

Update on the Law and New Practice Resources

2016 CIP Cross Training
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This presentation will cover updates to caselaw, 2015 Fall Term of the West Va. Sup. Ct. and 2016 Spring Term. The Rule updates cover this same period -- from 2015 through 2016. Legislative updates cover the 2016 terms of the Legislature. At the end of the presentation, I will also review some new resources for your practice.

Appellate Procedure

- Transcripts
 - Necessary to review a disputed evidentiary or testimonial issue

Rule 11(b), RAP
Comment

Appellate Procedure

- Rule 10(c)(10), Rules of Appellate Procedure
 - Effective January 1, 2016
 - Origin: Syl. Pt. 3, *State v. McGill*, 230 W.Va. 85, 736 S.E.2d 85 (2012)
 - Rule 3.1 of the Rules of Professional Conduct in relation to appeals

I thought I'd start with a topic that addresses a relatively common problem: Your client wants to appeal an adverse decision but as counsel you recognize that an appeal is not warranted. New provision of Rule 10(c) of the Rules of Appellate Procedure, which gives guidance to lawyers when counsel lacks a good faith belief that an appeal is warranted under the circumstances:

- applies to criminal, abuse & neglect & habeas cases
- candid discussion about the merits of an appeal
- if client insists, counsel has to file an appeal
- if counsel must ethically dissociate self

Counsel must indicate the brief is being filed under 10(c)(10)(b); counsel must file supplemental pro se motion

Rule 3.1 – Counsel shall not assert an issue unless there's a basis in law and fact that is not frivolous, which includes a good faith extension

Rule 3.1 is in your materials as a reminder -- comes out of Syl. Pt. 3 of *State v. McGill*

Appellate Procedure

- Counsel's duty if counsel lacks good faith belief that an appeal is warranted
- Candid discussion with client about the merits of the appeal
- If client insists on appeal, counsel must file a notice of appeal and then perfect the appeal

Appellate Procedure

- If counsel must ethically disassociate from any assignments of error, counsel must file a motion requesting leave for the client to file a *pro se* supplemental brief

Appellate Procedure

In re: A. N., Nos. 15-0182, 15-0208 (Sept. 30, 2015) (memorandum decision): GAL found in contempt for failing to comply with Supreme Court's scheduling orders and referred to ODC



I know that I'm preaching to the choir in this case, but I want to point out this memorandum decision in which the GAL was held in contempt for failing to abide by scheduling orders and was referred to ODC. If you are running of of time, file a written motion to extend the briefing schedule.

Appellate Procedure

- In re : A.B., Case No. 15-1013 (memorandum decision) (Feb. 16, 2016): Include legal authority in a brief



This opinion pointed out that respondent's counsel had failed to include relevant legal authority in the argument.

1. Administrative Order entered by then Chief Justice Ketchum re: Filing that do not comply with the Rules of Appellate Procedure – referenced lack of citation to legal authority.

- Lunch Ad Litem Webinar on August 19, 2016 with Bob Noone and Bob Wilkinson
- You can copy and paste syllabus points from the benchbook

Rules of Child Abuse and Neglect Proceedings

- Effective 11/19/2015
- Updated citations to Chapter 49

A series of amendments that include updated citations to Ch. 49 went into effect to H.B. 2200

RPCANP—Transition Planning Begins at Age 14, Rule 28(c)(8)



A substantive amendment: transition planning begins at age 14 -- extremely important that transition planning is emphasized for children in foster care.

Reminder: Appla – another planned permanent living – is allowed by West Va. Code § 49-4-604 (disposition statute) and § 49-4-608 (permanency statute)

Rules of Child Abuse and Neglect Proceedings

- Rule 17(a)
 - “Upon ~~mutual~~ consent of the co-petitioners, the verified petition may have co-petitioners. . . .”
 - Approved subject to 60 day comment period
 - Purpose: encourage co-petitioning

An amendment that has been approved subject to a 60 day comment period -- the word mutual has been struck from Rule 17(a)

Co-petitioning is important because it recognizes the distinction between abusing, neglecting parents and caregivers who, without assistance from the Dep’t, may not be able to adequately protect a child.

