IN THE SUPREME COURT OF APPEALS WEST VIRGINIA

January 1994 Term

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No. 21927

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BARBARA ANN QUESINBERRY,
Plaintiff
v.
MICHAEL R. QUESINBERRY,
Defendant

and

TINA MICHELLE CARTER,
Plaintiff
v.
JEROME ELWOOD CARTER, JR.,
Defendant

Certified Questions from the Circuit Court of Mercer County
Honorable John R. Frazier, Judge
Civil Action Nos. 90-CD-641-F and 92-CD-559-F

CERTIFIED QUESTIONS ANSWERED

Submitted: 12 January 1994
Filed: 24 March 1994

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Administrative Office of
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Charleston, West Virginia
Attorney for Ted Philyaw

JUSTICE NEELY delivered the Opinion of the Court.

SYLLABUS

1. Because there is neither a valid statute nor an appropriation for an expenditure providing compensation to a lawyer appointed as a guardian ad litem for an incarcerated convict named as a defendant in a civil action, there exists no lawful authority for a trial court to order, or the Administrative Director to pay the guardian ad litem fees in such an action.

2. Pursuant to W.V.R.C.P., Rule 17(c) [1978], 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. There are several alternatives to appointment of a guardian ad litem for indigent incarcerated defendants. If the term of confinement of a prisoner is not long, the court may defer the action against the prisoner until release, provided that such a continuance is not prohibited by law and postponement of the action will not substantially prejudice the rights of the adverse party. If a continuance is not feasible, the court should determine whether a guardian ad litem is essential for the protection of the incarcerated defendant's rights under the particular circumstances of the pending action. If, for example,

the prisoner is not contesting the suit, there is no need for counsel. Even if the prisoner is contesting any aspect of the suit, the court should determine whether an adverse judgment against the prisoner on the contested issues would affect any present or future property rights.

3. Under W. Va. Code 29-21-1 et seq. [1990], if compensation for a guardian ad litem appointed for an infant child in an action initiated to disprove that child's paternity cannot be ordered paid by either of the parties pursuant to Rule XIII of the Trial Court Rules for the Trial Courts of Record by reason of indigency, the minor child is "an eligible client" and the paternity proceeding is an "eligible proceeding" requiring payment through the Office of Public Defender Services.

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Neely, J.:

These consolidated actions are before this Court upon certified questions pursuant to W. Va. Code 58-5-2 [1967] and Rule 13 of the Rules of Appellate Procedure [1979]. The questions certified by the Circuit Court of Mercer County relate to appointment of counsel by a court and compensation for such counsel.

Both actions are divorce proceedings. In Quesinberry v. Quesinberry, an indigent wife represented by the Appalachian Regional Defense Fund sued her incarcerated husband, who was on death row in North Carolina on a first-degree murder conviction, for divorce. Pursuant to Rule 17(c), W.V.R.C.P. [1978], which provides for court appointment of a lawyer as guardian ad litem for convicts not otherwise represented, Thomas L. Berry, Esq. was appointed as guardian ad litem for the defendant. The final divorce order was entered on 7 June 1991.

In Carter v. Carter, the parties, after alleging and admitting in the pleadings that a child had been born of their marriage, presented a proposed agreed order indicating that there were no children born of the marriage-- in effect, bastardizing the child. Pursuant to our holding in Michael K.T. v. Tina L.T., 182

W. Va. 399, 387 S.E.2d 866 (1989), which mandates court appointment of a guardian ad litem for an infant child in an action initiated to disprove that child's paternity, the court then appointed Rebecca M. Bell, Esq. to represent the interests of the child. Subsequently, the court found the child to be a legitimate child of the marriage. The court also found that neither party had the ability to pay Ms. Bell's fees.

