

EFFECTIVE LEGAL REPRESENTATION THROUGHOUT THE
ABUSE AND NEGLECT PROCESS IN WEST VIRGINIA

REGIONAL BAR ASSOCIATION MEETING
OCTOBER 6, 2023

JAMES W. COURRIER, JR.
CIRCUIT COURT JUDGE
21ST JUDICIAL CIRCUIT
MINERAL, GRANT, AND TUCKER COUNTIES

Three Primary Types of Attorneys in Abuse and Neglect Cases

1. Prosecuting Attorney (PA)
 - Represents DHHR/CPS (advocates for its position)
2. Guardian ad Litem (GAL)
 - Represents the child and the best interests of the child
3. Respondent's Attorney
 - Represents the interests of the individual Respondent parent

An attorney might also occasionally represent an intervenor, foster parent, or other caregiver

Abuse and Neglect Petition

- PA involved pre-petition
 - Advice to DHHR
 - Draft Petition based on DHHR investigation/report
 - Verify/File with Court
 - Prepare proposed initial order
- Two Types of Petitions
 - General (child not removed)
 - Emergency (child removed)
 - By Magistrate with verbal approval of Circuit Court Judge or
 - By Circuit Court Judge directly
 - * PA/DHHR must then file a Petition within 48 hours of removal
- Requirements for Emergency Taking
 - WV Code 49-4-602 (a)(1)
 - A) Imminent Danger to physical well-being
 - Defined by 49-1-201 as:
 - Emergency in which welfare or life of child is threatened, including sexual abuse/exploitation, or the following conditions threaten the health, life, or safety of any child in the home:
 - nonaccidental trauma inflicted by parent, etc.
 - signs indicating battered child syndrome

- nutritional deprivation
- abandonment
- inadequate treatment of serious illness/disease
- substantial emotional injury inflicted by parent, etc.
- sale of attempted sale of the child by parent, etc.
- abuse of alcohol, drugs, controlled substances has impaired parenting skills to such a degree as to pose imminent risk to health/safety of child
- any other conditions that threaten health, life, safety of child

B) No reasonable available alternative to removal

--WV Code 49-4-602(a)(4) and Rule 16 (e) of Rules of Proc. For Child A and N

--Court must also make the following findings in the removal order:

- Continuation in home is contrary to best interest of child (why?)
- whether DHHR made Reasonable Efforts (RE) to preserve family/prevent removal or an emergency made these efforts unreasonable/impossible

--WV Code 49-4-602(d)

--DHHR not required to make RE to preserve in certain circumstances:

- Aggravated Circumstances (including but not limited to abandonment, torture, chronic abuse, sexual abuse)
- Parent committed certain offenses (murder, voluntary manslaughter or conspiracy to do these; unlawful or malicious wounding with serious injury, sexual assault or abuse; or when required to register as sex offender and not in child's interest)
- Parental rights to another child has been involuntarily terminated

Respondent Parents entitled to counsel throughout (49-4-601(f))

- Appointed in initial order
- Continue appointment after first hearing upon filing financial affidavit and meeting requirements
- *All Attorneys in these cases must have completed mandatory education in A and N training approved by Supreme Court (49-4-601(g))—8 hours every 2 years
- *GALs must also first complete training/become certified on the representation of children in an approved course from the WV Supreme Court (49-4-604(b))

Considerations in the Early Stages:

--Imminent Danger/RE to justify removal

--Petition must: be verified (49-4-601(b)/Rule 17)); allege specific conduct and how it falls within statutory definition of A and N; state the relief sought; be specific to each party

--Venue (49-4-601(a)):

--Where child resides

--Where custodial Respondent/Party Abuser resides

--Where A and N occurred

--Notice (49-4-601(e)):

--5 days before Preliminary Hearing (10 days otherwise)

--Can be made by publication if necessary

--Notify of right to counsel, date/time/place of hearing, and that proceeding can result in termination of parental rights

--Preference for Child Placement upon Removal (49-4-601a):

--DHHR must diligently search for Relatives/Fictive Kin

--No later than 7 days after Petition for removal, DHHR shall file a list of all known Relatives/Fictive Kin (**PA** monitor)

--Within 7 days of DHHR's list, any party may file own list (**Resp Atty**)

--DHHR shall investigate/determine those willing/able to take child and file its determination within 45 days from Petition (**PA** monitor)

--**PA/GAL** can apply to Court to have child taken into custody to be examined by doctor/hospital if there is probable cause to believe evidence of A and N exists (49-4-603)

--**Respondent's Attorney** file verified Answer within 10 days of service of Petition (Rule 17)

