
GAL LEGAL NEWSLETTER

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North Carolina Supreme Court Implements Expedited Appeals Rule in 7B Cases

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. Effective March 1, 2006, the new Rule 3A of the North Carolina Rules of Appellate Procedure will, in theory, decrease the length of GAL appeals by a year or more.

Rule 3A decreases significantly the amount of time to prepare the record on appeal, as well as to produce a transcript of the trial court proceedings. As of March 1st, appellants will have only 20 days to prepare the proposed record on appeal after filing the notice of appeal. Transcriptionists will have 35 days to complete the trial transcript after the AOC's court reporting coordinator assigns the case to the transcriptionist.

continued on page 2

Court of Appeals Gives Guidance to Guardianship

Deana Fleming, GAL Associate Counsel

The small body of caselaw that addresses guardianship under Chapter 7B is beginning to grow with two recent decisions by the Court of Appeals. *In re J.D.C.*, 620 S.E.2d 49, --- N.C. App --- (10/18/05), involved a neglect adjudication of a three-month-old infant in 1999 who was continually placed with grandparents from the non-secure hearing. At a subsequent review hearing, the court granted the grandparents guardianship, and after two more review hearings continuing the guardianship the court ceased scheduled reviews. Two years later, the mother filed a motion for review and custody citing

continued on page 2

Spotlight on Federal Legislation: "Justice for All Act"

Deana Fleming, GAL Associate Counsel

The purpose of the Justice for All Act is to protect crime victims' rights. The Act also addresses the backlog of DNA testing by issuing grants to develop new DNA technology and to improve capital defenders in state cases. Of interest to GAL attorneys is Title I of the legislation, which addresses victim's rights.

The Justice for All Act is only applicable to federal crimes, so the number of cases involving

continued on page 3

INSIDE THIS ISSUE

- 1 Expedited Appeals
- 1 COA Give Guidance to Guardianship
- 1 Justice for All Act
- 3 Calendar of Events
- 4 Pro Bono Corner
- 5 Appellate Holdings

The new appellate rule requires that both the party appealing and his/her attorney 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.

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 "calendar 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 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 new rules is:

<http://www.aoc.state.nc.us/www/public/aoc/Rule-3-11-3-05.pdf>

If you have any questions regarding the new expedited appeals procedure, please call or email me! Should there be any changes to the rules before March, 2006, we will let you know.

compliance with reunification conditions was a substantial change in circumstances affecting the welfare of the minor child. The trial court dismissed her motion after finding that it was the mother's burden to prove the guardians unfit—not merely a substantial change in circumstances, and she was unable to meet this burden. On appeal, the Court held that respondent did not have to prove the guardians unfit because the order of guardianship did not comport with NCGS § 7B-600(b) that requires findings for guardianship pursuant to NCGS § 7B-907 that guardianship was judicially determined to be the permanent plan for the child. Because the trial court never conducted a permanency planning hearing or otherwise made the requisite findings of fact to "trigger" the unfitness of the guardians burden of proof. As a result, the case was reversed and remanded to allow the mother to proceed on her motion to modify custody.

The lesson learned by this holding is that in order to benefit from the higher burden of finding unfitness in order to modify guardianship, the trial court must comport with the applicable statutes and make appropriate findings of fact that guardianship is the permanent plan for the child—otherwise, the guardianship order is of no more legal significance than a custody order.

In re E.C., 2005 N.C. App. LEXIS 2494 (11/15/05), involved a mother of a newborn with a substance abuse history who resided with her cousin, but continued to use drugs. After criticism of her lifestyle, the mother threatened to leave with the infant to go to a crack house. As a result, DSS filed a juvenile petition. After an adjudication of neglect, the trial court awarded the caretaker cousin guardianship at disposition with visitation in her discretion, and the mother appealed the order. On appeal, the mother argued that the juvenile code does not authorize granting guardianship at disposition, and that such an order was tantamount to ceasing reunification efforts without making the requisite findings of fact under NCGS § 7B-507 governing reasonable efforts.

Continued on Page 6

CALENDAR OF EVENTS

Nothing scheduled at this time:

Have a Happy and Healthy New Year!

children we represent will most likely be small, since the majority of crimes arising out of our cases are crimes covered by North Carolina law.

For purposes of the Act, "crime victim" means a person directly and proximately harmed as the result of the commission of a Federal offense or an offense in the District of Columbia. For victims of crime who are under 18, the legal guardians of the crime victim or representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights, **but in no event shall the defendant be named such guardian or representative.**

The Justice for All Act sets out a crime victims' "bill of rights." The following rights included: (1) The right to be reasonably protected from the accused; (2) the right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; (3) the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) the reasonable right to confer with the attorney for the Government in the case; (6) the right to full and timely restitution as provided in law; (7) the right to proceedings free from unreasonable delay; and (8) the right to be treated with fairness and with respect for the victim's dignity and privacy.

