**Establishing Compensability and Entitlement to Death Benefits under the**

**Virginia Workers’ Compensation Act**

 Handling death claims in Virginia can prove difficult from both sides of the bar: proving compensability can be difficult, as can determining which dependents, if any, may be entitled to benefits. Once eligible dependents are established, issues may arise with respect to the representation of those dependents if disabilities exist.

Claimants must address:

* Proof of compensability like all claims- this can be a little difficult since the injured worker is deceased. There is the rebuttable presumption which helps.
* Proof of dependency for claimants other than spouses or underage children of the deceased
* Competing claims by other beneficiaries - this is fairly common when a deceased worker has children by two different spouses and/or step children.
* Considerations as to a proper payee for any benefits due to underage children or other persons under a disability- may need to obtain custody court orders if grandparents are the custodian of some of the children.

*Practical pointer:* At the initial appointment with a claimant, make sure you get the marriage certificate and/or birth certificates of the minors. Also, if the spouse is separated, but there is a separation agreement ordering spousal support, this can also prove dependency.

**Death Presumption**

Under the Supreme Court holding in Southern Motor Lines Co. v. Alvis, 200 Va. 168, 104 S.E.2d 735 (1958), when an employee is *found dead* as a result of an accident at his place of employment, or nearby where his work duties may have called him to be, and there is no evidence introduced to the contrary, the court will presume that the death arose out of the course of employment.

In K & G Abatement Co. v. Keil, 38 Va. App. 744, 568 S.E.2d 416 (2002), the Court of Appeals clarified the holding in *Alvis* to say that the presumption requires that the employee be found dead, and will not apply when the employee is simply found, having suffered injuries that he later dies from. This decision reversed the Commission, which had indulged the presumption.

More recently, in 2009, the Court of Appeals solidified the limiting of the presumption from *Alvis* to its “original parameters” and is applicable only when the employee is found dead at his place of work and when there is no plausible noncompensable cause of the accident. Clifton v. Clifton Cable Contracting, 54 Va. App. 532, 680 S.E.2d 348 (2009). In that case, a firefighter found dead on the highway was not entitled to the presumption because there were other plausible, noncompensable, causes of his accident.

Defendants must address:

* Obtaining information necessary to challenge dependency claims (how much proof is enough?)
* Identifying all possible beneficiaries
* Addressing issues raised by beneficiaries with disabilities
* Protecting carriers from potential double exposure, i.e., having to defend and/or pay a claim twice should the adjudication not be binding on infants or other beneficiaries who are persons under a disability.

Once a claim is accepted as or determined to be compensable, the assignment of benefits is directed by §65.2-512, which addresses the benefits available:

**§ 65.2-512. Compensation to dependents of an employee killed; burial expenses. —**

A. Except as provided in subsections F, G and H, if death results from the accident within nine years, the employer shall pay, or cause to be paid, compensation in weekly payments equal to 66 2/3 percent of the employee's average weekly wages, but not more than 100 percent of the average weekly wage of the Commonwealth as defined in § [65.2-500](https://va.casefinder.com/views/view_viewer.php?file=va_cod041501) nor less than 25 percent of the average weekly wage as defined therein:

1. To those persons presumed to be wholly dependent upon the deceased employee as set forth in subdivisions A 1, A 2, and A 3 of § [65.2-515](https://va.casefinder.com/views/view_viewer.php?file=va_cod041517), for a period of 500 weeks from the date of injury; or

2. If there are no total dependents pursuant to subdivision A 1, A 2, or A 3 of § [65.2-515](https://va.casefinder.com/views/view_viewer.php?file=va_cod041517), to those persons presumed to be wholly dependent as set forth in subdivision A 4 of § [65.2-515](https://va.casefinder.com/views/view_viewer.php?file=va_cod041517), and to those determined to be wholly dependent in fact, for a period of 400 weeks from the date of injury; or

3. If there are no total dependents, to partial dependents in fact, for a period of 400 weeks from the date of injury.

B. The employer shall also pay burial expenses not exceeding $10,000 and reasonable transportation expenses for the deceased not exceeding $1,000.

C. Benefits shall be divided equally among total dependents, to the exclusion of partial dependents. If there are no total dependents, benefits shall be divided among partial dependents according to the dependency of each upon the earnings of the employee at the time of the injury, in the proportion that partial dependency bears to total dependency.

D. If benefits are terminated as to any member of a class herein, that member's share shall be divided among the remaining members of the class proportionately according to their dependency.

E. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments but shall not continue for a period longer than specified in subsection A of this section.

F. No benefits shall be paid pursuant to this section to the dependents of an AmeriCorps member as defined in subdivision r of § [65.2-101](https://va.casefinder.com/views/view_viewer.php?file=va_cod041471).

G. No benefits shall be paid pursuant to subsections A, C, D or E to the dependents of a Food Stamp recipient participating in the work experience component of the Food Stamp Employment and Training Program as defined in subdivision s of § [65.2-101](https://va.casefinder.com/views/view_viewer.php?file=va_cod041471).

H. No benefits shall be paid pursuant to subsections A, C, D or E to the dependents of a Temporary Assistance for Needy Families recipient participating in the work experience component of the Virginia Initiative for Employment Not Welfare Program as defined in subdivision t of § [65.2-101](https://va.casefinder.com/views/view_viewer.php?file=va_cod041471).

In short:

* This section of the Actprovides for benefits for the *dependents* of an employee who dies as a result of a compensable work accident.
* Benefits only available if death within nine years of accident and only if claim filed within two years of death.
* The claimant is required to prove causal connection between accident and death. If it is equally probable that death was from a different cause, then the burden had not been met.
* a death claim must be proven the same as any other compensable work accident, though possibly with more difficulty because the employee is not alive to testify as to how they were hurt.

**Person filing claim is an eligible dependent:**

Dependents can be actual dependents, and will need to prove dependency, or certain people who are presumed to be dependent.

**Types of Dependency:**

Total dependency is someone who is wholly dependent on the decedent. Those who are wholly dependent are entitled to sixty-six percent of the average weekly wage. Dependence is defined such that the claimant looked to and relied on the contributions of the deceased employee, in whole or in part, as a means of support and maintenance in accordance with social position and accustomed mode of life.

**§ 65.2-515. Persons conclusively presumed to be wholly dependent. —**

A. The following persons shall be conclusively presumed to be dependents wholly dependent for support upon the deceased employee:

1. A wife upon a husband whom she had not voluntarily deserted or abandoned at the time of the accident or with whom she lived at the time of his accident, if she is then actually dependent upon him;

2. A husband upon a wife whom he had not voluntarily deserted at the time of the accident or with whom he lived at the time of her accident, if he is then actually dependent upon her;

3. A child under the age of eighteen upon a parent and a child over such age if physically or mentally incapacitated from earning a livelihood or a child under the age of twenty-three if enrolled as a full-time student in any accredited educational institution; and

4. Parents in destitute circumstances, provided there be no total dependents pursuant to other provisions of this section.

B. As used in this section, the term "child" shall include a stepchild, a legally adopted child, a posthumous child, and an acknowledged illegitimate child, but shall not include a married child; and the term "parent" shall include stepparents and parents by adoption.

