

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of June, 2014, the following order was made and entered:

**IN RE: REQUEST FOR PUBLIC COMMENT ON PROPOSED AMENDMENTS
TO THE RULES OF PRACTICE AND PROCEDURE FOR MINOR
GUARDIANSHIP PROCEEDINGS**

On a former day, March 13, 2014, Nikki Tennis, Director, Division of Children's Services, presented proposed amendments to the Rules of Practice and Procedure for Minor Guardianship Proceedings. Upon review, the Court hereby approves a sixty-day period for public comment. **Comments may be filed, in writing, with the Clerk of the Court on or before August 11, 2014.** The proposed insertions are indicated by underscoring and deletions are indicated by strikethrough.

**RULES OF PRACTICE AND PROCEDURE
FOR MINOR GUARDIANSHIP PROCEEDINGS**

RULE 1. Scope of Minor Guardianship Rules

These rules set forth procedures for circuit court and family court minor guardianship proceedings instituted pursuant to W. Va. Code § 44-10-1, et seq. If these rules conflict with other rules or statutes, these rules shall apply. Provided, these rules have no application to proceedings involving settlement of a minor's claims for damages for injury to person or property. The procedures for such proceedings are governed by the Minor Settlement Proceedings Reform Act codified at W. Va. Code § 44-10-14. Provided further, these rules shall not be interpreted to limit a circuit court from appointing a guardian for a minor child in an abuse and neglect case brought pursuant to W. Va. Code § 49-6-1, et seq.

Note: There are different practices throughout the State concerning the procedure for appointing a guardian once parental rights have been terminated or once the court determines that the children will not be reunified with their parents. In some cases, the presiding judge appoints a guardian; and in some cases, a separate guardianship case is filed (similar to an adoption). This proposed revision references that a judge in an abuse and neglect case could appoint a guardian and that a separate guardianship case would not be required.

RULE 2. Jurisdiction, Venue and Parties

(a) *Jurisdiction.* —1) Circuit courts and family courts have concurrent subject matter jurisdiction over minor guardianship proceedings, whether involving guardianship of the person or estate of a minor, or both; 2) family court jurisdiction in minor guardianship proceedings is subject to removal under the conditions set forth in Rule 13 of these rules; 3) no guardianship petition may be considered if the child who is the subject of the petition is involved in another court proceeding relating to custody or guardianship or if the petitioner is a parent seeking custodial rights adverse to the other parent; and 4) if the child who is the subject of the petition was previously involved in an abuse and neglect proceeding under W. Va. Code § 49-6-1, et seq., the circuit court that heard that case retains exclusive jurisdiction over any subsequent minor guardianship proceedings, unless one of the exceptions in Rule 6 of the Rules of Procedure for Child Abuse and Neglect Proceedings is applicable.

Note: The proposed provision in section 3 is from an amendment to W. Va. Code § 44-10-3(d), and it prohibits a court from proceeding on a guardianship petition if the minor is subject to another custody or guardianship proceeding or if the basis of the guardianship proceeding is a custody dispute between two parents.

Note 2: Contrary to W. Va. Code § 44-10-3(d), W. Va. Code § 44-10-7 (last amended in 1996) allows a court to appoint a guardian in a case involving a dispute between parents. The applicable provision states that: "If the father and mother be living apart, the court to which application is made from the appointment of a guardian, or before which any such matter comes in question, shall appoint, as guardian of the person of the minor child or children of such father and mother, that parent who is, in the court's opinion, best suited for the trust, considering the welfare and best interests of such minor child or children." This provision in W. Va. Code § 44-10-7 is outdated and should be amended to remove this sentence that conflicts with the 2013 amendment to W. Va. Code § 44-10-3(d). In any event, adding the new language in section 3 of paragraph (a) of this rule supersedes the conflict presented by the outdated statute. Section 4 was added to paragraph (a) to clarify that if there has been a permanent out-of-home placement in a prior abuse and neglect case, only the circuit court that ordered the placement in that case has jurisdiction to hear a subsequent minor guardianship proceeding that could alter that earlier placement.

