

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of April, 2014, the following order was made and entered:

RE: Approval of Amendments to the Rules of Procedure for Child Abuse and Neglect Proceedings, the Guidelines for Children's Guardians *Ad Litem* in Child Abuse and Neglect Proceedings, and the Required Form Guardian *Ad Litem* Report

On October 15, 2013, the Court issued an order requesting public comment on proposed amendments to the Rules of Procedure for Child Abuse and Neglect Proceedings, the Guidelines for Children's Guardians *Ad Litem* in Child Abuse and Neglect Proceedings, and the Required Form Guardian *Ad Litem* Report. The proposed amendments were published for comment and the public comment period closed on January 13, 2014.

Comments were received by Anita Harold Ashley, Esq.; the Honorable Thomas C. Evans III; Loren Howley, Esq.; Catherine Munster, Esq.; Robert E. Barrat, Esq.; E. Ryan Kennedy, Esq.; R. Michael Shaw, Esq.; Reagan E. Whitmyer, Esq., Chairman of the West Virginia Access to Justice Commission; the Honorable Gary L. Johnson; Susan Harrison, Executive Director of Court Appointed Special Advocates for Children, Inc.; Garrett M. Jacobs, Commissioner of the Bureau for Child Support Enforcement; and Catherine Bond Wallace, Esq.

Upon consideration of the proposed amendments and comments to the Rules of Procedure for Child Abuse and Neglect Proceedings, the Guidelines for Children's Guardians *Ad Litem* in Child Abuse and Neglect Proceedings, and the Required Form Guardian *Ad Litem* Report, the Court is of the opinion to and does hereby adopt the proposed amendments, Guidelines, and Required Form Guardian *Ad Litem* Report, as modified, effective July 31, 2014. Justice Ketchum would provide that the circuit court judge has the discretion to determine if a guardian *ad litem* report is necessary based on the need to augment or clarify

information in the record in a particular case. The changes are attached to this order.
Additions are indicated by underlining and deletions are indicated by strikethrough.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court



RULES OF PROCEDURE FOR CHILD ABUSE AND NEGLECT PROCEEDINGS

Rule 3. Definitions.

(k) "Guardian-ad-litem" "Guardian *ad litem*" means the attorney appointed to represent the a child; or children as set forth in Rule 18a of the Rules of Procedure for Child Abuse and Neglect Proceedings.

Rule 18a. Appointment; responsibilities of guardian *ad litem*.

- a. Appointment. W.Va. Code § 49-6-2(a) and the Guidelines for Children's Guardians *Ad Litem* in Child Abuse and Neglect Proceedings set forth in Appendix A of these Rules govern the appointment of a child's guardian *ad litem* in a child abuse and neglect proceeding. In the initial order resulting from the filing of an abuse and neglect petition, the circuit court appoints a guardian *ad litem* to represent a child from a list of qualified attorneys who have completed the required guardian *ad litem* training. A guardian *ad litem* may be appointed to represent more than one child unless the representation of more than one child creates a conflict of interest.

- b. Responsibilities of guardian *ad litem*. A guardian *ad litem* should adhere to the Guidelines for Children's Guardians *Ad Litem* in Child Abuse and Neglect Proceedings set forth in Appendix A of these Rules and submit a written report to the court and provide a copy to all parties at least five (5) days prior to the disposition hearing that complies with the requirements set forth in Section D(8) of the Guidelines and Appendix B of these Rules. Upon petition of the guardian *ad litem*, the court, in its discretion, may seal the report or redact information contained in the report.

RULES OF PROCEDURE FOR CHILD ABUSE AND NEGLECT PROCEEDINGS

APPENDIX A: GUIDELINES FOR CHILDREN'S GUARDIANS AD LITEM IN CHILD ABUSE AND NEGLECT CASES

Introduction

The purpose of the following Guidelines is to provide guardians *ad litem* (GAL) with guidance in representing a child in an abuse and neglect proceeding under W.Va. Code § 49-6-1, *et seq.* The Guidelines are divided into five parts: 1) Section A sets forth the general role of a GAL and the education and training requirements of a GAL; 2) Section B discusses ethical considerations in representation; 3) Section C describes the duties of a GAL as to the initial stages of representation; 4) Section D discusses the duties of a GAL as to the adjudicatory and dispositional stages of representation; and 5) Section E describes the duties of a GAL as to post-dispositional representation.