**§ 65.2-516** Other cases of dependency.

In all other cases questions of dependency in whole or in part shall be determined in accordance with the facts as the facts are at the time of the accident; but no allowance shall be made for any payments made in lieu of board and lodging or services and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident.

In short: presumed eligible dependents are defined as:

* Husband or wife who, at the time of the accident, had not voluntarily abandoned or deserted the employee; or who lived with the employee at the time of the accident, if they were actually dependent on the employee.
* A child under the age of eighteen.
* A child over the age of eighteen if physically or mentally unable to earn a living.
* A child under the age of twenty-three if enrolled as a full-time student.
* Parents in destitute circumstances (so long as there are no other total dependents under the law).
* Circumstances as of date of accident are controlling.
* Partial dependents are entitled to benefits that are diminished in proportion to the extent of their dependency.
* Subject to the maximum and minimum rates.

**Priority Among Dependents:**

Death benefits are divided equally amongst those who are wholly dependent in fact or presumed. If there is a total dependent, no partial dependent can receive benefits.

**§ 65.2-517** Termination of Dependency

For the purposes of this title, the dependence of a widow or widower of a deceased employee shall terminate with death or remarriage, and the amount to be theretofore received by him or her shall be divided among the children or other dependents in the proportion of which they are receiving compensation, and the dependence of a child or any minor dependent, except a child or minor dependent physically or mentally incapacitated from earning a livelihood, or a full-time student, as defined in § 65.2-515, shall terminate with the attainment of eighteen years of age.

**Burial Expenses:**

§ 65.2-515 authorizes up to $10,000 in compensation for burial expenses and an additional $1,000.00 for transporting body. These benefits can be made without award of compensation, if there are no dependents.

**Third-Party Settlements:**

Carrier has right of subrogation against recovery secured against a third party.

Recently, an issue was raised at the Commission concerning the assignment of a guardian *ad litem* to a dependent under a disability (in this particular case, infancy). In the case of Rusk v. CR Smith Transport, LLC, VA000-0135-6500, July 31, 2018, the Full Commission concluded that Defendants were not responsible for securing a guardian *ad litem* for the minor children of the deceased because the claim was disputed and the minor children had not yet been determined to be beneficiaries.

 This decision raises many questions concerning the authority of the deputy commissioners, the assignment of guardians and the responsibility for payment of the guardian’s services.

**Infants – Common Law Principles**

It is the settled law of this Commonwealth that a personal judgment rendered against an infant for whom it does not affirmatively appear of record that a guardian ad litem has been appointed is void. Turner v. Barraud, 102 Va. 324, 330, 331, 46 S.E. 318, 320 (1904); Kanter v. Holland, 154 Va. 120, 122, 152 S.E. 328, 329 (1930); Cape Charles Flying Service v. Nottingham, 187 Va. 444, 456, 47 S.E.2d 540, 546 (1948); Burks Pleading and Practice, § 63, Infants, pp. 128, 129.

The only way known to our law of bringing an infant before a court is by a guardian ad litem appointed to conduct his defense for him. If no guardian ad litem was appointed or recognized by the court, he is not bound by the action of one who assumed to act for him, and the decree against him is void and may be collaterally assailed. Turner v. Barraud, 102 Va. 324, 330, 331, 46 S.E. 318, 320 (1904).

Proceedings against an infant are generally fatally defective unless the record shows that a guardian ad litem was assigned him. Langston v. Bassette, 104 Va. 47, 51 S.E. 218 (1905). However, if the decree rendered in a case to which an infant is a party is beneficial to him, the failure to appoint a guardian ad litem will not be reversible error. Id.

A void judgment is in legal effect no judgment. By it no rights are divested and from it no rights are obtained. All claims flowing out of it are void. It may be attacked in any proceeding by any person whose rights are affected. Anthony v. Kasey, 83 Va. 338, 5 S.E. 176 (1887); Turner v. Barraud, 102 Va. 324, 46 S.E. 318 (1930).

No guardian ad litem was appointed to represent an infant defendant. Hence, the judgment obtained in this case will have to be set aside and the action remanded for a new trial. Moses v. Akers, 203 Va. 130, 132, 122 S.E.2d 864, 865 (1961)

The common law required that an action on behalf of a minor child be brought in the child's name, not in the name of his next friend. The infant and not the next friend must be the real party plaintiff. Kirby v. Gilliam, 182 Va. 111, 116, 28 S.E.2d 40, 43 (1943). The minor child, not the next friend, is the real party in interest in such an action. See Womble v. Gunter, 198 Va. 522, 530, 95 S.E.2d 213, 219 (1956). If the action is brought “in the name of the next friend ‘on behalf of the infant’ it cannot be maintained. No party, infant or adult, may sue by deputy.” Kirby, 182 Va. at 117, 28 S.E.2d at 43 (quoting W. Lile, Equity Pleading and Practice, § 104, p. 53 n.21 (2d ed. 1922.))

**Statutory Construction**

A statutory provision will not be held to change the common law unless the legislative intent to do so is plainly manifested. Herndon v. St. Mary’s Hosp., Inc., 266 Va. 472, 476, 587 S.E.2d 567, 569 (2003).

The court found § 8.01-8 ambiguous and interpreted it so as not to change the common law rule. A suit brought by the mother in her name as mother and next friend of the minor was properly dismissed. Id.

“Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms.” Chesapeake & Ohio Ry. Co. v. Kinzer, 206 Va. 175, 181, 142 S.E.2d 514, 518 (1965).

“A statutory change in the common law is limited to that which is expressly stated in the statute or necessarily implied by its language because there is a presumption that no change was intended.” Mitchem v. Counts, 259 Va. 179, 186, 523 S.E.2d 246, 250 (2000).

“When an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule.” Boyd v. Commonwealth, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988).

**Next Friend**

A person under a legal disability may bring an action by a “next friend” at any time during the continuance of the legal disability or, after the disability is removed, in their own name within such time as allowed under Va. Code § 8.01-229 and the prescribed limitation period. Rivera v. Nedrick, 259 Va. 1, 5, 529 S.E.2d 310, 312 (1999).

In proceedings before the Commission, rigid or technical rules of pleading, evidence, or practice in the conduct of hearings shall not apply so long as the procedures adopted protect the substantial rights of the parties. Sergio’s Pizza v. Soncini, 1 Va. App. 370, 376, 339 S.E.2d 204, 207 (1986). The procedures utilized must afford the parties minimal due process safeguards. Id.

**Unauthorized Practice of Law – Nullity Doctrine**

Nerri v. Adu-Gyamfi, 270 Va. 28, 613 S.E.2d 429 (2005).

Virginia attorney’s license to practice law was administratively suspended for unpaid bar dues and unmet CLE requirements. The attorney filed a motion for judgment on behalf of adult clients during the period of his suspension. Defendants challenged the pleading. The attorney acknowledged that his license had been suspended. The plaintiffs, acting pro se, attempted to nonsuit the pending action. The Supreme Court reversed the trial court’s order granting the nonsuit.

[T]he status of an attorney during the time his or her license is administratively suspended is no different from that of an individual or an attorney who has never been licensed in Virginia — neither is authorized to practice law in this Commonwealth and both are subject to prosecution for practicing law without a license. Code § 54.1-3904.

[The attorney] was not entitled to practice law in this Commonwealth at the time he signed and filed the motion for judgment on behalf of the [plaintiffs]. That pleading was invalid and had no legal effect. Therefore, no valid proceeding was pending which could be non-suited.