Upon conclusion of the Quesinberry and Carter actions, each guardian ad litem moved for payment of counsel fees. Following hearings held on 8 February 1993 and 19 April 1993, the circuit court concluded that the Administrative Office of the Supreme Court of Appeals was responsible for payment of these counsel fees, and directed that several questions with respect to court-appointed counsel in civil actions be certified to this Court. The circuit court's order, entered 4 May 1993, set forth the following certified questions:

> 1. Where an attorney at law is appointed as guardian ad litem for an incarcerated convict named as a defendant in a civil action pursuant to the provisions of Rule 17(c) of the West Virginia Rules of Civil Procedure, what entity should be responsible for compensating that guardian ad litem for his/her fees and expenses?

Answer of Circuit Court: The Administrator's Office of the West Virginia Supreme Court of Appeals.

2. Where an attorney at law is appointed as guardian ad litem for an infant child in an action initiated to disprove that child's paternity as provided for in Michael K.T. v. Tina L.T., 387 S.E.2d 866 (W. Va. 1989), what state entity is responsible for compensating that guardian ad litem for his/her fees and expenses when neither party nor the infant are financially able to pay?

Answer of Circuit Court: The Administrator's Office of the West Virginia Supreme Court of Appeals.

3. (A) Can a circuit court appoint an attorney at law to represent a party in a divorce action involving a custody dispute when that party is currently unrepresented and would qualify for legal aid on the basis of indigency, except for the fact that the opposing party is already represented by the local legal aid entity?

Answer of Circuit Court: Yes.

(B) Is the court's power of appointment broader than situations described in 3(A) above, and can the circuit court appoint an attorney for an indigent party even if the other party is not represented by the "legal aid entity" and/or can the court's power of appointment extend to indigent parties to civil actions other than divorce actions involving custody disputes when no legal aid entity will represent the indigent persons?

Answer of Circuit Court: Yes.

(C) Where an attorney is appointed to represent indigent parties in situations described in 3(A) and 3(B) above, what entity

> is responsible for compensating that attorney for his/her fees and expenses?
>
> Answer of Circuit Court: No entity is responsible; attorneys appointed under these situations will perform services without pay--in effect a court-ordered pro bono appointment.

We address these questions seriatim.

I.

The first question certified by the circuit court asks us which entity should be responsible for paying a lawyer appointed as a guardian ad litem for an incarcerated convict named as a defendant in a civil action pursuant to the provisions of Rule 17(c), W.V.R.C.P.. The circuit court found that the Administrative Director of the West Virginia Supreme Court of Appeals (Administrative Director) is responsible.

W. Va. Const., Art. VIII, §3 and W. Va. Code 51-1-15 [1974] charge the Administrative Director with the administration and operation of the State court system. The Administrative Director's duties include the preparation of a proper budget for the maintenance, support and operation of the courts as well as the authorization of payment for those items and services obtained within that budget as are authorized by law. See W. Va. Code 51-1-17 [1981].

In State ex rel. Foster v. Gainer, 166 W.Va. 88, 272 S.E.2d 666, 667 (1980), we drew the contours of the Administrative Director's spending authority, determining that sufficient authorization existed for payments by the Administrative Director if each of the following factors were justified to the Auditor for payment through his offices:

> (a) there is an appropriation for the proposed expenditure;
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> (b) there is a valid statute, state or federal, authorizing the proposed expenditure;
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> (c) the appropriation for the proposed expenditure is for a public purpose, and not for personal or private gain.

Because there is neither a valid statute nor an appropriation for an expenditure providing compensation to a lawyer appointed as a guardian ad litem for an incarcerated convict named as a defendant in a civil action, there exists no lawful authority for a trial court to order, or the Administrative Director to pay the guardian ad litem fees in such an action.

Rule 17(c), W.V.R.C.P. provides in pertinent part:

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[1]See W.Va. Code 12-3-1 [1990].

> 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 the court shall make such order as it deems proper for the protection of any person under a disability.

