



---

# WEST VIRGINIA INFANT GUARDIANSHIP LAW OUTLINE

---

2016

**Table of Contents**

1. **Who can be a Guardian?** ..... 2

2. **Jurisdiction, Venue, and Parties** ..... 3

3. **Petition for Infant Guardianship** ..... 4

4. **Consent or Waiver, Nomination, and Confidentiality** ..... 6

5. **Documents Required for Filing**..... 7

6. **Notice of Hearing and Service** ..... 8

7. **Guardian ad litem**..... 9

8. **Granting Appointment of Guardian** ..... 9

9. **Termination of Guardianship** ..... 10

10. **Child Abuse and Neglect** ..... 11

11. **Timeline** ..... 12

12. **Case Scenario** ..... 13

## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

### **1. Who can be a Guardian?**

#### **a. W. Va. Code §44-10-03(d)**

- a. Any responsible person with knowledge of the facts regarding the welfare and best interests of a minor may petition for an appointment of guardianship.
  1. Except a parent or other person whose rights to the minor have been terminated.
  2. No guardianship petition may be considered if the child who is subject to the guardianship petition is involved in another court proceeding relating to custody or guardianship or if the petitioner is a parent seeking custodial rights adverse to the other parent.

#### **b. Screening Factors**

##### **a. West Virginia Rules of Minor Guardianship Proceedings— Rule 10**

- b. The court will ascertain and consider all matters the court deems pertinent in determining the appropriateness of a guardian including whether any proposed guardian:
  1. Is required to register as a sex offender under **W. Va. Code §15-12**;
  2. Has any misdemeanor or felony convictions;
  3. Has been subject to a restraining order or final protective order;
  4. Has ever been the subject of any substantiated report alleging child abuse, neglect, or molestation made to any child protection agency, other law enforcement agency, or court in any jurisdiction;
  5. Habitually uses any illegal substances or abuses alcohol; or
  6. Has another person living in the same home that involved any of the matters stated previously.

## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

- c. Circumstances under which Guardian can be Appointed:
  - a. **West Virginia Code §44-10-3(f)**
    - 1. The court must find by clear and convincing evidence that the guardianship is in the best interest of the minor AND:
      - a. The parents' consent;
      - b. The parent's rights have been previously terminated;
      - c. The parents are unwilling or unable to exercise their parental rights;
      - d. The parents have abandoned their rights by a material failure to exercise them for a period of more than six months; OR
      - e. There are extraordinary circumstances that would, in all reasonable likelihood, result in serious detriment to the child if the petition is denied.

### **2. Jurisdiction, Venue, and Parties**

- a. Jurisdiction:
  - a. **West Virginia Code §44-10-3 and West Virginia Rules of Minor Guardianship Proceedings—Rule 2(a)**
    - 1. Family and Circuit courts have concurrent jurisdiction to appoint a guardian for a minor.
    - 2. Venue—in the county where the minor has resided for the past 6 months.
      - a. Unless extraordinary circumstances.
    - 3. Petition for Guardianship cannot be considered when:
      - a. The minor who is the subject of the petition is involved in another court proceeding relating to custody or guardianship.
      - b. When petitioner is a parent seeking custodial rights adverse to the other parent.

## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

4. If the minor who is subject to the petition was previously involved in an abuse and neglect proceeding, the Circuit Court that heard that case retains jurisdiction.

b. Venue:

a. **West Virginia Rules of Minor Guardianship Proceedings—Rule 2(b)**

1. Venue is proper in the county where the minor child has resided for the past six months (from date of filing).
  - a. Unless:
    - i. The court finds extraordinary circumstances for a sooner filing; or
    - ii. The minor is a non-resident of the state, then a county in which the minor child has an estate.

c. Parties:

a. **West Virginia Rules of Minor Guardianship Proceedings—Rule 2(c)**

1. Petitioner(s).
2. Minor(s) on whose behalf the guardianship is sought.
3. Non-petitioner parent(s).
  - a. Provided his or her rights have not been terminated.
4. Any other person with actual or legal custody of any minor who is a subject of the proceedings.