270 Va. at 31, 613 S.E.2d at 430.

Kone v. Wilson, 272 Va. 59, 630 S.E.2d 744 (2006).

An administrator of a decedent's estate who is not licensed to practice law in Virginia may not file a wrongful death action pro se. Any such filing is invalid and of no legal effect.

A wrongful death action is a statutory action created by Code § 8.01-50, which permits a personal representative of a decedent to bring an action on behalf of the decedent's beneficiaries to recover damages caused by the wrongful act, neglect, or default of another. Subsection B of this statute vests this right of action in the decedent's personal representative. Horn v. Abernathy, 231 Va. 228, 237, 343 S.E.2d 318, 323 (1986). The cause of action, however, does not belong to the personal representative but to the decedent's beneficiaries identified in Code § 8.01-53. Thus, the personal representative merely acts as a surrogate for the decedent's beneficiaries. Id.; see Wilson v. Whittaker, 207 Va. 1032, 1036, 154 S.E.2d 124, 128 (1967); Conrad v. Thompson, 195 Va. 714, 721, 80 S.E.2d 561, 566 (1954).

Here, because Kone's right of action existed only to permit him to prosecute the cause of action belonging to Gumalla's statutory beneficiaries, and not to maintain any cause of action personal to Kone himself, he was not entitled to file the wrongful death action pro se. ***His surrogate status precluded a pro se filing because he was acting in a representative capacity for the true parties in interest***, Gumalla's beneficiaries. Therefore, we hold that the circuit court correctly concluded that Kone could not file a valid wrongful death action pro se.

272 Va. at 62-63, 630 S.E.2d at 746 (emphasis supplied).

**Query:** How are non-lawyer *pro se* next friends exempt from the nullity rule?

At least one Virginia Circuit Court has held that parents who act as next friends for minor children are ***not***.

The Supreme Court of Virginia repeatedly has articulated the rule that a pleading signed by another, in a representative capacity for the party with the cause of action, is a legal nullity. Aguilera v. Christian, 280 Va. 486, 488 (2010); Shipe v. Hunter, 280 Va. 480, 483 (2010); Kone v. Wilson, 272 Va. 59, 62-63 (2006); Nerri v. Adu-Gyamfi, 270 Va. 28, 31 (2005); Wellmore Coal Corp. v. Harman Mining Corp., 264 Va. 279, 283 (2002). While only persuasive authority, the United States Court of Appeals for the Fourth Circuit analyzed Virginia's next friend statute, and similarly concluded that Virginia Code § 8.01-8 does not permit parents pro se to litigate claims of their minor children. Myers v Loudoun Cty. Pub. Schs., 418 F.3d 395, 400 (4th Cir. 2005).

In this litigation, the parents of minor children I.W. and T.W. signed the Second Amended Complaint as next friends on behalf of their children. This does not comply with Virginia's signature requirements for pleadings. Accordingly, the Motion to Dismiss I.W. and T.W. from the lawsuit is granted, without prejudice.

Winter v. Pascoe, 96 Va. Cir. 76 (Fairfax Co. 2017).

**Excerpts from Part 6, Rules of the Supreme Court of Virginia and Unauthorized Practice Rules and Considerations**

RULES OF THE SUPREME COURT OF VIRGINIA
Part 6 Integration of the State Bar
Section 1 Unauthorized Practice Rules and Considerations

INTRODUCTION.

The right of individuals to represent themselves is an inalienable right common to all natural persons. But no one has the right to represent another; it is a privilege to be granted and regulated by law for the protection of the public.

PRACTICE OF LAW IN THE COMMONWEALTH OF VIRGINIA.

(A) No non-lawyer shall engage in the practice of law in the Commonwealth of Virginia or in any manner hold himself out as authorized or qualified to practice law in the Commonwealth of Virginia except as may be authorized by rule or statute.

…

(C) Definition of “Non-Lawyer” — The term “non-lawyer” means any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia.

UNAUTHORIZED PRACTICE CONSIDERATIONS

UPC 1-1. — The term “tribunal” shall include, in addition to the courts and judicial officers of Virginia or of the United States of America ... the Virginia Workers' Compensation Commission ….

UPC 1-2. — A non-lawyer may represent himself, but not the interest of another, before any tribunal….

UPC 9-1. — Representing another before an administrative agency normally constitutes the practice of law….

**The Coffey Decision**

Coffey v. Va. Birth-Related Neurological Injury Comp. Program, 37 Va. App. 390, 558 S.E.2d 563 (2002).

The Commission denied an infant’s claim for benefits under the Virginia Birth-Related Neurological Injury Compensation Act, Va. Code § 38.2-5000, et seq. The Commission held that the Program had successfully rebutted the statutory presumption of a birth-related neurological injury. The claim was brought by the infant’s mother and next friend, a non-lawyer.

On appeal, the infant argued that the Commission should have appointed counsel to represent him and prosecute the claim on his behalf or appointed a guardian ad litem for him. The Court of Appeals disagreed.

[Va. Code § 8.01-8] contains no provision either requiring or authorizing the appointment of legal counsel for a minor who sues by his next friend.

In Womble v. Gunter, 198 Va. 522, 95 S.E.2d 213 (1956), the Supreme Court said:

Code § 8-87 [now § 8.01-8] authorizes an infant to sue by his next friend. The practice in Virginia is for such suits to be instituted in the name of the infant by one of the parents or other near relative without formal appointment. If the suit or action proceeds without objection, it is a recognition by the court that the infant is a party to the proceeding. . . . In numerous cases we have held that in absence of fraud an infant is as much bound by a decree or judgment of a court as is an adult. The law recognizes no distinction between a decree against an infant and a decree against an adult, and, therefore, an infant can impeach it only upon grounds which would invalidate it in case of an adult party.

Id. at 530, 95 S.E.2d at 219. The record in this case contains no evidence of fraud. Rather, it reveals that the commission investigated and decided Devin's claim fairly and conscientiously.

The commission's failure to appoint legal counsel to prosecute Devin's petition did not deny it jurisdiction to decide his claim.

[Va. Code § 8.01-9(A)] specifically provides for the appointment of a guardian ad litem for an infant party defendant, not for an infant party plaintiff. The Supreme Court considered this very question in Cook v. Radford Community Hospital, 260 Va. 443, 536 S.E.2d 906 (2000), and held:

[Code § 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 . . . .

Id. at 449, 536 S.E.2d at 909.

Devin relies on our decision in Commonwealth ex. rel. Gray v. Johnson, 7 Va. App. 614, 376 S.E.2d 787 (1989), wherein we said:

The child . . . not adequately represented may not receive his or her day in court, and the fundamental due process right to be heard may be abridged.

\* \* \* \* \* \* \*

The strong public policy of this Commonwealth posits that the paramount concern where children are concerned are their best interests. . . . The courts of the Commonwealth have a long history of protecting the interests of minor children and have expressed that careful concern by ensuring that the rights and interests of the minors are safeguarded. Code §§ 8.01-9 and 16.1-266 require that guardians ad litem or counsel be appointed to represent a child's interests when the child is involved in court proceedings.

