

NO. COA04-1462

TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*

IN THE MATTER OF:

From Mecklenburg

C.H.-D., Minor Child

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BRIEF OF PETITIONER-APPELLEE THE GUARDIAN AD LITEM IN  
RESPONSE TO RESPONDENT-APPELLANT TAMARA H.

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## RESTATEMENT OF FACTS

On March 24" 2004, Tamara H. gave birth to a baby boy at Presbyterian Hospital (R. p. 5). This baby boy's siblings were already in the custody of the Mecklenburg County Department of Social Services (hereinafter referred to as "DSS") at the time of his birth (2002 J 656 and 657) (R. p. 3). On March 24, 2004, the DSS Social Worker spoke to Jennifer, the Social Worker at Presbyterian Hospital, and informed Jennifer she would be making a referral to CPS (Child Protective Services) Intake regarding Baby H (R. p. 5). On March 24, 2004, DSS Social Worker faxed a CPS referral to CPS Intake in regard to the baby boy (hereinafter referred to as C.H.-D.) (R. p. 5). On March 26, 2004, DSS Social Worker called CPS Intake and was informed that the case had been assigned to Investigations (R. p. 5).

On March 26, 2004, DSS Social Worker spoke with Mariam Brown, the CPS Investigator. Ms. Brown informed the DSS Social Worker that she visited with Tamara, C (C.H.-D.) and Willie at the hospital. Per Ms. Brown, Tamara informed her that she just moved into a new apartment and that Willie plans to go out today to purchase a crib for him. Ms. Brown informed the DSS Social Worker that she plans to make a home visit with Tamara and C (C.H.-D.) on March 27, 2004 (R. p. 5)

On March 29, 2004, DSS Social Worker spoke with Mariam Brown, the CPS Investigator. Ms. Brown informed the DSS Social Worker that she visited with Tamara, C (C.H-D), on March 27, 2004 in their home. Mariam Brown informed the DSS Social Worker that Tamara did not have any furniture but that she did have a bassinet and baby items for C (C.H.-D.). Mariam Brown stated that Tamara was waiting on rent a center to deliver her furniture (R. p. 5) On March 29, 2004, a decision was made by DSS to conduct a TDM (Team Decision Making) meeting before doing this Petition on C. H. (C.H.-D.). The TDM was scheduled for March 30, 2004 (R. p. 5). On this same date, March 29,2004, the DSS Social Worker called Tamara H. and informed her of the IDM. The DSS Social Worker also informed Tamara that she could bring anyone to the meeting that could act as a support figure for her, as well as someone that could act as a placement option for C (C.H.-D.) (R p. 5-6).

The TDM scheduled for March 30, 2004 was re-scheduled to April 1, 2004 (R p. 6). On April 1, 2004 a TDM was held (R. p. 6). The DSS Social Worker filed the Petition for C.H.-D. on April 2, 2004 (R. p. 6). The Petition alleged C.H.-D. is neglected and dependent (R p. 3). The basis for the allegations included:

1. The child's siblings are currently in the custody of Mecklenburg

County DSS (2002 J 656 and 657). The issues at the time DSS took custody of siblings were domestic violence between Mr. D (the father T, one of C's siblings, and C.H.-D.) and Ms. H (the mother of the siblings and C.H.-D.), substance abuse, as well as Ms. H and Mr. D ability to provide for the needs of the juveniles (R. p. 3).

2. The Petition further alleged (in referring to the case of C.H.-D.'s siblings) that the parents were ordered to work a reunification plan. Mr. D was ordered to obtain substance abuse treatment but that the father continued to use marijuana. Mr. D was also ordered to obtain domestic violence treatment (R. p. 3).

3. Furthermore, in the case of the siblings, the mother was ordered to seek domestic violence treatment and the mother did participate and complete domestic violence counseling, however, the mother is unable to demonstrate the skills learned (R. p. 3).

4. The mother continues to have a relationship with Mr. D. The mother minimizes the domestic violence (R. p. 3).

5. The parents continue to engage in domestic violence acts. The acts involve both parents as perpetrators of the domestic violence (R. p. 4).

6. Although the parents have engaged in treatment, the parents continue to take actions that would place this child (C.H.-D.) at risk (R. p.

4).

