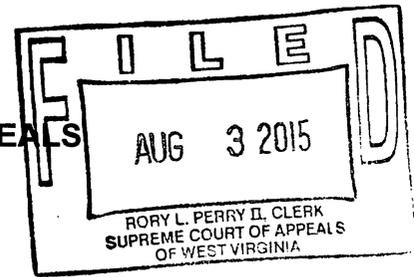


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
No. 15-0669



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, Twenty-Third Judicial Circuit of
West Virginia,

Respondents.

RESPONSE ON BEHALF
OF RESPONDENTS NANCY A. DALBY,
KIRK H. BOTTNER, AND DAVID P. SKILLMAN

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I. STATEMENT OF THE CASE

This is an original jurisdiction proceeding instituted by Petitioner Robert E. Barrat. The Petitioner is an actively practicing attorney in Berkeley County. He states in his Petition that he accepts court appointments in Berkeley, Jefferson and Morgan Counties in various types of cases involving child abuse and neglect, criminal, juvenile, and other areas of law. The gravamen of his Petition is that he is unable to obtain court appointments in adult guardianship and conservatorship cases. According to the Petitioner, most or all of those appointments go to another local attorney, James B. Rich.

The Petitioner seeks a writ of mandamus and prohibition against the three named Respondents -- Nancy A. Dalby, Kirk H. Bottner, and David P. Skillman. The Respondents serve as the mental hygiene commissioners for the Twenty-Third Judicial Circuit, which includes Berkeley, Jefferson and Morgan Counties. In their capacity as mental hygiene commissioners, the Respondents conduct proceedings for involuntary commitments to mental health facilities under West Virginia Code Article 5 of Chapter 27, as well as proceedings for appointment of guardians and conservators for mentally impaired persons under Chapter 44A of the West Virginia Code.

The instant Petition pertains only to Chapter 44A guardian and conservator cases. The Petitioner asserts two related arguments. First, he contends that mental hygiene commissioners cannot appoint counsel to serve as guardians *ad litem* (GAL) in guardianship and conservatorship cases. The Petitioner contends that only circuit court judges can make these appointments. Secondly, the Petitioner argues that it is improper to routinely select one attorney for appointment as GAL in most of these

cases. For relief, the Petitioner asks this Court to order circuit court judges, not mental hygiene commissioners, to make all GAL appointments in Chapter 44A cases. Further, the Petitioner seeks to have this Court order that all interested attorneys within a judicial circuit be considered for GAL appointments in these guardian and conservator cases.

II. SUMMARY OF ARGUMENT

Under the West Virginia Guardianship and Conservatorship Act, mental hygiene commissioners are authorized to conduct hearings and do other acts in place of the circuit court. This concurrent authority includes the appointment of guardians *ad litem* for protected person under the Act. There are limited exceptions in which only the circuit court can do certain acts, but these are specifically expressed by pertinent statutory language. A full reading of the applicable statutes clearly supports the authority of mental hygiene commissioner to appoint GALs.

The duties of GALs in guardian and conservator cases are detailed and extensive. Many such obligations are unique to these particular cases. Therefore, choice of appropriate counsel to serve as GAL is vitally important to protect the interests of the affected person. Judicial officers making these appointments must be able to exercise reasonable discretion in the appointment process to assure that due process rights of the affected person are preserved. Given the unique nature of the cases, GAL appointments may be legitimately limited by judicial discretion.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts and legal arguments are adequately presented in the Petition and Response, and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT OF LAW

A. Applicable Standards

With regard to the writ of mandamus sought by the Petitioner:

A writ of mandamus will not issue unless three elements coexist - (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy. Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

With regard to the writ of prohibition sought by the Petitioner:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

B. Mental Hygiene Commissioners Have Statutory Authority to Appoint Counsel to Serve as GAL in Guardian and Conservator Cases.

