

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
UPON ORIGINAL JURISDICTION**

No. 15-0669

State of West Virginia ex rel.
Robert E. Barrat
Petitioner,

v.

Nancy A. Dalby, Esq.
Kirk H. Bottner, Esq.
David P. Skillman, Esq.
Mental Hygiene Commissioners
23rd Judicial Circuit of West Virginia
Respondents

PETITION FOR WRIT OF MANDAMUS / PROHIBITION

Robert E. Barrat,
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Petitioner

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PETITION FOR WRIT OF MANDAMUS / PROHIBITION

3. QUESTIONS PRESENTED

Is it improper for the mental hygiene commissioners of the 23rd judicial circuit of West Virginia rather than circuit court judges to appoint counsel to serve as *guardian ad litem* for all guardian and conservator cases, and is it improper to appoint only one attorney to receive all the appointments in the entire circuit?

4. STATEMENT OF THE CASE

Petitioner Robert Barrat is an attorney in good standing with the W.Va. State Bar, number 6550. Petitioner practices primarily in Berkeley County, West Virginia and accepts court appointments from the circuit court and other sources in Berkeley, Jefferson and Morgan counties of West Virginia. Petitioner was admitted to practice before the bar in 1994 and since that time has accepted hundreds of appointments in abuse and neglect, criminal, juvenile and other areas of law.

Three mental hygiene commissioners that preside over cases in the 23rd Judicial Circuit consisting of Berkeley, Jefferson and Morgan Counties of West Virginia are named Nancy A. Dalby, Esq., Kirk Bottner, Esq. and David Skillman, Esq. Respondent Nancy A. Dalby Esq. is an attorney who practices law as a sole practitioner at Nancy A. Dalby, Attorney at Law, PLLC, 202 N. Charles Street, Charles Town, W.Va. 25414. Respondent Kirk H. Bottner Esq. is an attorney who practices law at Bottner & Skillman Attorneys at Law, P.O. Box 344, Charles Town, W.Va. 25414, and is partners with David P. Skillman Esq. Respondent David P. Skillman is an attorney who practices law at Bottner & Skillman Attorneys at Law, P.O. Box 344, Charles Town, W.Va. 25414 and is partners with Kirk Bottner, Esq.

The actions complained of have occurred in Berkeley, Jefferson and Morgan counties in West Virginia. Venue and jurisdiction for this Writ of Mandamus / Prohibition are proper before this Honorable Court as this is an original jurisdiction petition as follows West Virginia Rules of Appellate Procedure 16.

These mental hygiene commissioners preside over numerous guardian and conservatorship cases (W.Va. Code 44A-1-1 et seq) filed every year in Berkeley, Jefferson and Morgan Counties, as well as mental hygiene commitment proceedings. In each guardian/conservatorship case a *guardian ad litem* (hereafter GAL) is to be appointed to protect the rights of the respondents / alleged protected persons in these actions, as follows W.Va. Code 44A-2-7(a). It is the responsibility of the circuit court judges to appoint GALs to represent the respondents/alleged protected persons as follows W.Va. Code 44A-2-7(a). In the 23rd Judicial Circuit it appears however that duty has been improperly assumed by the mental hygiene commissioners. It is Petitioner's understanding and representation it is the standard practice and procedure for the mental hygiene commissioners to appoint only one attorney to serve as the GAL in all cases in these three counties.

James B. Rich, Esq., W.Va. State Bar # 3079, DBA James B. Rich III, PLLC, 211 W. John Street, Martinsburg, W.Va. is the recipient of numerous if not all guardian/conservator GAL appointments each year from the mental hygiene commissioners. Petitioner is not aware of any other attorney that has been appointed to serve as the GAL for many years. Your Petitioner has requested to be considered for GAL appointments for such cases to the mental hygiene commissioners over the years, only to be turned down and denied for such appointments. This appointment scheme creates a windfall of cases to benefit Mr. Rich. Other attorneys who would

accept and would be interested in such cases are precluded and barred from ever participating in them.

There are seventy active licensed attorneys presently listed by the W.Va. state bar residing in Jefferson county, approximately two hundred in Berkeley and fourteen in Morgan county, West Virginia.¹ Of these almost three hundred attorneys, probably at least twenty or more would be willing to accept such court appointments if available. A pool of approximately twenty or so local attorneys receive similar appointments in criminal, abuse and neglect and other cases in addition to local Public Defender offices in these three counties.