Preliminary Hearing

--Rule 3(g):

--Hold within 10 days of removal to determine:

--whether there is reasonable cause to believe child in imminent danger

- whether continuation in home in contrary to welfare of child
- whether DHHR made RE to preserve family/prevent removal
- whether efforts should be made by DHHR to facilitate child's return
- whether school placement is in district of origin/in child's best interest

--Things to Remember:

- Can't delay proceedings pending resolution of other matters (like criminal investigation/prosecution) (Rule 5)
- A and N takes precedence over other civil cases (49-4-601(j))
- Rules of Evidence Apply (49-4-601(k))
 - some exceptions for testimony of a child
- Proceeding must be kept confidential (Rule 6a)
 - impress upon clients, especially social media

--Responsibilities of Attorneys Through Preliminary Hearing Stage:

--PA:

- oversee/provide discovery (Rule 10)
- secure/prepare witnesses
- prepare questions/argument
- request child support (Rule 16a)

--GAL:

- notify child/caregiver of your appointment, set time to meet
- gather information/speak with relevant persons, including child
 - conduct independent investigation of allegations in Petition
- make sure PA has witnesses or call own
- prepare questions/arguments
- advocate for best interests of child
- take good notes to prepare appropriate order
- prepare a protective order where appropriate

--Respondent's Attorney:

- speak with client (arrive early because often first opportunity to speak with client)
- dissect Petition and Discovery/review with client
- explain procedure/preliminary hearing to client
- explore agreement with PA/GAL/DHHR/CASA
- prepare questions/argument and challenge DHHR actions
- request visitation/advocate for client
- review order for accuracy

--Preliminary Hearing may be waived (Rule 22) if:

- Respondents understand content /consequences of waiver
- Respondents voluntarily consent
- waiver meets purposes of the Rules/Statutes
- is in best interests of child

Discovery:

--Rule 10

(a) **GAL** has access to file of PA and DHHR

(b) within 3 days of the Petition the **PA** must provide discovery

- Statements of Respondents
- Copies of documents, etc. material to Resp. case or intended to be introduced
- Reports/results of tests, examinations
- List of witnesses/record of convictions
- Criminal record of Respondents

(c) at least 5 days prior to hearing in which Respondent intends to introduce evidence, **Respondent's Attorney** must provide reciprocal discovery

- tangible evidence to be introduced; results of tests/examinations;
- list of witnesses

(d) rule not intended to limit discovery—only sets a minimum

(e) on-going duty to disclose any newly discovered information

Preadjudicatory Improvement Period (IP)

--Procedural device to explore prior to the Adjudication

--Rule 23/49-4-610 (1):

--up to 3 months

--**Respondent's Attorney** must:

-- file written motion

--demonstrate by clear and convincing evidence that Respondent is likely to fully participate in IP

--Pros:

--Allows Respondent an opportunity to show ability to fix problems in Petition

--Less confrontational

--Potentially saves time

--Potentially less time child is out of home

--Ability to provide services in cases in which DHHR's case is not too strong

--Cons:

--Only 3 months—often not enough time to develop plan/solve all problems

--Not enough time to do extensive evaluations/services

--DHHR must file individualized case plan within 30 days

--other parts of Multidisciplinary Treatment Team (MDT) should help develop

--**PA/GAL** can file Motion to Revoke IP at any time for:

--failure to comply with treatment plan

--inability to remediate

Adjudicatory Hearing

--follows within 30 days of the probable cause finding/waiver of preliminary hearing or within 30 days of the filing of a General Petition (Rule 25)

--A or N must be proven by clear and convincing evidence

--Resp. has right to cross-examine witnesses, to present witnesses, and to present argument

--Between Prelim and Adjudicatory Hearings:

--PA:

- Continue to monitor discovery
- identify necessary witnesses/subpoena them
- prepare witnesses
- provide witness list 5 days prior to hearing
- prepare questions/arguments
- organize exhibits
- assist in formulation of agreed stipulations

--GAL:

- visit child
 - discuss posture of the case, when appropriate
 - determine wishes of the child, when appropriate
- review additional discovery
- speak with collateral sources
 - complete investigation
- make sure PA subpoenaed appropriate witnesses
- prepare questions/arguments
- assist in preparation of agreed stipulations

--Respondent's Attorney:

- meet with/speak to client
- continue to review discovery/discuss with client
- send letter/call to remind of next hearing
- provide list of what client should be doing, when, where
- prepare client to testify
 - explain negative inference of not testifying (silence can be evidence of culpability/might prevent IP)