A. Role of GAL; education and training

1. Role of GAL. The GAL in a child abuse and neglect case has a dual role, both as an attorney, and to represent the best interests of the child. A GAL has broad discretion in determining what is necessary to protect the best interests of a child. The safety, well-being, and timely permanent placement of a child in an abuse and neglect proceeding are central to all aspects of a GAL's representation.
2. Education and training. An attorney appointed as GAL shall complete a minimum of eight (8) hours of continuing legal education training every two years in child abuse and neglect practice and procedure as provided by the Supreme Court of Appeals of West Virginia.

B. Ethical Considerations in Representation

1. Rules of Professional Conduct. The Rules of Professional Conduct apply to a GAL's representation of a child in an abuse and neglect proceeding.
2. Duty of confidentiality. A GAL owes a duty of confidentiality to the child, but this duty is not absolute. A GAL has a duty to disclose a child's confidential communication to the court when the communication implicates a high risk of probable harm to the child.
3. Conflicts of interest. General principles of conflicts of interest apply to a GAL's representation of a child in an abuse and neglect proceeding. Conflicts of interest commonly arising in abuse and neglect proceedings include the following:

- a. A GAL determines that there is a conflict of interest in performing both roles as GAL and the child's attorney. In such instance, the lawyer should continue to represent the child as the child's attorney and withdraw as GAL. The lawyer should simultaneously ask the court to appoint a new GAL to represent the best interests of the child. A mere disagreement regarding the best interests of the child does not in itself constitute a basis for withdrawing as counsel.
- b. A conflict of interest arises when siblings represented by the same GAL have opposing interests. If the GAL discovers the conflict before commencing representation of the siblings, the GAL shall only accept appointment of one sibling or non-conflicting siblings. If the GAL discovers the conflict of interest after accepting appointment to represent the siblings, the GAL shall request that the court appoint a new GAL to represent the interests of the conflicting sibling or siblings.
- c. A conflict of interest arises when a GAL subsequently represents a child's parent, relative, caregiver, foster parent, or pre-adoptive parent in another matter. In such instance, a GAL should not engage in a subsequent representation that compromises the GAL's ability to independently consider the best interests of the child.

C. Duties of GAL as to Initial Stages of Representation

1. When appropriate, promptly notify the child and the child's caretaker of the GAL's appointment and the means by which counsel can be contacted.
2. When appropriate, initiate contact with the caseworker, review the caseworker's file and obtain copies of school, medical, social service, or other records necessary to thoroughly understand and investigate the case.
3. Schedule a face-to-face meeting with the child at a time and place that allows for observation and private consultation with the GAL unless the court specifically determines that such a meeting would be inappropriate given the age, medical and/or psychological condition of the child.
4. When appropriate, counsel the child regarding the subject matter of the proceedings, the specific reasons for the GAL's appointment and the expectations of the court.
5. When a Court Appointed Special Advocate (CASA) has been appointed to the case, work with the CASA volunteer to achieve the goal of representing the best interests of the child.
6. Conduct an independent investigation of the facts of the case.

- a. When appropriate, conduct in-home visits during which the GAL can observe the respective living environments of the child's parents or caretakers and their interaction with the child.
 - b. When appropriate, interview caregivers, caseworkers, therapists, school personnel, medical providers, relatives, siblings, and/or other individuals that have pertinent information regarding the child.
 - c. Ascertain the child's wishes when possible.
7. Maintain contact with the child throughout the case to monitor whether the child is receiving counseling, tutoring, or any other services needed to provide as much support as possible under the circumstances.
 8. When appropriate, keep the child apprised of any developments in the case and actions of the court or parties involved.

D. Duties of GAL as to Adjudicatory and Dispositional Stages of Representation

1. Actively participate in all aspects of litigation, including, but not limited to, discovery, motions practice, court appearances, and the presentation of evidence.
2. Maintain adequate records of documents filed in the case and of all conversations with the child and potential witnesses.
3. When appropriate, evaluate any available improvement periods and actively assist in the formulation of an improvement period and service plans. The GAL is to monitor the status of the child and progress of the parent(s) in satisfying the conditions of the improvement period by requiring updates or status reports from agencies involved with the family.
4. Assess whether it is appropriate for the child to participate in court hearings or multi-disciplinary team meetings. The GAL is to participate in any discussions regarding the proposed testimony of the child and, if it is determined that the child's testimony is necessary, strongly advocate for the testimony to be taken in an acceptable and emotionally neutral setting.
5. Assess whether it is appropriate for the child to undergo multiple physical or psychological examinations. Before multiple physical or psychological examinations are conducted, the requesting party must present to the judge evidence of a compelling need or reason considering: (1) the nature and intrusiveness of the examination requested; (2) the child's age; (3) the resulting physical and/or emotional effects of the examination on the child; (4) the probative value of the examination to the issues before the court; (5) whether the passage of time renders the examination unnecessary or irrelevant; and (6) the evidence already available for the respondent's use.

