely Manner

*The impact of In re L.E.B. & K.T.B., No. COA04-463
(April 5, 2005)*

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On April 5, 2005, the North Carolina Court of Appeals issued its opinion in In the Matter of: L.E.B. & K.T.B., No. COA04-463. At the GAL State Office in Raleigh, this decision has been met with both excitement, as well as trepidation. In the field, L.E.B. has the immediate potential to affect both GAL and DSS attorney caseloads.

The Facts:

L.E.B., age 13, and his sister, K.T.B., age 11,

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Appellate Brief Writing (Part One of Five in Series)

Five Tips from a Clerk's Perspective

Alexi Gruber
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A good appellate brief is essential to ensuring a positive outcome on appeal. Although most judges will generally not rule against a party simply because that party submitted a poor brief, a lackluster brief is a missed opportunity for the appellate attorney to persuade a divided court to rule in favor of his or her client.

After law school, I spent two years as an attorney clerk for the Tennessee Court of Appeals. From my experience as a clerk, I was able to take away a few simple and indispensable rules of appellate brief writing that I would like to share with you. 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.

Tip #1: Write Persuasively

Every word in your brief is an opportunity to persuade the court that your perspective is the correct one. One of the simplest ways to persuade is to use headings to your advantage. For example, look at a typical appellant's heading such as, "The Trial Court Erred In Terminating Appellant's Parental Rights Because Neither The Findings Of Fact Nor The Evidence In The Record Support Such A Ruling." Instead of responding to this heading by writing, "The Trial Court Did Not Err In Terminating Appellant's Parental Rights," consider writing

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Court of Appeals Reverses TPR (cont'd)

both born with heart problems requiring some medical attention, were adjudicated neglected and dependent in 1992 and 1994, respectively. The children's mother was found to be "mentally limited" and "intellectually challenged," and the children's father abuses alcohol. In 1995, 1996, 1998, 1999, 2000 and 2001, the trial court held review hearings in which the court ordered that the children remain in foster care with continued visitation with the parents. Finally, in February of 2001, the trial court ordered DSS to pursue TPR for both children.

Pursuant to the trial court's order, DSS filed TPR petitions and hearings were held in February and March of 2004 on those petitions. On September 26, 2003, more than 180 days after the hearings were held, the trial court entered a written order terminating the parents' rights to the children. Respondent mother appealed the September 26th order and citing N.C. Gen. Stat. §§ 7B-1109(e) and 7B-1110(a), argued that the trial court erred in failing to enter its signed order within the statutorily mandated 30-day period following the TPR hearing.

Despite prior rulings to the contrary that did not find prejudice to warrant reversal, the North Carolina Court of Appeals reversed the trial court's order granting the TPR's. In its opinion, the L.E.B. Court held that failure to enter the order within the statutorily mandated 30-day period was "*highly* prejudicial" to all parties involved, and contrary to the legislative intent behind the 30-day requirement.

Not surprisingly, this decision sent shock waves throughout the juvenile law community. The case presents some daunting challenges to North Carolina's already overburdened juvenile justice system and, specifically, to the GAL program statewide. However, we believe that, if viewed in a broader context, this case represents a victory for North Carolina's children and a step forward in developing an expedited legal process for handling abuse/neglect/dependency cases.

A Positive Perspective:

This case has many positive implications.

Until now, the Court of Appeals has not directly addressed one of GAL's greatest concerns: the lengthy legal process and its effect upon the safe, permanent placement of children. The Court writes that, "Children in the minors' age group traditionally have faced difficulty finding adoptive homes, as many prospective parents seeking to adopt limit their search to infants or younger children." The Court goes on to say that, "The delay of over six months to enter the . . . order terminating respondent-mother's parental rights prejudiced all parties, not just respondent mother."