- explore if client has witnesses/subpoena
- prepare cross examination/arguments
- explore possible agreed stipulations/review with client
 - in writing
 - distribute/obtain approval
 - prepare client for Court's questions
- keep client on track with services, etc. (if A and N found at hearing, client in better position to request IP)

Stipulated Adjudication (Rule 26):

- in writing and on the record
 - agreed upon facts supporting a finding of A and N
 - statement of problems and deficiencies to be addressed/how
 - Court reviews on record with Respondent under oath to determine:
 - Resp. understands content of stipulations
 - Resp. understands consequences of stipulations
 - will create finding of A and N
 - can lead to termination of parental rights
 - give up right to a contested adjudication
 - limits right to appeal
 - consent has to be voluntary/not coerced
 - satisfied with lawyer
 - not under influence/impaired
 - Meets purposes of Rules/Laws
 - In best interests of child
- *Vital that **Respondent's Attorney** properly prepares client for the Judge's questions

Following Adjudication:

--Respondent's Attorney:

- file written motion for Post-Adjudicatory IP (49-4-610 (2))
- advocate for rest of MDT to agree to IP
- assist in development of Family Case Plan terms with MDT
- make sure client understands these terms and is prepared to fully participate
- prepare to advocate to Judge if there is no agreement to grant IP
- continue to make sure client is in compliance with services/directives

--GAL:

- make sure proper findings and conclusions are in the order
- make sure order circulated/entered within 10 days of hearing
- continue to contact child/other necessary persons
- assist in development of Case Plan terms (when appropriate)
- prepare to advocate when opposed to IP
- continue to monitor discovery

--PA:

- assist DHHR in development of Case Plan terms
- prepare to advocate if DHHR is in opposition to an IP
- if proceeding to a Dispositional Hearing to terminate parental rights, prepare, file and serve witness list 5 days before next hearing and prep for hearing, including securing and preparing witnesses and ensuring that DHHR has timely filed appropriate Case Plan/provided to other parties

Post-Adjudicatory IP can be granted by Court (49-4-610 (2)):

- for up to 6 months
- clear and convincing evidence that Respondent likely to fully participate
- review terms on the record
- specifically tailored Case Plan to assist in fixing deficiencies/reunifying family
- Respondent has not been granted previous IP in the case (unless show substantial change of circumstances and is now likely to fully participate)
- set status/review hearings and MDT meetings to monitor progress

During Post-Adj. IP:

--Respondent's Attorney:

- keep in touch with client, return calls/e-mails
- make sure client knows what/when/where they are to be for services/meetings and the date/time of next hearing
- 49-4-610(4) Respondent is responsible for initiating/completing all terms of IP, and responsible for executing all necessary releases for medical, psychological, etc. records
- continue to review on-going discovery/monitor progress of client
- attend/advocate in MDT meetings
- continue to support and encourage your client
- continue to assess whether services are appropriate/necessary (RE to reunify)
- determine if more intensive services are needed (rehab; psych. exam, etc.)
 - get started early in IP
 - too late if wait until end of IP

--GAL:

- meet with child, foster family, providers, CASA
- review on-going discovery/monitor progress of Respondents
- file Motion to Terminate IP, if necessary
- assess whether services are appropriate/effective (RE to reunify)
- attend/advocate in MDT meetings, ask questions
- determine if child needs further services
- be prepared to provide summary/recommendations to Court at status hearings

--PA:

- makes sure DHHR is providing discovery timely
- review discovery/organize it
- assess services/monitor progress (RE to reunify)
- attend MDT meetings and advocate for DHHR
- provide advice to DHHR

Disposition

- after a finding of A and N
- within 45 days of final adjudication order unless IP granted (and then no later than 30 days from end of IP) (Rule 32)
- parental/custodial rights can be terminated if there is clear and convincing evidence of:
 - no reasonable likelihood the conditions of A and N can be substantially corrected in near future
 - necessary for child's welfare
 - Court should also consider whether RE to reunify family were made by DHHR

--Prior to Disposition Hearing:

--PA:

- file Case Plan/provide to parties within 5 days of hearing (Rule 29)
- make sure all parties are provided proper notice of Disposition Hearing
- provide witness list/summary within 5 days of hearing (Rule 30)
- again, be fully prepared to present witnesses/exhibits/argument

--GAL:

- prepare/file GAL report (Sample—Appendix B of Rules)
- provide witness list/summary within 5 days of hearing (Rule 30)
- make sure PA has proper witnesses subpoenaed
- fully prepare questions/exhibits/arguments for hearing
- consider where child should ultimately be placed/transitioned