Id. at 623, 376 S.E.2d at 791-92. This statement in Johnson was dictum. Johnson turned not on whether a guardian ad litem should have been appointed, but rather on whether a child whose interests were affected had been made a party to the proceeding. The quoted passage from Johnson relied upon Moses v. Akers, 203 Va. 130, 122 S.E.2d 864 (1961), and Kanter v. Holland, 154 Va. 120, 152 S.E. 328 (1930). Those cases turned on the failure to appoint guardians ad litem for infant defendants against whom judgment had been rendered. Both cases were decided in the context of former Code § 8-88, which required appointment of a guardian ad litem for an infant who “is a party.” The present statute provides only for the appointment of a guardian ad litem for an infant who “is a party defendant.”

The commission's failure to appoint a guardian ad litem to protect Devin's interests did not deny it jurisdiction to decide his claim.

The Court of Appeals also rejected a due process argument advanced by the infant.

Devin has identified no failure by the commission to comply with the requirements of the Act. He notes that his mother and next friend did not pursue all avenues of discovery that might have been available and might have been pursued by professional counsel. However, he has demonstrated no fraud or unfairness and no failure of the commission to consider his claim fully and fairly. In short, he has not demonstrated that the proceedings before the commission failed to comply with the established law of the Commonwealth or failed to afford him a fair disposition of his claim. He has demonstrated no denial of due process.

We hold that the commission properly afforded Devin his procedural rights under the Act and that it had jurisdiction to decide his claim.

On the merits, however, the Court reversed the Commission’s determination that the Program had successfully rebutted the statutory presumption of a birth-related neurological injury. Holding that the presumption was sufficient to carry the infant’s burden of proof, the Court remanded the case to the Commission for the entry of an appropriate award.

Thus, the ultimate decision in Coffey is favorable to the infant. Therefore, under Langston v. Bassette, 104 Va. 47, 51 S.E. 218 (1905), the lack of a guardian ad litem would not be reversible error in any event.

The Fourth Circuit dismissed an argument that Coffey stands for the proposition that Virginia law allows a parent to litigate his minor children's claims *pro se.*

We reject this contention. Even assuming that Coffrey represented Virginia's position on this matter and that we should give respect to that position in interpreting a federal statute, Coffey holds only that a pro se parent may litigate his children's claims before the Workers' Compensation Commission. [37 Va. App. at 397,] 558 S.E.2d at 566. We are aware of no Virginia case authorizing a non-attorney parent to litigate his minor children's claims before a court of law.

Myers v. Loudon County Public Schools, 418 F.3d 395, 401 n.6 (4th Cir. 2005).

To support the result it reached in Coffey, the Court of Appeals distinguished Commonwealth ex. rel. Gray v. Johnson, 7 Va. App. 614, 376 S.E.2d 787 (1989) and relied upon Womble v. Gunter, 198 Va. 522, 95 S.E.2d 213 (1956) and Cook v. Radford Community Hospital, 260 Va. 443, 536 S.E.2d 906 (2000).

All three of these decisions should be examined in detail.

Commonwealth ex. rel. Gray v. Johnson, 7 Va. App. 614, 376 S.E.2d 787 (1989).

Appeal of lower court’s dismissal of a child support petition against a putative father on res judicata grounds. Mother filed a petition to establish father’s paternity of her two children. Father admitted paternity of one child, but denied being the father of the other child. Mother filed a second claim and Division of Child Support Enforcement intervened and moved lower court to appoint a GAL for the child whose paternity was in dispute. Trial court sustained father’s plea of res judicata.

The Court of Appeals wrote, “we hold that a mother and child are not in privity when the prospective rights of a minor child to establish paternity are at issue, and the child is not bound by a paternity determination unless the child is formally named a party, represented by a guardian ad litem and given an adequate opportunity to litigate the issue.” 7 Va. App. at 621, 376 S.E.2d at 790.

The Court explained its reasoning thus:

Finally, and perhaps most significantly, where a child is not made a party and not represented by an independent guardian ad litem, the child has no control over the litigation, and the integrity of the fact finding process may suffer. The child not a party and not adequately represented may not receive his or her day in court, and the fundamental due process right to be heard may be abridged. In addition to the right to support, other significant rights of the child may be lost or compromised by conflicting interests and less than zealous representation, as in this case, where [the mother] was unrepresented by counsel in the initial paternity action.

The strong public policy of this Commonwealth posits that the paramount concern where children are concerned are their best interests. This public policy would be thwarted if a child were bound by a paternity determination in which the child's independent rights and interests were not adequately protected. The courts of the Commonwealth have a long history of protecting the interests of minor children and have expressed that careful concern by ensuring that the rights and interests of the minors are safeguarded. Code §§ 8.01-9 and 16.1-266 require that guardians ad litem or counsel be appointed to represent a child's interests when the child is involved in court proceedings. Our Supreme Court has consistently held that a guardian ad litem must be appointed when the interests of infants are involved, see, e.g., Moses v. Akers, 203 Va. 130, 131-32, 122 S.E.2d 864, 865 (1961); Kanter v. Holland, 154 Va. 120, 122, 152 S.E. 328, 329 (1930), and unless the record affirmatively shows that a guardian ad litem has been appointed, the judgment is void. Id. Thus, children who are not made parties to a paternity action are not bound by the judgment.

7 Va. App. at 623-24, 376 S.E.2d at 791-92.

Womble v. Gunter, 198 Va. 522, 95 S.E.2d 213 (1956).

Testator’s will contained a “no contest” clause revoking the gifts to any beneficiary who contested the validity of the will and transferring their interests to a church. All beneficiaries filed a bill in chancery attacking the will, alleging mental incompetence by the testator. That suit was ultimately dismissed. When the decree became final, the executors filed a bill alleging that the beneficiaries had breached the no contest clause. The Court agreed.

One of the arguments made on appeal was “that the infants who joined in the contest by their respective parents as next friend are not bound by the “no contest” provision in the will.” This statement is immediately followed by the passage which the Court of Appeals quoted in Coffey. The Court concluded that the no contest clause applied equally to the testator’s gifts to the infant beneficiaries as well as to the gifts to the adults.

The court is not concerned with whether an heir or a devisee receives the property of a decedent. The normal freedom of the owner to dispose of his property as he sees fit should not be curtailed unless the disposition violates some rule of law or is against public policy. Where the language is clear and unambiguous, it is the duty of the court to give force and effect to the intention expressed by the testator and carry out the objects desired by him in disposing of his property. If the court held the “no contest” paragraph valid as to adults and invalid as to infants, it would be making a new and different will for the testator, and one contrary to his clearly expressed intention to restrain both the adult and infant beneficiaries from making a public exposure of essentially private and personal matters.

Id. at 532, 95 S.E.2d at 220-21.

The opinion does not discuss the presence or absence of counsel for the infants who sued by their next friends. There is likewise no language in Womble about an infant being bound by the actions of a non-lawyer next friend who acts pro se to litigate on the infant’s behalf.

The Supreme Court of Virginia appears to have cited Womble eight times since 1956. Four cites are in cases that involve will contests. Two cites are for the proposition that a minor, not the next friend, is the real party in interest. One cite is for the proposition that issues may not be raised for the first time on appeal, and the remaining cite is for the proposition that it is unnecessary for the appellate court to resolve a claim of inconsistent positions. The Supreme Court has never cited Womble for the proposition that an infant will be bound by the actions of a non-lawyer next friend who attempts to litigate pro se on the infant’s behalf.

