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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS

OF THE STATE OF WEST VIRGINIA

JANE DOE-1, et al.,

Petitioners,

v. No. 15-0029

HON. GRAY SILVER III, Judge of the
Circuit Court of Berkeley County,

Respondent.

PETITION FOR A WRIT OF PROHIBITION

Respectfully submitted,

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I. INTRODUCTION AND QUESTION PRESENTED

This writ seeks relief from a Circuit Court order requiring that minor sex abuse victims pay legal fees in a civil action for the defense of the incarcerated pedophile who abused them. Unless corrected, this misguided, improper and outrageous order will impose a chilling tax upon children's rights and will provide fodder for critics of our Judicial system.

The Plaintiffs in this action are twelve minor children sexually abused by Christopher Michael Jensen ("Michael Jensen" or "Jensen") and their parents. They have sued Jensen, his parents, the Corporations of the President and Presiding Bishop of the Church of Jesus Christ of the Latter Day Saints (the "Mormon Church" or "Church"), and local Church officers for damages in the Circuit Court for Berkeley County, alleging that the Church and other Defendants harbored, facilitated, and enabled Jensen's predations on young children and in the process breached numerous duties of care and committed multiple intentional torts.

Michael Jensen is serving a 35-75 year sentence for abusing two of his young victims (three and four year old boys whom he forced to perform oral sex on him). Because he is incarcerated, Plaintiffs asked the Circuit Court, pursuant to W. Va. R. Civ. P. 17(c), to appoint a guardian *ad litem* for Jensen for the limited purpose of serving the complaint on him. That was done and process was affected. The self-described "Church Defendants" then moved for the appointment of a guardian *ad litem* to represent Michael Jensen's interests in the litigation generally. In response, Plaintiffs insisted that the guardian *ad litem*'s role, if one were appointed, be limited to the proper functions of the office (and not expand to the role of defense lawyer) and further that Plaintiffs could not be required to pay any of his fees. The Circuit Court (Silver, J.), on the recommendation of his "Discovery Commissioner" (Patrick Henry), granted the Church's motion, installed a Martinsburg attorney (Kirk Bottner) as Michael Jensen's guardian *ad litem* (hereinafter "GAL" or "Mr. Bottner"), did not delineate or define his functions, and left for

another day the question of his compensation. Without court direction, the GAL proceeded to act broadly as a defense lawyer – *e.g.*, among other things, he moved to exclude evidence concerning his ward's predatory past that Plaintiffs intended to use against *other Defendants (including those Defendants who requested the appointment of the GAL).*

In response to the GAL's aggrandizement of his role, Plaintiffs moved to limit his function to prevent him from acting as Michael Jensen's civil defense attorney, as Jensen has no right to appointed counsel in a civil case. The Circuit Court, adopting without modification the recommended order of the "Discovery Commissioner," denied Plaintiffs' motion and, in so ruling, held that the minor sex abuse victims and their parents had to pay one-half of the fees incurred by the GAL in defending their claims against the incarcerated pedophile who had molested them. The GAL has now submitted a bill for over $46,000, based on an hourly billing rate of $250/hour.[1] Significant litigation remains, including a trial and so this GAL bill is expected to grow considerably larger, absent relief from this Court.

The question presented is whether the Circuit Court exceeded its authority by requiring Michael Jensen's minor child victims to pay half of the GAL's legal fees for actively representing and defending Michael Jensen in this civil case?

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[1] The Circuit Court has referred all motions in the case (except to modify the schedule and the initial motion to appoint a guardian *ad litem* for service of process only) to Mr. Henry and ordered Plaintiffs to pay one-half of Mr. Henry's hourly rate to get their motions decided. In all, 9 motions, including those seeking exclusion of evidence, assertions of First Amendment immunity, and the rights of abused children to be protected from multiple examinations by Defendants counsel and expert, have been referred to the discovery commissioner, meaning that all significant issues, to date, have been referred to the discovery commissioner. All of Mr. Henry's recommended decisions have been adopted *in toto* by the Circuit Court, notwithstanding extensive and meritorious objections submitted by Plaintiffs, including the one at issue here. The result of this procedure is that virtually the entire judicial function has been delegated to an unelected private attorney, and when combined with the order on the GAL at issue in this writ, Plaintiffs are being ordered to pay significant sums both to get their motions heard and decided and for the defense of the molester who sexually abused the children and from whom they are seeking redress.

