THE DUTIES OF GUARDIANS AD LITEM TO FAMILY COURT

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The adoption of the new Rules, particularly the new Appendix B to the Rules of Practice and Procedure for Family Court, are enormously helpful to guardians ad litem and to the parties in that they standardize and further professionalize the practice of guardians ad litem in Family Court. What had once been a relatively occasional service to the Court has now become a bona fide practice area. The reasons for the increasing use of guardians ad litem are numerous, but poverty and its effects - including drug and alcohol abuse, violence, and often a simple inability to communicate effectively to the Court, are chief among them. The seriousness of the situations faced by the parties and of course their children, coupled with the near-total powerlessness of children to tell their own story, demands thorough, prepared and well-trained guardians.

The statutes and guidelines that govern this practice can be considered an agenda or road map to this practice. Further, the substantial increase in compensation for guardians ad litem means that doing a thorough job should not be a financial hardship on attorneys accepting these referrals.

I. STATUTORY AUTHORITY

The West Virginia legislature has, by statute, conferred broad authority upon guardians *ad litem*, as set forth in West Virginia Code sections 48-9-301 and 48-9-302. Section 301 give a family court the discretion to order written investigations and reports "to assist it in determining any issue relevant to proceedings under this article". Section 302 confers the authority to appoint guardian ad litem. Each section directs the courts to specify the scope of the investigation as well as the extent of the investigator's or guardian's authority.

Section 48-9-301(b) provides that the investigator may "consult any person who may have information about the child and the potential parenting or custodian arrangements", may (upon order of the court) refer the child to professional personnel for diagnosis, may consult with and obtain information from medical, psychiatric or other expert persons who have served the child in the past *"without obtaining the consent of the parent or the child's custodian...".* This code section thus gives guardians ad litem the authority to obtain medical records without a release signed by the parent or custodian. Note, however, that the *child's consent must be obtained if the child has reached the age of twelve, unless the court finds that the child lacks mental capacity to consent. (W.Va. Code section 48-9-301(a).)* When seeking medical records, I have found that the records custodians tend to respond much more readily to a court order specifically authorizing the release of records than a reference to my general authority under the Code. Orders appointing guardians ad litem should generally include authorization to obtain the child's medical records.

II. RULES OF PRACTICE AND PROCEDURE FOR FAMILY COURT

Rule 47(b) reiterates the statutory directive that the order appointing the guardian ad litem should specify the scope of the guardians authority, specific reasons for appointment, and expectations for the guardian's report. I have found it to be extremely helpful if these orders will include language authorizing me to obtain medical and psychiatric records, but also authorizing me to meet with the children alone at their school. I have recently been turned away from two schools because my appointment orders did not specifically authorize school interviews. One principal had been instructed by someone at her county Board of Education to refuse me access to the child despite a general order appointing me as the child's GAL. *Please remember* when dealing with school personnel that they are responsible for the safety and welfare of every child in the school, and that your request to speak to a child may be unusual for them. You would do well to have your authority to meet with the child at school spelled out very clearly in your order. I have found school personnel to be extremely helpful and accommodating, as a rule. If it makes them more comfortable to have a very specific order, we should endeavor to do that for them

The "beef" in the new rules is found in the entirely new Appendix B to the Rules of Practice and Procedure for Family Court. I view this as list of instructions to be followed in every case, to the extent that they apply.

Please remember that as a guardian ad litem, you are subject to cross-examination. As a practical matter, the majority of the cases that I have involve self-represented litigants and cross-examination is usually limited and ineffective. A wise counsel or self-represented litigant, however, facing a report of a GAL that he or she finds objectionable, would do well to cross-examine the GAL on the guardian's compliance with the guidelines in Appendix B. You should be prepared, as a guardian, to affirmatively and thoroughly discuss how you complied with each guideline. The following is a brief analysis of some of the major points.

