

No. COA06-1142

EIGHTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

IN RE:

)

)

D.C.B. and A.N.O.

)

)

From Wayne County

(04-JA-151, 152)

APPELLEE GUARDIAN AD LITEM'S BRIEF

INDEX

TABLE OF AUTHORITIESiii

STATEMENT OF THE FACTS 1

ARGUMENT 2

I. APPELLANT’S APPEAL OF THE APRIL 21, 2006 PERMANENCY PLANNING ORDERS IS INTERLOCUTORY BECAUSE IT DOES NOT INVOKE THE PROVISIONS OF N.C.G.S. § 7B-1001 2

II. JUDICIAL REVIEW OF A PERMANENT PLAN OF GUARDIANSHIP IS LIMITED TO A DETERMINATION OF WHETHER ONE OF THE BASES FOR TERMINATING GUARDIANSHIP PURSUANT TO N.C.G.S. § 7B-600(B) EXIST 2

A. Guardianship in this case was granted pursuant to an N.C.G.S. § 7B-907 permanency planning hearing, and, as such, can only be terminated upon a showing by the party moving for termination of guardianship of one of the grounds enumerated in N.C.G.S. § 7B-600(b). 3

B. Appellant Mother failed to demonstrate that grounds existed to terminate the permanent plan of guardianship and place the children in her custody...... 6

CONCLUSION 9

CERTIFICATION OF COMPLIANCE
OF WORD COUNT 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

CASES

North Carolina Court of Appeals Cases

<i>In re B.N.H.</i> , 170 N.C. App. 157, 611 S.E.2d 888 (2005).....	3, 6
<i>In re J.D.C.</i> , 174 N.C. App. 157, 620 S.E.2d 49 (2005).....	4
<i>In re Williamson</i> , 77 N.C. App. 53, 334 S.E.2d 428 (1985), <i>cert. denied</i> , 316 N.C. 194, 341 S.E.2d 584 (1986).....	4

STATUTES/RULES

N.C.G.S. § 7B-600.....	3, 4, 5, 6
N.C.G.S. § 7B-907.....	3, 4, 5
N.C.G.S. § 7B-1001.....	2, 6

STATEMENT OF THE FACTS

D.C.B. and A.N.O. (“Denise” and “Amy”¹) were adjudicated neglected in an order entered September 2, 2004. (R.pp. 16-17). After initially placing the children with Appellant’s mother and then placing the children with two different maternal aunts, the trial court granted custody of both children to Sheila C., one of the maternal aunts, in an order entered February 4, 2005. (R.pp. 38-43, 57-60). After a review hearing in which the trial court noted Appellant Mother’s failure to make progress towards reunification with her children, the trial court granted permanent guardianship of both children to Sheila C. at a permanency planning hearing held on August 10, 2005. (R.pp. 67-73, 93-96).

At the August 2005 permanency planning hearing, the trial court noted that, although she had completed some of the requirements of her case plan as of the date of hearing, Appellant Mother had waited approximately seven (7) months to begin working on the plan. (R.p. 93). The trial court found that, despite Mother’s completion of some of the plan’s requirements, Mother had still not obtained employment, and Mother had not convinced the court that she was seeking employment. (R.p. 93). The court also found that Mother had failed to obtain stable housing and was “living with her boyfriend out of the goodness of his heart.” (*Id.*). The trial court then concluded that it was “impossible to return the juvenile[s] to the

¹ The real names of the children have been changed to preserve confidentiality.

mother” at that time, and that it was “not likely that the Court can return the juvenile[s] to the other within the next six months.” (R.p. 95). The trial court then found it was in Denise and Amy’s best interest that the permanent plan be guardianship with Ms. C., and designated Ms. C. as the girls’ guardian. (*Id.*). Appellant Mother did not appeal the guardianship order.

Following entry of the guardianship order, Amy and Denise continued to live with Ms. C. (R.p. 104). In March of 2006, the trial court held a hearing in which it waived further reviews of the case, re-affirmed the permanent plan of guardianship with Sheila C., and released the parties’ attorneys. (R.pp. 123-26). It is from this hearing that Mother appeals.

ARGUMENT

I. APPELLANT’S APPEAL OF THE APRIL 21, 2006 PERMANENCY PLANNING ORDERS IS INTERLOCUTORY BECAUSE IT DOES NOT INVOKE THE PROVISIONS OF N.C.G.S. § 7B-1001.

Appellee has, contemporaneously with its brief, filed a motion to dismiss Appellant’s appeal as interlocutory pursuant to the provisions of N.C.G.S. § 7B-1001. Appellee adopts and incorporates herein the arguments contained in its motion to dismiss.

II. JUDICIAL REVIEW OF A PERMANENT PLAN OF GUARDIANSHIP

IS LIMITED TO A DETERMINATION OF WHETHER ONE OF THE BASES FOR TERMINATING GUARDIANSHIP PURSUANT TO N.C.G.S. § 7B-600(B) EXIST.

A. Guardianship in this case was granted pursuant to an N.C.G.S. § 7B-907 permanency planning hearing, and, as such, can only be terminated upon a showing by the party moving for termination of guardianship of one of the grounds enumerated in N.C.G.S. § 7B-600(b).