The Court of Appeals has cited Womble in Coffey and on one other occasion for the proposition that issues may not be raised for the first time on appeal.

Cook v. Radford Community Hospital, 260 Va. 443, 536 S.E.2d 906 (2000).

Medical malpractice case. Cook was declared incapacitated in a judicial proceeding. Her husband was appointed her guardian. Cook filed the action in her own name, rather than in the name of her guardian. The case turned on former Va. Code § 37.1-141 (now § 64.2-2025), which provided that all actions or suits of the ward shall be prosecuted by the fiduciary. The Court held that prosecution of the claim by the fiduciary was mandatory. Since the action had been filed by the wrong person in the first place, it could not be amended later to substitute the correct plaintiff.

The Court wrote the following with regard to the policy behind Va. Code § 8.01-9.

Cook next argues that the policy underlying Code § 8.01-9 requires that she be granted leave to amend her petition in this case. Code § 8.01-9 requires the appointment of a guardian ad litem for a person under a disability who is named as a defendant in a suit unless the person under a disability is represented by counsel. Code § 8.01-9 further provides that it is the duty of the court to “see that the interest of [such] defendant is so represented and protected.” Cook posits that this section recognizes that a suit filed against a person with disabilities rather than against the guardian is valid and curative amendments can be made if necessary. Based on this premise, Cook reasons that the converse must also be true; that is, ***a suit filed by a person under a disability is also valid and subject to curative action if needed to protect and represent the interest of such person. We disagree.***

Code § 8.01-9 is inapposite to the issue in this case. That section is a general law applying to all persons under a disability, which includes minors, alcoholics, drug addicts, incarcerated felons, as well as incapacitated persons. The statute 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 in litigation that he did not instigate, particularly if such person does not have a fiduciary. ***The provisions of Code § 8.01-9 do not provide any basis for concluding that a suit by a person under a disability who has a duly appointed fiduciary is valid.***

260 Va. at 449, 536 S.E.2d at 909 (emphasis supplied).

Query: Does the holding in Cook that the suit filed by a person under a disability is invalid, support the implication from the Court of Appeals’ decision in Coffey that an infant claimant may be bound by the actions of his non-lawyer next friend?

**Applicable Statutes – Title 8.01**

**§ 8.01-2(6):**

*"Person under a disability"* shall include:

a. a person convicted of a felony during the period he is confined;

b. an infant;

c. an incapacitated person as defined in § 64.2-2000;

d. an incapacitated ex-service person under § 64.2-2016; or

e. any other person who, upon motion to the court by any party to an action or suit or by any person in interest, is determined to be (i) incapable of taking proper care of his person, or (ii) incapable of properly handling and managing his estate, or (iii) otherwise unable to defend his property or legal rights either because of age or temporary or permanent impairment, whether physical, mental, or both. Such impairment may also include substance abuse as defined in § 37.2-100;

**§ 8.01-8. How minors may sue. —** Any minor entitled to sue may do so by his next friend. Either or both parents may sue on behalf of a minor as his next friend.

**§ 8.01-9. Guardian ad litem for persons under disability; when guardian ad litem need not be appointed for person under disability. —**

A. 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, whether the defendant has been served with process or not. If no such attorney is found willing to act, the court shall appoint some other discreet and proper person as guardian ad litem. Any guardian ad litem so appointed shall not be liable for costs. ***Every guardian ad litem shall faithfully represent the estate or other interest of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of the defendant is so represented and protected.*** ***Whenever the court is of the opinion that the interest of the defendant so requires, it shall remove any guardian ad litem and appoint another in his stead.*** When, in any case, the court is satisfied that the guardian ad litem has rendered substantial service in representing the interest of the person under a disability, it may allow the guardian reasonable compensation therefor, and his actual expenses, if any, to be paid out of the estate of the defendant. However, if the defendant's estate is inadequate for the purpose of paying compensation and expenses, all, or any part thereof, may be taxed as costs in the proceeding or, in the case of proceedings to adjudicate a person under a disability as an habitual offender pursuant to former § [46.2-351.2](https://va.casefinder.com/views/view_viewer.php?file=va_cod032573) or former § [46.2-352](https://va.casefinder.com/views/view_viewer.php?file=va_cod032574), shall be paid by the Commonwealth out of the state treasury from the appropriation for criminal charges. In a civil action against an incarcerated felon for damages arising out of a criminal act, the compensation and expenses of the guardian ad litem shall be paid by the Commonwealth out of the state treasury from the appropriation for criminal charges. If judgment is against the incarcerated felon, the amount allowed by the court to the guardian ad litem shall be taxed against the incarcerated felon as part of the costs of the proceeding, and if collected, the same shall be paid to the Commonwealth. By order of the court, in a civil action for divorce from an incarcerated felon, the compensation and expenses of the guardian ad litem shall be paid by the Commonwealth out of the state treasury from the appropriation for criminal charges if the crime (i) for which the felon is incarcerated occurred after the date of the marriage for which the divorce is sought, (ii) for which the felon is incarcerated was committed against the felon's spouse, child, or stepchild and involved physical injury, sexual assault, or sexual abuse, and (iii) resulted in incarceration subsequent to conviction and the felon was sentenced to confinement for more than one year. The amount allowed by the court to the guardian ad litem shall be taxed against the incarcerated felon as part of the costs of the proceeding, and if collected, the same shall be paid to the Commonwealth.

B. Notwithstanding the provisions of subsection A or the provisions of any other law to the contrary, ***in any suit wherein a person under a disability is a party and is represented by an attorney-at-law duly licensed to practice in this Commonwealth, who shall have entered of record an appearance for such person, no guardian ad litem need be appointed for such person unless the court determines that the interests of justice require such appointment***; or unless a statute applicable to such suit expressly requires that the person under a disability be represented by a guardian ad litem. The court may, in its discretion, appoint the attorney of record for the person under a disability as his guardian ad litem, in which event the attorney shall perform all the duties and functions of guardian ad litem.

***Any judgment or decree rendered by any court against a person under a disability without a guardian ad litem, but in compliance with the provisions of this subsection B, shall be as valid as if the guardian ad litem had been appointed***.

**Applicable Statutes – Title 65.2**

**§ 65.2-201. General duties and powers of the Commission. —**

A. It shall be the duty of the Commission to administer this title and adjudicate issues and controversies relating thereto. In all matters within the jurisdiction of the Commission, it shall have the power of a court of record to administer oath, to compel the attendance of witnesses and the production of documents, to punish for contempt, ***to appoint guardians*** pursuant to Part C (§ [64.2-1700](https://va.casefinder.com/views/view_viewer.php?file=va_cod051912) et seq.) of Subtitle IV of Title 64.2, and to enforce compliance with its lawful orders and awards. The Commission shall make rules and regulations for carrying out the provisions of this title.