In her concurring opinion, Judge Timmons-Goodson writes, "In their own respective manners, juveniles, their foster parents, and their adoptive parents are each affected by the trial court's inability to enter an order within the proscribed time period." Both Judge Timmons-Goodson and the majority recognized that the holding in L.E.B. would further delay the permanent placement of the two children who are the subject of the appeal. However, as the majority notes, "[M]any prior cases show that those responsible for timely entry of all orders have been remiss in complying within the thirty days required by the statute, which was amended by the General Assembly to provide prompt resolution in such matters." Timmons-Goodson goes even further in chastising the lack of compliance with the 30-day time limit. She writes:

[I]n the interest of quick and efficient resolution of juvenile cases, this Court has held that where an appeal of a permanency plan is currently pending before us, a subsequent termination of the respondent's parental rights makes the pending appeal moot. . . . By dismissing such pending appeals as "academic" and "moot," we acquiesce in the trial court's decision to unilaterally end the potential delay in disposition caused by the

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APPELLATE UPDATE

Don't forget about the upcoming GAL Appellate Training Scheduled for May 13, 2005—Details below!

We are still awaiting the Supreme Court's ruling in the two cases that hopefully will resolve the Stratten/Hopkins split in the Court of Appeals. We will keep you posted as to the decisions in *In re R.T.W.* and *In re T.D.P.*

CALENDAR OF EVENTS

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 (9:00 AM – 4:00 PM)

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. PLEASE CONTACT ALEXI GRUBER AT ALEXANDRA.S.GRUBER@NCCOURTS.ORG FOR REGISTRATION FORM. ATTENDANCE IS LIMITED!

THE GAL STATE OFFICE LEGAL TEAM IS:

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Appellate Brief Writing (Part One)

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something more persuasive such as, “The Trial Court Properly Terminated Appellant’s Parental Rights Based Upon Clear, Cogent And Convincing Evidence That Appellant Failed To Complete The Terms And Conditions Of Her Case Plan.”

Another way to persuade the court is to support your arguments with case law. This may seem obvious, but I continue to be surprised by parents’ attorneys whose briefs are nearly devoid of citations to relevant case law. In responding to these unsupported briefs, GAL appellate advocates have a terrific opportunity to demonstrate to the court that, not only is our argument the correct one, but it is an argument supported by current, relevant case law. Along these lines, be sure to cite to cases that are published (if they exist). Consider citing both the older, original case that addressed the point of law, as well as a more recent case that addressed the issue. If the brief is addressed to the North Carolina Court of Appeals, consider citing both Supreme Court cases as well as Court of Appeals cases to support your position. Courts generally don’t want to contradict themselves, so it’s always good to remind the judges of what they’ve said in the past.

Finally, it’s important to remember that, as an attorney, Rule 3.3(a)(2) of the Rules of Professional Conduct requires you to “disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.” While the rule requires you to disclose adverse legal authority, the rule only requires disclosure. You are not required to do anything more than cite the authority, although it is certainly helpful if you can eloquently distinguish the case. Along these lines, remember that you do not want to restate your opponent’s position unless doing so is essential to your argument.

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

PRO BONO CORNER

Spotlighting the work of Stuart Brock

By **Kurt Stephenson**, GAL Volunteer Resource Coordinator, **with major contributions by Allison DeLong**, Dist. 12 Program Supervisor

As the Pro Bono Project Coordinator, I often feel like I can never say enough about the work of the attorneys who offer their time and expertise free of charge to our program, or the folks that are simply waiting to take an appellate case when our program needs help. With more than 200 appellate cases in the last year, each with an average of at least 18 months in the courts, we are truly fortunate to have a group of such strong advocates that continues to grow as more attorneys hear about our program's ongoing work. We want to recognize the contributions of all our pro bono attorneys and thanks to Allison DeLong, Program Supervisor for District 12, this month we are highlighting Stuart Brock of Womble, Carlyle, Sandridge, & Rice. When I first asked Allison if she would like to write down some thoughts about Stuart and his work she didn't hesitate. Of course, I knew she wouldn't because the first time I met her she immediately told me about this great pro bono attorney with whom she had recently worked.

So, here is Stuart Brock in Allison's Words:

"Stuart Brock was appointed to represent a minor child, T.D.P., born in October 1999, in an appeal from District 12 in October of 2002. The mother turned the child over to DSS in February 2000, and relinquished her rights to the child in February 2001. At the time of the TPR one year later, the child was about 2 ½ years old, and had been living with her current foster parents since she was approximately 4 months old. The father, who was incarcerated at the time of the TPR, and not scheduled for release from prison until the early part of 2004, appealed the termination of his rights. The GAL supported the TPR, advocating that the child be freed for adoption by the only parents she had known.