Should this Court refuse to dismiss Appellant's appeal as interlocutory, this Court should still affirm the trial court's order continuing guardianship with Sheila C. In this case, the permanency planning orders granting guardianship of Appellant Mother's children to Sheila C. were entered on September 15, 2005. (R.pp. 92-96, 97-100) Although Appellant Mother argues that trial court's September 15, 2005 orders were insufficient to grant permanent guardianship pursuant to N.C.G.S. § 907, Mother did not appeal those orders. Mother cannot now challenge the sufficiency of the prior permanency planning order. *See In re B.N.H.*, 170 N.C. App. 157, 611 S.E.2d 888 (2005). The only orders properly before this Court, therefore, are the April 2006 orders continuing the permanent plan of guardianship with Sheila C. Should this Court determine that the April 2006 orders denying a change in permanent plan are appealable, this Court's review is limited to a determination of whether Appellant met her burden of proof in seeking to have the guardianship set aside pursuant to N.C.G.S. § 7B-600(b).

Where an individual seeks to overturn an order granting permanent

guardianship pursuant to N.C.G.S. § 7B-907, the trial court must determine if one of four requirements of N.C.G.S. § 7B-600(b) are satisfied. That statute provides, in relevant part:

In any case where the court has determined that the appointment of a relative or other suitable person as guardian of the person for a juvenile is in the best interest of the juvenile and has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, ***the court may not terminate the guardianship or order that the juvenile be reintegrated into a parent's home unless the court finds that the relationship between the guardian and the juvenile is no longer in the juvenile's best interest, that the guardian is unfit, that the guardian has neglected a guardian's duties, or that the guardian is unwilling or unable to continue assuming a guardian's duties.***

Id. (emphasis added).

Where guardianship is the juvenile's permanent plan, the party moving for review of custody pursuant to § 7B-600(b) has the burden of proof. *See In re J.D.C.*, 174 N.C. App. 157, 620 S.E.2d 49 (2005). In *In re J.D.C.*, this Court noted its belief that the legislature, "in enacting section 7B-600(b). . . intended to balance the goal of family reunification, with permanency, another important goal of the Juvenile Code." 174 N.C. App. at 162, 620 S.E.2d at 52. The *J.D.C.* Court went on to write that the Juvenile Code "places the burden of proof on a parent seeking review where guardianship is the permanent plan, so as not to disrupt permanency." *Id.* *See also In re Williamson*, 77 N.C. App. 53, 334 S.E.2d 428 (1985), *cert. denied*, 316 N.C. 194, 341 S.E.2d 584 (1986).

In this case, the trial court granted guardianship to Sheila C. in permanency planning orders entered on September 15, 2005. (R.pp. 93-96). The trial court complied with the mandate of N.C.G.S. § 7B-907(a)(2), and found “[t]hat it is impossible to return the juvenile to the home of the mother of this date and it is not likely that the Court can return the juvenile to the mother within the next six months.” (R.pp. 95, 98.). The trial court also defined Appellant’s “rights and responsibilities” by addressing the issue of visitation. (R.pp. 96, 100). The trial court then determined that it was in Amy and Denise’s best interests that the girls remain with Sheila C., and changed the girls’ permanent plan from reunification with their mother to guardianship with Sheila C. (R.pp. 95, 99). The orders clearly state that they are orders from a permanency planning hearing, and although Appellant Mother and her attorney were present for the hearing, there is no indication that either she or her attorney objected to such a designation. (R.pp. 93, 97). Absent an appeal from the guardianship order, any challenge to the permanent plan of guardianship must, therefore, be held pursuant to the provisions of N.C.G.S. 7B-600(b).

In her brief, Mother argues that the hearing which is the subject of this appeal was a “permanency planning hearing,” and that the resultant “permanency planning” orders should be reversed because the trial court failed to make the appropriate N.C.G.S. § 7B-907 findings. (*See* Appellant’s Brief, pp. 7-14). This argument fails, for several reasons. First, as discussed in Appellee’s Motion to Dismiss, since the

orders in question neither changed the permanent plan, nor did they change custody of the juvenile, the orders are not an appealable. *See, e.g., B.N.H., supra.* Second, since the order being appealed did not change the permanent plan or custody of the juvenile, the orders' reversal will have no real effect upon the outcome of the underlying juvenile case: the permanency planning order which granted guardianship to Sheila C. remains in effect. It is likely just such an outcome that the North Carolina legislature anticipated in enacting N.C.G.S. § 1001 to limit the scope of appeals under the Juvenile Code.

B. Appellant Mother failed to demonstrate that grounds existed to terminate the permanent plan of guardianship and place the children in her custody.

As discussed above, Appellant Mother has the burden of proving one of the grounds for termination of guardianship set forth in N.C.G.S. § 7B-600(b). The difficulty in this case is that there is no written motion from the Mother seeking to overturn guardianship as the girls' permanent plan which clearly states the basis for removal of the guardian. Rather, it appears from the record that the hearing from which Mother has appealed was a regularly scheduled review of the case in which Mother raised the issue of changing the permanent plan to reunification.