#3 - states that the guardian should only accept the appointment if he or she "has a thorough understanding of the issues involved and the functions to be performed." We are required to request clarification of the order if it is unclear. From time to time I will have a conversation with the Judge about the possible issues in the case, or actually be appointed while a hearing is in progress. If I have the opportunity to question the parties under oath before my investigation commences, I will take advantage of it. Please also remember that your "understanding of the issues involved" may change over the course of your investigation, and that, as your understanding evolves, this evolution may dictate a change in the "functions to be performed." Don't hesitate to follow your nose where it leads you. "Issue spotting" is one of the GAL's major functions.

#4 - *Review the Court File.* You shall review the court file and other relevant records. The Court file, in its entirety, is always relevant. Even if the immediate issue before the

Court appears to be modification of a relatively recent order, I still review the entire file, no matter how thick. You need to attempt to understand each party's perspective on the other and on their relationship with your client(s), and knowing both recent and remote history is always helpful. Understand that the parties' perspectives are often formed over a long period of time. Know the file. Plus, you never want to answer "No" if you are asked whether you read the Court's file.

#6 - *Face to Face Meeting with the Child.* This is also mandatory. First, the child is your client. You have to meet your client. Even if your client is an infant or is profoundly impaired and unable to communicate, you still must meet your client. That person is why you are in the case. Go see your client.

I vary the locations of these meetings depending on the age the client and the issues involved in the case. I find that the school setting offers the most neutral environment and most assures independent reporting. Typically I will interview the children at school without any advance notice to either parent. Understand that this is asking a lot of your clients. They may be a little surprised and sometimes (not often, though) they may be reluctant to talk. Where ever the interview takes place, you are expecting your clients to share deeply personal information with a total stranger. It may take more than one interview to get your clients to talk to you. This is hard for them. Come back again if you have to.

When dealing with older children, I tend to conduct those interviews at home, with other family members out of the room. Older kids tend to be embarrassed by getting called to the office. The older the kid, the more likely I am to make independent contact with the client and arrange a time and place for the interview directly with the client, just as I would with an adult client. I also share my cell phone information with nearly every client I have, and with their parents, and I encourage them to text me or call if they have questions. I'm a very big advocate of text communication. That is how the vast majority of my young clients communicate with their friends and just about everybody else in their lives. Give them the opportunity to communicate with you in the same way. It's easy, cheap, and they are used to it. Make sure that they understand that they can reach you by text so that if they have a question for you they don't have to wait until some rare time when you are in your office and they are out of school to reach you. I have had some very long text conversations with clients that I would not have had had we been forced to find an appointment during business hours to have our discussion.

#7 - *Explain the Proceedings.* This is mandatory. Remember that kids have a lot of fears and may have a complete or distorted understanding of what is happening in court. They are likely to be hearing two different stories. I explain to my clients that I am their lawyer and that *I work for them*, not for their parent, or for the court, but for them. I explain to them how my job is to argue for their "best interests" and that what they have to tell me is the most important part of my assessment of that. I also explain to them how to get in touch with me as dicussed in #6 above.

#8 - *Meet Parents Or Caretakers.* This is also mandatory. I generally like to meet the parties to a case *before* meeting with the children, because talking with the parties will shed light on the issues and help me figure out what I need to ask the children.

#9 - *Home Visits.* I do this in every case to the extent possible. Typically I will conduct my interviews of the parents in their homes. There is no substitute for it. If necessary, I do the home visits without prior notice, but usually the times for the visits are scheduled in advance. What I look for at the home depends on the issues in the case. Generally, I am trying to get a sense of the family's lifestyle, the child's lifestyle, and a sense as to whether the environment itself is at least minimally acceptable for the child. My perception and assessment of people's homes has evolved over time. In most of my cases, the standards of living at each home are pretty much the same. It would be rare that I would recommend a custodial allocation based on which home was preferable, although I do that occasionally. I also look for things that may suggest illegal activity. Complicated, multi-cameral security systems are a big red flag.

