
GAL LEGAL NEWSLETTER

Issue No. 4

June 2005 – July 2005

Supreme Court Holds That Trial Courts Have Jurisdiction to Proceed to TPR Despite Prior Pending Appeals

In re R.T.W., No. 417PA04 (July 1, 2005)

Alexi Gruber, GAL Appellate Coordinator

On Friday, July 1, 2005, the Supreme Court handed down its opinion in *In the matter of R.T.W.*, which resolves the Court of Appeals' split in the *Stratton/Hopkins* line of cases. In its unanimous opinion, the North Carolina Supreme Court held that jurisdiction does exist to proceed with a termination of parental rights hearing even if an appeal of a prior order in the case is pending. The end result of both of this landmark ruling is that there is no longer a need to wait until a prior appeal has been completed before the petition to terminate parental rights is filed!

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Court of Appeals Clarifies Sixth Amendment Right to Confrontation Inapplicable in Civil Abuse, Neglect & Dependency Cases

In re D.R., No. COA04-953 (August 2, 2005)

Deana Fleming, GAL Associate Counsel

The Court of Appeals published the opinion *In the matter of D.R.* on August 2, 2005 and specifically held that the Sixth Amendment right to confrontation does not apply in civil juvenile abuse, neglect and dependency proceedings. Although there was already a strong argument that

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Appellate Brief Writing (The Conclusion of Three Part Series)

Five Tips from a Clerk's Perspective

Alexi Gruber, GAL Appellate Coordinator

This is the third and last in a series of articles on improving brief writing, written from my perspective as a former attorney clerk on the Tennessee Court of Appeals. As always, my disclaimer: 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.

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The *R.T.W.* Court recognized that requiring the trial court to hold off on termination proceedings while an earlier order in the case is on appeal “could result in protracted custody proceedings that leave the legal relationship between parent and child unresolved and the child in legal limbo.” This, the Court writes, “would thwart the legislature’s wish that children be placed ‘in . . . safe, permanent homes[s] within a reasonable amount of time.’” The Supreme Court goes on to write that, “Parents’ fundamental right to control their children at some point gives way to the state’s interest in the welfare of the child.”

Notably, the Supreme Court writes that, “[t]he termination order necessarily renders the pending appeal [on a custody order] moot.” This sentence, found in the last paragraph of the opinion, means that once the TPR order is entered (i.e., reduced to writing and file-stamped by the clerk of court), GAL and/or DSS attorneys can move to dismiss a pending (pre-TPR) appeal. Simply filing a petition for TPR, however, does not moot the underlying appeal. Until the order is actually entered in the district court, GAL and DSS attorneys must continue to defend any prior appeals filed until such time that a motion to dismiss is proper.

Practice Note: Motions to dismiss appeals may be filed in the trial court or in the Court of Appeals, depending upon whether the appeal has been docketed in the Court of Appeals. Surprisingly, many district court judges are not aware that they have jurisdiction over the appeal until such time as the record on appeal is filed in the appellate court. The GAL State Office has a form motion to dismiss that cites the applicable jurisdictional case law. If you would like an electronic copy of the motion, please contact me at: Alexandra.S.Gruber@nccourts.org.

The Supreme Court, noting that the Court’s opinion “does not prejudice the rights of parents,” and citing N.C.G.S. § 7B-1113, writes that parents who believe “the trial court improperly relied upon a custody order during termination proceedings is free to raise the issue in an appeal of the order

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a respondent to a juvenile petition did not have the right to confront his or her accuser, the issue was a case of first impression for North Carolina appellate courts since the United States Supreme Court’s ruling in *Crawford v. Washington*, 541 U.S. 36 (2004).