(b) *Venue.*—A petition for appointment of a minor guardian shall be filed and heard in the county where the minor has resided for the past six months unless the court finds extraordinary circumstances for a sooner filing; or if the minor is a nonresident of the state, a county in which the minor has an estate. Any subsequent proceedings shall be heard in the county in which the guardian was appointed.

Note: The proposed provision is from the 2013 amendment to W. Va. Code § 44-10-3(b) which establishes a six-month residency requirement to establish venue, but it does allow for an earlier filing if there are extraordinary circumstances.

(c) *Parties.*— In addition to the petitioner, parties to a minor guardianship case shall include the minor or minors on whose behalf the guardianship is sought; every non-petitioner parent, provided his or her rights have not been terminated; and any other person with actual or legal custody of any minor who is a subject of the proceedings.

Note: This proposed provision comes from the 2013 amendment to W. Va. Code § 44-10-3(d) which prohibits a parent whose rights have been terminated from petitioning for the guardianship of a minor.

RULE 3. Petition

(a) *Contents.* —A petition for appointment of a guardian for a minor may name more than one minor, if the minors joined are all siblings or half-siblings. The petition shall contain the following in connection with each minor:

- 1) Full name, date of birth, and residence address;
- 2) A statement supporting venue in the county of filing;
- 3) A statement indicating whether guardianship over the person or estate, or both, is sought;
- 4) The name and last known address of the minor's father and mother, further stating whether each parent is living, ~~or~~ deceased; or his or her parental rights have been terminated;

Note: This provision is proposed because one basis for appointing a guardian for a minor is that parental rights have been previously terminated. W. Va. Code § 44-10-3(f)(2).

- 5) If the minor does not reside with a parent, the name and address of the current custodian or custodians;
- 6) A statement describing the reason or reasons why the guardianship appointment is sought;
- 7) The places where the minor has lived during the last five years, or since birth if the minor is less than five years of age, and the names and present addresses of the persons with whom the minor lived during that period;
- 8) A description of any past or current proceeding involving the minor's custody, identified by court, location, case number, and type of proceeding;
- 9) The name and address, and relationship if any, of the proposed guardian or guardians;
- 10) A statement affirming the competency and fitness of each proposed guardian, further attesting that the welfare and best interest of the minor will be properly protected by the appointment;
- 11) If appointment over the minor's estate is sought, a description and estimated value of all real property and other assets in the minor's estate;
- 12) A description of any anticipated periodic payments due to or on behalf of the minor, including but not limited to child support and government benefits; and
- 13) A statement as to whether appointment of a curator or temporary guardian is needed to protect the welfare and best interests of the minor until a guardian is appointed and qualified to act.

(b) *Verification.* —The petition shall be signed by the petitioner and contain an affirmation or oath that the facts set forth in the petition are true to the best knowledge and belief of the petitioner.

(c) *Filing.* — The petition, along with a completed case information statement, shall be filed with the circuit clerk. At the time of filing, the filing fee for general civil actions and any

necessary service costs shall be paid unless the petitioner presents a completed affidavit of indigency.

RULE 4. Notice of Hearing

(a) *Scheduling and Notice.* —Upon the filing of a petition, the circuit clerk shall provide a copy, ~~forthwith~~ within two days, to the appropriate court. The court shall schedule a hearing to be conducted within 10 days after the petition is filed. A notice of scheduled hearing shall be served along with the petition and summons in accordance with Rule 5 of these rules upon every non-petitioner parent whose rights have not been previously terminated; any other person with custodial interests listed in the petition; any minor named in the petition who is 14 years of age or more; and any counsel of record. The petitioner shall be served the notice of hearing by the court or clerk by first-class mail.

Note 1: W. Va. Code § 44-10-3(e), as amended, establishes a definite time period, no longer than two days, in which a clerk must provide a copy of the petition to the presiding judge.