This is perhaps a reasonable place to discuss protecting personal safety during investigations. Safety is one reason that most of my home visits are scheduled in advance. Without plunging this paper into stereotypes, many of the homes I visit are in isolated communities where poverty and crime are rampant. The people I see are genuinely and rightly concerned about security. You should expect dogs and you should also expect to make people nervous if you come up to their home, unexpected, and bang on the door. It is generally a good idea to be expected. You also do not have a search warrant or any legal right to gain admission to their homes.

With those cautions, I will state unequivocally that I have never felt threatened or unsafe on any home visit. I have been welcomed into just about every home that I've visited. People appreciate your efforts and most of them genuinely just want the process to be fair and to have some one listen to and consider their point of view.

#10 - *Interview School Personnel, Case Workers, and Medical Providers.* Teachers, principals, guidance counselors and even school secretaries are extremely important sources of information. Do not overlook the secretaries - the person who sits in the office, answers the phones, and watches the parents and kids come and go. They see everything and will often know which parent gets the kids to school on time, whether the kids are well fed and clean, and especially the general attitude of each parent.

#11 - *Other Interviews.* The guidelines require us to interview other people as necessary. Grandparents are very rich sources of information. I usually ask the parties in a letter to identify for me any person that they want me to interview. Putting this request in writing will help you find out what information they believe is relevant, and will help your conclusions withstand attack if you talk to all the suggested witnesses. Remember that the parties, even those represented by counsel, tend to do nothing to prepare for their hearings and they are unlikely to subpoena witnesses or present anything on their behalf. The prevailing attitude is that the GAL is supposed to do everything. It is up to you to decide who to interview, but it will help you enormously if

you put some burden on the parties to tell you who to talk to. I also remind the parties, in writing, that just because I am in the case does not mean that they are relieved of their burden of calling witnesses, introducing evidence, and generally proving their case.

#12 - *Additional Evaluations*. You can request evaluations of your clients and even of the parties. This could occur for a variety of reasons, for example, if the parties disagree about required medical or psychological treatment for the child, or if there is a concern that a child may be traumatized by resumed contact with a long-absent parent. You should become familiar with the mental health providers in your area, the age group of patients they tend to work best with, and the methods of payment that they accept. Unfortunately, funding for psychological evaluations and treatment is often a challenge.

#14 - *Disclosing the Child's Wishes; Requesting Attorney for The Child.* This rule states that you must disclose the child's "wishes" unless you believe that doing so would jeopardize the child's "safety." Those terms obviously have some room for interpretation. Generally, I do not like to put younger children in the position of having to "choose." I feel that it is appropriate to ask them if there is any behavior about either parent - or things about their time with either parent - that they would like to change, if they are generally happy with their situation, if they feel that they get to see mommy or daddy often enough, and similar questions. I do not feel that it is appropriate to simply put a choice between two alternatives and expect them to pick one or the other and risk alienating one of the two most important people in their lives. I tend to ask more oblique questions of younger children. Further, the statutes regarding modification of parenting plans treat age 14 as the line (not an absolute line) at which children's preferences alone are justification for modification of parenting plans or selection of a primary residential parent. Generally, my approach is determining the child's wishes becomes more direct as the age, intelligence and maturity level of the child rises. Keep in mind that a child's "wishes" and the reasons underlying those wishes are entirely different things. We owe our young client's a duty of confidentiality and if we disclose their innermost thoughts we risk alienating one parent or the other, or both. The duty of confidentiality in this work could be the subject of an entire seminar. Suffice it to say that we must be sensitive to our clients' fears of offending a parent when they tell us what they think. Some clients of course are strong enough or defiant enough or just plain tired enough that they don't care who is offended - they are going to say their piece and they want to know that they will be heard. But please bring some sensitivity to your work - we are not required to disclose everything our clients tell us. Our work as lawyers may (theoretically) end with the final order, but what we leave behind for the young people we represent will endure for a very long time. This practice is about doing our best to make their lives a little easier, and they are trying to navigate a very tricky path between opposing parties that are both very important to them.