From the GAL perspective, in a case where a respondent parent/caretaker is charged in federal court, we should act to make the federal district attorney handling the case aware of our client's rights under the Act, and actively seek to ensure that those rights are protected. In order to do so, we may need to get an order authorizing disclosure of confidential information since the Department of

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continued on page 5

PRO BONO CORNER: “APPEALING” FOR YOUR HELP

Kurt Stephenson, Advocacy Enhancement Specialist

In one form or another the Guardian ad Litem (GAL) Program’s Pro Bono Project has been around for nearly five years. While it continues to evolve, one thing remains constant; we are always in need of more caring and dedicated attorneys. With less than half of our current fiscal year complete, we are on pace to double last year’s total number of appeals handled by pro bono attorneys. The GAL Program has seen the number of appeals more than double in just two short years, and while our attorney advocates would appreciate the chance to continue their work at the appellate level many simply don't have the time. Many of our attorney advocates and GAL staff have expressed great appreciation for the talent and dedication that our pro bono attorneys bring to each appeal, and as a result, our staff frequently turns to their expertise.

Clearly the growing number of appeals poses an ongoing concern and we have worked to both decrease the frequency and length of appeals. Many of our concerns have been heard, and as of March 2006 appeals involving our children will hopefully be much shorter in duration and receive priority in the court. These changes will certainly reduce the effects of the “legal limbo” our children experience while a case is on appeal, but it also gives cause to find additional pro bono attorneys to aid our program. From the day a written notice of appeal is filed until a GAL brief would be due is potentially as little as 110 days. Again, this greatly shortened time frame is in the best interests of our children, but our attorney advocates will have less time than ever to prepare multiple cases for appeal. As you might expect, our partnerships with pro bono attorneys will be more vital than ever.

Consequently, given our current pace and the upcoming March changes we want to be completely prepared, and we're asking for your

help. You receive this newsletter because you already play an important role in our efforts. We are hoping that you can suggest other like-minded attorneys who may be able to take our appeals on a pro bono basis. As you all know, experience in appeals and juvenile law can be helpful, but it’s certainly not a prerequisite given our free CLE training sessions and other legal resources.

So, if you know attorneys you think might be interested please feel free to pass their name on to me at kurt.d.stephenson@nccourts.org or at 919-789-3633. Alternatively, you can approach them directly with information about our need for pro bono attorneys to handle appellate matters. As attorneys involved with the Guardian ad Litem Program you already represent the best interests of individual children, but by helping in this task you can assist us in providing effective advocacy for the nearly 16,000 children we serve each year.

Pro Bono Attorneys Assigned Cases Since the Last Newsletter:

Holtkamp Law Firm, PLLC

Lynne M. Holtkamp

Poyner & Spruill, LLP

Bryn Wilson

Smith, Anderson, Blount, Dorsett, Mitchell &
Jernigan, LLP

Heather Adams

Womble, Carlyle, Sandridge & Rice, PLLC

Alison Ashe-Card

Stuart Brock

Erin Burke

Lewis Rowell

Joann Waters

Our Child Clients Thank You!

APPELLATE HOLDINGS

(2005 Published Appellate Opinions, Oct. 4 – Nov. 15)

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 As.L.G & Au.R.G., COA 04-1226 (10/24/05). The TPR order was affirmed in this case despite the delay by DSS in filing the TPR after the trial court ordered the TPR to be filed within 60 days after the permanent plan was changed to adoption. Although the delay by DSS was a violation of statute and the court's order, the appellant was not prejudiced by the delay and there was no indication that the children's best interest was prejudiced by the delay. The Court also overruled the mother's argument that she should have been appointed a Rule 17 GAL.

In re B.D., COA 03-1559-2 (11/1/05). The Court affirmed the TPR order overruling the arguments set forth by the parents. They argued that B.D. was not served with the summons; however, the attorney advocate was served and this service was proper. Failure to hold a special proceeding to determine issues in dispute prior to the TPR order was overruled because it was clear from the parents' answers that all material facts were in dispute and there was no objection at trial. Failure to attach the custody order was not prejudicial error. Various evidentiary arguments were also overruled. TPR was in the child's best interest.

In re D.M.W., COA 05-70 (10/18/05). Despite her numerous incarcerations during the case, the majority held that there was not clear and convincing evidence to support TPR on the mother and reversed the TPR order. While incarcerated, respondent mother addressed several issues including drug abuse and DV counseling. The dissent found clear and convincing evidence to support TPR because the evidence did not support the contention that respondent had met the conditions of her case plan despite some effort. When she was not incarcerated, she did not work the plan.