### **3. Petition for Infant Guardianship**

a. **West Virginia Rules of Minor Guardianship Proceedings—Rule 3**

- a. Petition may name more than one minor if the minors are all siblings or half siblings.
- b. Required Contents:
  1. Full name, date of birth, and residence address of minor child.
  2. Statement supporting venue in the county of filing (county where the minor child resides).

## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

3. Statement indicating whether guardianship over the person or estate, or both, is sought.
4. The name and last known address of the minor's father and mother:
  - a. State whether each parent is living, deceased, or has had their parental rights terminated.
5. If the minor does not reside with a parent:
  - a. Name and address of current custodian(s).
6. Reason why the guardianship appointment is sought.
7. List of places where the minor has lived for the past 5 years and names of persons with whom the minor has lived.
  - a. Or since birth if minor is under 5 years old.
8. Description of any current or past proceedings involving the minor's custody.
  - a. Include: court, location, case number, and type of proceeding.
9. Name and address, and relationship, of the proposed guardian(s).
10. Statement affirming competency and fitness of each proposed guardian.
  - a. Attest that the welfare and best interest of the minor will be properly protected by the appointment.
11. If appointment over estate:
  - a. Description of the estate and estimated value of all real property and other assets.
12. Description of any anticipated periodic payments due to or on behalf of the minor.
  - a. Including child support and government benefits.
13. Statement as to whether appointment of a curator or temporary guardian is needed to protect the welfare and best

## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

interests of the minor until a guardian is appointed and qualified to act.

- b. You can find a Petition for Infant Guardianship form on the West Virginia Judiciary's website or as a Law Help form.

### **4. Consent or Waiver, Nomination, and Confidentiality**

- a. Consent or Waiver:

- a. **West Virginia Rules of Minor Guardianship Proceedings—Rule 8**

- 1. A parent may consent to the appointment of a guardian.
    - 2. A parent may waive his or her priority right of consideration for appointment as guardian of a person.
    - 3. The consent or waiver by a parent must be either:
      - a. Made before the court on record in the guardianship proceedings, OR
      - b. Evidenced by a written consent or waiver signed and verified that is filed with the court.

- b. Consent/Waiver forms can be found at [www.courtswv.gov](http://www.courtswv.gov) or as a LAWV Law Help form.

- b. Nomination:

- a. **West Virginia Code §44-10-4** and **West Virginia Rules of Minor Guardianship Proceedings—Rule 6**

- 1. A minor above the age of fourteen years old may nominate his or her own guardian by:
      - a. Making a request on the record before the court, or
      - b. Filing a signed and verified written request any time before the court hearing on the petition.
        - i. Written nominations must be served on parties.
    - 2. The court has discretion to determine, as a preliminary matter, whether the particular circumstances warrant the appointment of a guardian.

## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

- a. If the court finds the circumstances warrant appointment of a guardian, and that the minor's nominee would be suitable and appropriate, the appointment shall be made.
- b. Nomination forms can be found at [www.courtswv.gov](http://www.courtswv.gov) or as a LAWV Law Help form.
- c. Confidentiality:
  - a. **West Virginia Rules of Minor Guardianship Proceedings—  
Rule 7**
    1. (a)—Hearings: hearings are limited to: parties, counsel, witnesses while testifying, and other persons the court determines have a legitimate interest in the proceedings.
    2. (b)—Records: all records of minor guardianship proceedings are confidential and shall not be disclosed to anyone who is not a party, counsel of record, or the court presiding without a court order; EXCEPT:
      - a. Court orders.
      - b. Case indexes.

### **5. Documents Required for Filing**

- a. Civil Case Information Sheet;
- b. Petition for Infant Guardianship;
- c. Waiver of Guardian Appointment;
  - a. By parent or other person with custodial rights to the minor.
- d. Nomination of Appointment of Guardian;
  - a. Required for minors aged 14 and older.
- e. [Fee Waiver](#).
  - a. For income qualifying Petitioners.
  - b. Can be found at [West Virginia Judiciary website](#) or as a LAWV Law Help form.



## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

### **6. Notice of Hearing and Service**

#### a. Notice of Hearing:

##### a. **West Virginia Rules of Minor Guardianship Proceedings— Rule 4**

1. The court must schedule a hearing to be conducted within 10 days of the petition being filed.
2. If all parties are not served at least 5 days prior to the hearing, the hearing must be continued.
  - a. Unless service requirement is waived in writing or on the record.
    - i. Rescheduled hearing must take place within 30 days of the notice.
3. In the case of a continuance, the court may appoint a temporary guardian in order to protect the minor.
  - a. Temporary guardianship cannot exceed six months, but the court may extend upon further findings of continued need in the best interest of the minor.

#### b. Service:

##### a. **West Virginia Rules of Minor Guardianship Proceedings— Rule 5**

1. Circuit clerk will issue a summons to be served within 5 days of the filing of the petition.
2. Petitioner can choose method of service in accordance with the **West Virginia Rules of Civil Procedure—Rule 4.**
3. Following documents must be served:
  - a. Summons;
  - b. Copy of petition;
  - c. Notice of hearing;
  - d. Any other documents filed with the petition;
  - e. Any documents filed subsequent to the petition.

## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

- i. Certificate of service must be included for each person.
    4. Notice must be served on the following:
      - a. Every non-petitioner parent whose rights have not been previously terminated;
      - b. Any other person with custodial interests listed in the petition;
      - c. Any minor named in the petition who is 14 years of age or older; AND
      - d. Any proposed guardian if someone other than the petitioner.
  7. **Guardian ad litem**
    - a. **West Virginia Rules of Minor Guardianship Proceedings—Rule 12**
      - a. Appointments of Guardian ad litem are governed by the **West Virginia Trial Court Rules—Rule 21.**
      - b. Appointment is limited to:
        1. Cases where the court is unable to obtain reliable and credible information necessary for a decision from the minor, parties, or other interested persons;
      - c. Order appointing Guardian ad litem shall state:
        1. The specific reasons for the appointment;
        2. The expectations of the court for the guardian's report,
          - a. Including the date by which the report is due.
8. **Granting Appointment of Guardian**
  - a. Standard of Proof:
    - a. **West Virginia Code §44-10-3(f)**
      1. Clear and convincing evidence that the appointment of a guardian is in the minor's best interest and:
        - a. Parent consents;
        - b. Parental rights have been terminated;

## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

- c. Parents unwilling or unable to exercise their parental rights;
  - d. Parents have abandoned their rights by a material failure to exercise them for a period of six (6) months;  
OR
  - e. Extraordinary circumstances that would, in all reasonable likelihood, result in serious detriment to the child if petition is denied.
- b. The Order Granting Appointment:
- a. **West Virginia Rules of Minor Guardianship Proceedings—  
Rule 11**
    - 1. At the conclusion of the hearing, court shall make findings of fact and conclusions of law regarding the guardianship of the minor.
    - 2. A written order including the findings of fact and conclusion of law shall be issued within 10 days following the hearing.
    - 3. Order shall contain provision in its final paragraph directing the clerk to provide certified copies to parties and other interested persons or entities identified by the court.
    - 4. Person(s) appointed guardian should keep a copy of the order and should supply a copy to the minor's school and any other relevant entity that needs to be informed of the guardianship.

### **9. Termination of Guardianship**

- a. **West Virginia Rules of Minor Guardianship Proceedings—Rule 15**
  - a. Reaching adulthood;
    - 1. Guardianship terminates as a matter of law when minor turns 18 years of age;
  - b. Death of guardian or minor;
  - c. Guardian petitions court to resign and court approves resignation by written order;

## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

- d. Petition is filed by interested party stating that the minor is no longer in need of guardian;
  - 1. Court must issue an order to terminate.
- e. Substituted guardianship.
  - 1. Court must appoint a substitute guardian if the minor is still in need of protection if original guardian resigns or dies.