7. When under stress, the parents have limited coping skills (R. p. 4).

On April 2 2004 a Non-Secure Custody Order was filed ordering DSS to place C.H.-D. in foster care (R. p. 12). The Seven-Day Hearing regarding C.H.-D. was heard before the Honorable Elizabeth Miller District Court Judge Presiding over the Juvenile Court Session on April 7, 2004. The mother and father were personally served with the Petition on April 7, 2004. Both parents and their counsel were present for the hearing. Emily Lewis was appointed Attorney Advocate for C.H.-D. as well as the Guardian ad Litem Program (R. p. 27). Both the Attorney Advocate and Guardian ad Litem were present for the hearing (R. p. 23). Judge Miller entered an Order on April 7, 2004 placing C.H.-D. in foster care. The Respondent Mother, Tamara H. and the Respondent Father Willie H., gave notice of appeal through their counsel of record, regarding placement of Baby C (R p. 26). Willie D did not perfect his appeal and therefore it is not an issue before this Court.

## ARGUMENT

I. THE NONSECURE CUSTODY ORDER WAS NOT CONTESTED AT THE TRIAL COURT LEVEL AND IS NOT PROPERLY BEFORE THIS COURT.

The Appellant-Respondent-mother (hereinafter referred to as

"Appellant") states that the "sole" issue for this Honorable Court is whether an infant should be placed in the custody of the State when there is a relative ready, willing, and able to take care of that child.

A- The Nonsecure Custody Order Under N.C.G.S. Section 7B-505 Was Not Contested At The Trial Court Level And Is Not Properly Before This Court.

The Appellant cites North Carolina General Statutes Section 7B-505 (2003).

In placing a juvenile in nonsecure custody under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds the placement with the relative would be contrary to the best interests of the juvenile.

N.C.G.S. Section 7B-505 (2003) (emphasis added). The Appellee-Petitioner Guardian ad Litem (hereinafter referred to as "Guardian") acknowledges that N.C.G.S. Section 7B-505(2003) applies when a child is first placed into Nonsecure Custody.

In the present case, the Nonsecure Order was filed on April 2, 2004 (R. p. 12). Appellant recites in detail all of the facts which occurred prior to this April 2, 2004 Nonsecure Order and appears to be contesting the validity of this first Order. N.C.G.S. Section 7B-505 does not apply to the facts in

this case. On April 7, 2005, during the Initial 7-Day Hearing, the Appellant, through counsel, stated that "we are not contesting the removal of this child this morning from Ms. H's custody". (T. p. 12). Rule 10 (b) (1) of the North Carolina Rules of Appellate Procedure states:

(1) General. In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

N.C.R. App. P. 10 (b)(1) (2003). This rule is also cited in *In re O.W.*, 164 N.C. App. 699, 596 S.E.2d 851 (2004). The validity of the Nonsecure Order filed on April 2, 2004 was not raised as an issue at the trial court level, was not preserved for appeal, and cannot now be raised at the appellate court level. *See* N.C. R. App. P. 10(b)(1) (2003).

B. Continuing A Nonsecure Custody Order Cannot Be Raised on Appeal For the First Time if It Was Not Preserved As An Issue At the Trial Court Level.

The Appellant argues that under N.C.G.S. Section 7B-506(b) (2003) the State produced no evidence as to whether nonsecure custody should

continue. Again, the Guardian ad Litem respectfully points out to this Honorable Court that the Appellant stated she was not contesting the removal of the child, and therefore, was not contesting the continuance of the Nonsecure Order. Any issue or argument regarding the continuance of the Nonsecure Order is not properly before this Court. The "sole" issue raised for appeal at the trial court level was continuing the placement of Baby C in foster care, and not placing Baby C with a relative.

## II. THE TRIAL COURT PROPERLY FOUND THERE WAS SUFFICIENT EVIDENCE TO PLACE THE CHILD IN FOSTER CARE AND NOT WITH A RELATIVE.

Appellant argues that there is nothing in the record other than "bare allegations completely unsupported by evidence" to support the conclusion that the child should have been placed in foster care rather than with a relative. The Guardian disagrees.