II. STATEMENT OF JURISDICTION

Issuance of a writ of prohibition is warranted when a lower court acts without subject matter jurisdiction or, when having jurisdiction, exceeds its legitimate powers. W. Va. Code § 53-1-1. *See State ex rel. Lawson v. Wilkes*, 501 S.E.2d 470, 473-74, 202 W. Va. 34, 37-38 (1998) (writ of prohibition issued because appointment of GAL was not authorized). As explained more fully in the Reasons for Granting the Writ, a writ of prohibition is warranted here because the Circuit Court has exceeded its legitimate powers by requiring the victims of a sexual predator to fund his legal defense by a GAL in civil litigation. Even if the guardian *ad litem*'s role in this case were more limited, the Circuit Court has no authority to impose the cost of a guardian *ad litem* on an unwilling adverse litigant, except in a circumstance that does not apply here – namely, to reimburse this Court for funds it has expended (subject to limits on hourly rate and total compensation and to prior review for conformity to this Court's billing regulations) by taxing those costs. W. Va. Trial Court R. 21.06. Finally, even if the Circuit Court had general authority to impose guardian *ad litem* fees on an unwilling party, the imposition of those fees in this case on the victims of egregious criminal conduct to fund the defense against civil liability of the person who harmed them, is clearly wrong as a matter of law and presents an important issue of first impression that cannot be remedied on direct appeal. *State ex rel. Hoover v. Berger*, 483 S.E.2d 12, 199 W. Va. 12 (1996). Even if the Court vacated the appointment of the GAL and ordered repayment of the money paid by the Plaintiffs, doing so would not remedy the expense and delay resulting from the GAL's Plaintiff-funded interference in this case.

III. STATEMENT OF THE CASE

A. The Underlying Tort Litigation Based on Michael Jensen's Serial Sexual Abuse and the Church's Concealment and Facilitation of That Abuse

Michael Jensen is currently serving a 35-75 year prison sentence for the horrific sexual abuse of two of the minor-Plaintiffs (suing through their mother and next friend Jane Doe-1) in this case. (Am. Compl., ¶ 43, Appx. p. 4.) The Amended Complaint details the ways in which officials of the Mormon Church facilitated, encouraged and covered up Michael Jensen's predation on many young children whose families, like Michael Jensen's, were affiliated with the Mormon Church. In addition to J.T. and W.T., the victims in the criminal case, between 2007-2012, and after the Church and its leaders were informed and had knowledge of Michael Jensen's history as an abuser and dangerous tendencies, Jensen went on a sexual crime spree in West Virginia, in which he abused at least ten other children between the ages of three and twelve. (*Id.* ¶¶ 1, 73-74, 78, 83, Appx. pp. 23-28.)

Despite knowing about multiple instances of abuse by Michael Jensen, and despite having banished Michael Jensen from their own home to protect their other children, Michael Jensen's parents, one of whom was the highest ranking female Church official in the local ward and who ministered to the needs of women and children (including assistance in locating child care), encouraged other Church members to employ him as a babysitter. (*Id.* ¶ 78, Appx. pp. 25-26.) The Church's knowledge of Michael Jensen's dangerous predilections dated back to 2004 (according to the deposition testimony of one of its Bishops in Provo, Utah) when Jensen was arrested for assaulting two girls at school, charged with felony sex crimes and ultimately admitted to lesser sex offenses. The President of the Martinsburg Stake of the Mormon Church and other Church leaders, as alleged in the Amended Complaint, also discussed Michael Jensen's conduct in 2007 (*Id.* ¶ 83, Appx. pp. 27-28.); one of the Church's Bishops in Martinsburg was

told in May/June 2007 by Jensen's mother that Jensen had assaulted a 14-year-old girl in a darkened movie theatre and that Jensen had an earlier case she linked in her mind to the assault at the movie theatre (Sandra Lee Jensen Dep. 133-35); a second Bishop in Martinsburg was told in early 2008 by the victim's mother that Michael Jensen had forced her son to suck his penis on multiple occasions (Am. Compl. ¶ 93-95, Appx. pp. 32-33.); and in 2010, a third Bishop in Martinsburg was told that Michael Jensen had an earlier case before he moved to West Virginia in 2005 (which was the subject of the testimony by the Bishop in Provo and had been mentioned to bishop number one is Martinsburg 3 years earlier) and that he had been found in bed on top of his much younger sister (Vincent Dep. 103-06).

Yet, rather than report the abuse, as required by West Virginia law, or take steps to warn or protect other potential victims, as required by applicable standards of care, Mormon Church officials stood by Michael Jensen, and in fact feted him for achieving "eagle scout" rank and honored him by appointing him as a young leader of the flock, while he victimized other children. (Am. Compl. ¶ 85, Appx. p. 28.) When parents expressed concerns to Mormon Church officials, these officials failed to reveal their knowledge of Jensen's prior abuse, and tried to dissuade the parents from taking any action concerning the abuse of their children. (*Id.* ¶¶ 96-100, Appx. pp. 33-34.) In 2011, and notwithstanding this history and his bishop's noting on the mission application submitted to Church headquarters in Salt Lake City Jensen's history of "poor choices,"[2] the Church sent Jensen on a Church-sponsored mission to Arizona. When Jensen was recalled from his Church mission in early 2012 to face charges of abusing other children, Church officials encouraged Church members with young children to take Jensen into their homes without advising them of those charges or warning them of the risk of sexual abuse. (*Id.* ¶¶ 111-

[2] This was the bishop who allegedly was told in 2008 that Michael Jensen had repeatedly forced a four-year-old boy to suck his penis.

