

PRELIMINARY HEARINGS and
ADJUDICATORY HEARINGS:
Role of the
Guardian ad Litem

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GUARDIAN AD LITEM'S ROLE IN ABUSE AND NEGLECT CASES

- The GAL in a child abuse and neglect case has a **dual role**, both as an **attorney for the child**, 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.**

GUARDIAN AD LITEM'S ROLE IN ABUSE AND NEGLECT CASES

- A child has a **right to be represented by counsel** in every stage of abuse and neglect proceedings (including appeal).
WV Code Code 49-4-601(f)(1)
- A *Guardian ad Litem* shall provide **competent representation** to a client, and to act with **reasonable diligence and promptness** in representing the child.
- A *Guardian ad Litem* shall make a **full and independent investigation** of the facts involved in the proceeding, and shall make his or her **recommendations** known to the court.

GUARDIAN AD LITEM'S ROLE IN ABUSE AND NEGLECT CASES

The WV Supreme Court has offered GALs a roadmap to follow – a list of expectations that are the *starting point* for a GAL's investigative (and other) work in abuse and neglect cases:

- *In re: Jeffrey R.L.*, 190 W.Va. 24 (1993)
- Appendix A (and Rule 18a) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings
- The WV Rules of Professional Conduct

BEFORE THE PRELIMINARY HEARING

“Cool, I’ve got a case – what do I do now??”

Petition and Initial Order

Read the Petition and the Initial Order!

What will the Petition tell you?

The Petition will set forth the **factual allegations** that DHHR expects to be able to prove in support of a finding that the child was an abused and/or neglected child, as defined by WV Code §49-1-201.

The Petition will also give you an initial clue as to who you will need to interview, which records you will need to review, which places you will need to view, and other information to start your investigation.

Initial Order Grants Temporary Custody

If the **Initial Order grants temporary custody** to DHHR or a responsible relative (on a finding of **imminent danger** to the child (WV Code §49-4-602(a)):

- **Sets a Preliminary Hearing** within 10 days of the filing of the Petition, giving at least 5 days notice of the hearing (Rules 20 and 22)
- **Appoints counsel** for the child, separate counsel for the parents, custodians, “other qualified respondents” (WV Code §49-4-601(f);
- Provides for **transfer of the child** to DHHR or a responsible person

Initial Order Grants Temporary Custody

- May appoint CASA
- May initiate services to facilitate reunification
- “Contrary to the welfare” and “reasonable efforts” (DHHR made reasonable efforts or reasonable efforts not required due to emergency situation) language

Initial Order Does NOT Grant Temporary Custody

If the **Initial Order does not grant temporary custody**
(WV Code §49-4-602):

- **MAY set a Preliminary Hearing** with at least 5 days notice if facts demonstrate imminent danger to the child; **OR**
- **MAY** have no Preliminary Hearing and **set Adjudicatory Hearing** with at least **10 days notice** (Rule 20) and within **30 days of the filing of the petition** (if no pre-adjudicatory improvement period is granted) (Rule 25)

Initial Order Does NOT Grant Temporary Custody

- **Appoints counsel** for the child, separate counsel for the parents, custodians, “other qualified respondent” (WV Code §49-4-601(f))
- Provides for **transfer of the child** to WVDHHR or a responsible person
- **May appoint CASA**

Adjudicatory Pre-Hearing Conference

Court may hold an **Adjudicatory Pre-Hearing Conference** (Rule 24) 5 days before the Adjudicatory Hearing.

- **Any party may ask for one** if the Court does not schedule one.
- **Issues commonly addressed:**
 - service on the parties
 - appointment of counsel
 - presence and/or testimony of the child
 - discovery issues
 - identification of issues of law and fact for adjudication
 - witnesses
 - length / date of Adjudicatory Hearing
- Can be useful to early investigation

Guardian ad Litem Investigation

- The investigation is going to be **ongoing**.
- The investigation will be **tailored to the circumstances** of the case. There are certain investigative tasks done in every case, while others will not be a priority early on or at all.
- There is a **short time frame** between the filing of the Petition and the Preliminary Hearing. **Prioritize your investigation** so that you have the evidence you need for the Preliminary Hearing first, and then focus on the broader investigation relevant to the Adjudication.