Note 2: The second proposed provision is added to expressly state that a non-petitioner parent whose rights have been terminated would not be entitled to service of a petition. See W. Va. Code 44-10-3(d).

(b) *Continuance for Insufficient Notice.* —At the time of the scheduled hearing, if all persons entitled to service of the petition and notice of the hearing have not been served at least 5 days prior to the hearing, or waived service in writing or on the record, the court shall continue the hearing. When all persons are served with the petition, the court shall promptly schedule and provide notice (by personal service or first-class mail) of the re-scheduled hearing, to take place within 30 days of the notice.

(c) *Temporary Guardian.* —Upon a continuance of a hearing pursuant to subsection (b) above, at the request of the petitioner, or by the court upon its own motion, a temporary guardian for the minor may be appointed for the protection of the minor if the court finds such temporary appointment necessary, under such terms as the court finds appropriate. The court shall set the duration of the temporary guardian appointment, but such appointment shall not exceed six months. The court may extend the temporary guardianship upon further order finding continued need in the best interest of the minor.

Note: This provision is proposed to clarify that a temporary guardianship should not exceed six months unless the court finds that there is a continued need for such an appointment. See W. Va. Code § 44-10-3(g).

RULE 5. Service

(a) *Summons and Petition.* —Upon the filing of a petition, the circuit clerk shall issue a summons to be served within 5 days of the filing of the petition. The petitioner shall choose a method of service in accordance with Rule 4 of the Rules of Civil Procedure. The summons, along with a copy of the petition and notice of hearing, shall be served upon every non-

petitioner parent whose rights have not been previously terminated; any other person with custodial interests listed in the petition; any minor named in the petition who is 14 years of age or more; and any proposed guardian if someone other than the petitioner.

(b) *Other Pleadings and Documents.* —Any pleading, notice, or other document filed subsequent to the original petition shall be served, together with a certificate of service, upon each of the parties. If a party is represented by an attorney, service shall be made on the attorney unless service upon the party is ordered by the court. Service upon a party or attorney shall be made by hand-delivering a copy to the party or attorney; or by mailing a copy by first class mail to the last-known address of the party or attorney, or if no address is known, by leaving it with the circuit clerk; or by facsimile transmission made to the party or attorney pursuant to West Virginia Trial Court Rule 12. Hand-delivery of a copy under this rule means: handing it to a party or attorney; or leaving it at the party's or attorney's office with a clerk or other appropriate staff person; or if the person to be served has no office, by leaving it at the person's home with some member of the person's family above the age of 16 years.

Note: This proposed provision was included to clarify that a parent whose rights have been terminated would not be entitled to be served with a copy of the petition.

RULE 6. Nomination of Guardian by Minor

(a) *Request.* —A minor above the age of 14 years may nominate his or her own guardian by either making a request on the record before the court or filing a signed and verified written request anytime in advance of the hearing on the petition. If a written nomination is filed at the time of the filing of the petition, it shall be served on others along with the summons and petition; otherwise, it shall be served in accordance with Rule 5(b) of these rules.

(b) *Court Approval.* —Although a minor may nominate a person to serve as his or her guardian, the court has the discretion to determine, as a preliminary matter, whether the particular circumstances warrant the appointment of a guardian. If the court finds that the circumstances warrant the appointment of a guardian and that the minor's nominee would be a suitable and appropriate guardian, the appointment shall be made. If the minor's nominee is not appointed, the court may appoint a guardian in the same manner as if the nomination was not made.

Note: These two provisions have been proposed to clarify that the court has the discretion to determine, as a threshold matter, whether the particular circumstances warrant the appointment of a guardian, even if the minor has nominated a person as his or her guardian. Syl. Pt. 5, *In re: Antonio R.A.*, 228 W. Va. 380, 719 S.E.2d 850 (2011).

RULE 7. Confidentiality

(a) *Hearings.* —Attendance in all hearings relating to minor guardianship proceedings shall be limited to the parties, counsel, witnesses while testifying, and other persons whom the court determines have a legitimate interest in the proceedings.