A review of the transcript indicates two possible bases under which Appellant may have sought to terminate guardianship pursuant to N.C.G.S. § 7B-600(b): (1) the

guardian is unfit to continue in her duties; and (2) guardianship is no longer in the juveniles' best interest. Appellant Mother failed to satisfy her burden of proof with respect to either ground.

Testimony at the March 2006 hearing relating to the issue of fitness centered on Appellant Mother's concern that Sheila C. had permitted Kenneth B., Denise's father, to have contact with the children. (T.p. 39). Kenneth B. had been ordered to have no contact with the children. (R.pp. 119, 123). Interestingly, both April 2006 orders note that Appellant Mother herself testified that she had assisted Kenneth B. in violating this particular court-ordered provision. (R. pp. 119, 124).

Despite her concerns with respect to Mr. B, however, Appellant was consistent in voicing her belief that Ms. C. had properly taken care of the children:

Q. There have been other times in other court orders when there've been indications that Ms. C. continued to be the custodian, and I don't find anything in there where you were objecting to that situation; is that true?

A. That's true.

Q. Do you object to that now?

A. Yes, sir. Yes, sir, because I want to have custody myself.

Q. But, I mean, it's not because she's not taking care of them?

A. Right.

* * * * *

Q. You're not saying today that Ms. C. is not doing a good job taking care of the children, but your concern is Kenneth B's influence or contact with the children?

A. Yes, sir.

(T. pp. 38-39). The trial court considered Appellant's testimony regarding Mr. B.'s contact with the children, finding the Appellant "believed that Kenneth B. had visited with the juveniles on at least three occasions," but determined that Appellant had not met her burden of proof with respect to grounds to change the permanent plan. (R.pp. 120, 124-25).

With respect to the best interests ground, the Appellant's only evidence, other than her concerns regarding Mr. B's contact with the children, was as to Appellant's own situation. Appellant Mother testified that she had "no excuse" for the fact that it took her more than a year and a half to stop using drugs after DSS had removed her children, but now she was "clean." ((T.pp. 40-41). In her closing statement, Appellant's attorney argued that it was "no longer in [the girls'] best interest to be [with Ms. C.] because [Mother] has done what she needed to do." (T.p. 57). The trial court properly found that Mother had failed to present sufficient evidence to demonstrate that guardianship with Ms. C. was no longer in Denise or Amy's best interests.

Based upon the testimony at the hearing, the trial court ordered that custody remain with Ms. C. and that the girls' permanent plan remain guardianship with Sheila C. The court specifically concluded that guardianship with Ms. C. was in the girls' best interests, and that Ms. C. continued "to be a fit and proper person to have custody" of the children. (R.pp. 120, 126). In support of these conclusions of law,

the trial court found that, “no one had complaints as to the way Sheila C. cares for the juvenile,” and that “the mother of the juvenile[s] has produced no grounds to warrant a change in the custody of the juvenile[s].” (*Id.*).

CONCLUSION

For these reasons, Appellee Guardian ad Litem, on behalf of the children, D.C.B. and A.N.O., respectfully asks this Court to affirm the orders granting guardianship to Sheila C. in this case.

Respectfully submitted, this _____ day of November, 2006.

Alexandra S. Gruber
North Carolina State Bar No.: 33425
North Carolina Guardian ad Litem Program
100 E. Six Forks Road
P.O. Box 2448
Raleigh, NC 27602
Telephone: (919) 571-4799
Facsimile: (919) 788-5321
Attorney for Appellee Guardian ad Litem

CERTIFICATION OF COMPLIANCE
OF WORD COUNT

The undersigned attorney certifies that the foregoing brief in the above-entitled action, in accordance with Rule 28(j)(2)(A)(2) of the North Carolina Rules of Appellate Procedure, contains 2,094 words, which is less than the word count limit of 8,750 for briefs using Times New Roman proportional type (excluding cover, index, table of authorities, certificate of service, certification of compliance). The undersigned relies on the word count reported by Microsoft Word Processing software.

This the _____ day of November, 2006.

By: _____

Alexandra S. Gruber
North Carolina State Bar No.: 33425
North Carolina Guardian ad Litem Program
100 E. Six Forks Road
P.O. Box 2448
Raleigh, NC 27602
Telephone: (919) 571-4799
Facsimile: (919) 788-5321

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing APPELLEE'S BRIEF was served by enclosing the same in an envelope, with postage fully prepaid and by depositing said envelope in a United States Post Office mailbox, addressed to:

Annick Lenoir-Peek
10650 Culebra Road, #104-547
San Antonio, TX 78251

Robert M. Smith
104 S. William Street
Goldsboro, NC 27533

E.B. Borden Parker
208 S. William Street
Goldsboro, NC 27530

This _____ day of November, 2006.

By: _____
Alexandra S. Gruber
North Carolina State Bar No.: 33425
North Carolina Guardian ad Litem Program
100 E. Six Forks Road
P.O. Box 2448
Raleigh, NC 27602
Telephone: (919) 571-4799
Facsimile: (919) 788-5321