12, 116, Appx. pp. 38-39.) The children of those unwitting Church members were also abused by Jensen. (*Id.* ¶ 113, Appx. p. 39.)

Finally, on October 18, 2012, a grand jury indicted Michael Jensen for sexual assaults on two children who were three and four years old respectively at the time of the abuse. (*Id.* ¶¶ 11-12, Appx. p. 5.) On February 6, 2013, a jury found Michael Jensen guilty of two counts of sexual abuse by a custodian and one count of first degree sexual assault. (*Id.* ¶ 119, Appx. p. 40.) During trial, the Circuit Court also admitted W. Va. R. Evid. 404(b) evidence of Jensen's abuse of another child who was four years old at the time of the abuse. The Circuit Court imposed a sentence of 35-75 years in prison, followed by fifty years' probation, on July 29, 2013, and designated him a dangerous sexual predator. (*Id.* ¶ 120, Appx. p. 40.) This Court affirmed the conviction and sentence on June 13, 2014, and Jensen is serving his time in the State penitentiary.

B. The Initial Appointment of the GAL for Service of the Complaint

On September 16, 2013, Plaintiffs filed under seal a civil action alleging claims against Michael Jensen, the Mormon Church (including specifically the Corporations of the President and Presiding Bishop of the Church of Jesus Christ of Latter Day Saints)[3] and certain Church officials (including Michael Jensen's parents who held high positions in the Church). On January 31, 2014, Plaintiffs filed an Amended Complaint alleging abuse of an additional victim and adding a Defendant who they alleged was part of the conspiracy. Recognizing that Michael Jensen was entitled to protection against a default judgment, Plaintiffs on October 9, 2013, also moved to appoint a guardian *ad litem* "for Purposes of Service of the Complaint Upon Christopher Michael Jensen" pursuant to Civil Procedure Rule 17(c). On October 31, 2013, the

[3] These two corporate entities are the Church entities that are formally named, per stipulation with the Church.

Circuit Court granted the motion, and appointed attorney Kirk Bottner as GAL. (Order, Appx. pp.82-83.) The order stated that "Plaintiffs agree to pay the reasonable attorney fees and expenses of the Guardian *ad litem* subject to other individuals or entities being ordered to do so by this Court." (*Id*, Appx. p. 83.) It is understood, and not contested, that this initial order applied only to service of the complaint. Plaintiffs served the complaint on Michael Jensen by delivering it to the GAL on November 5, 2013.

C. The Subsequent Appointment of the GAL at the Mormon Church's Request

On January 23, 2014, the self-described "Church Defendants" (the Mormon Church and two church officials)[4] moved to appoint a GAL "to represent the interests" of Michael Jensen in the litigation. (Motion to Appoint GAL and [proposed] Order Appointing GAL, Appx. pp. 84-89.) The motion noted that although Plaintiffs agreed to share the GAL's fees for accepting service of a subpoena on Michael Jensen to appear for a deposition, (*Id.* at n.1, Appx. p. 85.), they declined to pay any share of the GAL's fees for any other work on behalf of Michael Jensen. (*Id.*, Appx. p. 85.) The proposed order submitted by the Church provided that the GAL would "submit invoices for services rendered to the Court for review of reasonableness," with "payment thereof to be resolved by subsequent Order of this Court." (*Id.* at [proposed] Order Appointing GAL, Appx. pp. 88-89.) Michael Jensen was represented by a public defender in connection with his criminal appeal, which was pending in this Court at the time. Plaintiffs did not oppose the appointment of Michael Jensen's public defender as GAL for the limited purpose of accepting service of process on him or representing his interests "to the extent events here bear on . . . his criminal case." (Plaintiffs' Response to Motion to Appoint GAL, Appx. p. 91.)

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[4] Plaintiffs contend that the other individual Defendants (other than the Jensen's) – not just the two designated by the Church as "Church Defendants" – were also Church officials whose acts bind the institution.

Plaintiffs also did not object to the appointment of a GAL "as to other matters" arising in the litigation *provided* that the GAL did not go beyond appropriate functions of the office and act as defense counsel for Michael Jensen, and that they not be required to pay any of the GAL's fees. (*Id.*, Appx. p. 91.) Plaintiffs explicitly objected to the appointment of counsel to represent Michael Jensen, as there is no right to counsel in a civil case, and to being required to pay any share of GAL fees (other than fees to accept service of process, as previously noted). The self-described Church Defendants, the parties seeking the appointment of the GAL, did not address either of those objections in their reply in support of their motion.