Rules of Child Abuse and Neglect Proceedings

- Rule 32(a)
 - Disposition hearings should be conducted within 30 days of the conclusion of an improvement period
 - Approved subject to a 60 day comment period
 - Purpose: make the time-frame consistent with W. Va. Code § 49-4-610(8)(B)

Another clean up provision --

Disposition hearings at the end of the improvement period should begin within 30 days of the end of the improvement period

Rules of Juvenile Procedure

- Commitments to DJS
 - May not exceed maximum sentence that an adult can serve
 - Juveniles entitled to credit for time served
 - Rule 39(c), RJP
 - W. Va. Code § 49-4-714(b)(5)(C)
 - Approved subject to a 60-day comment period

Make Rule 39(c) consistent with § 49-4-714(b)(5)(c)

Case Law

In re C.M., 236 W. Va. 576, 782 S.E.2d 763 (2016)

– What should happen when the evidence of sexual abuse is not crystal clear?

In re C.M., 236 W. Va. 576, 782 S.E.2d 763 (2016)

This case addresses the problem of when the evidence of sexual abuse of a child is not crystal clear. Appellant – the child's mother, appealing the dismissal of an A&N petition against father
Parents – Divorced; children reside with father visited their mother in NC during the summer and other holidays

C.M. (age 7) tell mom that respondent father makes her watch sexually explicit videos; C.M. goes back for a Christmas visit, dad is making me watch sexually inappropriate videos.

CPS worker interviews children – C.M. is able to describe videos, says dad made her take clothes off and the son had to leave the room. Both children say that they have seen father & live-in girlfriend have sex. CPS worker goes to home – doesn't find any sexually explicit videos. Children recent reports in principal's office. Case closes because abuse not substantiated.

C.M. (age 8) – visits mom in NC – discloses watching videos again. Dad had C.M. remove clothes, touched his private part to her private part

Forensic interviewer in NC – C.M. describes an incident of sexual abuse; WV DHHR reopens its case – C.M. testifies during adjudication of movies and sexual abuse. Brother D.M. also testifies to the movies

Ulterior motive of mother – unpaid child support

Circuit Ct. dismisses for lack of proof; Ct. goes back to the case of F.S. (2014)

Sup. Ct. finds evidence of abuse because of testimony about sexually explicit videos, and specific acts of contact. Cir. Ct. was concerned about inconsistencies.

Children are not always completely consistent; Even if contact abuse didn't occur, showing sexually explicit videos is abusive

Be thorough in presenting all details – if possible ask someone to testify about the fact that a child may be inconsistent in providing details

Problem with mom: Mom arrested for possession of heroin, possession of drug paraphernalia and child neglect – car had been traveling 90 mph, another child in back seat with needles & unrestrained including a needle containing heroin; St. Ct. directs DHHR to investigate the allegations related to

mom

Case Law

In re: M. M., 236 W. Va. 108, 778 S.E.2d 338
(2015)

– Were the Rules of Procedure substantially frustrated?

The parents were appealing a disposition order that denied them an improvement period and terminated their parental rights.

Case was initiated b/c of the parent's behavior at a church league basketball game. The parents cursed at their son, slung him into a wall, grabbed his face and knocked his head in a door multiple times. The parents were convicted of misdemeanor charges associated with the incident. Once the children were in foster care, they had significant issues and were just being stabilized in foster care. The oldest child had turned 18 and had gone home.

Parents requested an improvement period and the circuit court conducted 2 evidentiary hearings on the motion. The Dept's case plan did not oppose an improvement period but the GAL did. The report had indicated that the GAL had mixed feelings but at the beginning of the hearing said she opposed the improvement period. Significant facts showed that the mom had a previous services case but little progress had been made. Children had been removed from mom's custody in another state and placed with a grandmother. When grandmother died, mom went to court to regain custody. Both parents had significant mental health issues and prior cases involving services.

Predisposition services: The Sup. Ct found that circuit court did not err in considering all of the facts including the predisposition services.

Parents argue that circuit court erred b/c the case plan originally agreed to an improvement period. Unlike the cases relied upon by the parents, the Court noted that the parents knew

that the GAL might object and did, in fact, object to an improvement period. In addition, another evidentiary hearing was scheduled and the parents could have presented additional witnesses. The parents did not object to going forward. Therefore, the Court found that the circuit court order did not substantially disregard or frustrate the disposition process. The evidence clearly supported the conclusion that there was no reasonable likelihood that the parents could correct the conditions of abuse and neglect.