6. Review any pre-dispositional report prepared for the court prior to the dispositional hearing and submit a factually accurate report if necessary to correct deficiencies.
7. Complete the investigation of the case with sufficient time between the interviews and court appearances to thoroughly analyze the information gleaned to formulate meaningful arguments and written recommendations to the court.
8. Submit a written report to the court and provide a copy to all parties at least five (5) days prior to the disposition hearing that complies with the format and content requirements of the "Report of Guardian *Ad Litem*" set forth in Appendix B of the Rules of Procedure for Child Abuse and Neglect Proceedings. When necessary, petition the court to seal or redact information contained in the report as provided in Rule 18a of the Rules of Procedure for Child Abuse and Neglect Proceedings. Submit an updated report if necessary to notify the court of any changes in the child's circumstances. Such report is protected by the attorney-client privilege and the attorney work product privilege. GALs are precluded from testifying as to any aspect of the report.
9. When appropriate, explain to the child the decisions of the court.
10. Ensure that the child/family case plan and subsequent progress reports include appropriate treatment. The GAL is to advocate, when appropriate, for a gradual transition period and take into consideration the educational stability of the child. The GAL is to ensure that the transition plan is intended to foster the child's emotional adjustment.
11. Recommend to the court the appropriateness of establishing, continuing, or collecting a child support obligation from the parents involved in the case.
12. Ensure that the court considers whether continued association with siblings in other placements is in the child's best interests.
13. Ensure that the dispositional order contains provisions that direct the child protective agency to provide periodic reviews and reports to appropriate entities.

E. Duties of GAL as to Post-Dispositional Representation

1. When appropriate, explain to the child the decisions of the court.
2. When appropriate, inform the child of the right to appeal and what that right means. Exercise the appellate rights of the child if under the reasonable judgment of the GAL an appeal is necessary. If the GAL decides to file an appeal, the appeal must fully comply with the requirements set forth in Rule 11 of the Rules of Appellate Procedure.
3. Actively participate and timely file a response in any appeal, extraordinary writ, modification, or action ancillary to the abuse and neglect proceeding including

proceedings to address the disruption of a permanent placement which affect the recommendations of the GAL. If an appeal is filed by another party in an abuse and neglect case, the GAL is required to file a respondent's brief or summary response that adheres to the requisite provisions of Rule 11 of the Rules of Appellate Procedure.

4. During the period of representation, evaluate whether it is appropriate to file a motion for modification of the dispositional order if a change in circumstances occurs for the child which warrants a modification.
5. As provided in Rule 52(g) of the Rules of Procedure for Child Abuse and Neglect Proceedings, a GAL's representation of the child continues until such time as permanent placement of the child has been achieved, or as determined by the Court.

APPENDIX B

IN THE CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA

In the Matter of:

(Child's Name)

Case No.:

Judge:

Report of Guardian *Ad Litem*

As guardian *ad litem* (GAL) for the minor child (child's name), I hereby submit the following report based on my investigation and observations prior to the (type of hearing) scheduled on (date of hearing).

I. General Information

1. Child's Full Name and Date of Birth
2. Parents' Full Names
3. Sibling Information
4. Other parties involved in the abuse and neglect petition

II. History

Provide a brief summary of the procedural posture of the case.

III. GAL's Contact with Child

List the dates of contact with the child and the nature of the contact.

IV. Persons Interviewed

List the name of each person interviewed, the date of the interview, and the person's relationship to the child.

V. Summary of Information Obtained from Interviews/Observations

Provide an objective summary of the information obtained from the interviews and observations obtained from the investigation. Observations may include information regarding the parties' living environments, the child's behavior, and the child's interaction with others.

VI. Summary of Documents Reviewed

List and briefly summarize the documents reviewed during the course of the investigation and attach any documents that are necessary for the court's consideration.

VII. Child's Current Status

1. Placement

2. Visitation

3. Education

4. Medical

5. Services

6. Contact with Siblings/Relatives

VIII. Parents' Current Situation

Provide information regarding each parent's current status and their ability to care for the child.

IX. Child's Expressed Wishes

When appropriate, discuss the child's wishes and any issues that the child requests that the court consider.

X. Recommendation

Analyze any allegations of abuse and neglect and provide a specific recommendation that addresses the best interests of the child with regard to custody, visitation, and permanent placement. Discuss the child's case plan as well as the family case plan. Address any additional factors that are necessary for the court to consider to protect the best interests of the child.