Crawford v. Washington

Crawford was a criminal case in which the defendant was tried for assault and attempted murder. The facts of the case involve the defendant and his wife going to the victim’s apartment because of an earlier incident in which the wife asserted the victim attempted to rape her. A fight ensued in which the victim was stabbed in the torso and the defendant had a cut on his hand. During police interrogation, the defendant’s account of the fight indicated self-defense. His wife generally corroborated the story, but somehow shed some doubt on the validity of the self-defense claim. At the trial, the defendant claimed self-defense and his wife did not testify due to the marital privilege. The privilege barred the testimony, but did not extend to hearsay exceptions. The State wanted to introduce a recorded statement that his wife had made during the police interrogation under the hearsay exception of statement against penal interest. Over the defendant’s objection that the hearsay statement violated his right to confrontation, the trial court allowed the recording and the defendant was found guilty.

The issue before the Supreme Court was whether the wife’s statements violated the confrontation clause that provides “in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.” The Sixth Amendment disallows testimonial statements of witnesses who do not appear at trial unless the defendant is unavailable for trial *and* has had the opportunity for prior cross-examination. The Supreme Court held that the statements were introduced in violation of the Sixth Amendment and reversed the prior court rulings.

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APPELLATE UPDATE

As a reminder, there is an appellate **Brief Bank** at the GAL State Office. Please feel free to contact Alexi to review a sample GAL, DSS, or parent's brief on a particular issue.

CALENDAR OF EVENTS

STATE OF THE ART ADVOCACY FOR CHILDREN, YOUTH AND FAMILIES

28TH NATIONAL CHILDREN'S LAW CONFERENCE OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

Conference is comprised of General Sessions and Workshops along four tracks: (1) Abuse/Neglect; (2) Juvenile Justice; (3) Family Law; (4) Policy Advocacy

PLACE: RENAISSANCE HOLLYWOOD HOTEL, LOS ANGELES, CA

DATE: THURSDAY, AUGUST 25TH – SUNDAY, AUGUST 28TH

TUITION: \$325 NACC MEMBERS/\$425 NON-MEMBER (BY 7/25)
\$350/\$450 FOR REGISTRATION AFTER 7/25

Visit www.NACCchildlaw.org for more information

GAL New Attorney Training

Place: TBA

Date: Fall 2005 (Specific dates TBA)

Appeals by the Numbers

Place: Statesville, NC

Date: Friday, September 30, 2005 (tent.)

Place: Raleigh, NC

Date: Friday, October 14, 2005 (tent.)

GAL Appellate Training, Video Replay

Place: Statesville, NC

Date: Thursday, September 29, 2005 (tent.)

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Rule #4: Watch Your Formatting

First and foremost, make sure your brief conforms to the requirements of N.C.R.App.P. 28. More specifically, review Rule 28(j) regarding page limitations and font. Following the appellate shows you have respect the court. If in doubt about formatting, review the appendices to the Appellate Rules.

Use headings and subheadings to define sections of your brief. This will make your arguments easier to follow. In many cases, you may be responding to a brief that has little or no organization. By organizing your brief into clear subheadings, you will make the brief easier to read. One caveat: too much of a good thing isn't a good thing anymore. Don't over subdivide your brief. As a general rule of thumb, if you can't write two or more paragraphs under a particular subheading, there should probably not be a subheading there.

Rule #5 Proofread, Proofread, Proofread!

In my opinion, you cannot proofread a document too many times. Sloppy proofing makes your client look bad, and shows disrespect for the court. I recommend reading through the final draft of a brief two or three times. Then read the brief out loud (you'd be surprised what mistakes you will catch when you hear yourself reading the text, as opposed to reading it silently). Try to have at least one other person read through the brief to check for mistakes. The State Office legal team is also available, if you'd like us to review a brief before filing. Just email it to us in an MS Word file.

Don't rely on computer spell-checkers to do the proofreading for you! One of my law school professors told our class the story of a law school applicant who wrote in his personal essay, "I have attention *defecate* syndrome," which led to some wild speculation among the law students as to what the applicant had for brains. My favorite spell-check story from clerking was a brief in which the appellant meant to write that the defendant had "aided and abetted the commission of an injustice." Unfortunately, the spell checker quietly replaced the phrase with "rating and bedding the commission of an injustice." I'm not even going to try to fathom what that might mean!