Case Law

In re: S.H., 2016 WL 3434883, No. 15-0708 (W. Va. Supreme Court, June 6, 2016)

– Which story (version of the facts) is in the child's best interests?

2011 A & N case in which parents relinquish custodial rights (not parental rights) and maternal grandmother (M.C.) is named S.H.'s guardian.

In 2014, S.H.'s mother is placed on home confinement at grandma's house where S.H. lives. Home confinement officer finds 2lbs of marijuana which results in possession charges against both mom and grandma.

Grandmother is granted a post-adjudicatory improvement period. AT a review hearing, generally good: 35 clean drug screens, good interaction during visits, Dep't's proposal is to return S.H. to home for duration of improvement period.

But circuit court terminates improvement period (no motion by a party)

At disposition, circuit court finds that guardianship should be terminated.

Marijuana was accessible to child

Not error to find that the child had been neglected b/c of the presence of illegal drugs in the home.

First review: court finds that grandma is in substantial compliance with improvement period. Despite the evidence presented at the review, the circuit court terminated the improvement period. The Court found that the circuit court finding had been wholly unsupported by its own finds of fact.

Loughry: Grandma's guardianship was the result of a court-ordered disposition and could be altered by the circuit court upon a finding of clear and convincing evidence. Pointed out some facts: Grandma used and possessed illegal drugs, had 2 lbs of pot accessible to the child; used pot in baked goods and is convicted of a drug crime. Compliance with an improvement period isn't always the determinative factor in an improvement period.

Workman: Record devoid of evidence that it would not be in S.H.'s best interests to be reunified with Grandma. Relies upon the bond between grandma and S.H.

Interveners: Grandma's neighbors who were providing care of S.H. Need to look at the relationship b/t S.H. and the interveners

Case Law

In re: S.W., 236 W. Va. 309, 779 S.E.2d 577
(2015)

– When should a legal guardianship be modified?

A & N petition filed when little boy is between a year and 18 months; placed with paternal grandparents. After two failed improvement periods (and drug possession charges) the abuse and neglect case is resolved by a guardianship with the paternal grandparents. Approximately, one year later, mom graduates drug court and wants custody of her son. She files a motion indicating that there is a material change of circumstances b/c she's been sober for over a year. Her son is between 5 and 6 years old. After a hearing, the circuit court terminated the guardianship and required a transfer of custody w/i 10 days.

Mother based her petition on the statute for modifying dispositional orders. The Sup. Ct. noted that there are two factors to consider: a material change of circumstances and the child's best interests. The mother also relied on the minor guardianship statute found in WVA Code 44-10-3. The Court also noted that Rule 46 is consistent and the movant needs to satisfy both factors: material change of circumstances and the child's best interests. The Court observed that the mom relied upon the bond between the mother and child, but there was a glaring absence of evidence on the child's best interests.

The Court held that the evidence was insufficient to show that modifying the guardianship was in the child's best interests. As an example, the Court observed that the mom was unaware about issues associated with the child changing schools. The case was remanded for the establishment of a visitation schedule with the mother and maternal grandmother.

New Statutes: S.B. 326

- Contributing to the delinquency of a minor
 - Moved from W. Va. Code § 49-4-901 and -902 to W. Va. Code § 61-8D-10
 - Increases the permissible amount of bond from \$1,000 to \$5,000
 - Clarifies that bond should be used for court costs and next the care and treatment of the child
 - Establishes a procedure for bond forfeiture

New Statutes: S.B. 504

- Confidentiality of recorded interviews of children
- Applies to criminal sex offense cases (Article 8B, Sections three, four, five and seven)
- Duplication, publication by court order only
- Supreme Court may promulgate a rule

- W. Va. Code § 62-6B-2-6; § 49-5-101(i)

Addresses the confidentiality of recorded interviews – in criminal sex offenses cases
Provides guidance on the disclosure of those interviews by court order
A proposed rule is being drafted because recorded interviews may be misused, for example, in a custody proceeding I will require a court order for disclosure