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COA Reverses TPR *continued from page 2*

respondent's appeal. But, by allowing the trial court to delay its entry of the order terminating the respondent's parental rights, we do nothing to protect the respondent's right to a quick and speedy resolution when his or her appeal is no longer "academic." **I believe that if, in the interest of efficient case-resolution, this Court allows the trial court to remove an appeal from our purview by issuing an order terminating parental rights, we should at least require that the trial court enter that order in the amount of time mandated by the legislature.** (emphasis added)

The Reality:

L.E.B. will tax already overburdened DSS and GAL resources. We are likely to see an increase in appeals based upon failure to enter a written order within 30-days of a TPR disposition. While the State Office continues to assess the effects of this case statewide, we are working to develop a response to the immediate impact it may have upon your districts. At this time, we are recommending that, for future TPR hearings, GAL attorney advocates do their best to assist in preparation of the order so that it is entered in a timely manner. If you have a case that has already been heard, but no order has yet been entered and it is past the 30-day mark, please contact Deana or Alexi in Raleigh for some suggestions on how to rectify the situation.

Apart from the strain on resources, the biggest downside to the L.E.B. opinion is that it raises several important questions, but provides little or no guidance for juvenile advocates. The first of these questions is, "How long a delay is too long?" Clearly, six months is too long. But should each case be considered based upon its own set of facts for a determination of prejudice, or does the Court's reference to the statutory mandate mean that any delay is unacceptable and

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APPELLATE HOLDINGS

(2005 Published Appellate Opinions, Feb. 1st – Apr. 5th)

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 B.M. et al., COA 04-455 (2/1/05). The Court reversed and remanded this termination of parental rights for failure to appoint a Rule 17 guardian ad litem for the parents where DSS alleged dependency as a ground. The mother's mental illness and the father's mental retardation were heavy factors that led to DSS custody.

In re J.L.S., COA 04-818 (3/1/05). The Court reversed this private termination of parental rights proceeding in which the trial court failed to appoint a guardian ad litem pursuant to NCGS § 7B-1108 to represent the child's best interest where the respondent father filed an answer denying material allegations the day of the hearing.

In re V.L.B., COA 04-219 (3/1/05). The Court affirmed this termination of parental rights and held that there was clear and convincing evidence to support the termination based on NCGS § 7B-1111(a)(9). The parents rights to other children had been involuntarily terminated in Michigan, and although the parents showed some progress that the trial court consider, the progress was insufficient and they lacked the ability to establish a safe home for the child.

In re M.J.G., COA 04-369 (3/1/05). The Court affirmed the adjudication of neglect and disposition order that ceased reunification efforts. Respondent mother's other daughter had been adjudicated abused and neglected prior to M.J.G.'s birth, and the mother has a history of drug use including a positive toxicology screen at the child's birth. Although the evidence did not support some findings of fact, the Court held there was sufficient evidence for an adjudication of neglect. Further, it was appropriate under NCGS § 7B-901 that the court based its order on the DSS and GAL reports. Dispositions are informal and the trial court may consider any submitted reports.

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merits reversal? Another unanswered question is, "To what extent does the holding in L.E.B. have an impact upon other types of juvenile hearings." And, similarly, "What is the effect of a long delay between adjudicatory and dispositional hearings?" Perhaps the North Carolina Supreme Court will address some of these issues or, perhaps some of the proposed statutory changes to the juvenile code will render at least some of these questions moot. In the meantime, please feel free to consult members of the GAL State Office legal team with any questions or concerns you may have about the impact of this challenging ruling.

APPELLATE HOLDINGS (CONT.)

In re D.A. et al., COA 04-604 (3/15/05). The Court vacated and remanded the order terminating respondent mother's rights due to the fact that the notice of motion to terminate parental rights was not sufficient pursuant to NCGS 7B-1106.1 that requires six specific provisions. The notice in this case only met one provision—the name of the minor juvenile.