### **10. Child Abuse and Neglect**

#### **a. West Virginia Rules of Minor Guardianship Proceedings—Rule 13**

- a. Cases involving abuse and neglect shall be remanded to Circuit Court if the Family Court learns that the basis, in whole or in part, of a petition for minor guardianship is an allegation of abuse and neglect.
- b. Should the Family Court learn of allegations of abuse and neglect during a hearing, then Family Court shall continue the hearing, subject to an appropriate temporary guardianship order, and remove the case to Circuit Court for a hearing to be conducted within 10 days.
  - 1. In Circuit Court, the allegations of abuse and neglect must be proved by clear and convincing evidence.
- c. Once removed, the case (or any portion) shall not be remanded to family court.
  - 1. The case will remain in Circuit Court.
- d. The Circuit Court shall give notice to parties and the Department of Health and Human Resources of the removal and abuse and neglect allegations.
  - 1. Circuit Court can then utilize the investigative and mandamus process and relation procedures set forth in the **West Virginia Rules of Procedure for Abuse and Neglect Proceedings—Rule 3a** as the court deems necessary.

## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

### **11. Timeline**

#### **Eligibility**

- Petitioner is willing and able to provide for the minor.  
In the best interest of the child to appoint guardian.  
No other case involving custody of the minor in any jurisdiction.  
Petitioner cannot be a parent seeking custodial rights adverse to the other parent.

#### **Filing the Petition**

- Petition can be for more than one minor, so long as all minors are siblings or half siblings.  
File in the county in which the minor child(ren) resides.  
File all required documents with the petition.  
Legal Aid has Law Help forms for all necessary documents.

#### **Notice and Service**

- Hearing will be conducted within 10 days of filing petition and served by clerk at least 5 days prior to hearing (unless service is waived).  
All documents filed with the court must be served in accordance with West Virginia Rules of Civil Procedure—Rule 4.  
All parents, persons with custodial interests, and minor over the age of 14 must be served.

#### **Consent, Waiver, Nomination**

- Parents can waive their priority right as the minors guardian and give consent to the guardianship.  
Minors aged 14 and older may nominate a guardian.  
If the court finds circumstances warrant the appointment of a guardian, and that the minor's nominee would be suitable and appropriate, the appointment shall be made.

#### **Appointment**

- The Court will appoint the guardian if it finds by clear and convincing evidence that it is in the minor's best interest and contributing factor exists under W. Va. Code §44-10-3(f).  
At the conclusion of the hearing, court will make findings of fact and conclusions of law regarding the guardianship of the minor.  
A written order will be issued within 10 days following the hearing.

## **WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

### **12. Case Scenario**

- a. Tiffany, 16, has been staying with her aunt and uncle, John and Judy, and their daughter, Kayla.
- b. Tiffany has been staying with them most nights for the past 4 months. John and Judy take her to school, feed her meals, and take care of other living necessities.
- c. Tiffany's biological mother, and Judy's sister, Liz, passed away 6 months ago.
- d. Tiffany's parents were divorced and her mom was her primary caregiver. She spent some weekends off and on with her dad, Steve, but never stayed with him consistently.
- e. Steve owns his own construction business and works long hours and frequently travels out of state for weeks at a time.
- f. All parties agree that it is best to give John and Judy legal guardianship of Tiffany.

### **Response**

- a. John and Judy will need to both agree to the guardianship, even if only one seeks to be appointed guardian.
- b. File in the county where the child resides. If Steve and John and Judy live in different counties, it will be where Steve resides since he is the legal guardian.
- c. Steve will need to fill out a Waiver of Guardian Appointment form and file it with the court, or will need to waive his priority right in front of the judge.
- d. Since Tiffany is over age 14, she can nominate John and/or Judy to be appointed her guardian. She can fill out a Nomination for Guardian Appointment and file it with the court, or can make the nomination in front of the judge. If Tiffany nominated John and Judy and the court determines they are appropriate guardians and Steve waives his priority right, the court shall appoint John and Judy as Tiffany's guardians.

**WEST VIRGINIA INFANT GUARDIANSHIP LAW TRAINING OUTLINE**

- e. If John and Judy qualify for a Fee Waiver, they should file a Fee Waiver when they file the Petition for Guardianship Appointment.
- f. The guardianship will automatically terminate when Tiffany turns 18 years old, or under other qualifying circumstances.