Paragraph 3.a. in the Petition states:

This child's siblings are currently in the custody of the Mecklenburg County Department of Social Services (2002 .J 656 and 657). The issues at that time (referring to the 2 sibling cases) involved domestic violence between Mr. D and Ms. H.. substance abuse, as well as Ms. H's and Mr. D's ability to provide for the needs of the juveniles

(R. p. 3) (emphasis added). The Petition goes on to state in Paragraph 3.b. "the parents were ordered to work a reunification plan (referring to the siblings cases), Mr. D was ordered to obtain substance abuse treatment and

domestic violence treatment (again referring to the siblings cases).” (R. p. 3). (emphasis added). These are facts, not "bare allegations unsupported by evidence.” The North Carolina Supreme Court has held:

Where, as here, a case is tried without a jury, the fact-finding responsibility rests with the trial court. Absent a total lack of substantial evidence to support the trial court's findings such findings will not be disturbed on appeal. The essential ingredient here is "substantial" evidence. The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

*State v. Hill*, 347 N.C. 275, 301, 493 S.E.2d 264, 279 (1997) (emphasis added). The trial court had sufficient relevant evidence upon which to make its Findings of Fact and support its Conclusions. This is further supported in the April 7, 2004 Order which clearly states that The Court finds by CLEAR and CONVINCING Evidence that... 7. The Court finds specifically as follows regarding the evidence relied upon in reaching the decision: (a) The facts alleged in the petition: Are received into evidence incorporated herein by reference and are true for purposes of this hearing (R. p. 23) (emphasis added). The Guardian also respectfully directs this Court's attention to the six paragraphs in the Petition (R p. 3-7). The April 7, 2004 Order, under specific findings, in P. 8, specifies why Ms. Covington's home is not an appropriate placement for Baby C (R. p.24). The trial court also stated in its

Order of April 7, 2004 that:

Based on the above FINDINGS OF FACT, the Court CONCLUDES AS A MATTER OF LAW that ...

3. Continuation of the child in or return to the home is contrary to the child's best interest and there is a reasonable factual basis to believe that there are no other reasonable means to protect the juvenile. (emphasis added)

4. There is a reasonable factual basis to believe the matters alleged in the petition are true; and The juvenile is exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, custodian, or caretaker has created the conditions likely to cause injury or abuse or has failed to provide or is unable to provide adequate supervision, or protection; or The parent, guardian, custodian, or caretaker consents to the non-secure custody order.

5. It is in the child's best interests to remain in the legal and physical custody of the Mecklenburg County Youth and Family Services ... pending adjudication

(R.p.24) (emphasis added). In the April 7, 2004 Order, after making FINDINGS OF FACT and CONCLUSIONS OF LAW, the Court Ordered that: "1. The child remain in the nonsecure legal/physical custody of the Mecklenburg County Youth and Family Services" (R. p. 25). The trial court made appropriate findings of fact based upon substantial evidence which supported its conclusions of law. The trial court further found that it was in Baby C's best interest to continue in his foster home rather than be placed Ms. Covington. Appellant argues that the only reason given by the trial court to continue Baby C in foster care placement was so Baby C "wouldn't be 'shifted around.'" This is totally erroneous and misleading by the Appellant.

At the Initial (7-Day), the trial court allowed Ms. Covington to speak to the Court regarding placement of Baby C in her home (T. p. 15-16). In response to Ms. Covington's statements, the trial court gave her reasons in open court, and on the record, that (she was not placing Baby C in Ms. Covington's home) because "it wasn't just about the home study, it was also about the arrangement for child care that you had set up (R. p. 2), (T. p.16) and the lack understanding (sic) that you had with regard to the issues that the Court had surrounding the safety issues." (T. p. 16) (emphasis added). The Court does state later that she doesn't want Baby C, (who as approximately 14 days old on the date of this hearing) to be moved around a lot, but this was not the sole reason for leaving Baby C in foster care. The trial court was extremely concerned with Ms. Covington's child care arrangements, as well as her lack of understanding of the issues involved between the mother and father and the safety issues for Baby C. (T. pp. 16-17).

Appellant refers to a home-study that was performed by YFS on the relative's home, and appears to argue that this approved home-study should control the trial court's decision and mandate placement of Baby C with the relative. The Guardian respectfully directs the Courts' attention to this document which simply requests information of the relative or caregiver

who is under consideration for home placement of the juvenile (R. pp. 13-21). A Home-Study or Home Assessment (as labeled on the document) (R. p. 13) is that, and only that - an assessment of the home. It is just another source of information available for the Court's consideration regarding placement. There isn't any case law or statutory law which mandates placement in the home.