In re L.E.B. & K.T.B., COA 04-463 (4/5/05).
PLEASE SEE HEADLINE ARTICLE, PAGE 1

In re P.M., COA 04-346 (4/5/05). The Court affirmed the trial court's finding that P.M. was neglected, but reversed and remanded the part of the adjudication of dependency because the trial court did not address whether appropriate alternative childcare arrangements were available. The definition of dependency has two prongs: (1) a parent's ability to provide care or supervision; and (2) the parent's availability to alternative child care arrangements that are appropriate to meet the child's needs.

NEW ATTORNEY MATERIALS ON THE WEB

<http://www.nccourts.org/Citizens/GAL/ResAtt.asp>

- Check out the prior Newsletter if you missed it the first time.
- **Please note the 2004 Case Summaries**—hopefully you will find the summaries and the accompanying index to be a valuable resource to find that particular case when you "know there was this case from last year that held _____," but do not have the time to research the issue because you are in the middle of a hearing.

PRO BONO CORNER Cont. from page 4

As a GAL Pro Bono Appeal Attorney, Stuart Brock has consistently demonstrated himself to be a diligent professional who truly is an expert legal practitioner. He navigated the challenging course presented by the issues in this appeal, he demonstrated humor, expertise and determination to advocate for this child in the COA. He was never too busy to promptly respond to numerous emails and phone calls concerning the case status and developments. Mr. Brock was always accessible, patiently and clearly explaining every aspect of the appeals process. He was always willing to listen to the opinions of the GAL, as well as offering patient reassurances for the frustrations experienced as the case traveled through the lengthy appeals process. No question was ever too small for him to give his undivided attention to the matter.”

“Mr. Brock’s legal staff also demonstrates their professional investment in the case through their diligent work to maintain the case documents, respond to inquiries in a timely and courteous manner, and insure that the GAL was informed of every development in the case. Mr. Brock consistently demonstrated patience and grace, even when faced with the challenges of dealing with the diverse personalities involved in the case. His extensive knowledge of the law and its application has proven to be key this appeal’s success, making a vast impact on the life of this young child.”

This case was heard by the COA, at which time they upheld the lower court’s ruling, with one dissent, which transitioned the case forward to being heard, with oral arguments, at the NC Supreme Court. This matter was then heard before the NC Supreme Court in March 2005. Given the fact that the father was incarcerated at the time of the termination hearing, significant issues include what amount of support is reasonable based on meager prison pay, and what kind of contact is enough to be a parent.

As a follow up. . .

Although Allison desperately wanted to attend the oral argument, she was unable to be there due to a case in District 12 for which she needed to be present. However, those of us from the State Office who attended the argument can say wholeheartedly that Stuart fervently represented the child’s best interests. Of course, this was not Stuart’s first time in the NC Supreme Court on behalf of the Guardian ad Litem Program. During his years of service, he has already successfully argued another case to help our program secure a safe and permanent home for three other children.

Due to the nature of the statewide Pro Bono Project, I rarely get to meet the attorneys in person who so willingly offer their time and service to our program. However, I believe you can learn a lot about a person from brief telephone conversations or emails. Stuart, like so many of our pro bono attorneys, never loses sight of the child at the center of the case. Every time I had the opportunity to correspond with Stuart he always referenced the child by name and expressed his desire to successfully get the case through the appellate process so the child could at last be officially adopted into the family of a nearly five year foster care placement.

I believe Stuart’s contributions, and those of the North Carolina Guardian ad Litem Program’s similarly-minded pro bono attorneys, exemplify the importance of the Pro Bono Project and our ongoing efforts to build additional relationships with attorneys from the private sector and law firms across the state. So, if you or others you know are interested in advocating for a child’s best interests in an appellate case, please contact Kurt Stephenson at 919-789-3633 or at kurt.d.stephenson@nccourts.org.

The Rest of the Story... The Supreme Court affirmed the majority opinion of the Court of Appeals and upheld the termination in T.D.P. <http://www.aoc.state.nc.us/www/public/sc/opinions/2005/310-04-1.htm> **Thanks. Stuart!**