What do I review?

(Prior to the Preliminary Hearing)

- “Court Summary” provided by DHHR
- Rule 10 Disclosure
(Evidence and witnesses expected at the hearing)
(3 days after filing Petition for DHHR; 5 days before hearing for other parties)
- Respondents Answers (Note: the child is not required to file and serve an Answer (Rule 17(b)))

What do I review?

(Prior to the Preliminary Hearing)

- *Contact the **caseworker** and review the caseworker's file and all relevant information
- **Prior Court files** (civil, family, criminal, DVPO, abuse and neglect)
- **Social media** posts of people relevant to the proceeding (Be aware of ethical limitations!)
- **Any other relevant records**

Who do I interview? What do I ask?

(Prior to the Preliminary Hearing)

- **The child** (in a manner appropriate for age and maturity)
 - Introduce yourself
 - Ask simple questions - put the child at ease and to get to know the child
 - Let the child know who you are, what your role is, why you are there, what types of decisions the court will be making, and how to contact you

Who do I interview? What do I ask?

(Prior to the Preliminary Hearing)

- **The child** (Cont.):
 - **Do NOT** attempt a forensic or targeted interview with the child designed to get the child to disclose specific incidents of abuse/neglect to you
 - **DO** be an active listener for anything the child wants to tell you
 - **DO** give the child a safe opportunity to provide you with information about his/her home situation with the Respondents, relationship with them, maltreatment, or anything else he/she wishes to discuss.

Who do I interview? What do I ask?

(Prior to the Preliminary Hearing)

The child (Cont.):

- **Meet with the child alone** (as is possible) in a safe, comfortable setting
- Ask about the child's family
- Ask about the child's current living situation / caretaker
- Ask about whether the child wants contact with anyone (his/her parents, siblings, etc.) and what kind (supervised / unsupervised visits, facetime, phone calls, letters, etc.)

Who do I interview? What do I ask?

(Prior to the Preliminary Hearing)

- **The child** (Cont.):
 - Ask whether the child wants / needs anything from home
 - Keep the child informed about appropriate issues and proceedings (in an age and maturity appropriate manner)
 - Ask whether the child would like the Court to know anything

Who do I interview? What do I ask?

(Prior to the Preliminary Hearing)

Current caretakers / foster parents of the child:

- Introduce yourself
- Let the caretakers/foster parents know:
 - who you are
 - what your role is
 - why you are there
 - what types of decisions the court will be making
 - how to contact you

Who do I interview? What do I ask?

(Prior to the Preliminary Hearing)

Current Caretakers / Foster Parents (Cont.):

- Ask about the child's current medical, dental, educational, psychological, and developmental status, and identify service providers currently helping the child in these areas so that you can talk with them as well
- Ask whether the parents have attempted contact with the child (in a relative placement scenario), and ascertain the details
- Ask about behavioral issues, habits, and other observations of the child – alone, with parents / siblings, with the caretakers, with other children, etc.

Who do I interview? What do I ask?

(Prior to the Preliminary Hearing)

- **Current Caretakers / Foster Parents** (Cont.):
 - Ask what concerns the current caretakers / foster parents have about the child
 - Make sure that the caretakers/foster parents have notice of the Petition, hearings, MDTs, significant motions, visitation schedules, service provider contact information, and any other information necessary to help provide what the child needs.

Who do I interview? What do I ask?

(Prior to the Preliminary Hearing)

Potential relative placements:

- They often have a great deal of information about the family
- You should determine their **interest** as early as possible
 - Do they want to be a temporary or permanent placement?
 - Do they want to have ongoing contact?
 - Do they want to be a support system for the parents?

Who / What do I want to see with my own eyes?