Notably, Rule 17(c), while requiring that a guardian ad litem be appointed for an incarcerated convict named as defendant in a civil action, does not include a provision charging any entity with the responsibility of paying for the services of such a guardian ad litem. Indeed, the only source of authority in this State allowing compensation for an attorney appointed as a guardian ad litem for an incarcerated convict -- Rule XIII of the Trial Court Rules for the Trial Courts of Record (Trial Court Rules) -- mandates that the compensation be taxed as part of the costs of the proceeding. Under W.V.R.C.P., Rule 54(d) [1978], such costs are taxed and chargeable only against a non-prevailing party and, where state officers or agencies are the non-prevailing parties in an action, only to the extent expressly permitted by law. Where, however, a guardian ad

[2]The cases from which today's certified question arise involve indigent litigants on all sides. However, the question of who pays for guardians ad litem may arise in other contexts where it is wholly inappropriate to place the burden on practicing lawyers. We believe that even though Rule 54(d), W.V.R.C.P. provides for the taxing of costs against a non-prevailing party, a court still has discretion to require entities who raise issues that force the appointment of a guardian ad litem to pay the costs. Thus, when an insurance company or other well-financed litigant crossclaims, counterclaims, or

litem is appointed to represent an incarcerated convict named as a defendant in a civil action, the Administrative Director is not a party, much less a non-prevailing one. Thus, the Administrative Director is not responsible in any instance for compensating a guardian ad litem appointed to represent an incarcerated convict named as a defendant in a civil action.

We should note that, as recognized in the last portion of Rule 17(c), W.V.R.C.P. [1978], 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. In Payne v. Superior Court, 553 P.2d 565 (Cal. 1976), the California Supreme Court recognized several alternatives to appointment of a guardian ad litem for indigent incarcerated defendants. If the term of confinement of a prisoner is not long, the court may defer the action against the prisoner until release, provided that such a

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otherwise joins an indigent to a lawsuit, the trial court has discretion to require the party creating the problem that compels appointment of a guardian ad litem to pay for such a guardian. This rule is necessary lest the lawyers of this State be overwhelmed by court-appointed work; although the solution is not perfect, it is more just to require a well-heeled party to litigation which joins an indigent for tactical purposes to pay the fees than it is for a wholly innocent practicing lawyer to bear the cost, often at the expense of his meager livelihood since not all lawyers in our rural areas are living high on the hog.

continuance is not prohibited by law and postponement of the action will not substantially prejudice the rights of the adverse party. Id. at 576. If a continuance is not feasible, the court should determine whether a guardian ad litem is essential for the protection of the incarcerated defendant's rights under the particular circumstances of the pending action. If, for example, the prisoner is not contesting the suit, there is no need for counsel. Even if the prisoner is contesting any aspect of the suit, the court should determine whether an adverse judgment against the prisoner on the contested issues would affect any present or future property rights. Id. at 577. In short, 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.

II.

The second certified question asks us to determine which state entity is responsible for paying a lawyer appointed as guardian ad litem to represent an infant child in an action initiated to disprove that child's paternity when neither party nor the infant is able to pay. The circuit court found that the Administrative Director of the West Virginia Supreme Court of Appeals is the appropriate entity to pay a guardian ad litem for fees and expenses incurred in such an action.

As in cases where a guardian ad litem is appointed to represent an incarcerated convict in a civil action described above, there is, contrary to the circuit court's finding, no statutory authority for the Administrative Director to pay such compensation. In Carter, Mr. Berry was appointed by the trial court pursuant to syllabus point 4 of Michael K.T. v. Tina L.T., 182 W. Va. 399, 387 S.E.2d. 866 (1989) which provides:

> A guardian ad litem should be appointed to represent the interests of the minor child whenever an action is initiated to disprove the child's paternity.

Although in Michael K.T., we observed that "the fees of such guardian ad litem are to be borne by the party or parties to the divorce who

the court determines is/are best able to bear such expense, or in the case of indigency of the parties by the state," we did not expressly indicate the appropriate payor agency of the State. Michael K.T., supra, 387 S.E.2d at 873.