XI. Conclusion

Provide a summary of the most important factors for the court to consider in making its decision and indicate any action that is necessary in order to further the child's best interests.

Respectfully submitted,

(Signature of Guardian Ad Litem) (Date)

DIRECTIONS ON COMPLETING REPORT OF GUARDIAN AD LITEM

The following directions provide guidance to guardians *ad litem* (GAL) in preparing a report in an abuse and neglect proceeding pursuant to Rule 18a of the Rules of Procedure for Child Abuse and Neglect Proceedings. A GAL must submit a written report to the court and provide a copy to all parties at least five (5) days prior to the disposition hearing. It is the duty of the GAL to determine if the information contained in the report should be sealed or redacted. The GAL is to submit an updated report if necessary to notify the court of any changes in the child's circumstances. The contents of each section and subsection of the report are discussed below.

I. General Information

This section is intended to provide general information regarding the parties involved in the abuse and neglect petition including the following:

1. Child's full name and date of birth;
2. Parents' full names;
3. If applicable, the names and ages of any siblings or half-siblings; information regarding the sibling's parents, and the sibling's current placement.
4. Provide the names of any other parties involved in the abuse and neglect petition such as step-parents, relatives, or a parent's boyfriend or girlfriend. If the child is currently in foster care, list the names of foster parents and any other individuals residing in the child's current placement.

II. History

Briefly describe the procedural posture of the case. Did a parent or parents voluntarily relinquish rights to any other children? Have parental rights been involuntarily terminated to

any other children of either parent previously? If so, provide the date, case number, and facts with regard to the previous relinquishment. It is the duty of the GAL to determine what parental information is pertinent to a decision regarding the welfare of the child or children involved in the petition. What circumstances led to the filing of the instant petition? What essential issues need to be addressed by the Court in this proceeding?

III. GAL'S Contact with Child

Indicate the dates of contact with the child, the purpose of the contact, and the duration of the visit. Was the child alone during the visit? If not, who was present? Did the GAL conduct in-home visits and observe the respective living environments of the child's parents or caretakers and their interaction with the child?

IV. Persons Interviewed

List the name of each person interviewed and their relationship to the child. Such persons may include parents or caregivers, caseworkers, therapists, school personnel, medical providers, relatives, and siblings. Also list the date and manner in which the interviews were conducted (e.g., by phone, in person).

V. Summary of Information Obtained from Interviews/Observations

Provide an objective summary of the information obtained from the interviews and observations obtained from the investigation. Observations may include information regarding the parties' respective living environments, the child's behavior, and the child's interaction with parents, siblings, relatives, peers or others.

VI. Summary of Documents Reviewed

List and summarize the documents reviewed during the course of the investigation. Documents may include medical records, school records, police reports, psychological

reports, psychiatric reports, and other documents. Attach any necessary documents.

VII. Child's Current Status

Provide the court with information regarding the current status of the child including information regarding the child's placement, visitation, education, medical needs, services, and contact with siblings and relatives.

1. Placement. Describe any observations regarding the child's current placement. Is this environment satisfying the needs of the child? What are the plans for the child's permanency?
2. Visitation. What is the status of parental visitation? Are the child's needs being met with regard to visitation?
3. Education. What is the child's current grade level? What school does the child attend? What are the child's current grades? What is the child's attendance record? Does the child have any special needs that need to be addressed?
4. Medical. Does the child have any medical needs that need to be addressed?
5. Services. Does the child need counseling, tutoring, or any other types of services?
6. Contact with Siblings/Relatives. Are the child's needs being met with regard to contact with siblings and/or relatives?

VIII. Parents' Current Situation

Provide information regarding the fitness of each of the parents and their ability to care for the child including: the parents' work schedules/time available to spend with the child; parents' educational levels; financial resources; family support; home studies/living arrangements; domestic violence issues; substance abuse problems; criminal history; medical, emotional or psychological matters; and the parents' compliance with services and court

orders. Include any other information that the GAL determines is pertinent to a decision regarding the welfare of the child or children involved in the petition.

IX. Child's Expressed Wishes

Discuss the child's wishes when appropriate and any issues that the child requests the court to consider.

X. Recommendation

Analyze the factors that are essential for the court to consider when making a determination regarding the allegations of abuse and neglect and custody, visitation, and permanent placement of the child. Discuss the child's case plan as well as the family case plan including the services to be made available to the child and family. Address any other issues that are necessary in order for the court to protect the best interests of the child.

XI. Conclusion

Summarize the most important factors for the court to consider in making its decision, noting all aspects requiring special court direction and indicate any other action that is necessary to further the best interests of the child.