(Prior to the Preliminary Hearing)

- **The child** in his/her current placement
- Respondent parents / custodians
- Other caretakers
- The child's home(s)
- Homes of parents / custodians / other caretakers (relevant to the case)
- Child's school / daycare

What information will be a priority prior to the Preliminary Hearing?

- **Child's status**
 - safety, stability, basic needs being met
 - educational stability
 - a plan in place to maintain contact with appropriate family / individuals during pendency of the case
- Evidence supporting / refuting **imminent danger** finding
- **Efforts** by DHHR to preserve the family
- Existence of **appropriate relatives** who may wish to serve as temporary / permanent placement

Some Guidance from *In re: Jeffrey R.L.* on investigation in the early stages of the case:

- *Notify promptly the child and any current caretaker of the child of the appointment of counsel and give them **contact information**
- *Provide to the child, his or her parents (by counsel), and any foster parent / caretaker **notice** of the petition and all subsequent motions
- ***ON AN ongoing basis**, maintain contact with the child throughout the case and assure that s/he is receiving counseling, tutoring, or any other services needed to provide as much stability and continuity as possible.

(Also consider Birth-To-Three, Head Start / Early Head Start, services to address developmental delays (speech therapy / physical therapy / etc.), well-child and other medical services, educational, extracurricular, and cultural activities appropriate to the child.)

Preliminary Hearing

- **Purposes:** The court will review the petition and take evidence regarding **status of the child**, whether the Department made **reasonable efforts to preserve the family** (or whether reasonable efforts were not necessary), and whether **imminent danger** necessitates removal of the child from custody of the parents or continuation of previously ordered emergency custody. (WV Code 49-4-105 & 602; Rules 16 and 22).
- **Legal standard / evidence:** **Probable cause** to believe that the child is abused and/or neglected and imminent danger sufficient to necessitate removal from the home.
(Standard noted in *In re J.G.*, 2016 W.Va. Lexis 628, Docket No. 16-0337 (2016) (memorandum decision); *In re G.R.*, 2016 W.Va. Lexis 257, Docket No. 15-1200 (2016) (memorandum decision).

Guardian ad Litem's Role

Preliminary Hearing

- **Advocate for the child**
 - Fully litigate as you would for any other client.
 - Be prepared to call witnesses, cross examine witnesses, make relevant motions and objections, etc.
- Be prepared to provide the Court with the **current status** of the child
 - Circumstances
 - Placement
 - Services / needs / wishes

Guardian ad Litem's Role

Preliminary Hearing

- Be prepared to make **recommendations** regarding:
 - Removal of the child
 - Placement of the child
 - Visitation (supervised / unsupervised / therapeutic / special conditions / no visitation) and other contact (letter, telephone, etc.)
 - Services for the child while in placement
 - Any other issues that require Court attention
- If paternity is an issue, move the Court as early as possible for **paternity testing**

Guardian ad Litem's Investigation Prior to Adjudication

- The **GAL's investigative role is ONGOING** from the time the GAL receives the case.
- Although certain information is time-critical prior to the Preliminary Hearing, the investigative process is a continuum and there is a **duty to continue to update** the evidence obtained.

What (else) do I review? (Prior to the Adjudicatory Hearing)

- **New Evidence**: Review items previously listed that you did not have access to prior to the Preliminary Hearing due to the short timeframe, or that only became known or relevant after the Preliminary Hearing
- Ongoing **medical, therapy, educational, and other objective records** involving the **child**, including updated DHHR records
- **Therapy / medical / legal records** of the **respondents**
- **Updates** from various **service providers** for the parents and child
- **Visitation summaries** for supervised visits
- Logs, diaries, or calendars kept by **caretakers documenting** relevant information about the child

Who (else) do I interview? (Prior to the Adjudicatory Hearing)