The West Virginia Guardianship and Conservatorship Act, codified in West Virginia Code Chapter 44A, provides the judicial process for the appointment of guardians and conservators to manage the personal and financial affairs of mentally

disabled adults, defined as "protected persons" under the Act. West Virginia Code § 44A-2-7(a) provides that at the outset of each case the alleged protected person shall have counsel appointed to serve as guardian *ad litem*. Specifically, the statute states:

(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.

The Petitioner argues that the use of the term "the court" restricts the authority to appoint counsel to circuit court judges. This narrow interpretation of a single passage ignores the generally broad authority afforded to mental hygiene commissioners under the Guardianship and Conservatorship Act. A complete reading of this statute, as well as the full Act, evidences a legislative intent that mental hygiene commissioners are, in most instances, authorized to act in place of circuit court judges. This concurrent authority includes the appointment of GALs.

There are a few exceptions in which only a circuit judge may act, the principal exception being that only the circuit court judge can enter an order making the appointment of a guardian or conservator. W. Va. Code § 44A-2-9. In this same statute it is also expressly provided that only the circuit court can serve as the trier of fact if the petition seeks appointment of a conservator for a missing person. In other words, where the legislature specifically intended to limit authority to the circuit court alone, that limitation was clearly expressed.

The general use of "the court" appointing counsel in West Virginia Code § 44A-2-7(a) is a shorthand reference. Other provisions in this statute make it clear that *either*

the circuit court or the mental hygiene commissioner, as part of the appointment process, is to be informed of prospective counsel's proposed hourly rate. W. Va. Code § 44A-2-7(e).¹ Further, under this statute *either* the circuit court or mental hygiene commissioner approves the fee at the conclusion of the case. *Id.* Reading the statute in its entirety, it is clear that the appointment of counsel, approval of the fee rate, and the ultimate fee approval are all matters under the concurrent authority of the circuit court and mental hygiene commissioner.

This concurrent appointing authority is further supported by the provision in the Act relating to a petition for the sale or mortgage of a protected person's real property. Under West Virginia Code § 44A-3-5(b): "Following a petition by the conservator for the sale or mortgage of real property, the court or mental hygiene commissioner shall appoint a guardian *ad litem* and set a hearing on the petition." It makes no sense to distinguish appointment-of-counsel authority for different types of petitions filed under this Act. The shorthand reference to the court in one instance does not support such a distinction.²

Finally on this point, it is noted that the Supreme Court-approved forms allow for the appointment of counsel in guardian and conservator cases by either a mental hygiene commissioner or a circuit court judge. See attached Exhibits 1-3. These form Orders, used statewide, reflect the accepted reading of the Act language to authorize GAL appointments by either circuit court judges or mental hygiene commissioners.

¹ Under West Virginia Code § 44A-1-13(c), counsel fees are paid by the protected person's estate if funds are available; otherwise the fees are paid at a set rate from funds allocated by the Supreme Court.

² It is noted that in Chapter 27 involuntary commitment cases, circuit court judges and mental hygiene commissioners also have concurrent authority to appoint counsel. W. Va. Code § 27-5-2(e).

C. Guardianship and Conservatorship Cases Are Not Proceedings Covered by the Public Defender Services Act.

The Petitioner also contends that, "[i]t would appear guardian/conservator hearings are ancillary proceedings to criminal proceedings considering the definitions in W. Va. Code 29-21-2(2)." He makes this far-fetched claim to reach his argument that appointment of GALs in Chapter 44A cases should be made from the panel of attorneys for each circuit established under the Public Defender Services Act (PDS Act) codified in Chapter 29. The Petitioner is clearly wrong for the following reasons.

The PDS Act provides for legal counsel for indigent persons in certain eligible proceedings. As specifically defined, "eligible proceedings" include:

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 proceedings, 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 proceedings. 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. W. Va. Code §29-21-2(2).

The Petitioner asserts, without elaboration or support, that guardian and conservator cases under Chapter 44A are proceedings that are "ancillary" to eligible proceedings, namely mental hygiene commitment proceedings. (Petition, at p. 5.) This is clearly incorrect. Mental hygiene commitment proceedings under Chapter 27 and the

proceedings for appointment of guardians and conservators under Chapter 44A are entirely separate and independent proceedings. Moreover, under the Petitioner's argument that the PDS Act applies to Chapter 44A proceedings, in circuits where a public defender office is in operation, counsel from that office would be the default choice to serve as GAL, not panel attorneys. See W. Va. Code § 29-21-9(b).