--Respondent's Attorney:

- prepare written Motion for Extension of IP (49-4-610(6))
 - up to 3 months
 - Resp. substantially complied
 - will not substantially impair ability of DHHR to permanently place child
 - in best interest of child

- prepare written Motion for Post-Dispositional IP (49-4-610(3))
 - up to 6 months
 - clear and convincing evidence Resp. likely to fully participate
 - place terms on record
 - DHHR creates new Case Plan
- negotiate with MDT members for desired outcome
- make sure client is informed of hearing date/time and what is at stake
- fully prepare for hearing
- file witness list/summary within 5 days of hearing (Rule 30)
- prepare witnesses, including client
- organize file/exhibits
- prepare questions/arguments
- advocate for a less restrictive outcome to termination (49-4-604 (c))
 - dismiss Petition/with services in place
 - guardianship
 - terminate only custodial rights

If Extension of IP or a Post-Dispositional IP is granted, all attorneys should continue previous responsibilities during IP phase

If parental rights/custodial rights terminated at final Disposition Hearing:

--Respondent's Attorney:

- request post-termination visitation
- provide copy of order
- advise and speak to client about expedited appeal (Rule 49):
 - notice of appeal within 30 days of order
 - perfected within 60 days
 - right to appointed counsel
 - if not same attorney, new one can be requested/appointed
 - right to free copy of transcript
- make sure it is clear when your representation ends

--GAL:

- make specific findings/conclusions in order
 - provide timely because signed order starts time for appeal
- attend Permanent Placement Review Hearings (Rule 39)
- respond to appeal
- continue to meet with child
 - provide status of case, when appropriate
 - inform of right to appeal, when appropriate
- file appeal on behalf of child, when appropriate
- continue to contact foster family, CASA, school, etc. to ensure best interests of child
- representation by GAL continues until child achieves permanency (Rule 52(g))

--PA:

- represent DHHR at Permanent Placement Hearings
- make sure DHHR is making RE to achieve permanency

General Advice

--GAL:

- if you have a CASA, use this resource
- identify up front where the child goes to school
 - school secretary, principal, counselor are wealth of information
 - meet the kids at school—often more comfortable there/more honest; sometimes issues arise in the placement and child unlikely to disclose if meet at home
- create rapport with child
- prepare a chart inside each file
 - child's name, age, date of birth
 - parents' names
 - where/with whom living at removal

- where currently placed/in school
- service providers' contact information
- organize/highlight drug results by Respondents/date
 - easier to find in hearings
 - useful if you need to file Motion to Terminate IP/argue at hearings
- take good notes so you can make specific findings/conclusions in orders
 - address RE
 - findings of A and N
 - findings to terminate, etc.
 - good orders are vital for appeals
- don't be afraid to clarify with Judge if unsure about a finding/conclusion
- continually assess RE

--Respondent's Attorney:

- Protect yourself
 - always go out of your way to communicate with your client
 - even if your client has seemingly disappeared from the case, send letter/e-mail, call/leave message to inform them of hearings, responsibilities, etc.
 - keep a record of your contacts/attempted contacts with client
- write down for your client at each hearing exactly what/when/where they are expected to do/be
- continually verify with them their contact information/back-up contact
- overly explain things to them/reinforce
- explain ramifications of prior terminations
- negotiate agreed stipulations ahead of Adjudicatory Hearing
 - have in writing
 - already approved by rest of MDT
 - thoroughly explain consequences
- don't wait until the day of the hearing to start working things out

- review RE throughout the case and at each hearing
 - ensure your client is receiving/taking advantage of proper services
- read all discovery and organize it
 - make sure your client sees it
- be the best cheerleader you can be

--PA:

- make sure DHHR follows law/rules
 - Petitions filed on time and with particularity
 - witness lists/case plans within 5 days of hearings
 - ensuring proper notice
 - providing proper services
 - providing timely discovery
- be prepared to properly examine/cross-examine all witnesses, present exhibits
- be prepared to make good arguments on behalf of DHHR
- ensure RE being made

--Everyone:

- communicate with each other
- always be civil, willing to work with others
 - makes case smoother
 - will probably have to work with same people again
 - productive MDT is essential
- hold DHHR responsible/accountable but recognize the workers have a very difficult job/high case load, and often need patience from the rest of MDT
- always be prepared
 - have things ready before the day of the hearing
 - review file prior to day of hearing
- do not assume someone else has taken care of it
- definitely one of the most important types of cases in the court system, so take what you are doing very seriously--future lives of children and families at stake