(b) *Records*. —Other than court orders and case indexes, all records of minor guardianship proceedings are confidential and shall not be disclosed to anyone who is not a party to the proceeding, counsel of record, or the court presiding over the proceeding, unless the court by written order permits examination of such records.

Note: W. Va. Code § 44-10-3(l) was added in 2013 and, for the most part, is consistent with the records access provision in paragraph (b) of this rule. However, the statute further provides that another family or circuit court presiding over another proceeding involving the minor would have access to the entire file in the minor guardianship case. In contrast, Rule 6a(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings only allows that "family courts and staff shall have access to all circuit court orders and case indexes in this State in all such related Chapter 49 proceedings." The reason for the limitation in Rule 6a was a balance between making sure that another court would not contravene a determination made by a circuit court, but access to the entire court file was not allowed because review of records, such as psychological examinations, might influence a judge without providing any notice to the parties that the presiding judge in the second case had reviewed confidential information in an earlier case file. We think a similar approach should be adopted with regard to Minor Guardianship Rule 7. Since indexes and orders are already public records, there is no reason to include a specific provision allowing a presiding judge in a second case to review any orders or indexes in a minor guardianship case file. Furthermore, access to the case file appears to be more of a procedural, rather than substantive, matter. Therefore, the current provisions of Rule 7 would supersede the conflicting language of W. Va. Code § 44-10-3(l).

RULE 8. Parental Consent to or Waiver of Guardianship Appointment

A parent may consent to the appointment of a guardian or may waive his or her priority right of consideration for appointment as guardian of the person or estate of any minor child. The consent or waiver by a parent must be either: 1) made before the court on the record in the guardianship proceedings; or 2) evidenced by a written consent or waiver signed and verified that is filed with the court in the guardianship proceedings.

Note: The provisions that refer to a parent's consent were included because W. Va. Code § 44-10-3(f)(1) refers to a parent consenting to the appointment of a specific guardian. As a matter of common sense, it seems that a parent could consent to a guardianship, as opposed to waiving appointment, because a parent may also consent to an adoption. For example, military personnel may want to consent to a guardianship while deployed.

RULE 9. Bond

(a) *General Requirement*. —A guardian appointed by the circuit court over the estate of a minor must qualify the appointment by promptly giving bond fully meeting the conditions specified by the court in the order of appointment. The guardian is not qualified, or

authorized to hold and manage the minor's estate, until the bond requirements are met. If the bond requirements are not met within 15 days from the date of the order of appointment, the clerk shall notify the court and the matter shall be set for further hearing to address the guardian's failure to qualify.

(b) *Exception.* —When the appointment of a guardian over a minor's estate is sought under a testamentary request that the person specified in the will not be required to give bond, the court may dispense with the bond if it finds that a bond is unnecessary for the protection of the minor's estate under the circumstances presented.

(c) *Curator or Temporary Guardian.* —If the court finds, at any stage of the proceedings, that there is an immediate need to protect the person or estate of a minor until such time that a permanent guardian can be appointed and qualified, the court may appoint a curator or temporary guardian to take any actions or measures for the protection of the minor or minor's estate. The duration of such appointment may not exceed six months. The court may extend the temporary appointment upon further order finding continued need in the best interests of the minor.

Note: This provision is proposed to clarify that a temporary guardianship should not exceed six months unless the court finds that there is a continued need for such an appointment. See W. Va. Code § 44-10-3(g).

RULE 10. Guardianship Screening Factors

The court, when determining an appropriate guardianship appointment over the person of a minor, shall ascertain and consider, among other pertinent matters, whether any proposed guardian:

- 1) Is required to register as a sex offender under West Virginia Code, Chapter 15, Article 12;
- 2) Has a record of any misdemeanor or felony convictions;
- 3) Has ever been subject to a restraining order or final protective order;
- 4) Has ever been the subject of any substantiated report alleging child abuse, neglect, or molestation made to any child protection agency, other law enforcement agency, or court in any jurisdiction;
- 5) Habitually uses any illegal substances or abuses alcohol; or
- 6) Has another person living in the home that involves any of the matters stated above.