- **DHHR workers** presently / previously involved with the family
- **Parents / Caretakers / Custodians / Foster parents**
(Be sure to obtain permission if represented by counsel)
- **Older children** (siblings or otherwise) and others who live(d) in the home with the child
- **Grandparents / other relatives** who can provide historical information about the family and/or evidence relevant to the Petition
- **Hospital personnel and physicians** (child and parents)
- **Therapists** (child and parents)

Who (else) do I interview? (Prior to the Adjudicatory Hearing)

- Teachers / Coaches / Tutors
- Law enforcement
- Pastors/clergy
- Babysitters / Daycare providers / After school or summer program providers
- Employers (of the parents)
- Visitation supervisors / service providers (child and parents)

Who (else) do I interview? (Prior to the Adjudicatory Hearing)

- The **first MDT** should be held between the Preliminary Hearing and Adjudication (within 30 days of Petition) (WV Code §49-4-405; Rule 51(a)).
- Talk with all **members of the MDT** regarding their knowledge of the child, the facts of the case, the circumstances, and other people who might have information relevant to the case.
- Compare notes with **CASA** (if one is appointed), who should be conducting their own independent investigation and can sometimes give you a fresh perspective.

Importance of MDT prior to Adjudication:

- Important **source of information** for the investigation, but also a critical **planning** stage
- Discuss **needs** of the child, needs of the parents, initiation of services, visitation, possible relative placements, **expectations**
- **Involving the child** in part of the MDT should be considered, if age / maturity appropriate
- Discussion of **possible stipulations**
- Discussion of whether or not there is agreement on recommendation of an **improvement period**, and if so, expectations about terms and conditions, including preferences for service providers

Guidance from *In re: Jeffrey R.L.*

***Contact and interview** persons such as older children, others who live(d) in the home with the child, caseworkers, and caretakers who may have information with respect to the child and obtain names and addresses of hospital personnel, physicians, teachers, law enforcement, pastors/clergy, babysitters, and other persons who may have pertinent information regarding the child and interview them.

Access to records

- Make **requests for records** as early as you reasonably can – some records and reports (especially from medical providers) can take significant time to obtain. It helps if you obtain releases of information from necessary parties early in the process, irrespective of the Order appointing you as GAL.
- You have the authority (and the duty) to **subpoena records and witnesses**. Do not hesitate to use it when deemed appropriate.
- If denied access, seek assistance from the court!

Who / What (else) do I want to see with my own eyes? (Prior to Adjudication)

- **The child:**
 - In his current placement
 - In public / extracurricular activities
 - Interacting with his/her current custodians / foster parents and service providers
 - Interacting with his/her parents (observe visitation)
 - In school / Daycare
 - Other environments as the case may suggest
- **Parents / custodians** in their current home and any proposed placement
- **Custodians / Foster Parents** in their current home

Reliance on WVDHHR and CASA Reports and Findings

- DHHR and CASA generally do an excellent job gathering evidence relevant to the proceeding. However, **never presume** that:
 - The evidence is always accurate (their reports are subject to the statements made to CPS workers and CASA by others, which are not always accurate)
 - The evidence is always complete (CPS workers and CASA are good, but not omniscient)
- DHHR and CASA reports are just **one component** in a GAL's investigation, never the whole investigation.

What information will be most important prior to the Adjudicatory Hearing?

- The **child's status** (ongoing), needs (ongoing), changes in status, recommended and appropriate services
- **Evidence that supports / refutes a finding that the child was abused and/or neglected**
- **Consideration of anticipated requests for improvement period**, including terms and conditions you believe necessary to address the conditions of abuse and neglect

Pre-Adjudicatory Improvement Periods

At any time prior to Adjudication, a respondent may move for a **pre-adjudicatory improvement period** (WV Code §49-4-610; Rule 23).

- Only **3 months**
 - **Cannot be extended**
 - Very little time to address substantial issues such as drug abuse, mental health issues, domestic violence, and other chronic problems
 - Consider carefully whether the case is appropriate for a Pre-Adjudicatory Improvement Period

Pre-Adjudicatory Improvement Periods

- *Evaluate any available improvement periods and actively assist in the formulation of an improvement period, where appropriate, and service plans.
- *Monitor the status of the child and progress of the parent(s) in satisfying the conditions of the improvement period by requiring monthly updates or status reports from agencies involved with the family.