Which leads me to another point regarding proofreading. All of us, at some point, use existing work we have done on similar cases and "cut and paste" portions of a document into our briefs. This can be a

PRO BONO CORNER

Kurt Stephenson, GAL Volunteer Resource Coordinator

Since our last newsletter the Guardian ad Litem Program's Pro Bono Project has been quite busy, and fortunately, our friends from the private sector have been amazingly helpful. Attorneys who have been offering their expertise to our program for some time took on a number of cases, and as always, we are thankful for their continued support. However, to show you how busy we've been, ten attorneys took on their first Guardian ad Litem appeal in just the last 8 weeks. As a small recognition of our newest contributors we have listed their names and the name of their employing firm below.

As you can see, we are fortunate to have broad support from the legal community, and thanks to the contributions of these attorneys and others affiliated with the Pro Bono Project, we guarantee that children's best interests are heard at the appellate level. If you cross paths with the folks below I hope you will join me in thanking them for their recent assistance, and as you see others in your legal practice that might be interested in this work, I hope you will encourage them to contact me at 919-789-3633 or kurt.d.stephenson@nccouts.org.

A SPECIAL THANK YOU TO:

Elizabeth A. Stephenson, Attorney at Law

Elizabeth Stephenson

Manning, Fulton & Skinner, P.A.

Leonor Hodge

Nelson, Mullins, Riley & Scarbourght, LLP

Chris Thomas

Poyner & Spruill, LLP

Bryn Wilson

Smith, Anderson, Blount, Dorsett, Mitchell &

Jernigan, LLP

Martin Brinkley

Womble, Carlyle, Sandridge & Rice, PLLC

Lewis Rowell

Matt Healey

Eric Zion

Christopher Daniel

Betsy Tucker

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terminating parental rights.” This allows parents to contest the validity of an order changing custody that may have been the basis of a now mooted, prior appeal.

As always, if you have any questions about the applicability of this opinion to your cases, please feel free to contact me at 919-571-4799 or Alexandra.S.Gruber@nccourts.org

D.R.. continued from page 2

In re D.R.

This case involved the appeal of a termination of parental rights order by both parents. Due to recurring issues of inappropriate discipline, domestic violence, substance abuse, and unstable living conditions, D.R. was adjudicated neglected. Initially D.R. was placed with his paternal grandmother; however, the placement fell through due to serious mental health and behavioral problems. While in foster care, inappropriate sexual discussions and behavior were reported after D.R. told his foster parents that his parents had involved him in sexual activity. Although DSS subsequently filed an abuse petition, it was ultimately dismissed without prejudice. The parents were criminally charged with several felonies as a result of the foster parents' report. Rights were terminated on the following grounds: neglect; abuse; and willful abandonment. Respondents argued that it was error to admit statements made by the juvenile through the testimony of social workers, foster parent, and psychologists because it was a violation of the Sixth Amendment's confrontation clause. They asserted that the testimony violated their Sixth Amendment rights because they were not given the opportunity to confront and cross-examine D.R.

The Court of Appeals overruled this argument and specifically held that the Sixth Amendment is inapplicable because the case is a civil action—not criminal. By its own terminology, the Sixth Amendment applies to criminal proceedings as held by the North Carolina Supreme Court in *State v. Adams*, 345 N.C. 745 (1997). Further, there is juvenile precedent that a termination of parental rights is civil rather than criminal. [See *In re Faircloth*, 153 N.C. App. 565 (2002); *In re Murphy*, 105 N.C. App. 651 (1992); and *In re Barkley*, 61 N.C. App. 267 (1983)]

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APPELLATE HOLDINGS

(2005 Published Appellate Opinions, June 7-July 19)

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.E. & J.E., COA 04-406 (7/19/05). The majority affirmed the adjudication of neglect due to the father failing to comply with sex offender treatment ordered as a condition of probation for case involving a third party. Judge Tyson dissented as to the evidence of neglect.

