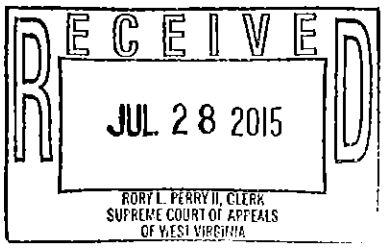

15. Rules 04

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Rory L. Perry II, Clerk of Court
State Capitol Rm E-317
1900 Kanawha Blvd. East
Charleston WV 25305

July 28, 2015

In re: Comments on Amendments to the Rules of Procedure for Child Abuse and Neglect Proceedings

Dear Mr. Perry:

Please find my comments (admittedly somewhat hurried and informal) regarding the proposed amendments. I understand that no set of rules will ever be perfect, these are some of my pet peeves about the proposed rules.

My comments are as follows:

Re: Rule 10(a): the WVDHHR should be mandated to provide the GAL with all materials it maintains, receives, generates, or any materials that come into its possession pertaining to the children/parties at least once every 30 days beginning from the date of the filing of the petition (does not have to be a paper file, can be digital) until final dismissal. The attorney for the WVDHHR should likewise provide the GAL with its materials (excepting attorney-client privilege material but only if that material is noted in a privilege log). This is an on-going struggle because certain WVDHHR personnel continue to believe that GALs do not have the right to the WVDHHR material and thus, GALs have to file motions to compel and then there is always a prolonged dispute until the parties can get in front of the judge. The WVDHHR currently says: "well, you can come look at the file" (but you have to make an appointment and then sit in a room and can't take things) – and while this is technically "access" there are always missing portions of the file that are in some other areas and which are not provided – and the GAL often does need to have copies of the material and not simply notes about the material. The onus needs to be on the WVDHHR to fully share EVERYTHING it has regarding the children/family with the GAL or be sanctioned (say, be required to pay the GAL's fees instead of WVPDS?). GALs cannot, in good faith, advocate for their clients' best interests when materials are hidden from them. And yes, materials have been hidden or rather: "sorry, we neglected to include them."

Re: Rule 17(b): Never, in my nearly 30 years of practice, have I ever seen a verified answer filed 10 days after a respondent/party has been served with a petition. First, most of the respondents/parties have yet to even contact, much less confer with their attorneys during that time. Second, counsel for the respondent/party is hardly in a position to provide competent legal advice regarding the verified answer until such time as at least some discovery has been provided (and yes, I realize that Rule 10(b) says that the WVDHHR is to provide certain discovery w/i three days of the filing of the petition, but that also rarely happens and when it does, the production is so meager that it is hardly substantive). It makes more sense to require that the verified answer be filed no later than 5 judicial days (or maybe 7) prior to any adjudicatory hearing or at least no later than the adjudicatory pre-hearing conference. That way, the respondent/party has a chance to meet/confer with counsel, receive and review meaningful discovery, and hopefully attend at the first MDT meeting. While I have never had a judge hold a respondent to this rule, if it is simply ignored, then what is the purpose? Make it relevant to what actually happens and then judges can require compliance.

Re: Rule 17 (c)(5): The WVSCA or the WVDHHR, alone or together, need to fashion this form for child support. If WVDHHR has a form, I have never seen one. Several years ago a local judge had me draft a form using the family court form and the dictates of Title IV-E. Once this form is developed (if not already) this form should then be appended to each and every petition so that parties receive it at service.

Re: Rule 41 ***and in general***: While understandably, the WVDHHR plays a significant role is submitting plans to the court, it should be known that rarely does WVDHHR ever conferred with anyone other WVDHHR personnel. Case plans, permanency plans – are regularly provided to the court without input from the parties or their counsel, including the GALs. These plans are rarely signed and it is impossible to tell how they were generated. It is all fine and good for the WVDHHR to submit a proposed plan HOWEVER, no plan should be implemented without court approval and then, only after all parties can review the proposed plan, make suggestions, or offer alternatives. The WVDHHR typically barrels ahead with their "plan" as if that is THE plan and it often creates situations that cannot be undone or corrected without some party, including the children, suffering. The Rules should clarify that the WVDHHR cannot act unilaterally and without Court approval.

My final comment addresses this notion of "persons entitled to notice and the right to be heard" (**See, Rule 3(o)**). Most certainly CASA, foster parents, custodial relatives and pre-adoptive parents should receive notice of all hearings and MDT meetings, and they should have the opportunity to make their opinions known, but I think it is going too far to require that verified answers, discovery, Rule 30 information, etc. is to be served upon these non-parties. Since when do these non-parties have the right receive that? Are they going to be allowed to file non-party, pro-se motions and responses next? This only gives rise to the infamous "letter to the judge" or some other non-conforming document. And then what? Do counsel have to respond to these non-conforming, non-party missives? If these persons wish to make their opinions known – fine, let the court, prior to ruling or concluding any hearing, seek their input, but I just don't understand why my client's answer or discovery, etc., is being served on these people.

What is the mechanism to ensure that these materials are not widely disseminated? These non-parties, excepting CASA, are not ethically bound to keep this information secure. This will essentially make the term "confidential proceedings" meaningless.

Yours truly,

Tracy Weese

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