

## STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on May 18, 2015, the following order was made and entered:

### **IN RE: GUIDELINES FOR CHILDREN'S GUARDIANS *AD LITEM* IN CHILD ABUSE AND NEGLECT CASES**

On May 4, 2015, Nikki Tennis, Director of the Division of Children's Services, presented to the Court a proposed amendment to Appendix A of the Guidelines for Children's Guardians *ad Litem* in Child Abuse and Neglect Cases. Appendix A has been updated to reflect that during the 2015 Regular Session, the West Virginia Legislature repealed West Virginia Code §§ 49-1-1 through 49-11-10 and recodified these statutes, with some revisions, into West Virginia Code §§ 49-1-101 through 49-7-304.

Upon review, the Court hereby approves the proposed amendment as set forth in the attached Appendix.

A True Copy

Attest: //s// Rory L. Perry II  
Clerk of Court



# **RULES OF PROCEDURE FOR CHILD ABUSE AND NEGLECT PROCEEDINGS**

## **APPENDIX A: GUIDELINES FOR CHILDREN'S GUARDIANS *AD LITEM* IN CHILD ABUSE AND NEGLECT CASES**

### **Introduction**

The purpose of the following Guidelines is to provide guardians *ad litem* (GAL) with guidance in representing a child in an abuse and neglect proceeding under W.Va. Code § ~~49-6-1~~ 49-4-601, *et seq.* The Guidelines are divided into five parts: 1) Section A sets forth the general role of a GAL and the education and training requirements of a GAL; 2) Section B discusses ethical considerations in representation; 3) Section C describes the duties of a GAL as to the initial stages of representation; 4) Section D discusses the duties of a GAL as to the adjudicatory and dispositional stages of representation; and 5) Section E describes the duties of a GAL as to post-dispositional representation.

### **A. Role of GAL; education and training**

1. **Role of GAL.** The GAL in a child abuse and neglect case has a dual role, both as an attorney, and to represent the best interests of the child. A GAL has broad discretion in determining what is necessary to protect the best interests of a child. The safety, well-being, and timely permanent placement of a child in an abuse and neglect proceeding are central to all aspects of a GAL's representation.
2. **Education and training.** An attorney appointed as GAL shall complete a minimum of eight (8) hours of continuing legal education training every two years in child abuse and neglect practice and procedure as provided by the Supreme Court of Appeals of West Virginia.

### **B. Ethical Considerations in Representation**

1. **Rules of Professional Conduct.** The Rules of Professional Conduct apply to a GAL's representation of a child in an abuse and neglect proceeding.
2. **Duty of confidentiality.** A GAL owes a duty of confidentiality to the child, but this duty is not absolute. A GAL has a duty to disclose a child's confidential communication to the court when the communication implicates a high risk of probable harm to the child.
3. **Conflicts of interest.** General principles of conflicts of interest apply to a GAL's representation of a child in an abuse and neglect proceeding. Conflicts of interest commonly arising in abuse and neglect proceedings include the following:
  1. A GAL determines that there is a conflict of interest in performing both roles as GAL and the child's attorney. In such instance, the lawyer should continue to represent the child as the child's attorney and withdraw as GAL. The lawyer

should simultaneously ask the court to appoint a new GAL to represent the best interests of the child. A mere disagreement regarding the best interests of the child does not in itself constitute a basis for withdrawing as counsel.

2. A conflict of interest arises when siblings represented by the same GAL have opposing interests. If the GAL discovers the conflict before commencing representation of the siblings, the GAL shall only accept appointment of one sibling or non-conflicting siblings. If the GAL discovers the conflict of interest after accepting appointment to represent the siblings, the GAL shall request that the court appoint a new GAL to represent the interests of the conflicting sibling or siblings.
3. A conflict of interest arises when a GAL subsequently represents a child's parent, relative, caregiver, foster parent, or pre-adoptive parent in another matter. In such instance, a GAL should not engage in a subsequent representation that compromises the GAL's ability to independently consider the best interests of the child.

### **C. Duties of GAL as to Initial Stages of Representation**

1. When appropriate, promptly notify the child and the child's caretaker of the GAL's appointment and the means by which counsel can be contacted.
2. When appropriate, initiate contact with the caseworker, review the caseworker's file and obtain copies of school, medical, social service, or other records necessary to thoroughly understand and investigate the case.
3. Schedule a face-to-face meeting with the child at a time and place that allows for observation and private consultation with the GAL unless the court specifically determines that such a meeting would be inappropriate given the age, medical and/or psychological condition of the child.
4. When appropriate, counsel the child regarding the subject matter of the proceedings, the specific reasons for the GAL's appointment and the expectations of the court.
5. When a Court Appointed Special Advocate (CASA) has been appointed to the case, work with the CASA volunteer to achieve the goal of representing the best interests of the child.
6. Conduct an independent investigation of the facts of the case.
  1. When appropriate, conduct in-home visits during which the GAL can observe the respective living environments of the child's parents or caretakers and their interaction with the child.
  2. When appropriate, interview caregivers, caseworkers, therapists, school personnel, medical providers, relatives, siblings, and/or other individuals that have pertinent information regarding the child.