RULE 11. Order of Appointment

At the conclusion of the hearing on the petition, the court shall make findings of fact and conclusions of law regarding the guardianship matters raised in the petition and proceedings. The court shall issue an order for entry by the clerk with respect to the matters determined, including the findings of fact and conclusions of law, within 10 days of the conclusion of the hearing. The order shall contain a provision in its final paragraph directing the clerk to provide certified copies to the parties and other interested persons or entities as identified by the court.

RULE 12. Guardians Ad Litem

The appointment of guardians ad litem for minors or other parties under disability in cases seeking the appointment of a guardian shall be governed by Rule 21 of the West Virginia Trial Court Rules. Appointment of a guardian ad litem for a minor should be limited to those cases where the court is unable to obtain reliable and credible information necessary for decision from the minor, parties, and other interested persons. The order appointing a guardian ad litem shall state the specific reasons for the appointment and the expectations of the court for the guardian ad litem's report, including the date by which the report is due.

RULE 13. Cases Involving Allegations of Child Abuse and Neglect

(a) *Removal by Family Court to Circuit Court of Minor Guardianship Cases Involving Child Abuse and Neglect.* —If a family court learns that the basis, in whole or part, of a petition for minor guardianship brought pursuant to W. Va. Code § 44-10-3, is an allegation of child abuse and neglect as defined in W. Va. Code § 49-1-3, then the family court before whom the guardianship proceeding is pending shall remove the case to the circuit court for hearing. Should the family court learn of such allegations of child abuse and neglect during the hearing, then the family court shall continue the hearing, subject to an appropriate temporary guardianship order, and remove the case to the circuit court for hearing to be conducted within 10 days, for determination of all issues. Once removed, the case (or any portion) shall not be remanded to family court. At the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence. Immediately upon removal, the circuit clerk shall forthwith send the removal notice to the circuit court. Upon receipt of the removal notice, the circuit court shall forthwith cause notice to be served in accordance with W. Va. Code § 44-10-3 and to the Department of Health and Human Resources who shall be served with notice of the petition, including a copy of the petition, and of the final hearing to be conducted before the circuit court. Such notice to the Department of Health and Human Resources shall constitute a report by the family and circuit courts pursuant to W. Va. Code § 49-6A-2.

(b) *Investigation of Abuse and Neglect.* —Upon removal of the minor guardianship petition, the circuit court may utilize the investigative and mandamus process and related procedures set forth in Rule 3a of the Rules of Procedure for Child Abuse and Neglect Proceedings if the court deems it necessary or appropriate under the circumstances presented. The circuit court shall allow the petitioner for minor guardianship to appear as a co-petitioner on the petition filed by the Department of Health and Human Services pursuant to W. Va. Code § 49-6-1, et seq., if both so agree. Nothing herein shall be construed as either a requirement that the petitioner for minor guardianship be a co-petitioner under W. Va. Code § 49-6-1, et seq., or a prohibition against the filing of a W. Va. Code § 49-6-1, et seq., petition by the petitioner for minor guardianship should the Department show cause why it will not file such a petition.

(c) *Transfer and Consolidation upon Filing of Abuse and Neglect Petition.* —If a petition is filed pursuant to W. Va. Code § 49-6-1, et seq., the circuit court before which the Chapter 49 petition is filed may order any other proceeding pending before another circuit court, family court, or magistrate court which arises out of the same facts alleged in the Chapter 49 petition or involves the question of whether such abuse and neglect occurred transferred to

the court where the Chapter 49 petition is pending and may consolidate such proceedings, except criminal and delinquency proceedings, all in accordance with Rule 42 of the Rules of Civil Procedure and W. Va. Code § 56-9-1.

