



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

April 19, 2013

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

The Honorable Charles N. Dorsey  
Judge, Twenty-third Judicial Circuit  
Roanoke City Courthouse  
315 Church Avenue, S.W.  
Post Office Box 211  
Roanoke, Virginia 24002-0211

Dear Judge Dorsey:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You ask whether a circuit court may appoint a guardian *ad litem* to represent a minor beneficiary in a proceeding pending before the Virginia Workers' Compensation Commission ("VWCC" or "the Commission").

## Response

It is my opinion that the Circuit Court may appoint a guardian *ad litem* in proceedings pending before the VWCC.

## Background

You relate a scenario in which the Estate of a deceased person filed a claim for compensation with the Commission pursuant to the Virginia Workers' Compensation Act (the "Act"). You state that the decedent, for purposes of the Act, was survived by three dependents, including two minor children. The Estate and the defendants reached a tentative settlement agreement subject to the approval of the minor children. The Estate then filed in your Court a Petition to Appoint Guardian *ad Litem* to represent the two minor children in proceedings before the Commission. You declined to appoint a guardian *ad litem* until the Attorney General rendered an advisory opinion regarding the subject. Subsequently, upon the Estate's request, you entered an order of non-suit dismissing the Petition to Appoint Guardian *ad Litem* without prejudice.

## Applicable Law and Discussion

The petitioners have asked your Court to appoint a guardian *ad litem* to represent the minors' interests with regard to the settlement of a claim pending before the VWCC. A guardian *ad litem* is a special guardian appointed by the court to prosecute or defend, on behalf of an infant or incompetent, a

lawsuit to which he is a party, and such guardian is considered an officer of the court to represent the interest of the infant or incompetent in the litigation.<sup>1</sup> The Act does not empower the Commission itself to appoint a guardian *ad litem*.<sup>2</sup> Case law from the VWCC regarding the appointment of guardians *ad litem*, while scant, reinforces the VWCC's inability to appoint a guardian *ad litem*. The Commission's standing, and historical, practice is to direct the parties to apply to the appropriate circuit court for the appointment of a guardian *ad litem*.<sup>3,4</sup>

A customary practice of the VWCC does not necessarily confer power upon a circuit court to appoint guardians *ad litem* for proceedings before the VWCC. In light of the fact that the VWCC may not appoint a guardian *ad litem* to represent the interests of a minor child in a workers' compensation claim, we must review the circuit court's power to appoint a guardian *ad litem* for proceedings before the VWCC.<sup>5</sup>

One source of authority of a circuit court to appoint a guardian *ad litem* is statutory. The general statutory provision for the appointment of guardians *ad litem* states:

A suit wherein a person under a disability is a party defendant shall not be stayed because of such disability, but the court in which the suit is pending, or the clerk thereof, shall appoint a discreet and competent attorney-at-law as guardian *ad litem* to such defendant....<sup>[6]</sup>

---

<sup>1</sup> BLACK'S LAW DICTIONARY 635 (5th ed. 1979).

<sup>2</sup> VA. CODE ANN. § 65.2-201(A) (2012), in relevant part, grants to the VWCC to power of a court, "to appoint guardians pursuant to Part C (§ 64.2-1700 et seq.) of Subtitle IV of Title 64.2." Section 64.2-1702 empowers a court to, "appoint a guardian for the estate of the minor and may appoint a guardian for the person of a minor unless a guardian has been appointed for the minor" by a parent in a valid testamentary instrument. These forms of guardianships over a minor's property estate, or over the general welfare of a minor's person, do not equate to the specialized duties of a court-appointed guardian *ad litem*, who is charged to represent the best interests of a minor, or other legal incompetent, in a litigation context.

<sup>3</sup> See *Mowbray v. Appalachian Freight Carriers, Inc.*, 06 WC UNP 2231103 n.2 (2006) (explaining that "[w]hether or not we have the inherent authority, the Commission's practice has been to require the parties to seek the appointment of a guardian *ad litem* in the appropriate circuit court, and we see no reason to deviate from that practice here."); *Davis v. Kenton Transfer & Storage Co.*, 65 Va. WC 312, 313 (1986) (holding that "[b]ecause James P. Davis was found to be a person under disability[,] an Order appointing a guardian *ad litem* was entered in the Circuit Court of the City of Virginia Beach ... to represent, defend and protect the interest of James P. Davis in the instant proceeding."); *In re Townsend*, 11 WC UNP B0903 (2011) (deciding that Bedford County Circuit Court should be asked to appoint a guardian *ad litem* for the infant).

<sup>4</sup> The General Assembly is presumed to be aware of an agency's construction of a particular statute, and, when such a construction continues without legislative alteration, the legislature will be presumed to have acquiesced in it. See 2011 Op. Va. Att'y Gen. 143, 145 cases/opinions cited therein. See also *Commonwealth v. Appalachian Electric Power Co.*, 193 Va. 37, 45-46, 68 S.E.2d 122, 127 (1951).