Adjudicatory Hearing

- **Purposes** – to determine whether the child has been abused and/or neglected, and whether the respondent parents / respondent custodians have abused and/or neglected the child
- **Legal standard / evidence** – DHHR must prove by clear and convincing evidence that the child is an abused and/or neglected child, as defined by WV Code.

W. Va. Code §§ 49-1-201; 49-4-601(i); Rule 27.

Adjudicatory Hearing

- At the conclusion of the Adjudicatory hearing, the court shall make a determination based upon the evidence and shall make **findings of fact and conclusions of law as to whether such child is abused or neglected**, which shall be incorporated into the order of the court.
- If applicable, the court **may find that a parent is a non-abusing parent** because he or she is a battered parent or because he or she did not knowingly allow abuse. W. Va. Code § 49-1-201.
- The findings **must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof.**

W. Va. Code §§ 49-1-201; 49-4-601(i); Rule 27.

Adjudicatory Hearing

- All parties (including the child!) have a **meaningful opportunity to be heard**, including the right to present and cross-examine witnesses, and all the rules of evidence apply.
- *Plan to subpoena witnesses for hearings or otherwise prepare testimony or cross-examination of witnesses and ensure that relevant material is introduced. WV Code §49-4-601.
- **The Guardian ad Litem's role during the hearing is both as advocate for the child and to offer recommendations as to the best interest of the child.**

Preparation for the Adjudicatory Hearing

- *Pursue the **discovery of evidence**, formal and informal.
- *File timely and appropriate written **motions** such as motions for status conference, prompt hearing, evidentiary purpose, psychological examination, home study, and development and neurological study.
- *Maintain adequate **records** of documents filed in the case and of conversations with the client and potential witnesses.
- *Apprise the court of the **child's wishes**.

Preparation for the Adjudicatory Hearing

Stipulated Adjudications:

- Any stipulated or uncontested adjudication should include **agreed upon facts** supporting court involvement and a **statement of the problems or deficiencies** to be addressed at the final disposition hearing. (Rule 26).
- Be certain to include all critical problems in the statement of problems or deficiencies to be addressed - don't leave out anything important that the parents will need to address.

Preparation for the Adjudicatory Hearing

Be prepared to offer **recommendations / updates** to the Court regarding:

- **Findings of fact / conclusions of law** regarding Adjudication
- Requests for **improvement periods**
 - Whether the respondents have met their burden
 - Recommended **terms and conditions**
 - Length (up to **6 months**, with possible 3-month extension)
- **Current status** of the child, including placement and visitation
- **The child's wishes / needs / progress / services**

Protecting the Child From the Investigative Process

- Don't let investigation (by all parties) harm the child
- *Ensure that the child is not exposed to excessive interviews with the potential dangers inherent therein.
(Consider whether a Child Advocacy Center interview is the best option, and recommend one if appropriate.)
- Don't let the respondents attempt to interview the child regarding the case (or discuss the case with the child)

Protecting the Child From the Investigative Process

- *Ensure that a child who is court ordered to be **interviewed by a psychologist or psychiatrist** is interviewed in the presence of the guardian *ad litem* attorney unless the court, after consulting the child's guardian *ad litem*, believes that the interview is best conducted without the guardian *ad litem*.
- 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 a legally acceptable and emotionally supportive, neutral setting.

A GAL's investigation is never done...

Remember that the investigative process is an ongoing process.

- Ask questions.
- Request verification.
- Review status reports and update records as needed.
- Chat with CASA, DHHR, and all members of the MDT frequently, not just on MDT day.
- Stay in touch with the child, his/her caregiver(s) and service providers, and all other parties and witnesses who can provide ongoing updates.
- Document everything you learn.

Thank you for all that you do!