The only promulgated rule with respect to compensation for guardians ad litem -- Rule XIII of the Trial Court Rules -- mandates that the compensation be taxed as part of the costs of the proceeding. Under W. Va. Code 29-21-1 et seq. [1990], if compensation for a guardian ad litem cannot be ordered paid by either of the parties pursuant to the Trial Court Rules, Rule XIII by reason of indigency, the minor child is "an eligible client" and the paternity proceeding an "eligible proceeding" requiring payment through the Office of Public Defender Services. In an analogous context, where a lawyer is appointed as guardian ad litem to protect a child's interests in an abuse and neglect proceeding where parental rights may be terminated, this Court recently noted that the child is an "eligible client" under W. Va. Code 29-21-2(1) [1990], entitling the lawyer to compensation through Public Defender Services. In Re Jeffrey R.L., __ W. Va. __, 435 S.E.2d 162, 177 n.27 (1993). Clearly, then, it was the intent of the legislature that W. Va. Code 29-21-2 [1990] also cover a guardian ad litem in an action initiated to disprove that child's paternity when neither

party nor the infant is able to pay. Accordingly, we hold that a trial court may require the office of Public Defender Services to compensate an attorney appointed as guardian ad litem to represent an infant child in an action to disprove that child's paternity when neither party nor the infant is able to pay. Contrary to the circuit court's finding, there is no statutory basis to order that the Court Administrator's office to pay the guardian ad litem's fees and expenses.

III.

The third certified question asks us to make two determinations with regard to the appointment of counsel by a court and compensation for such counsel: first, the ambit of a court's power to appoint guardians ad litem for indigent parties in civil actions; and second, the appropriate entity for compensating lawyers appointed as guardians ad litem for indigent parties in civil actions.

In Powell v. Alabama, 287 U.S. 45, 73 (1932), the United States Supreme Court recognized that a court's power to appoint counsel, "even in the absence of a statute, cannot be questioned. Attorneys are officers of the court, and are bound to render service

when required by such an appointment." In State ex rel. Partain v. Oakley, 159 W. Va. 805, 227 S.E.2d 314, 320 (1976), we echoed this recognized authority of courts to appoint needed counsel and the concomitant duty of lawyers to serve:

> "[T]his Court clearly has the authority to deal with the question of whether attorneys will or will not be required to provide service under appointment. As the highest judicial body in this State, this Court has the inherent power to define, supervise, regulate and control the practice of law in West Virginia. This power exists both inherently and by specific recognition in our Constitution and statutes.

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.

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[3]We note that compensation to counsel appointed to represent indigent persons is properly provided by the legislature in a substantial number of cases, specifically, those involving a potential deprivation of a substantial liberty interest. These actions include criminal, probation, and parole charges that may result in incarceration; juvenile proceedings; contempt of court; child abuse and neglect proceedings that may result in termination of parental rights; mental hygiene commitment proceedings; paternity proceedings; extradition proceedings; and appeals and post-conviction challenges to a judgment in any of these actions.

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In Jewell v. Maynard, 181 W. Va. 571, 383 S.E.2d 536, 546 (1989), this Court recognized the propriety and constitutionality of requiring lawyers to serve pro bono in this State:

> The dedication of lawyers to public service is reflected by the fact that lawyers are accorded substantial public benefits: They have a state-imposed monopoly in appearing for others in the courts, on drafting legal documents, and on giving legal advice; they conduct much of their business in facilities paid for by the taxpayers; and, they practice before judges whose salaries and logistical support are furnished entirely at public expense. Every student who enters law school understands that

> it is an ancient and honored tradition of the law that a reasonable part of a lawyer's time be devoted to uncompensated public service.

Notably, the Jewell Court did recognize that there are constitutional implications if court-appointed criminal cases are not spread equally among members of the bar. Under circumstances where uncompensated or undercompensated representation begins to pose an unreasonable financial burden on a particular lawyer, relief should be granted by the court. Jewell, supra, 181 W. Va. 571, 383 S.E.2d at 546-47 (1989). Likewise, the relatively limited number of civil cases where the circuit courts find it necessary to appoint a lawyer without compensation to protect vital interest of an indigent litigant should be equitably distributed among members of the local bar.

Certified Questions Answered.