Finally, under the Petitioner's interpretation, the Public Defender Corporation would be paying for GALs in Chapter 44A cases. Clearly this is not happening, as these GALs are paid with the funds available from a protected person's estate. If such funds are not available, the GAL is paid through the account funded under the budget allocations of the Supreme Court. W. Va. Code § 44A-1-13(c).

Appointments of GALs in guardian and conservator cases are specifically addressed in Chapter 44A. See W. Va. Code §§ 44A-2-7 and 44A-3-5. The PDS Act and its provisions regarding appointment of counsel and payment of counsel have absolutely no application to adult guardian and conservator cases under Chapter 44A.

D. Judicial Officers May (and Should) Exercise Legitimate Discretion in the Appointment of Guardians *Ad Litem*.

The Petitioner seeks what he apparently perceives as his share of GAL appointments in guardian and conservator cases. He cites two cases that provide no support, and only stand for the point that practicing attorneys can be required to undertake a reasonable amount of court-appointed representation. *Jewell v. Maynard*, 181 W. Va. 51, 383 S.E.2d 536 (1989); *Quesinberry v. Quesinberry*, 191 W. Va. 65, 443 S.E.2d 222 (1994). A lawyer's obligation to accept court appointments does not translate into a right of full employment for lawyers. For the following reasons, judicial discretion is vitally important to the appointment of GALs.

Counsel serving as guardians *ad litem* for alleged protected persons in Chapter 44A proceedings have tremendous responsibilities. The pertinent statutory obligations cover five "major areas of concern" and in addressing those areas, the statute details a minimum of twenty-one separate responsibilities. W. Va. Code § 44A-2-7(b) and (c).³ This is quite similar to the responsibilities of GALs in child abuse and neglect cases, for

³ West Virginia Code 44A-2-7(b) and (c) provides as follows:

(b) Legal counsel shall have the following major areas of concern: (1) Whether or not a guardian or conservator is needed; (2) limitation of the role of the guardian or conservator to the protected person's specific needs -- e.g., personal supervisor, business affairs, medical consent only; (3) if needed, assure that the person or entity that will act in the best interest of the protected person is appointed; (4) if needed, assure the adequacy of the bond; and (5) if needed, assure consideration of proper placement.

(c) In responsibly pursuing the major areas of concern set forth in subsection (b) of this section, counsel may perform any or all of the following: (1) Promptly notify the individual and any caretaker of the appointment of counsel; (2) contact any caretaker, review the file and all other relevant information; (3) maintain contact with the client throughout the case and assure that the client is receiving services as are appropriate to the client's needs; (4) contact persons who have or may have knowledge of the client; (5) interview all possible witnesses; (6) pursue discovery of evidence, formal and informal, including obtaining medical and financial records; (7) file appropriate motions, including temporary protective orders; (8) obtain independent psychological examinations, medical examinations, home studies, as needed; (9) advise the client on the ramifications of the proceeding and inquire into the specific interests and desires of the individual; (10) subpoena witnesses to the hearing; (11) prepare testimony for cross-examination of witnesses to assure relevant material is introduced; (12) review all medical reports; (13) apprise the decision maker of the individual's desires; (14) produce evidence on all relevant issues; (15) interpose objections to inadmissible testimony; (16) raise appropriate questions to all nominations for guardian and conservator and the adequacy of the bond; (17) take all steps to limit the scope of guardianship and conservatorship to the individual's actual needs, and make all arguments to limit the amount of the intervention; (18) ensure that the court considers all issues as to the propriety of the individual's current or intended housing or placement and that the limitations are set forth in the order; (19) inform the client of the right to appeal, and file an appeal to an order when appropriate; (20) file a motion for modification of an order or a petition for a writ of habeas corpus if a change of circumstances occurs which warrants a modification or termination upon counsel being reappointed by the court; and (21) otherwise zealously represent the interests and desires of the client while also reporting to the court what actions are in the best interests of the client.