On March 3, 2014, the Circuit Court entered an order appointing a GAL for Michael Jensen. The Court noted the Plaintiffs' objections, but did not directly address the distinction between the scope of the GAL's appointment and representation of Michael Jensen as his defense counsel and did not otherwise provide direction as to the GAL's role. The order also left the issue of payment for a subsequent order, absent agreement by the parties.

D. The GAL's Actions as Counsel for Jensen

Beginning in March 2014, after his appointment via the Church's motion, Mr. Bottner expanded his role as GAL beyond service of process and began acting as a vigorous defense attorney for Jensen. On March 26, 2014, Mr. Bottner attended the deposition of the lawyer who had defended Michael Jensen at his criminal trial,[5] stating that he was there as counsel "on behalf of" Jensen. On April 2, 2014, Mr. Bottner attended the deposition of Michael Jensen and, acting as Jensen's defense attorney, advised and instructed him not to answer questions to avoid self-incrimination. On July 17, 2014, Mr. Bottner filed a motion to quash a subpoena served on a West Virginia State Police officer seeking records in the officer's possession concerning conduct

[5] On appeal of his criminal conviction, his paid trial counsel was replaced by a public defender. It was trial counsel who was deposed and at which the GAL appeared on behalf of Jensen.

by Michael Jensen in other states,[6] and to exclude the use of the records as evidence in the case. On August 6, 2014, Mr. Bottner filed a motion for a protective order, arguing that Michael Jensen should not be required to answer requests for admission on the ground that the requests involved Jensen's juvenile records from Utah (which are governed by a completely different legal regime than juvenile records in West Virginia and had been released without restriction by the Utah Country Attorney to the West Virginia State Police in connection with pending investigations) and arguing, further, that Plaintiffs should be precluded from taking the deposition of the arresting police officer in Utah. The next day, on August 7, 2014, Mr. Bottner attended the depositions of two West Virginia State Police officers subpoenaed by the Church, and stated that he was present as "the guardian" for Jensen.

On September 30, 2014, in light of Mr. Bottner's expansion of his role into active defense counsel, Plaintiffs moved to limit and define his role as GAL. (Motion to Limit and Define Role of GAL, Appx. p.p. 98-115.)

E. The Circuit Court's Ruling That Is The Subject Of This Petition

The Circuit Court referred Plaintiffs' motion to the previously-appointed Discovery Commissioner, consistent with the Court's practice of delegating all motions to Mr. Henry (including matters not involving discovery). After consulting with the Circuit Court on October 1, 2014 for two and a half hours (according to Mr. Henry's bill to the parties, *see* Appx. pp. 116-118), Mr. Henry announced his decision at the outset of the hearing on October 2, 2014, before argument on the GAL's motions to quash, exclude evidence and for the protective order described above (all of which had also be referred to Mr. Henry). The Discovery Commissioner

[6] In January 2005, shortly before moving to West Virginia with his family, Michael Jensen pled guilty to two counts of Lewdness Involving a Child in the Fourth District Juvenile Court for Utah County, Utah. As with the West Virginia acts of child abuse, Mormon Church officials were aware of, and even present at, those court hearings.

issued a Recommended Order and Report on November 10, 2014, regarding Plaintiffs' motion to curtail the GAL's role, which the Circuit Court adopted *in toto* on December 9, 2014. (Order Adopting Recommended Order and Report of Discovery Commissioner, Appx. pp. 119-134.)

The Circuit Court, on Mr. Henry's recommendation, ruled that even though Michael Jensen's assets were likely to be "zero" (p. 11 of Transcript of Motions Hearing, Oct. 2, 2014, Appx. p.138.) and there would be nothing for a committee to protect or administer, the court would have to abate the action unless a committee were appointed pursuant to W. Va. Code § 28-5-6. "[T]o avoid the necessity of current abatement," and anticipating a request to appoint a committee, the court deferred consideration of whether abatement (sought by no party) was required and directed that the GAL "shall continue in full capacity and role he has been exercising in the past pending future direction by the duly appointed and qualified committee on behalf of the convict and subject to further Order of the Court." (Order Adopting Recommended Order and Report of Discovery Commissioner at p. 4, Appx. p.124.) The Recommended Order and Report adopted by the court did not address the distinction between the role of GAL and counsel. Nor did the court explain why—if the GAL was to remain only as an interim substitute for a committee—the GAL would be empowered to perform functions well beyond the role of a committee.