If you do this work frequently enough, there will undoubtedly come a time when your assessment of a child's best interests is contrary to the child's wishes. Under those circumstances, you "may" request an attorney be appointed for the child. Don't hesitate

to do that. The roles of guardian ad litem and attorney for the child are different and require different approaches.

#15 - *Written Report.* These rules make it clear that written reports are required. This is really a matter of basic fairness to the litigants. Since the reports are to include identification of the witnesses, dates of interviews, records reviewed, etc., I have found it helpful to prepare an "Activity Log" for each case. This is basically a diary of each activity, by date, and is built as the work on the case continues. It would start with the date that the appointment is received, notes upon review of the court file, letters to the parties, etc. Keeping such a log will make it very easy to write your reports, and will make disclosing your notes a simple process should one of the parties ask for them. I keep these on an iPad, which I tote along to most interviews. Be sensitive, however - I generally avoid pecking away on my iPad when I am interviewing a child, especially someone very young. You need to get to know your client, and that requires real interaction. You should not appear to your client as some strange bureaucrat entering data on a computer or studiously taking notes. Have a conversation. You can electronically write the notes as soon as your are done. Technology can be helpful, but distracting.

#19 - *Post-hearing Monitoring.* You can be ordered to remain in the case for up to six months. Don't hesitate to ask to remain involved if it is appropriate or if you anticipate problems. I ask for this regularly if there is a change of custody involved, especially if the new primary residential parent has questionable history or motivations, or if I think my client may have an unreasonably rosy assessment of how live will be in the home he or she wants to move in to. Whether you are asked to remain in the case or not, you need to assure your clients that you are their lawyer and that you view that as a long-term relationship. Make sure that they know how to get in touch with you, even after the case is "over." If you become aware of situations that demand court attention, even after your appointment has officially terminated, you should seek reappointment and take appropriate action.

III. REPORTING OF SUSPECTED ABUSE OR NEGLECT; FURTHER ACTION

West Virginia Code Section 49-6A-2(a) identifies persons who are legally required to report suspected abuse or neglect. Attorneys and guardians ad litem are not specifically identified, but family court judges are identified, along with "social service worker." "Social service worker" is not a defined term. Arguably, guardians ad litem are social service workers, in that their duties include an assessment of and recommendation regarding the "best interests" of a child. It is difficult to imagine how a person with such duties, who has "reasonable cause" to report suspected child abuse or neglect, would not fall within this statute. I assume that I am a mandatory reporter, and I have had more than one occasion to communicate my concerns about a child to DHHR. The reports are to be made to the DHHR "immediately" but not more than 48 hours after suspecting the abuse or neglect.

Further, section 49-6A-2(b) requires *every person* who either receives a disclosure from a credible witness or observes any sexual abuse or assault of a child to report such abuse or assault to the DHHR "or" the State Police or other law-enforcement agency. There are a couple of Rules of Professional Conduct (at least) that are involved in such disclosures (This is not intended to be an exhaustive discussion of the duty of confidentiality of guardians ad litem.)

Rule 1.6 governs disclosure of confidential information. Note that it excepts "disclosures that are impliedly authorized in order to carry out the representation." Rule 1.14 governs representation of clients under a disability, *including minority*. While lawyers representing clients under a disability are required, to the extent reasonably possible, to maintain "a normal client-lawyer relationship" with the client, such a lawyer is also authorized by the rule to "take other protective action" with respect to a client, but only when the lawyer "reasonably believes the client cannot adequately act in the client's own interest."

From these statutes and rules, and the very nature of work as a guardian ad litem in family Court, it is clear that we have the authority and the duty to a) report suspected abuse and neglect and b) take other action beyond reporting when necessary. This can include filing emergency petitions to suspend shared parenting, immediately change the primary residential parent, or seek such other relief as may be appropriate under the circumstances of the case. Remember that you are a lawyer in the case, not merely an impartial reporter or assessor of "best interests". You have the right *and obligation* on behalf of your client protect him or her. That includes taking emergency action when it is necessary to do so.