A recent review of the W.Va. State VISTA payment listings show James B. Rich III PLLC has been paid \$228,592.00 for 384 invoices over the past several years by the Supreme Court. It appears these payments arise from guardian/conservatorship appointments.² Also see Appendix. This demonstrates the number of guardian/conservatorship appointments Mr. Rich receives. Appointing one attorney precludes all other attorneys in the 23rd Judicial Circuit from such appointments. This practice has occurred for at least the past five (5) years and probably longer. A brief appendix as follows W.Va. Rule of Appellate Procedure 16(e) has been submitted together with this Petition.

5. SUMMARY OF ARGUMENT

It is improper for the mental hygiene commissioners of the 23rd judicial circuit rather than circuit court judges appoint counsel to serve as the *guardian ad litem* (GAL) for guardianship and conservatorship cases. It is also improper to appoint only one attorney to receive all the

¹ From the 2015 W.Va. State Bar membership directory

² <https://vista.wvsao.gov/> Website

appointments in the entire circuit and a rule should issue prohibiting such future conduct.

6. **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The facts and legal argument contained herein should be sufficient to rule upon this matter without oral argument.

7. **ARGUMENT**

- A. **It is improper for the mental hygiene commissioners rather than circuit court judges to appoint counsel to serve as GAL in guardian and conservatorship cases.**

In the 23rd Judicial Circuit it appears the local practice is to permit the mental hygiene commissioners either appoint or dictate to the assigning clerk who is to be appointed as the GAL for guardianship/conservator cases. W.VA. Code 44A-2-7 governs appointment of counsel for alleged protected persons.³ W.Va. Code 44A-2-7(a) states the "Court" is to appoint legal counsel for the alleged protected person. W.Va Code 44A-2-7(e) goes on to clearly distinguish

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§44A-2-7. Appointment of counsel.

(a) The court shall appoint legal counsel for the alleged protected person to make recommendations to the court that are in the best interests of the alleged protected person. In appointing legal counsel, the court shall consider any known preferences of the alleged protected person, or an alleged protected person may hire and pay for an attorney of his or her choice.

(e) A person appointed by the court as counsel for a nonindigent alleged protected person shall inform the court or the mental hygiene commissioner of his or her hourly rate at the onset of the case and seek approval of his or her fee for the case by submitting it to the court or the mental hygiene commissioner for approval using forms provided by the West Virginia Supreme Court of Appeals. The hourly rate and fee for the case must be reasonable in light of the going rate for legal services, the complexity of the matter and the amount of legal work involved. The court may set the fee at the time of appointment.

between the court and mental hygiene commissioners. From a clear reading of these code sections, this it appears the circuit court alone is to appoint legal counsel, not the mental hygiene commissioners. Petitioner is unaware of any local rule order in place permitting commissioners to make these appointments.

B. It is improper to appoint the GAL outside of the panel

It further appears this appointment scheme is generally discriminatory and the appointments should be derived from panel of attorneys who accept such appointments, W.Va. Code 29-21-9.⁴ It would appear guardian/conservator hearings are ancillary proceedings to criminal proceedings considering the definitions in W.Va. Code 29-21-2(2).⁵ Accordingly,

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§29-21-9. Panel attorneys.

(a) In each circuit of the state, the circuit court shall establish and maintain regional and local panels of private attorneys-at-law who are available to serve as counsel for eligible clients. An attorney-at-law may become a panel attorney and be enrolled on the regional or local panel, or both, to serve as counsel for eligible clients by informing the court. An agreement to accept cases generally or certain types of cases particularly may not prevent a panel attorney from declining an appointment in a specific case.

(b) In all cases where an attorney-at-law is required to be appointed for an eligible client, the appointment shall be made by the circuit judge.

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"Eligible proceeding": Criminal charges which may result in incarceration; juvenile proceedings; proceedings to revoke parole or probation if the revocation may result in incarceration; contempt of court; child abuse and neglect proceedings which may result in a termination of parental rights; *mental hygiene commitment proceedings*; extradition proceedings; *proceedings which are ancillary to an eligible proceeding*, including, but not limited to, proceedings to enhance sentences brought pursuant to sections eighteen and nineteen, article eleven, chapter sixty-one of this code, forfeiture proceedings brought pursuant to article seven, chapter sixty-a of this code, and proceedings brought to obtain extraordinary remedies; and appeals from or post-conviction challenges to the final judgment in an eligible proceeding. Legal representation provided pursuant to the provisions of this article is limited to the court system of the state of West Virginia, but does not include representation in municipal courts unless the accused is at risk of incarceration; (Italics added)

appointment of GALS for protected persons should be accomplished using the entire panel of attorneys that would be interested in such appointments rather than one attorney receiving all available appointments. To appoint only one attorney breaches fundamental fairness of the panel attorney appointment scheme as outlined in W.Va. Code 29-21-9.