As to the GAL's fees, the court ruled, also on the Discovery Commissioner's recommendation, that the GAL "shall be permitted to issue interim billings regarding his services *with the presumption that the costs be borne equally one-half by the Plaintiffs' side and one-half by the Defendants' side*, subject to the seeking by the parties of the reimbursement of those expenses from the estate of the convict, if any, and further subject to further allocation by the Court." (*Id.* at 5, Appx. p. 125. (emphasis added).) Thus, the Circuit Court directed the

Plaintiffs—Michael Jensen's victims—to pay half of the costs of his legal defense. The Circuit Court cited no statute, rule or case authorizing its action. Mr. Bottner then sent a bill for over $46,000 to the parties (Billing Statement of Bottner, Appx. pp.186-214). If the current regime continues, that charge will certainly increase.

IV. SUMMARY OF THE ARGUMENT

There is no authority for imposing the cost of a GAL on Plaintiffs, much less a GAL acting beyond his office as an appointed defense counsel in a civil case. Nor could any sane judicial system require child sex victims to pay for the legal defense of the convict who molested them in their civil suit against him for damages.

West Virginia Rule of Civil Procedure 17(c) ("Rule 17(c)") provides no support for imposing fees on Plaintiffs. It does not, to start, mandate the appointment of a GAL for Michael Jensen. Nor does it contain any provision permitting the imposition of GAL fees on any party. Under this Court's decision in *Quesinberry v. Quesinberry*, 443 S.E.2d 222, 226-27, 191 W. Va. 65, 69-70 (1994), a Circuit Court has discretion to appoint a GAL for a convict, *but only* if alternatives are considered and determined not to be feasible. That was not done in this case. Further, had the Circuit Court followed this procedure, which it did not, the court still could decline to appoint a GAL, if the imposition of an adverse judgment would have no impact on the convict's estate, which is the case here, because Michael Jensen is indigent, as the Discovery Commissioner noted. This Court, in *Quesinberry*, did recognize a limited power to impose costs on parties, but only on parties that raise issues forcing the appointment of a GAL. But that could not be Plaintiffs, because it was the self-described "Church Defendants" that sought the appointment of a GAL to represent Michael Jensen's interests generally, and it was Plaintiffs who objected to a GAL being appointed beyond traditional roles for such an office and, in

particular, to his serving as defense counsel. Nor have Plaintiffs taken action raising a typical issue for a GAL, other than service of the complaint.

Trial Court Rule 21, the other potentially applicable rule, also cannot justify the Circuit Court's imposition of the GAL's/appointed defense counsel's fees. Rule 21.05 provides three alternatives regarding compensation of a GAL – a GAL (1) can work for free, (2) be paid by a willing litigant, or (3) be paid by the Supreme Court. The only authority to impose GAL fees on an *unwilling litigant* is the limited power in Rule 21.06 to "tax the costs of the appointment of a guardian *ad litem* to the parties" to reimburse fees previously authorized and paid from Supreme Court funds pursuant to Rule 21.05. But the fees at issue here were not "previously authorized and paid . . . [by the] Supreme Court," but instead were imposed directly on unwilling plaintiffs.

Moreover, even if the Circuit Court had considered alternatives to a GAL as required by *Quesinberry*, there were potential impacts on the convict's estate, and it were within its discretion to appoint a GAL for limited purposes in a case such as this, the Circuit Court committed a grave abuse of authority by permitting the GAL to assume the role of legal defense counsel. There is no right to counsel in a civil case and that clear rule cannot be avoided by appointing a lawyer as GAL and then permitting the GAL to perform traditional functions of defense counsel. But that is exactly the error committed here. The Circuit Court compounded this error by then ordering Michael Jensen's child sex abuse victims to pay the fees incurred by the GAL defending Jensen against their civil claims for damages, including as well the filing of motions concerning evidence to be used against other Defendants. The Circuit Court's order, in addition to being illegal, stands all sense of right and wrong on its head, and imposes a tax on any child who wishes to pursue civil damages against an abuser whose conduct is serious enough that he has been incarcerated for his crimes.

V. REASONS FOR GRANTING THE WRIT

A. There is No Authority for Imposing the Cost of a Guardian *ad Litem* on the Plaintiffs.

The Circuit Court did not cite any authority for requiring Michael Jensen's victims to pay for his legal representation, much less for his defense by a GAL. Nor did it cite any authority for appointing a defense lawyer in a civil case. Plaintiffs were willing to incur the cost of a GAL to ensure that Michael Jensen was properly served with process, but they objected consistently to funding the GAL's efforts to obstruct their efforts in discovery aimed at uncovering evidence directly relevant to the culpability of the Mormon Church and Church officials who knew about, but chose to hide, the danger Michael Jensen presented to young children. They also objected to funding the GAL's efforts to exclude critically important evidence in this case, i.e., evidence that the Church knew of Michael Jensen's deviant criminal sexual behavior since at least 2004 when he was charged with two felonies and admitted to lesser sexual charges (per the testimony of his parents and the Church's Bishop) in Provo, Utah and *before* he went on his crime spree in West Virginia after moving here in 2005.