<sup>5</sup> The VWCC's reliance on circuit courts to effectuate its determinations regarding compensation payments has statutory support. See VA. CODE ANN. § 65.2-523 (2012) (allowing the VWCC to direct lump sum payments to an entity appointed by an appropriate circuit court); § 65.2-525 (2012) (allowing the VWCC to direct lump sum payments for a minor or incapacitated person to an entity appointed by an appropriate circuit court). It may be argued that if the legislature had intended to confer upon the circuit courts the power to appoint guardians *ad litem* for proceedings before the VWCC, it could have done so explicitly. Nevertheless, in light of the doctrine of *parens patriae*, discussed hereinafter, the circuit court would not exceed its equitable power in appointing a guardian *ad litem* for proceedings before the VWCC.

<sup>6</sup> VA. CODE ANN. § 8.01-9(A) (2012).

This statute is inapplicable here for two reasons. First, the minor children are not party defendants in the VWCC proceedings or in your Court; rather, they are claimants seeking approval of a settlement of their deceased father's workers' compensation claim.<sup>7</sup> Second, only the court "in which the suit is pending" may appoint guardians *ad litem* pursuant to the language of the statute.<sup>8</sup> No underlying suit is pending in your Court. Therefore, the guardian *ad litem* appointment power contained in §8.01-9(A) does not grant a circuit court the power to appoint guardians *ad litem* in this scenario.

Nonetheless, a circuit court's ability to appoint guardians *ad litem* is not limited to the authority granted the court by statute.<sup>9</sup> Rather, a circuit court has the inherent power to appoint guardians *ad litem*.<sup>10</sup> This inherent equitable power and responsibility stems from the common law doctrine of *parens patriae*, which is "defined as that power of the Commonwealth to watch over the interests of those who are incapable of protecting themselves."<sup>11</sup> "In *all* suits or legal proceedings, of whatever nature, in which the . . . rights of a minor are involved, the protective powers of a court of chancery may be invoked whenever it becomes necessary to fully protect such rights."<sup>12</sup> I therefore conclude that the circuit court does have the power to appoint a guardian *ad litem* to represent the minor children in proceedings before the VWCC.

To effectuate its protective powers, the established practice is that a guardian *ad litem* may be appointed after a trial judge makes a preliminary finding that the best interests of the child require such appointment.<sup>13</sup> In the instant case, your Court was presented with a petition to appoint a guardian *ad litem* to represent the minor children's interests in proceedings before the VWCC. The petition specifically stated that "[i]n order to protect the Hubbard Children's interest in [their deceased father's estates' settlement before the VWCC], a guardian *ad litem* should be appointed."<sup>14</sup> Upon a determination

---

<sup>7</sup> See *Cook v. Radford Cmty. Hosp.*, 260 Va. 443, 449, 536 S.E.2d 906, 909 (2000) (holding that "[Section 8.01-9] is not concerned with the capacity of a person under a disability to sue but with the protection of such person when named as a defendant in a lawsuit. One who institutes litigation is in a posture completely different than one against whom suit is filed. The filing of a lawsuit is an affirmative act on the part of a plaintiff and does not carry with it the need for the type of court-initiated protection which may exist when a person with a disability is required to defend himself . . .").

<sup>8</sup> Section 8.01-9(A).

<sup>9</sup> See *Verrocchio v. Verrocchio*, 16 Va. App. 314, 319-20, 429 S.E.2d 482, 485 (1993) ("We find the rules and statutes that presently express the court's authority to appoint guardians *ad litem* are not exclusive sources of that power. Rather they are non-exclusive codifications of an equitable power and responsibility dating back to chancery days." (quoting *Stewart v. Superior Court*, 787 P.2d 126, 129 (Ariz. 1989))).

<sup>10</sup> See *Word v. Commonwealth*, 30 Va. (3 Leigh) 743, 748 (1827) (holding that it is a power incident to every court of justice to appoint a guardian *ad litem*); *Strayer v. Long*, 83 Va. 715, 719, 3 S.E. 372, 374 (1887) (noting that the power to appoint a guardian *ad litem* is incident to every court).

<sup>11</sup> *Verrocchio*, 16 Va. App. at 318, 429 S.E.2d at 485 (citation omitted).

<sup>12</sup> *Id.* at 319, 429 S.E.2d at 485 (emphasis added) (quoting *Stewart*, 787 P.2d at 129 (citation omitted)).

<sup>13</sup> *Id.* at 317-18, 429 S.E.2d at 484. ("...[D]espite the great need for a circuit court to have the power to appoint a guardian *ad litem* . . . , a 'trial court must have a cognizable basis for granting equitable relief.'" (quoting *Tiller v. Owen*, 243 Va. 176, 179, 413 S.E.2d 51, 53 (1992))).

<sup>14</sup> See Va. Sup. Ct. R. pt. 6, § II, 1.14(b) (2012) ("When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.").

that it is in the best interests of the child, the circuit court has the equitable power to appoint a guardian *ad litem*.

**Conclusion**

Accordingly, it is my opinion that a circuit court has jurisdiction to appoint guardians *ad litem* to protect the interests of minor children in proceedings before the VWCC.<sup>15</sup>

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

---

<sup>15</sup> In specific instance you describe in your letter, it is not clear that the petitioners chose the correct circuit court to appoint the guardian *ad litem*. The mother and children were residents of Patrick County at the time the Petition was filed in Roanoke Circuit Court. As the appropriate situs of the petition was not questioned, I offer no opinion regarding venue or personal jurisdiction. Additionally, I offer no opinion regarding the requisite qualifications of any guardian *ad litem* that may be appointed.