In re C.B., COA 04-1166 (7/5/05). Adjudication order finding neglect and dependency was reversed and remanded for failure to appoint a GAL for the mother who had clear mental health issues contributing to the grounds.

In re C.E.L., COA 04-1349 (7/19/05). The PPH order that awarded guardianship was affirmed. The case involved a simultaneous Chapter 50 custody action, but the Court overruled a res judicata argument due to the evolving nature of best interests and permanent plans for the child.

In re C.J.B. & M.G.B., COA 04-992 (6/21/05). TPR order entered five months after the hearing was reversed and remanded for failure to follow statutory 30-day mandate. A separate concurrence makes clear that the delay is not per se prejudicial—parties must still show prejudice for reversal.

In re C.L.C. et al., COA 04-471 (7/19/05). The Court affirmed the TPR order and overruled the mother's argument that repeated failure to abide by statutory timelines deprived the trial court of jurisdiction.

In re D.D.Y., COA 04-990 (7/5/05). Adjudication of dependency order reversed and remanded for failure to appoint a GAL for mentally ill mother.

In re D.J.D. et al., COA 04-955 (7/5/05). TPR order affirmed as to incarcerated father due to his overall failure to communicate with his children and lack of relationship.

In re D.M., COA 04-484 (7/5/05). The majority affirmed this TPR as to the failure for failure to make reasonable progress on DV issues for not completing the DV program. The dissent found substantial compliance with the case plan.

In re K.C.G. & J.G., COA 04-902 (7/19/05). The Court affirmed a non-interference order, but remanded the temporary order granting custody to the father because no petition was filed to grant the trial court jurisdiction.

In re K.R.S., COA 04-1381 (6/7/05). The Court reversed and remanded the TPR order for failure to appoint a GAL for the mother because dependency was alleged as a ground and drug abuse and mental illness were ongoing issues.

In re L.M.C., COA 04-912 (6/7/05). The Court reversed and remanded the PPH order that granted guardianship of the child to the present caretakers for failure to appoint a GAL although mental illness was the cause of dependency.

In re N.B., 168A04 (7/1/05). See front page article. The Supreme Court affirmed the COA that the underlying appeal was moot due to the subsequent entry of TPR.

huge timesaver, but you must be very careful to be sure you haven't cut and pasted too much.

The most egregious case of haphazard cutting and pasting I saw as a clerk was a case in which a prisoner, *pro se*, filed a complaint alleging constitutional violations pursuant to 42 U.S.C. § 1983. The trial court dismissed the complaint for failure to state a claim. In its brief, the appellee corrections facility incorrectly argued that the "judgment of the trial court" should be upheld if supported by any "competent, credible evidence."

Even the most inexperienced attorney knows that the competency and credibility of evidence has nothing to do with the dismissal of a complaint for failure to state a claim. It seemed pretty clear to me, in reading the brief, that the language regarding upholding the judgment of a trial court was part of another, earlier brief, which the corrections facility had reworked. This "piece" of the old brief had been left at the end of the new brief, and now made no sense at all. In its opinion, the court made a point of noting what it felt was a "significant error" on the part of the corrections facility. This careless mistake is now a permanent part of Tennessee case law, and I hope the attorney who drafted the brief is a bit more careful now.

Finally, with respect to proofreading, always check and double-check your citations. I can't tell you how

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Appellate Holdings (Cont'd)

In re O.C. & O.B., COA 04-923 (7/19/05). TPR order affirmed despite the mother's argument for a GAL due to substance abuse. The underlying adjudication was a consent dependency order and the mother argued she should have had a GAL at the earlier proceeding. The Court declined to expand its holdings to include the underlying proceeding.

In re R.A.H., COA 04-965 (7/5/05). TPR order reversed and remanded for failure to appoint a GAL for the child. Although an attorney advocate represented the child at trial, there was no independent investigation as to the child.

In re R.T.W., 417PA04 (7/1/05). See front page article. The Supreme Court held that the trial court has jurisdiction of a TPR despite the appeal of an underlying order.