There is, in fact, no authority for the Circuit Court's ruling and imposition of costs on Plaintiffs. West Virginia Rule of Civil Procedure 17(c) does not mandate the appointment of a GAL for Michael Jensen, much less assign responsibility to his victims to pay the GAL's fees.

> Whenever an infant, incompetent person, or convict had a representative, such as a general guardian, curator, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant, incompetent person, or convict. An infant, incompetent person, or convict who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court or clerk shall appoint a discreet and competent attorney at law as guardian ad litem for an infant, incompetent person, or convict not otherwise represented in an action, *or shall make such other order as it deems proper for the protection of the infant, incompetent person, or convict.* A guardian ad litem is deemed a party for purposes of service; failure to serve a guardian

> ad litem is deemed a party for purposes of service; failure to serve a guardian ad litem in circumstances where service upon a party is required constitutes failure to serve a party.

(emphasis added).

As this Court explained in *Quesinberry v. Quesinberry*, 443 S.E.2d 222, 191 W. Va. 65 (1994), there are alternatives to the appointment of a GAL for a prisoner, and so "the appointment of a guardian *ad litem* is within the court's discretion if the court determines that any of the above alternatives is not feasible." 443 S.E.2d at 227, 191 W. Va. at 70. Syllabus Point 2 states: "the appointment of a guardian *ad litem* for an incarcerated convict in a civil action is not mandatory if the court can reasonably order another appropriate remedy while the convict remains under the legal disability of incarceration." 443 S.E.2d at 224, 191 W. Va. at 67. One of the options available to the court is to decline appointment of a GAL if an "adverse judgment" would not "affect any present or future property rights." *Id.* As the Discovery Commissioner noted in his Recommended Order and Report (adopted *in toto* by the circuit court), the value of Michael Jensen's estate is likely to be "zero." Michael Jensen is joined as a party in this case, among other reasons, to prevent the Mormon Church Defendants from attempting to defect blame to him at trial and faulting the Plaintiffs for his absence—not so that his (nonexistent) assets can be used to satisfy a judgment. But the Circuit Court did not examine any alternatives, as the law mandates.

This Court also made clear that Civil Rule 17(c) "does not include a provision charging any entity with the responsibility for paying for the services" of a GAL if one is appointed. 443 S.E.2d at 226, 191 W. Va. at 69. This Court stated that, because of the burden of unpaid service as GAL on the bar, "a court still has discretion to require entities who raise issues that *force* the appointment of a guardian *ad litem* to pay the cost." 443 S.E.2d at 226 n.2, 191 W. Va. at 69 n2. But that discretion does not apply to this case, where there are alternatives to the appointment of

a GAL, and Plaintiffs did nothing to "force" the appointment of a GAL. Indeed, Plaintiffs were willing to pay for the service of a GAL to assure proper service of the complaint, but that is a far cry from agreeing to pay for defense counsel to vigorously oppose and obstruct Plaintiffs' discovery and use of relevant information about Jensen's predatory past, particularly as to other defendants and their knowledge.

Trial Court Rule 21 addresses the payment of GAL's appointed by the Circuit Court. Generally, a GAL may "(a) serve on a voluntary basis without compensation, (b) be paid by a litigant or a litigant-parent of an infant for whom the appointment is made if the litigant or litigant-parent is not an indigent person, or (c) be paid by the Supreme Court of Appeals as provided in rule 21.05." Trial Court R. 21.02. The language of the rule is permissive ("may") and subsection (b) authorizes a court-appointed GAL to accept payment from a *willing* litigant, such as the parent of a minor represented by the GAL. It does not authorize the court to order an unwilling litigant to pay, such as Plaintiffs here, who opposed, at each opportunity, the function assumed by the GAL and the payment of any of his fees (except with respect to service of the complaint).

The only authority to impose GAL fees on an *unwilling* litigant is the limited power in Rule 21.06 to "tax the costs of the appointment of the guardian *ad litem* to the parties" to reimburse fees previously authorized and paid from Supreme Court funds pursuant to Rule 21.05. Such payments from Supreme Court funds are subject to an overall limit of $3,000, hourly limits on rates, and review for compliance with billing regulations. But the Circuit Court did not order payment of the GAL from Supreme Court funds, so Rule 21.06 is inapplicable. Even if it were applicable, as this Court explained in *Quesinberry*, the authority to "tax" GAL

fees is limited to fees the party "forced" the GAL to incur; it does not extend to fees incurred for work undertaken by the GAL acting on his own initiative as the attorney for the prisoner.