3. Ascertain the child's wishes when possible.
7. Maintain contact with the child throughout the case to monitor whether the child is receiving counseling, tutoring, or any other services needed to provide as much support as possible under the circumstances.
8. When appropriate, keep the child apprised of any developments in the case and actions of the court or parties involved.

#### **D. Duties of GAL as to Adjudicatory and Dispositional Stages of Representations**

1. Actively participate in all aspects of litigation, including, but not limited to, discovery, motions practice, court appearances, and the presentation of evidence.
2. Maintain adequate records of documents filed in the case and of all conversations with the child and potential witnesses.
3. When appropriate, evaluate any available improvement periods and actively assist in the formulation of an improvement period and service plans. The GAL is to monitor the status of the child and progress of the parent(s) in satisfying the conditions of the improvement period by requiring updates or status reports from agencies involved with the family.
4. Assess whether it is appropriate for the child to participate in court hearings or multi-disciplinary team meetings. The GAL is to participate in any discussions regarding the proposed testimony of the child and, if it is determined that the child's testimony is necessary, strongly advocate for the testimony to be taken in an acceptable and emotionally neutral setting.
5. Assess whether it is appropriate for the child to undergo multiple physical or psychological examinations. Before multiple physical or psychological examinations are conducted, the requesting party must present to the judge evidence of a compelling need or reason considering: (1) the nature and intrusiveness of the examination requested; (2) the child's age; (3) the resulting physical and/or emotional effects of the examination on the child; (4) the probative value of the examination to the issues before the court; (5) whether the passage of time renders the examination unnecessary or irrelevant; and (6) the evidence already available for the respondent's use.
6. Review any pre-dispositional report prepared for the court prior to the dispositional hearing and submit a factually accurate report if necessary to correct deficiencies.
7. Complete the investigation of the case with sufficient time between the interviews and court appearances to thoroughly analyze the information gleaned to formulate meaningful arguments and written recommendations to the court.
8. Submit a written report to the court and provide a copy to all parties at least five (5) days prior to the disposition hearing that complies with the format and content requirements of the "Report of Guardian Ad Litem" set forth in Appendix B of the Rules of Procedure for Child Abuse and Neglect Proceedings. When necessary, petition the

court to seal or redact information contained in the report as provided in Rule 18a of the Rules of Procedure for Child Abuse and Neglect Proceedings. Submit an updated report if necessary to notify the court of any changes in the child's circumstances. Such report is protected by the attorney-client privilege and the attorney work product privilege. GALs are precluded from testifying as to any aspect of the report.

9. When appropriate, explain to the child the decisions of the court.
10. Ensure that the child/family case plan and subsequent progress reports include appropriate treatment. The GAL is to advocate, when appropriate, for a gradual transition period and take into consideration the educational stability of the child. The GAL is to ensure that the transition plan is intended to foster the child's emotional adjustment.
11. Recommend to the court the appropriateness of establishing, continuing, or collecting a child support obligation from the parents involved in the case.
12. Ensure that the court considers whether continued association with siblings in other placements is in the child's best interests.
13. Ensure that the dispositional order contains provisions that direct the child protective agency to provide periodic reviews and reports to appropriate entities.

#### **E. Duties of GAL as to Post-Dispositional Representation**

1. When appropriate, explain to the child the decisions of the court.
2. When appropriate, inform the child of the right to appeal and what that right means. Exercise the appellate rights of the child if under the reasonable judgment of the GAL an appeal is necessary. If the GAL decides to file an appeal, the appeal must fully comply with the requirements set forth in Rule 11 of the Rules of Appellate Procedure.
3. Actively participate and timely file a response in any appeal, extraordinary writ, modification, or action ancillary to the abuse and neglect proceeding including proceedings to address the disruption of a permanent placement which affect the recommendations of the GAL. If an appeal is filed by another party in an abuse and neglect case, the GAL is required to file a respondent's brief or summary response that adheres to the requisite provisions of Rule 11 of the Rules of Appellate Procedure.
4. During the period of representation, evaluate whether it is appropriate to file a motion for modification of the dispositional order if a change in circumstances occurs for the child which warrants a modification.
5. As provided in Rule 52(g) of the Rules of Procedure for Child Abuse and Neglect Proceedings, a GAL's representation of the child continues until such time as permanent placement of the child has been achieved, or as determined by the Court.