**§ 65.2-512. Compensation to dependents of an employee killed; burial expenses. —**

A. Except as provided in subsections F, G and H, if death results from the accident within nine years, the employer shall pay, or cause to be paid, compensation in weekly payments equal to 66 2/3 percent of the employee's average weekly wages, but not more than 100 percent of the average weekly wage of the Commonwealth as defined in § [65.2-500](https://va.casefinder.com/views/view_viewer.php?file=va_cod041501) nor less than 25 percent of the average weekly wage as defined therein:

1. To those persons presumed to be wholly dependent upon the deceased employee as set forth in subdivisions A 1, A 2, and A 3 of § [65.2-515](https://va.casefinder.com/views/view_viewer.php?file=va_cod041517), for a period of 500 weeks from the date of injury; or

2. If there are no total dependents pursuant to subdivision A 1, A 2, or A 3 of § [65.2-515](https://va.casefinder.com/views/view_viewer.php?file=va_cod041517), to those persons presumed to be wholly dependent as set forth in subdivision A 4 of § [65.2-515](https://va.casefinder.com/views/view_viewer.php?file=va_cod041517), and to those determined to be wholly dependent in fact, for a period of 400 weeks from the date of injury; or

3. If there are no total dependents, to partial dependents in fact, for a period of 400 weeks from the date of injury.

B. The employer shall also pay burial expenses not exceeding $10,000 and reasonable transportation expenses for the deceased not exceeding $1,000.

C. Benefits shall be divided equally among total dependents, to the exclusion of partial dependents. If there are no total dependents, benefits shall be divided among partial dependents according to the dependency of each upon the earnings of the employee at the time of the injury, in the proportion that partial dependency bears to total dependency.

D. If benefits are terminated as to any member of a class herein, that member's share shall be divided among the remaining members of the class proportionately according to their dependency.

E. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments but shall not continue for a period longer than specified in subsection A of this section.

F. No benefits shall be paid pursuant to this section to the dependents of an AmeriCorps member as defined in subdivision r of § [65.2-101](https://va.casefinder.com/views/view_viewer.php?file=va_cod041471).

G. No benefits shall be paid pursuant to subsections A, C, D or E to the dependents of a Food Stamp recipient participating in the work experience component of the Food Stamp Employment and Training Program as defined in subdivision s of § [65.2-101](https://va.casefinder.com/views/view_viewer.php?file=va_cod041471).

H. No benefits shall be paid pursuant to subsections A, C, D or E to the dependents of a Temporary Assistance for Needy Families recipient participating in the work experience component of the Virginia Initiative for Employment Not Welfare Program as defined in subdivision t of § [65.2-101](https://va.casefinder.com/views/view_viewer.php?file=va_cod041471).

**§ 65.2-515. Persons conclusively presumed to be wholly dependent. —**

A. The following persons shall be conclusively presumed to be dependents wholly dependent for support upon the deceased employee:

1. A wife upon a husband whom she had not voluntarily deserted or abandoned at the time of the accident or with whom she lived at the time of his accident, if she is then actually dependent upon him;

2. A husband upon a wife whom he had not voluntarily deserted at the time of the accident or with whom he lived at the time of her accident, if he is then actually dependent upon her;

3. A child under the age of eighteen upon a parent and a child over such age if physically or mentally incapacitated from earning a livelihood or a child under the age of twenty-three if enrolled as a full-time student in any accredited educational institution; and

4. Parents in destitute circumstances, provided there be no total dependents pursuant to other provisions of this section.

B. As used in this section, the term "child" shall include a stepchild, a legally adopted child, a posthumous child, and an acknowledged illegitimate child, but shall not include a married child; and the term "parent" shall include stepparents and parents by adoption.

**§ 65.2-516.** Other cases of dependency.

In all other cases questions of dependency in whole or in part shall be determined in accordance with the facts as the facts are at the time of the accident; but no allowance shall be made for any payments made in lieu of board and lodging or services and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident.

**§ 65.2-517.** Termination of Dependency

For the purposes of this title, the dependence of a widow or widower of a deceased employee shall terminate with death or remarriage, and the amount to be theretofore received by him or her shall be divided among the children or other dependents in the proportion of which they are receiving compensation, and the dependence of a child or any minor dependent, except a child or minor dependent physically or mentally incapacitated from earning a livelihood, or a full-time student, as defined in § 65.2-515, shall terminate with the attainment of eighteen years of age.

**§ 65.2-525. Who may receive payment and receipt therefor. —**

A. Whenever payment of compensation is made to a surviving spouse or parent for his use, or for his use and the use of a minor child, or the use of a minor child and such payments are made in the form of periodic weekly, monthly or quarterly payments, the written receipt thereof of such surviving spouse or parent shall acquit the employer. The Commission, however, may require annual written certifications from the surviving spouse or parent confirming that the portion of such payments for the benefit of the minor child has been used for the benefit of such minor child.

B. Whenever payment is made to any person eighteen years of age or over, the written receipt of such person shall acquit the employer. If a minor shall be entitled to receive a lump sum payment amounting to not more than $15,000 as compensation for injuries, or as a distributive share by virtue of this title, the parent or natural guardian upon whom such minor shall be dependent for support shall be authorized and empowered to receive and give receipt for such moneys to the same extent as a guardian of the person and property of such minor duly appointed by proper court, and the release or discharge of such parent or natural guardian shall be a full and complete discharge of all claims or demands of such minor thereunder.

C. Whenever any lump sum payment greater than $15,000 is due to a minor or to an incapacitated person as defined in § [64.2-2000](https://va.casefinder.com/views/view_viewer.php?file=va_cod051949), the same shall be made to the guardian of the property of such minor or the conservator of such incapacitated adult or, if there is none, ***to some suitable person or corporation appointed by the circuit court as a trustee***, and the receipt of such trustee shall acquit the employer.

**§ 65.2-526. Payment to junior dependents in good faith. —** Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer unless and until such dependent or dependents prior in right shall have given him notice of his or their claim. In case the employer is in doubt as to the respective rights of rival claimants, he may apply to the Commission to decide between them.

**§ 65.2-528. Time limitations on persons under disability. —** No limitation of time provided in this title for the giving of notice or making claim under this title shall run against any person who is incapacitated or under eighteen years of age, so long as he has no guardian, trustee, or conservator.

Compare § 65.2-528 with Rivera v. Nedrick, 259 Va. 1, 529 S.E.2d 310 (1999) and Va. Code § 8.01-229. Does § 65.2-528 change the common law rule and remove the protection of tolling the statute of limitations period from an infant beneficiary who has a duly appointed fiduciary?

Perhaps so. See Whetzel v. Waste Management of Va., No. 0352-99-3 (Va. Ct. App. Aug. 10, 1999). “The commission correctly concluded that the existence of the specific tolling provisions contained in Code §§ 65.2-528 and 65.2-602 precluded it from applying Code § 8.01-229(A)(1), a statute of general application, to toll the limitations period in this case.” Whetzel involved an adult claimant who unsuccessfully asserted a claim of incapacity in an attempt to avoid the limitations bar.

**Commission Cases – Guardians ad Litem**

Rusk v. CR Smith Transport, LLC, JCN VA00001356500 (July 31, 2018).

Death case. Willful misconduct defense. Three potential beneficiaries were infants. Grandparents filed claim on behalf of the decedent’s minor children. Hearing Deputy entered orders requiring defense counsel to initiate circuit court proceedings to appoint a guardian ad litem to represent the interests of the minor children and defendants to pay GAL fees. Full Commission granted interlocutory review and reversed the Deputy Commissioner’s orders requiring the GAL.