B. Requiring the Victims of a Sexual Predator to Fund His Representation is a Grave Abuse of Any Authority the Circuit Court Has to Allocate the Fees of a Guardian *ad Litem.*

Even if the Circuit Court had discretionary authority to tax the costs of Michael Jensen's GAL, the court cannot impose them on Michael Jensen's victims. That would amount to punishing the Plaintiffs for seeking redress for the criminal wrongdoing visited on them.

One of the reasons for the national movement to enact protections for victims of crime was the experience that victims were treated unfairly and harmed again in the criminal justice process. *See, e.g.*, W. Va. Code § 61-11A-1 (legislative findings and purpose of Victim Protection Act of 1984). It is just as wrong to harm victims through the civil process. Moreover, there has been absolutely no showing of any need to inflict the GAL's fees on Michael Jensen's victims. The self-described "Church Defendants" moved for the continuing appointment of a GAL in this case. Although those parties may be reluctant to volunteer to pay for the GAL in order to avoid the appearance of an alliance with Michael Jensen, they certainly have the means to pay all of the GAL's fees if ordered to do so. Likewise, Michael Jensen's parents are represented in this matter by private counsel who has represented the Church in the past. Because the conduct at issue in this case began when Michael Jensen was a minor, his parents could fairly be required to pay the GAL's fees.

C. There is No Authority for the Appointment of a Guardian ad Litem to Serve as Counsel for a Civil Defendant at a Civil Plaintiffs' Expense.

Even if the Circuit Court were within bounds in extending the GAL's appointment pending the appointment of a committee, it had no authority to impose the costs of Michael Jensen's legal defense on the Plaintiffs. In *Kollsman v. Cubic Corp.*, 996 F.2d 702, (4th Cir.

1993), the federal district court applied Virginia law in a diversity case involving a convicted prisoner. In that case, counsel for the plaintiff did not object to the appointment of a GAL (Plaintiffs here objected to any role beyond traditional functions of a GAL), but just like Plaintiffs here, objected to the imposition of attorney's fees. *Id.* at 705. The Court of Appeals reversed the district court's order requiring the plaintiff to pay the GAL's fees under Fed. R. Civ. P. 17(c). The Fourth Circuit concluded that, in general, GAL fees could be taxed to the losing party as costs under Fed. R. Civ. P. 54, and that the plaintiff could be taxed because the court had dismissed its claims against the prisoner, making the prisoner the prevailing party as to those claims. Nonetheless, the Court of Appeals ruled that the fee award was improper because the GAL had also acted as the attorney for the prisoner. The Court of Appeals explained that an attorney's services for a party are not taxable costs, and that the rule could not be different when the same person performs both functions. *Id.* at 706-07; *see also id.* at 706 n. 3 ("It is quite a different matter to impose the attorney's fees of one party against another party."). Likewise, the Plaintiffs cannot be required to fund Michael Jensen's legal representation just because the same person is acting as GAL and defense counsel.

The Circuit Court based its conclusion that the Plaintiffs could be required to fund Michael Jensen's GAL on W. Va. Code § 28-5-36. The Circuit Court read that statute to require, in all circumstances, the appointment of a GAL or a "committee" on behalf of a prisoner lest the action abate during the term of the defendant's confinement. But that rationale—even if correct—would not justify requiring the Plaintiffs to pay for legal representation that exceeds the proper role of a committee. Moreover, a committee is compensated (if at all) from the prisoner's estate, not by the opposing party. Treating the GAL as a temporary stand-in for a committee cannot justify shifting fees to the opposing party.

The Circuit Court's premise was, in any event, incorrect. There is no requirement for a GAL or committee to represent a prisoner throughout civil litigation, certainly once the complaint has been duly served. In *Quesinberry*; this Court ruled that appointment of a GAL is a matter of discretion, and the logic of that decision necessarily extends to the mandatory appointment of a committee, if other remedies can protect the prisoner's assets. Appointment of a committee is governed by W. Va. Code § 28-5-33. That statute provides that "upon such motion [of any party interested], the county commission shall appoint said committee, although the convict has no estate." Mandating the appointment of a committee upon a proper request is not the same as making such appointment a precondition to suit if no request is made. Here, neither Michael Jensen (pro se or through his public defender counsel in the criminal case), not his parents, nor any other interested party moved to appoint a committee. The language of W. Va. Code § 28-5-36 is mandatory only if the condition for the appointment of a committee is satisfied. Thus, the premise of the Circuit Court's conclusion that the GAL had to remain in place and continue to serve as Michael Jensen's advocate was incorrect. There is no need to pay for a GAL while awaiting appointment of a committee.