### III. THE TRIAL COURT PROPERLY RULED THAT IT WAS IN BABY C'S BEST INTEREST TO REMAIN IN IDS CURRENT FOSTER HOME RATHER THAN BE PLACED WITH A RELATIVE.

The trial court, not only considered the home assessment, but also considered statements by the mother Tamara H. Juanetta Covington, the Guardian ad Litem Attorney Advocate the YFS Attorney and counsel for Tamara H. and Willie D. The Supreme Court in *In re Shue* stated: “Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court[.]” 311 N.C. 586, 587, 319 S.E. 2d 567, 574 (1984).

N.C.G.S. Section 7B-506(b) states, in pertinent part:

At a hearing to determine the need for continued custody, the court shall receive testimony and shall allow the guardian ad litem, or juvenile, and the juvenile's parent, guardian, custodian, or caretaker an opportunity to introduce evidence, to be heard in the person's own behalf, and to examine witnesses. The State shall bear the burden at every stage of the proceedings to

provide clear and convincing evidence that the juvenile's placement in custody is necessary. The court shall not be bound by the usual rules of evidence at such hearings.

N.C.G.S. Section 7B-506(b) (emphasis added). In accordance with 7B-506(b), the Attorney Advocate, Emily Lewis, upon being granted permission by the trial court to be heard regarding the issue of placement of Baby C, and upon no objection raised by the parent's or their attorneys, stated the following reasons as to why it was in Baby C's best interest to remain in foster care and not be placed with a relative, Ms. Covington:

Your Honor, as it relates to placement of the infant at this point, we are in agreement with the Department. 7B- 506 specifically says that if the Court finds that a relative is willing and able to provide proper care and supervision in the State's (sic) then the Court shall order that unless it would be contrary to the best interest of the juvenile. I think that's really the question before the Court this morning. Certainly Ms. Covington appears to be willing. But I think the question is is (sic) whether or not it's in C's best interest, and I would submit to the Court that at this point it is not.

The Department has been working with both Ms. H and Mr. D since March of 2002. The issues have always evolved around the safety of the children, the honesty of the parties with the Court and the Department, and their ability to follow through with service agreements, their ability to abide by court orders and create a safe environment for their children. There have been numerous incidences in the underlying case with the other two children where there have been real concerns about the parents' ability to abide by court orders and to do things that put the safety of their children first ... given C's age, given the issues that have confronted this family, which have yet to be addressed, they could seriously put this child ... in a very precarious position with regard to his safety ... it is in his best interest to be in a neutral foster home with his sibling.

Additionally the other case is going to termination and unfortunately these children do not exist in a vacuum. The same issues that confronted T and K (C's siblings) are the same exact issues that now have prevented C from remaining with his parents ... for C that he remain in his current foster home.

(T. pp. 13-15). At the Initial (7-day) hearing, Twyla George, YFS Attorney stated:

[T]he child was placed into foster care as indicated by the non-secure order that was signed by the magistrate on April 5, 2004. The child is currently in foster care. He is placed with his sibling in the same foster home ... the Court also ordered at that time that the Department complete a home study on Ms. Covington. We have completed that home study. It is the Department's recommendation, however, that C remain in foster care...placed with his sibling...in terms of the recommendation for the placement of the child, the Department has several reasons for making that recommendation. The first and foremost reason being that this child can be placed with his sibling. The foster mother in this particular case has had a relationship with the mother. She knows exactly what the issues in this particular case is (sic). Additionally the information regarding Ms. Covington is the information presented to the Department was that Ms. Covington was not aware of/he history of Ms. H and Mr. D's involvement. In fact ... she's only seen T. once. She did not know of the existence of K. ... she's never even met Mr. D. She's only seen T. once and she had no knowledge of the DV of the history that occurred between Ms. H. as well as Mr. D. In light of that, given the lack of closeness or relationship that Ms. H. had with Ms. Covington, the Department felt like it was in C's best interest to have C placed with his sibling at this point in time[.]