In re T.K. et al., COA 04-196 (6/21/05). The majority affirmed the PPH order that granted guardianship of the 3 older children to a caretaker, but continued reunification efforts as to the youngest. The dissent found that the order was essentially a TPR because there was no visitation specified.

In re Z.T.B., COA 04-238 (6/7/05). Private TPR order reversed for failure to comply with statutory mandate of attaching any existing orders of custody or guardianship.

Another State's Interpretation

In some ways the holding in *D.R.* seems almost “a given” due to the Confrontation Clause’s applicability to criminal actions. However, it is noteworthy that other states have differed in their interpretation of *Crawford* in the context of juvenile abuse, neglect and dependency proceedings. In *A.G.G. v. Commonwealth of Kentucky, Cabinet for Health and Family Services*, 2005 Ky. App. LEXIS 163 (July 22, 2005), the Kentucky Court of Appeals held that in a termination of parental rights proceeding, a child’s statements obtained through a counselor during a sexual abuse assessment and therapy sessions were inadmissible testimonial evidence under *Crawford* since the child did not testify at trial and there was no prior opportunity for cross-examination. In determining that the holding in *Crawford* did apply to this termination proceeding, the Kentucky Court of Appeals did not address the issue of whether the proceeding was criminal in nature. Instead, the Court relied on a prior holding that in termination of parental rights proceedings, fundamental fairness includes the right to confrontation under Kentucky law. [See *G.E.Y. v. Cabinet for Human Resources*, 701 S.W.2d 713 (Ky. App. 1985)]. That particular case relied on the precedent set in *Santosky v. Kramer*, 455 U.S. 745 (1982), that a termination of parental rights proceeding must provide parents with fundamentally fair procedures due to the liberty interest of essentially being a parent. Absent the necessity to follow prior caselaw that specifically includes confrontation as part of parents’ due process rights, perhaps the Kentucky Court of Appeals would have reached a different result.

Our Child Clients in Criminal Court

The holding in *Crawford* does have an effect on some of our child clients if the perpetrator is charged criminally. The question turns on whether the statements the child made are “testimonial” in nature. For instance, if the statements were made to a police officer

interviewing a child as part of an investigation, then the child victim would likely have to testify against the perpetrator, unless the child was cross-examined prior to trial. It is possible that statements can be admitted through an established hearsay exception; however, first hand knowledge and testimony can be required in order to obtain a conviction. In these cases in which the child must testify, it is preferred that the child be permitted to testify outside the presence of the perpetrator via closed circuit television. *Crawford* does not affect the validity of such protective measures.

Brief Writing, continued from page 5

many times the bluebook cites in appellate briefs I read were so garbled (or just outright incorrect) that I could not locate the case to which the writer was citing. This was frustrating for me, as a clerk. More importantly, when I could not locate a case by citation or caption, it meant that my boss, the judge, could not rely on that case in formulating his opinion. The format of the cite need not be perfect (we all make mistakes in proper blue book formatting), but if the numeric citation is incorrect, the citation is essentially useless. If you have access to electronic databases such as Lexis or Westlaw, run your citations through their “cite checker” software. If you don’t have access to a database, feel free to contact the State Office legal staff, and we can arrange to run the cite check for you.

Conclusion

Keep it simple, clean, and free of mistakes, and your brief will reflect your professionalism and respect for the court. Please feel free to send me your briefs if you’d like a “second opinion” or even a second set of eyes to check for mistakes. Advocacy for our children doesn’t begin and end in the trial court – we need to fight with the same commitment on appeals.

Please Welcome our New Attorney Advocates

James Cummings, Carteret County
Walter Pence III, Pamlico County
Tom McNamara, Duplin County
Millicent Graves, Wilson County
Carolina Slater Burnette, Vance County
Jeffrey Carpenter, Anson County
Melissa Sams, High Point, Guilford County
Darryl Brown, District 30 (backup)