This Court's decisions have eliminated any rationale for the mandatory appointment of a committee, or any reading of § 28-5-36 to impose such a requirement in all cases, just as they have eliminated any mandatory requirement for a GAL. In *Craigo v. Marshall*, 331 S.E.2d 510, 175 W. Va. 72 (1985), this Court held, at Syllabus Point 1, that "[a] prisoner may proceed to file a civil action without having a committee appointed pursuant to W. Va. Code § 28-5-33, or using a next friend pursuant to Rule 17(c) of the West Virginia Rules of Civil Procedure." 331 S.E.2d at 511, 175 W. Va. at 72. The Court adopted the majority view that prisoners are not per se incompetent as parties to litigation, and expressly overruled its contrary holding in a prior case.

331 S.E.2d at 513-14, 175 W. Va. at 74-75. The same statutory language applies to prisoner defendants as to prisoner plaintiffs, so the appointment of a committee is not mandatory as a statutory matter. While the Court in *Craigo* distinguished the situation where a prisoner is a defendant from the situation where he is the plaintiff in a civil case, that distinction was based on fairness considerations, not incompetency, because "where a prisoner is sued, a lawyer will often be representing the opposing party and this places the prisoner at a considerable disadvantage." 331 S.E.2d at 514, 175 W. Va. at 75. *Craigo* supported those fairness considerations with reference to Civil Rules 55 and 17(c), but in this case, Michael Jensen has been fully protected against an unfair default by the appointment of a limited GAL for service of process, and Rule 17(c) does not require the appointment of a representative party when appropriate alternatives to preserve fundamental fairness exist.

This Court's later decision in *Quesinberry* shows that fairness may be served by alternatives to the appointment of a GAL or committee and that *Craigo* does not require the appointment of a representative for a prisoner in every case. And Rule 17(c) expressly recognizes that provisions other than the appointment of a GAL may be appropriate. Likewise, *State ex rel. Lawson v. Wilkes*, 501 S.E.2d 470, 202 W. Va. 34 (1998), held that Circuit Courts have no authority to appoint a GAL in a civil forfeiture case involving property seized from a prisoner. Although the rationale of *Lawson* was that the forfeiture case is *in rem* rather than *in personam*, that case plainly involves a property interest belonging to the prisoner, yet the court held that fairness considerations noted in *Craigo* did not mandate appointment of a representative for the prisoner before the forfeiture action could proceed.

The "American Rule" that each party bears its own legal fees also precludes imposing Michael Jensen's legal fees on the Plaintiffs in this case. The courts have long since rejected the

proposition that fairness requires the appointment of counsel in every civil proceeding in which the opposing party is represented. *See Turner v. Rogers*, 131 S. Ct. 2507 (2011) (confinement for civil contempt); *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981) (termination of parental rights). As *Lassiter* illustrates, even when the opposing party has counsel and the individual stakes are grave, there is no right to appointed counsel. It follows *a fortiori* that there is no right to counsel in civil tort litigation like the present case and no one, including the Circuit Court, contends that such a right exists. Nor are the practical difficulties of litigating sufficient reason to adopt a special appointment of counsel standard for prisoners. Prisoners can and do participate in litigation in West Virginia (and across the country as plaintiffs). There is no reason why they cannot also do so as civil defendants. The Circuit Court had no authority to order the Plaintiffs to pay fees for legal representation that the GAL has already performed, nor to authorize the GAL to continue to act as Michael Jensen's attorney.

VI. CONCLUSION

The Court should issue an order to show cause why the writ of prohibition should not issue. Upon briefing and argument, the Court should issue the writ and direct the Circuit Court to vacate the order requiring the Plaintiffs to pay a share of the GAL's fees and utilize this case to define the role of a Guardian *ad litem* for an incarcerated defendant in a civil action.

Respectfully submitted,

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VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF OHIO, to-wit:

I, Robert P. Fitzsimons, being duly sworn, states that he has read the foregoing PETITION FOR A WRIT OF PROHIBITION and that he knows the contents thereof; that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and as to such allegations he believes them to be true.

Dated: January 12, 2015.

ROBERT P. FITZSIMMONS
Counsel for Petitioners

Taken, sworn to and subscribed before me, this 12th day of January, 2015.

NOTARY PUBLIC OFFICIAL SEAL
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MY COMMISSION EXPIRES OCT. 20, 2019

Notary Public

[SEAL]

CERTIFICATE OF SERVICE

Service of the foregoing ***PETITION FOR WRIT OF PROHIBITION*** was served upon Respondent and the parties in the action below by regular, United States Mail, postage prepaid, on the 12th day of January, 2015, as follows:

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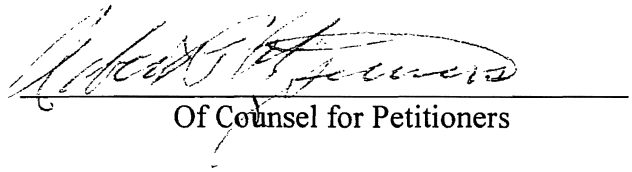

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