Note: Subsection (f) of W. Va. Code § 44-10-3, added when the statute was amended in 2013, establishes five different types of circumstances in which a court would have the discretion to appoint a guardian. In addition, subsection (g) establishes one other set of circumstances, when a period of transition into the custody of a parent is needed, for the appointment of a temporary guardian. The concern is that these circumstances specifically described in subsections (f)(2) through (f)(5) would, in most instances, constitute allegations that would be subject to removal to circuit court under Rule 13. The combined result is that almost all minor guardianship proceedings can only be addressed in circuit court, even though both circuit court and family court share concurrent jurisdiction over minor guardianship cases. We see no rule-based solution to this imbalance in the concurrent jurisdiction scheme intended under the minor guardianship statutes.

RULE 14. Proceedings Regarding a Minor's Estate

(a) *Commencement.* —Subject to the exception for small estates set forth in W. Va. Code § 44-10-8, a guardian appointed for the management of a minor's estate who needs to spend more than the annual income of the estate for the well-being and education of the minor, may file a verified petition setting forth the reasons why it is necessary to make such expenditures. The petition shall be filed with the court that made the guardianship appointment, as part of the original proceeding, without additional filing fees. The minor shall be made a respondent and the court shall appoint a guardian ad litem for the minor, who shall answer the petition, represent the minor, and be present at any hearing. The guardian ad litem may serve on a voluntary basis without compensation or be paid a reasonable sum as determined by the appointing court, based upon the services provided, from the minor's estate.

(b) *Disbursements Beyond Income.* —Any disbursements beyond income from a minor's estate shall be authorized and handled in accordance with W. Va. Code § 44-10-9 if relating to personal property, and W. Va. Code § 44-10-13 if relating to real property.

Note: The proposed language added to paragraph (a) is to clarify the source of any compensation for a guardian ad litem. Since there is an estate with assets, the indigency provisions under Trial Court Rule 21 should not apply.

RULE 15. Termination of Guardianship

(a) *Reaching Adulthood.* —Upon the minor reaching 18 years of age, the guardianship shall terminate as a matter of law. If the minor had any estate, the guardian shall promptly deliver the remaining estate assets to him or her along with a final accounting. Any written receipt or release obtained by or on behalf of the guardian in conjunction with the delivery of estate assets shall not prejudice or otherwise affect any legal right to seek recovery for mismanagement or misappropriation of estate assets.

(b) *Other Circumstances.* —A guardianship may be earlier terminated if:

- 1) The guardian or minor dies;
- 2) The guardian petitions the court to resign and the court approves the resignation by written order; or
- 3) A petition is filed by the guardian, the minor, or another interested person stating that the minor is no longer in need of the assistance or protection of a guardian, or the court upon its own motion finds the same, and an order is entered terminating the guardianship.

(c) *Substituted Guardianship.* —A guardianship may not be terminated by the court if there are any estate assets due and payable to the minor, or if the minor is still in need of supervision and protection. In the event of the resignation or death of a guardian in such circumstances, the court shall appoint another guardian.

RULE 16. Appeals

(a) *Family Court Cases.* —Appeals from final orders in family court shall be made in accordance with Rules 26 through 36 of the Rules of Practice and Procedure for Family Court.

(b) *Circuit Court Cases.* —Appeals from final orders in circuit court shall be made in accordance with Rules 72 and 73 of the Rules of Civil Procedure and the Rules of Appellate Procedure.

RULE 17. Reference to Fiduciary Commissioner or Supervisor

(a) *Reference.* —In any case involving the appointment of a guardian over a minor's estate, the order of appointment shall include reference to a fiduciary commissioner or supervisor for supervision of the minor's estate in accordance with the applicable provisions of West Virginia Code Chapter 44, Articles 4 and 10.

(b) *Waiver.* —If the value of the minor's estate is less than twenty-five thousand dollars, the court may waive any or all of the requirements regarding reference to a fiduciary officer, the filing of reports or statements of accounts, and publication of accounts."

A True Copy

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