The Deputy Commissioner determined the interests of the decedent’s minor children may not be protected. We make no finding on this question. The defendants presumably understand the absence of legal counsel or a guardian ad litem for the minors may affect the validity of a final determination. We do not decide at this stage of the proceedings whether any determination on the merits will bind the minor children of Sam Rusk if their interests are not protected by a guardian ad litem or the legal services of counsel of record.

We REVERSE the Deputy Commissioner’s March 16, 2018 and March 28, 2018 Orders finding a guardian ad litem is necessary in this matter in the absence of legal representation of the minor children of Sam Rusk. Because we find appointment of a guardian ad litem is not required at this time, we need not and do not decide which party must petition the circuit court and pay guardian ad litem fees.

The Full Commission’s decision in Rusk appears to be substantially aligned with the Coffey case from the Court of Appeals.

**Excerpts from the Commission’s Pre-Rusk Decisions**

In Re: Townsend, VWC File No. B-09-03 (Feb. 3, 2011). The Commission reversed a Deputy Commissioner’s order disqualifying claimant’s counsel from representing the mother in both a malpractice action and the mother and the infant before the Commission in a birth-injury claim but affirmed the requirement of a GAL appointed by the circuit court.

Further, we agree with the Deputy Commissioner's decision that Bedford County Circuit Court should be asked to appoint a guardian *ad litem* for the infant.

Estate of Derrick Lee Mowbray v. Appalachian Freight Carriers, Inc., VWC File No. 223-11-03 (Dec. 13, 2006).

One potential dependent is a minor. A guardian ad litem must be appointed because his interest differs from the interests of every other potential dependent. We, therefore, direct the defendants to apply to the appropriate civil court for the appointment of a guardian.²

Should his claim be successful, the cost of the guardian's appointment and representation would be assessed against the minor as an attorney's fee under Code § 65.2-713. If, however, the minor is ultimately determined not to be entitled to benefits, the defendants would bear the guardian's cost because the need for the guardian was necessitated by the defendants' desire to join the minor as a party to the proceeding.

While at first reading it may seem beyond our authority to direct the defendants to obtain a guardian, closer analysis shows it is not. Under Code § 65.2-526, the defendants are protected and discharged if they pay death benefits to the other dependents in “good faith.” We do not consider it good faith for the defendants to identify a potential dependent, request that this potential dependent's rights be decided, but not permit the adjudication of that potential dependent's rights by failing to obtain a guardian ad litem.

In conclusion, we REVERSE the Deputy Commissioner's Order and reinstate this case back on the active hearing docket without requiring the appointment of an administrator. The defendants shall notify the Deputy Commissioner within ten (10) days whether they wish to join the other potential dependents and have their rights decided. If so, the defendants shall facilitate the appointment of a guardian ad litem for the potential minor dependent. The Deputy Commissioner shall then establish a new hearing date and send notice to the parties, to all potential beneficiaries and to the guardian ad litem when appointed.

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² The law is unclear whether the Commission has the authority to appoint a guardian ad litem. This power is not listed in § 65.2-201. Code § 8.01-9, that requires the appointment of a guardian ad litem for a person under disability in a “suit,” may or may not apply to the Commission. Compare Musick v. Coddell Construction Co., 4 Va. App. 471, 358 S.E.2d 739 (1987) (the non-suit statute [§ 8.01-229(E)(1)], does not apply to the Commission because it applies to “actions”) and Eliason v. Stellute, 78 O.W.C. 80 (1999) (non-applicability of § 8.01-271.1) with Coffey v. Virginia Birth-Related Neurological Injury Compensation Program, 37 Va. App. 390, 558 S.E.2d 563 (2002) (the Commission was not required to appoint a guardian ad litem for an infant claimant because § 8.01-9 requires such appointment only for minor children and not minor plaintiffs, thereby implying that § 8.01-9 is applicable to proceedings before the Commission) and Strayer and Wife v. Long and als., 83 Va. 715, 3 S.E. 372 (1887) (the power to appoint a guardian ad litem is an inherent power of every judicial tribunal).

Whether 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 Company, 65 O.W.C. 312, 313 (1986)(Deputy Commissioner Opinion).

Because 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 appointing Donald S. Clarke, Esquire, Guardian ad litem, to represent, defend and protect the interest of James P. Davis in the instant proceeding.

The Rusk opinion recited that the Commission found the reasoning of the Mowbray case to be unpersuasive and found that the Davis and Townsend cases had additional factors that were not present in Rusk.

**Payees**

Kern v. Coastal Supply, Inc., VWC File No. 213-90-42 (July 9, 2004).

The sole issue on this Review requested by the employer is whether Margaret Louise Terminiello, the deceased employee's mother, is the proper payee with regard to the death benefits owed to the decedent's minor child, David Matthew Kern. We AFFIRM the decision of the Deputy Commissioner to award benefits to Margaret Louise Terminiello as guardian of the minor child.

At the hearing of this case, the claimant presented evidence from the state of New York granting custody of David Kern to Margaret Terminiello, his grandmother, on June 21, 1993.

Furthermore, we decline to hold that a mother asserting a right to survivor benefits from the death of son, who lived with the mother at the time of death, impairs her ability to receive and administer the funds owed to David Kern for his use and benefit. We similarly decline to hold that Ms. Terminiello has exhibited such a lack of judgment with regard to her finances that she is unable to receive and administer the funds owed to David Kern for his use and benefit. We find that Margaret Terminiello, grandmother of David Kern and mother of the decedent employee, is the proper payee of the benefits owed to David Kern.

Pena v. Tidewater Plastering & Drywall Co., VWC File No. 180-64-13 (Nov. 12, 1997).

In an Opinion dated June 25, 1997, the Deputy Commissioner determined that the decedent's average weekly wage was $314.85. It was further found that an award of compensation would be entered, based on said calculation, pending the appointment of a guardian or trustee for the minor beneficiaries.

The Opinion in all other regards is AFFIRMED. No compensation benefits are awarded at this time, since it still appears from the record that no guardian or trustee for the minor beneficiaries has been appointed in compliance with Code § 65.2-525.

Wilson v. Dean’s Steel Erection, 57 O.I.C. 319 (1977)(Deputy Commissioner Opinion).

Since, however, Ruth Marie Wilson has been deprived of the custody of all three children involved in the case, their respective shares to the compensation will be paid to the Department of Social Services of Lynchburg, Virginia, for their use and benefit.

**Additional Commission decisions since 2013**

**Compensability**

Mullins v. Maumee Express, Inc., JCN VA00000700549 (Apr. 23, 2014).

Deputy Commissioner awarded death benefits, including compensation, to the mother of an employee killed in a motor vehicle accident while operating the employer’s tractor-trailer. Decedent’s BAC was 0.273. However, the carrier “no showed” and did not retain defense counsel until after the hearing. On review, the Full Commission affirmed: (1) the deputy’s order denying the defendants’ request to reopen the record post-hearing; (2) the determination that defendants had waived willful misconduct and other defenses; and (3) the determination that the mother’s evidence of “destitute circumstances” was adequate to support a finding of dependency. Nevertheless, the Full Commission REVERSED the award of benefits because the majority found that “the decedent had voluntarily removed himself from the course of his employment by his intoxication…” thereby precluding a finding of compensability.

Moore v. Prince William County Schools, JCN VA000-0056-9086 (Apr. 1, 2013).