which this Court has rightfully imposed specific and detailed duties. See *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); see also *Rules of Procedure for Child Abuse and Neglect Proceedings, Appendix A: Guidelines for Children's Guardian Ad Litem in Child Abuse and Neglect Proceedings* (effective July 31, 2014; amended May 18, 2015). Any attorney appointed GAL for a child must first complete specific training and certification. W. Va. Code § 49-4-601(g). Unfortunately, similar training requirements do not exist for GALs in guardian and conservator cases.

It is fundamental then, that appointing authorities have the discretion to choose appropriate counsel to carry out the duties of a GAL. In many circuits, courts routinely appoint the same proven individuals to do the work necessary to effectively address to the best interests of the child or protected person.⁴ Similar concerns arise in the appointment of GALs for minor settlement proceedings. W. Va. Code § 44-10-14.

In all of these circumstances, courts draw upon legitimate expectations and experience to exercise the discretionary authority to appoint capable and diligent GALs. The Respondents certainly acknowledge that Attorney James B. Rich is appointed GAL of most of these cases in the Twenty-Third Circuit. But this is based upon past experience with the work of Attorney Rich, as well as other attorneys, including the Petitioner. The Petitioner would have this Court dictate that court discretion based upon performance be abandoned and replaced by a mandatory list. It is respectfully submitted that such a change would deprive courts of the level of discretion needed to appoint appropriate GALs for children and protected persons.

⁴ The Petitioner cites Canon 2 of the Code of Judicial Conduct and suggests that it may give the appearance of impropriety to not fairly distribute GAL appointments "amongst interested counsel." (Petition, at p. 6.) As discussed above merely being interested in appointment is not sufficient. Meeting court expectations and performing obligations earn repeat appointments. The pertinent provision of the Code of Judicial Conduct is found in Canon 3C(4): "A judge shall exercise the power of appointment impartially and on the basis of merit." That is indeed what is happening here.

V. CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Honorable Court deny the issuance of a rule to show cause and dismiss the Petition. In the event that a rule to show cause issues, the Respondents request the opportunity to provide a more developed response to the matters raised.

NANCY A. DALBY, KIRK H.
BOTTNER, and DAVID P.
SKILLMAN
Respondents

By Counsel



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Counsel for Respondents Dalby, Bottner
and Skillman

IN THE CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA

IN RE: _____, CASE NUMBER _____ - G - _____
AN ALLEGED PROTECTED PERSON

ORDER OF APPOINTMENT OF COUNSEL

[*West Virginia Code*: § 44A-2-7]

WHEREAS, _____ has filed a petition with this Court seeking the appointment of a guardian and/or conservator for the alleged Protected Person named above under the provisions of *West Virginia Code*: § 44A-1-1, et seq.;

WHEREAS, this Court is required to appoint legal counsel for the alleged Protected Person pursuant to the provisions of *West Virginia Code*: § 44A-2-7(a),

WHEREAS, the undersigned [*check one*] _____ has _____ has not been advised of known preferences of the alleged Protected Person and, if preferences have been made known, has considered such preferences in the making of this appointment,

Accordingly, it is hereby **ORDERED** that

Name of Appointed Attorney: _____

Address: _____

Telephone Number: (_____) _____

is hereby appointed to represent the alleged Protected Person in this cause and shall exercise the duties and responsibilities set forth under *West Virginia Code* § 44A-2-7. Counsel shall further inform this Court of the hourly rate of counsel and seek approval of the fee of counsel for the case pursuant to *West Virginia Code*: § 44A-2-7(e).

The Clerk shall enter the foregoing as and for the day and date set forth below and shall transmit attested copies thereof to any counsel of record, to counsel appointed by this **ORDER** and also by first class mail to the Petitioner and the alleged Protected Person at their mailing addresses as the same appear in the Petition.