(T. pp. 6-8) (emphasis added). The attorney advocate pointed out to the court that there was a 2-year history with the Department, going back to March 2002. The issues in the sibling cases are the very same issues in Baby

C's case. The safety risks that existed over 2 years ago are the very same safety risks that exist in Baby C's case. The attorney advocate further expressed to the trial court it was not in Baby C's best interest to place him with Ms. Covington, but that it was in his best interest that he be placed in a neutral foster home with his sibling (T. pp. 13-15) (emphasis added).

Twyla George, attorney for YFS, informed the trial court that Ms. Covington had only met a sibling of Baby C. once, and did not even know about the other sibling of Baby C. Ms. Covington was not aware of the DV history between Tamara H. and Willie D, a history that had been documented by the Department for over 2 years. In fact, Ms. Covington had not even met Willie D., the father of T. and Baby C (T. pp. 6-8).

The trial court had to make the decision as to whether it was in Baby C's best interest to place him in the foster home with a foster mother who knew Tamara H., knew about the issues and domestic violence between Tamara H. and Willie D., and had one sibling of Baby C already in her home or to place Baby C with a relative. The trial court ruled properly in finding it was in Baby C's best interest to remain in his current foster home.

The trial court stated as some of its reasons for leaving Baby C in his current foster care was due to the daycare the relative had planned for Baby C., as well as a very big concern over Ms. Covington's lack of understanding

regarding the safety issues. (T. P. 16). The trial court had sufficient, competent and relevant evidence upon which to base its decision and the trial court was correct in ruling that it was in Baby C's best interest to remain in his current foster placement and not be placed with a relative.

#### IV. THE ATTORNEY ADVOCATE AND GUARDIAN AD LITEM HAD STANDING TO APPEAR ON BEHALF OF BABY C AT THE 7-DAY HEARING.

Appellant contends that since the Order appointing the Guardian ad Litem Program and Attorney Advocate to the present case was not signed by the trial court until the day after the 7-Day hearing, April 18, 2004, that the Attorney Advocate does not have the right to submit argument to the trial court at the 7-Day hearing. This issue was never raised for appeal at the trial court level, the mother and father were present with their attorneys, there was never an objection raised during this hearing as to the standing of the Guardian ad Litem Program or the Attorney Advocate, Emily Lewis, to participate at this Initial (7-Day) Hearing, the court heard argument by Ms. Lewis without objection by the parents or their attorneys and therefore, is not properly before this Honorable Court. See N.C. R. App. P. 10(b)(1) (2003). If however, this Honorable Court deems this to be an issue that needs to be addressed, the Guardian defers to the following statutory authority: Section 7B-601 of the North Carolina General Statutes states, in

pertinent part, as follows:

(a) When in a petition a juvenile is alleged to be abused or neglected, the court shall appoint a guardian ad litem to represent the juvenile.... The juvenile is a party in an actions under this Subchapter. The guardian ad litem and attorney advocate have standing to represent the juvenile in all actions under this Subchapter where they have been appointed.

N.C.G.S. 7B-601 (2003) (emphasis added). The Order entered on April 7, 2004 at the Initial (7-Day) Order, under Paragraph 6, states "By separate order Emily Lewis was appointed as attorney advocate for this case, and Forest Steele as Guardian ad Litem' (R. p. 23). The Order appointing the Guardian ad Litem Program and Emily Lewis as attorney advocate was entered on April 7,2004 (R. pp.23-26), and signed by the Honorable Elizabeth Miller on April 8, 2004 (R. p. 27). Therefore, the Guardian ad Litem contends that Appellant's argument is without merit.

In summary, the Guardian submits to this Honorable Court that the trial court ruled properly in continuing the placement of Baby C in foster care. The trial court had substantial evidence as to why it continued placement of Baby C in foster care and not in a relative placement. The trial court properly ruled that it was in Baby C's best interest to continue in foster care rather than be placed with a relative. The Guardian ad Litem and Attorney Advocate had standing to appear at the 7-Day hearing on behalf of Baby C.

## CONCLUSION

For the reasons stated above, the Court of Appeals should affirm the trial court's order continuing the placement of Baby C in foster care.

Respectfully submitted, this the 22nd day of April, 2005.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure, counsel for the Appellee-Petitioner Guardian ad Litem certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, table of authorities, certificate of service, this certificate of compliance and appendix).

This the 22nd day of April, 2005.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing brief on counsel for the appellee and appellant by depositing a copy, contained in a first-class-postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows, this the 22nd day of April, 2005.

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