Judicial impropriety is addressed in the Canons of Ethics for Judges. See Canon 2 of the Code of Judicial Conduct of West Virginia.⁶ It may give the appearance of impropriety for one attorney to receive each and every GAL appointment. While this is a windfall for him, it prevents the cases from being fairly distributed amongst interested counsel. This current practice prevents younger attorneys from being involved and learning the guardianship/conservatorship process.

Attorneys that appear and represent criminal and abuse/neglect respondents should also be able to receive such GAL appointments. It is a form of discrimination for only certain attorneys to be appointed as GAL.

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Canon 2: A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

B. A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or knowingly permit others to convey the impression that they are in a special position to influence the judge.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. (From commentary).

C Guardianship/conservatorship GAL appointments should be made available to interested counsel throughout the local bar.

Your Petitioner seeks appointment to at least some of the available GAL appointments heard in the 23rd Judicial Circuit. Presently only one attorney receives them all. Other cases that discuss court appointments are Jewell v. Maynard, 383 S.E.2d 536, 181 W.Va. 51, Lexis 120 (W.Va. 1989) and Quesinberry v. Quesinberry, 191 W.Va. 65, 443 S.E.2d 222, W.Va. Lexis 35 (W.Va. 1994).

Jewell v. Maynard held in part that it was expected and required for private counsel throughout the State to accept and perform some amount of Court-appointed cases. That case established the upper bracket of the amount of cases an attorney should perform as Court appointed cases:

Although we firmly believe that it is a lawyer's obligation to accept court appointments, we nonetheless conclude that equal protection and due process principles place some upward limit on this obligation. Accordingly, we hold that effective immediately no lawyer in West Virginia may be required to devote more than 10 percent of his normal work year to court-appointed cases. "And concerning the tithe of the herd, or of the flock, even of whatsoever passeth under the rod, the tenth shall be holy unto the Lord." Leviticus 27:32.

Alternatively it only makes sense that interested counsel should be able to receive at least some of those cases and not be precluded from participating in W.Va. Code Chapter 44A guardian/conservator cases altogether. Courts that have the duty to spread the burden of court-appointed cases should also have the responsibility to spread the benefit of those same appointments.

Quesinberry states in dicta that:

Furthermore, as a condition to the practice of law in West Virginia, Rule 6.2 of the Rules

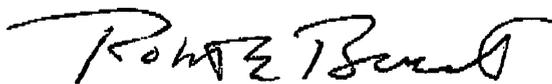
of Professional Conduct prohibits a lawyer from seeking to "avoid appointment by a tribunal to represent a person except for a good cause. . . ." According to the commentary under Rule 6.2, lawyers may be subject to appointment by the court to serve unpopular clients or persons unable to afford legal services. In short, with or without statutory expression, the court's power of appointment extends to indigent parties when no legal aid entity will represent the indigent person and without a lawyer the ends of justice are likely to be seriously confounded.

In Quesinberry the question before the court was payment of counsel for representation of indigents. Converse to this holding, it is only fair and equitable when appointing counsel as GALs, the court should spread these appointments throughout the panel or to interested counsel willing to accept them, and not deliver them all to one person.

8. CONCLUSION

Wherefore, Petitioner prays this Petition be granted by this Honorable Court and the following relief be Ordered:

1. Enter an Order prohibiting the mental hygiene commissioners of the 23rd Judicial Circuit of W.Va. from appointing GALs to serve in guardian/conservator hearings filed.
2. Issue an Order directing the circuit court judges to appoint GALs to serve in guardian/conservator hearings filed in the 23rd Judicial Circuit of West Virginia.
3. Issue an Order or establish a rule that interested and qualified attorneys practicing within the circuit be considered for such guardian/conservatorship GAL positions.
4. And any further relief as may be appropriate.



Robert E. Barrat, Petitioner
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9. VERIFICATION

By signing below Petitioner Robert E. Barrat does verify the facts contained in this Petition are true and correct to the best of his knowledge, and if stated upon information and belief he believes them to be true:

Robert E. Barrat

Robert E. Barrat, Petitioner

Notarization

This verification was acknowledged before me on this the 2nd day of July 2015 by Robert

E. Barrat:

Kela Y Blandin Franco

Notary

My Commission Expires: Jan 26, 2020

Affix Seal.



10. CERTIFICATE OF SERVICE

A true and correct copy of this Petition for Mandamus/Prohibition and Appendix was mailed to the following parties by U.S. First Class Mail, return receipt requested, on this the 7th day of July 2015:

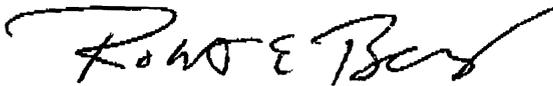
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