In re E.C., COA 05-218 (11/15/05). Guardianship given at disposition was not improper because a guardian can be appointed at any time in the child's best interest. Essentially it was a temporary guardianship order because the court continued reviews and there was no finding that guardianship was the permanent plan. The portion of the order that left visitation in the guardian's discretion was vacated because the judge cannot delegate this authority. **See also article page 1.**

In re J.D.C., COA 04-615 (10/18/05). The court reversed and remanded this case with instructions to proceed on the motion to modify custody based on a substantial change in circumstances as opposed to having to prove the guardian is unfit because guardianship was never

Justice is not a local agency to which we can share information under 7B-3100.

If you have any questions regarding this legislation, please feel free to contact me by email or telephone.

determined to be the permanent plan. **See article page 1.**

In re J.W., K.W., COA 04-1280 (10/4/05). The majority affirmed the TPR order based on lack of reasonable progress and likelihood of repeated neglect. The children were removed for unsanitary conditions and K.W.'s failure to thrive diagnosis. The children were returned home on a trial basis, but were removed again for unsanitary conditions. Respondent mother failed to meet the conditions imposed by the court for reunification despite sporadic efforts. The dissent did not find clear and convincing evidence to support TPR because the mother did make some progress.

In re L.C. & A.N. COA 05-363 (11/15/05). This case is an appeal of a denial of the mother's Rule 60(b) motion to vacate the TPR order. The denial of the motion to vacate the TPR order was affirmed—Rule 60 cannot be used as a substitute for appellate review.

In re L.O.K, et al., COA 04-1684 (11/15/05). The Court affirmed the TPR order and specifically held that Rule 41(a)(1) of the Rules of Civil Procedure does not apply in TPR proceedings. DSS had previously filed a TPR, but voluntarily dismissed the petition after DSS rested its case and while the mother presented her case. A subsequent TPR was filed, granted, and appealed. Respondent filed a motion to dismiss the petition arguing that the second petition was barred because the first petition had been dismissed. Although the Rules of Civil Procedure do apply in juvenile abuse/neglect cases, it is only to the extent that the Rules do not conflict with the legislative intent of the Juvenile Code. If the voluntary dismissal of a petition precluded the filing of a second petition, the result could be no permanent plan for a child contrary to best interests.

In re S.B.M., COA 05-71 (10/4/05). The Court affirmed this TPR order despite its delayed entry of five months because the incarcerated father failed to show prejudice. There was no abuse of discretion that TPR was in the child's best interest.

In re T.R.P., COA 04-1356 (10/4/05). The Court vacated and dismissed the review order appealed in this case because the initial juvenile petition was not verified as required by statute in order for the court to exercise subject matter jurisdiction. The dissent would have affirmed the review order and reasoned that the defense of subject matter jurisdiction was waived when the mother did not appeal the initial adjudication and dispositional order.

The Court disagreed, and interpreted the statutes to allow an appointment of a guardian at any time during juvenile proceedings when the appointment is in the child's best interest. The mother did not appear at the hearing, so the appointment of the cousin as guardian was presumed to be in accordance with NCGS § 7B-600(a) that allows the appointment of a guardian for a minor when no natural guardian is available. The order of guardianship did not equate to ceasing reasonable efforts for reunification because it did not make guardianship the permanent plan at disposition and did not cease the duty of DSS to make reasonable efforts toward reunification. However, the portion of the order that granted visitation solely in the discretion of the guardian was vacated. By statute, a visitation plan is required when custody is removed from a parent at disposition. Further, visitation is a judicial function that the trial court may not delegate.

This case makes a distinction between the two different types of guardianship allowed by the juvenile code: a guardian to serve when there is no natural parent; and guardianship as the permanent plan. Further, this case clarifies that an order of guardianship must specifically address visitation. Previous cases have held that the issue of visitation is a judicial function and this case reiterates the necessity that the trial court put a visitation plan in place without solely relying on a third party. Purportedly, a guardianship or custody order that denies any visitation could be constitutionally challenged as a *de facto* termination of parental rights without the constitutional clear and convincing burden of proof.

When it comes to guardianship, it is important for the court and parties to clarify the goal of the guardianship order so that all statutory requirements are met. If the guardianship is the permanent plan, then guardianship should be granted at a permanency planning hearing with the order comporting with both NCGS §§ 7B-907(d) and 7B-600(b). If the purpose of the guardianship order is to appoint a guardian in the absence of the child's natural guardian, then the order can be made at anytime, but unless grounds exist to waive reviews, the court must continue to hold reviews.