New Statutes: S.B. 329

- W. Va. Code § 49-4-605(a)(3)
 - Adds another basis that requires the Dep't to seek termination of parental rights
 - Parent has committed sexual assault or abuse against identified victims
- W. Va. Code § 49-4-502
 - Strikes language that suggests prosecutors would represent co-petitioners

Includes some clean up provisions, but it also adds circumstances where the Dep't required to seek termination of parental rights

New Statutes: H.B. 4237

- Governs powers of attorney relating to delegation of care, custody and control of a minor child
- Amends W. Va. Code §§ 49-8-1 through -6

I'm not going to go into the details of this statute, but it does amend provisions relating to powers of attorney for the care of minor children.

- If parental rights are terminated, the power of attorney is revoked
 - Use of a POA, by itself, does not constitute abandonment or abuse or neglect unless parent doesn't execute a new POA after the 1 year period has elapsed
 - references to non-profit organizations taking custody of a child pursuant to a POA
- concerns that this could involve unlicensed facilities

New Practice Resources: Juvenile Law Guide

- Overview of juvenile law and court procedures
- Child abuse and neglect resources, Court Improvement Program, Projects
- <http://www.courtsv.gov/public-resources/CAN/juvenile-law-procedure/index.html>

New Practice Resources: MDT Desk Guide

- Applies to A & N and juvenile cases
- Best practices and procedures for mdts



*"What ... didn't get the memo **again**, Smith?"*

New Practice Resources

- 2016 Abuse and Neglect Benchbook

Topic	Citations from the W. Va. Child Welfare Act	Former Citations to Chapter 49
Definitions: abuse, neglect and imminent danger	§49-1-201	§49-1-3
Transitioning adult defined	§49-1-202	§49-2B-2(x)
Parent and other family terms defined	§49-1-204	§49-1-3
Sibling preference	§49-4-111(e)	§49-2-14(e)
Grandparent preference	§49-4-114(a)(3)	§49-3-1(a)
Petition (venue, contents, court action upon filing)	§§49-4-601(a) – (c)	§§49-6-1,2
Preliminary Hearing/Temporary Custody	§49-4-602	§49-6-3
Adjudicatory Hearing	§49-4-601(j)	§49-6-1 and -2
Disposition	§49-4-604	§49-6-5
Permanency Hearings	§49-4-608, §49-4-110(c)	§49-6-8
Improvement Periods	§49-4-610	§49-6-12
Child support provisions	§§49-4-801, et seq.	§49-7-5
Quarterly status reviews	§49-4-110	§49-7-36

New Practice Resources

- 2016 Abuse and Neglect Benchbook

C. Child Support Following a Termination or Voluntary Relinquishment of Parental Rights

In re Stephen Tyler R., 213 W. Va. 725, 584 S.E.2d 581 (2003)

The circuit court terminated the respondent father's parental rights, but required him to continue paying child support. On appeal, the respondent father argued that the child support requirement was fundamentally unfair because he could not visit his son. Rejecting this argument, the Court reasoned that W. Va. Code § 49-6-5(a)(6) allowed the circuit court to terminate parental rights and/or responsibilities. Finding that child support is a parental responsibility, the Court held:

Syl. Pt. 7: Pursuant to the plain language of W. Va. Code § 49-6-5(a)(6), a circuit court may enter a dispositional order in an abuse and neglect case that simultaneously terminates a parent's parental rights while also requiring said parent to continue paying child support for the child(ren) subject thereto.

As further grounds to challenge the decision, the respondent father argued that the support obligation would be inequitable if the child were later adopted. Addressing this concern, the Court held that:

Syl. Pt. 8: A circuit court may, in the course of modifying a previously-entered dispositional order in an abuse and neglect case in accordance with W. Va. Code § 49-6-6, amend a parent's continuing child support obligation or the amount thereof. The court may not, however, modify said dispositional order to cancel accrued child support or decretal judgments resulting from child support arrearages.

W. Va. Code §
49-4-604(b)(6)

See also W.
Va. Code § 49-
4-802(d)

W. Va. Code §
49-4-606

Conclusion

What developments will help achieve:

Safe, stable, secure permanent homes for abused and/or neglected children and fairness to all litigants?