Deputy Commissioner had denied benefits to the dependents of a school bus driver who had tripped and fallen walking from the school, where he had been using the restroom, to his bus, hitting his head. The Full Commission reversed, finding that the hearsay testimony of multiple people, including medical professionals who treated the decedent shortly after the accident and before he died, that the decedent had tripped in a hole on the median was sufficient to show that the accident was compensable.

Arroyo v. Carlos Ramirez, Record No. 1282-14-1 (Feb. 3, 2015).

Court of Appeals case affirming Full Commission opinion that a worker who died after falling down an elevator shaft did not have a compensable work accident because there was not enough evidence for his falling having arisen from his employment. No one witnessed his fall and he did not make any hearsay statements. Unclear why he was near the elevator shaft.

McDonald v. Service Mechanical, Inc., JCN VA00000406564 (May 23, 2013).

A worker’s death was compensable when medical evidence existed to support the conclusion that the worker died due to cardiovascular complications caused by a sedentary lifestyle imposed upon him by his work injuries (broken leg bones). There was evidence that, before the accident, the decedent was very healthy and very active. Testimony from doctor’s supported the conclusion that his work accident caused his death.

Busick v. Bill Hudgins GMC, JCN VA 00000533007 (Sept. 13, 2013).

Full Commission reversed the deputy commissioner’s ruling and held that decedent’s death was, in fact, the result of a compensable injury which occurred after he suffered an abdominal aneurysm. Claimant worked as a car salesman, sustaining what he initially believed to be a pulled muscle in his back while pushing a car that had stalled in the dealership’s showroom. Claimant’s pain increased to the point that he sought medical treatment, at which time the aneurysm was identified. The Commission held that the medical evidence supported a finding of causation even though the aneurysm did not result in immediate death.

Sims v. Pike Electric, Inc. JCN VA 00001006841 (Dec. 15, 2015)

Full Commission affirmed the deputy commissioner’s decision that the evidence failed to prove the decedent’s accident was within the course of his employment. At the time of the automobile accident, the decedent was a passenger in his own vehicle which was being driven by a co-worker as they traveled approximately 350 miles home from their assigned work location. Evidence was introduced regarding the decedent’s work arrangement, wages and per diem. In its Opinion, the Full Commission cited the deputy commissioner: “ …without sufficient evidence proving the time consumed to and from work was paid for by the employer or included within the decedent’s wages, we cannot conclude the decedent remained within his employment course when mortally injured.” The Full Commission concluded by stating that the decedent’s per diem served as “an additional compensation to attract skilled workers to a remote jobsite,” and that it was not a payment made “in lieu of furnishing transportation.” As such, death benefits were denied.

Weise v. Huntington Ingalls Incorporated, JCN VA 02000020841 (Apr. 5, 2016)

The Full Commission affirmed the deputy commissioner’s findings that there was insufficient medical evidence to conclude that the sudden cardiac arrest suffered by decedent while at work arose out of his employment as an engineering supervisor.

Short v. Lumos Networks Corp., JCN VA 00001070344 (Dec. 12, 2016)

The Full Commission affirmed the deputy commissioner’s denial of death benefits based upon the determination that decedent’s accident and resulting death did not arise out of employment. At the time of his death, the decedent was attending a work conference and was thrown off a mountain bike while riding down a slope. Summarizing the evidence and its conclusion, the Full Commission wrote, in part,” … although the decedent was expected to attend the conference, he was neither required nor encouraged to participate in the activity which caused his death. Bike riding was not a sanctioned activity, nor was it sponsored or encouraged by the employer. It was separate from other conference events and activities, and no other employees participated. … The decision to ride the bike was entirely personal to the decedent, and [it] had no reasonable relationship either to the employer’s business or the overall purposed of the conference.”

**Abandonment**

O’Connor, et al. v. Standard Marine, Inc. JCN VA 2377930 (Nov. 4, 2014)

The Full Commission upheld the deputy commissioner’s determination that decedent’s wife, who had separated from decedent and lived in a different state, was dependent upon the decedent and entitled to death benefits. The parties had not filed for divorce. The Full Commission stated that it is not required that the wife be totally dependent on the decedent, but the evidence must establish that she looked to her husband’s contributions, in whole or in part, for support and maintenance of her accustomed standard of living. There was evidence presented of wire transfers made by decedent to his wife over the period of separation. There was additional evidence concerning the personal relationship between the decedent and his wife prior to his accident, as well as evidence of continued communications after the accident. To that end, the Commission held there was not sufficient evidence of abandonment by decedent’s wife and death benefits were awarded.

**Presumptions**

McAden, III v. McAden Dairy Trucking, Inc., JCN VA 00000948536 (April 21, 2015)

The Full Commission affirmed the deputy commissioner’s finding that the death presumption did not apply because there was evidence that decedent was alive for approximately 70 minutes during his extraction from the overturned vehicle he was driving at the time of the accident. Because the presumption did not apply, the actual risk doctrine was applied, and the Commission affirmed the ruling that there was insufficient evidence to explain how the accident occurred. Absent evidence that the accident arose out of decedent’s employment, death benefits were denied.

Eppes v. Prince Edward County, JCN VA 00001023144 (June 23, 2016)

The Full Commission reversed the decision of the deputy commissioner who held that Defendants had rebutted the presumption of Virginia Code section 65.2-402(B). The Full Commission agreed that because the decedent was chief deputy sheriff and because his immediate cause of death was listed as severe coronary artery disease, the presumption applied. The Full Commission concluded, however, that Defendants’ evidence failed to prove that decedent’s cardiovascular disease was not caused by his employment or establish by a preponderance of the evidence a non-work-related cause of the decedent’s heart disease.

**Dependents:**

Coleman, et al. v. Dinner Bell Meat Products, JCN 239-94-84 (Jan. 8, 2013).

Death unrelated to work injury, but there are WC benefits (PPD). There were two claimants: Mary Jane Coleman, the decedent’s estranged wife; and Brenda Hurt, the decedent’s live-in girlfriend, who was at the time estranged from, but still married to, another man. Hurt argued that she was a dependent because, after his accident, she lost her job and he paid the rent and other bills. Coleman argued that she was entitled to the PPD benefits because her husband had given her money in the months between his accident and death. Neither were dependents. Coleman, because she did not look to or rely upon the decedent for support. Hurt, because although they lived together it was a situation of mutual assistance and at the time of his accident, she contributed financially to the household, and the decedent did not have a legal or moral obligation to her.

**Termination of death benefits:**

Couch v. Blevins Tire and Recapping Co., JCN VA00000111690 (June 25, 2013).

An out-of-state settlement with a third party that did not comply with the VWC’s rules regarding settlement did not effectively terminate WC benefits.

**Rejection of a Petition and Order assigning death benefits:**

Sledge v. Coinmach Route – Virginia/Ashland, JCN VA00001187584 (June 14, 2017)The Full Commission affirmed the decision of a deputy commissioner who refused to approve a Petition and Order which did not comply with the mandatory language of Rule 1.7 which requires evidence that the issuing annuity company is authorized by the State Corporation Commission to transact business in Virginia. Additionally, the language in the Petition provided for a lump sum payments on behalf of minor beneficiaries in “care of” their mothers for the purpose of purchasing an annuity. The Full Commission agreed that this provision violated Virginia Code Section 65.2-525(C) (requiring a guardian when sums exceed $15,000.00).