DATE

MENTAL HYGIENE COMMISSIONER/JUDGE OF THE CIRCUIT COURT

IN THE CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA

IN RE: _____, CASE NUMBER _____ - G - _____
AN ALLEGED PROTECTED PERSON

**ORDER OF APPOINTMENT OF GUARDIAN AD LITEM
And
NOTICE OF HEARING**
[*West Virginia Code: § 44A-3-5 & § 37-1-3*]

WHEREAS, the Conservator in the above-captioned action has filed a petition with this Court seeking to sell or mortgage certain real estate owned by the Protected Person named above under the provisions of *West Virginia Code: § 44A-3-5*;

WHEREAS, this Court is required to appoint a guardian ad litem for the Protected Person pursuant to the provisions of *West Virginia Code: § 44A-3-5* and *§ 37-1-3*;

Accordingly, it is hereby **ORDERED** that

Name of Appointed Guardian ad litem: _____

Address: _____

Telephone Number: (_____) _____

is hereby appointed and shall report to this Court on the _____ day of _____, _____, at _____ o'clock ____m. before the Honorable _____ judge/mental hygiene commissioner for hearing on the Petition to Sell and/or Mortgage Real Estate of the Protected Person.

The Clerk shall enter the foregoing as and for the day and date set forth below and shall transmit attested copies thereof to any counsel of record, to the guardian ad litem appointed by this **ORDER**, and to Petitioner at the mailing address as appears in the Petition, and to the Protected Person.

ENTER this _____ day of _____, _____.

MENTAL HYGIENE COMMISSIONER/JUDGE OF THE CIRCUIT COURT



IN THE CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA

IN RE: _____ CASE NUMBER _____ - G - _____
A PROTECTED PERSON

ORDER OF APPOINTMENT OF COUNSEL

In the case of a Petition to Terminate, Revoke or Modify and Appointment of Guardian/Conservator
[West Virginia Code: § 44A-4-6(c)]

WHEREAS, _____ has filed a petition with this Court seeking to terminate, revoke or modify the appointment of the guardian and/or conservator for the Protected Person named above under the provisions of *West Virginia Code*: Section 44A-4-6;

WHEREAS, this Court is required to appoint legal counsel for the Protected Person pursuant to the provisions of *West Virginia Code*: Section 44A-4-6(c),

WHEREAS, the undersigned [*check one*] has has not been advised of known preferences of the alleged Protected Person and, if preferences have been made known, has considered such preferences in the making of this appointment,

Accordingly, it is hereby **ORDERED** that

Name of Appointed Attorney: _____

Address: _____

Telephone Number: (_____) _____

is hereby appointed to represent the alleged Protected Person in this cause and shall exercise the duties and responsibilities set forth more fully under *West Virginia Code*: Section 44A-2-7, subsections (b), (c) and (d).

The Clerk shall enter the foregoing as and for the day and date set forth below and shall transmit attested copies thereof to any counsel of record, to counsel appointed by this ORDER and also by first class mail to the Petitioner and the alleged Protected Person at their mailing addresses as the same appear in the Petition.

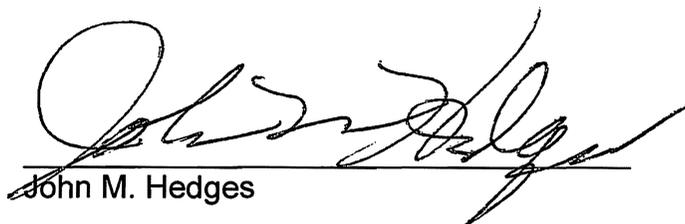
DATE

MENTAL HYGIENE COMMISSIONER/JUDGE OF THE CIRCUIT COURT

CERTIFICATE OF SERVICE

I, John M. Hedges, do hereby certify that I served a true and correct copy of the foregoing *Response on Behalf of Respondents Nancy A. Dalby, Kirk H. Bottner, and David P. Skillman* via U.S. Mail, postage prepaid, this 31st day of July 2015 upon the following:

Robert E. Barrat
308 S. Queen Street
Martinsburg, WV 25401


John M. Hedges