## LAW AND THE FAMILY

Where the Buck Stops for Law Guardians

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THESE ARE BUSY DAYS in matrimonial courtrooms. Judges have

skillfully been using a 1993 court rule to aid them in sorting out

the complex issues of custody. Inspiring greater confidence in the

system and boosting efficiency is a part of the goal.

Custody and visitation proceedings have as their objective the

best interests of the child. The child, however, is not a party to

the action and is normally not represented. A law guardian may be

appointed by the court to protect the interests of the child, or the

child may choose independent counsel. The court may also order the

parties and the child to submit to forensic evaluations pursuant to

Civil Practice Law and Rules Sec.3121(a) and Family Court Act (FCA)

Sec.251.

Section 202.16 (f) of the Uniform Civil Rules for the Supreme

Court, enacted in 1993, provides that the court ``may appoint a law

guardian for the infant children, or may direct the parties to

submit to the court, within 20 days of the [preliminary] conference,

a list of suitable law guardians for selection by the court.''

Section 202.18 of the rules provides that in any action or

proceeding tried without a jury to which Domestic Relations Law

Sec.237 applies, the court may appoint a psychiatrist, psychologist,

social worker or other appropriate expert to give testimony with

respect to custody or visitation and that the cost of such expert

shall be paid by a party or the parties to the action as the court

shall direct.\*1

Statutory Authority

It has generally been held that a court has inherent authority

to designate counsel to represent children in custody cases and that

no statutory authority is necessary. In addition to such inherent

power, there is statutory authority to appoint law guardians under

FCA Sec.241, which provides that ``minors who are the subject of

family court proceedings or appeals originating in the family court

should be represented by counsel of their own choosing or by law

guardians . . . .''

FCA Sec.249 provides that in any proceeding in which it has

jurisdiction ``the court may appoint a law guardian to represent the

child, when, in the opinion of the family court judge, such

representation will serve the purposes of this act, if independent

legal counsel is not available to the child.'' This statutory

authorization to appoint law guardians in custody/visitation cases

under FCA Sec.249 carried over to the Supreme Court before the

enactment of the rules.\*2 FCA Sec.241 specifies that law guardians

are ``counsel'' who ``help protect'' the children's interests.

The Appellate Division has said\*3 that the role of the law

guardian in disputed custody/visitation litigation has been to act

as champion of the child's best interest, as advocate for the

child's preferences, as investigator seeking the truth on

controverted issues or to recommend alternatives for the court's

consideration. The role of the law guardian appointed under the FCA

was to be the same as the role of independent counsel. Because FCA

Sec.242 requires law guardians to be attorneys admitted to practice

in New York they differ from guardians ad litem, who need not be

attorneys.\*4

In an earlier article\*5 we commented that inevitably the

question will arise: Who will foot the law guardian's bill? Since

the enactment of the 1993 rule, judges, including Supreme Court

judges, are routinely appointing law guardians in custody cases,

ordering forensic evaluations and directing one or both of the

parties to pay the legal fees of the law guardian and costs of the

forensic evaluation.

In many cases the judges are directing one spouse, often the

husband, to pay a retainer to the law guardian and pay him or her at

an hourly rate. This is particularly strange to most lawyers since

it is a huge departure from the past unwillingness judges have shown

in awarding advance retainers for counsel fees, pendente lite, to a

needy spouse.

Directing a Parent to Pay

The decision in Anonymous v. Anonymous,\*6 decided this month by

Justice Silberman of the Supreme Court, New York County, is a sign

of the times. The court granted a law guardian's motion for pendente

lite counsel fees and directed the father to advance a $15,000

retainer to a law guardian selected by the children with the further

authorization granted to the law guardian to enter judgment against

the father should he fail to pay the award.

The parties' children, dissatisfied with the guardian ad litem

appointed by the prior assigned judge, contacted the attorney after

seeing his name in a magazine. The attorney made application on

behalf of the children to be appointed as their law guardian. The

court granted the motion, appointed him as the law guardian and

ordered the father to pay the law guardians fee in the first

instance with a final determination as to a proper allocation of the

fee to be made by the trial court.

The law guardian then moved for a $25,000 retainer pendente

lite, and the father opposed the motion on the ground that the law

guardian was ``not acting as a law guardian pursuant to the Family

Court Act because he was not independently selected and since he is

not acting as a neutral evaluator.'' The father also argued that the

law guardian should be paid at the statutory rate designated for law

guardians rather than the rate he was billing for his services and

that he had not submitted a detailed breakdown of the time he spent.

It is hardly shocking that Justice Silberman confirmed that the

court has the authority to appoint the law guardian and that there

is no distinction between the role of a law guardian and the role of

an attorney individually selected by the children. Nor is it

surprising that the court rejected the father's argument that the

law guardian should be paid at the ``18-b statutory rate'' since 18-

b has no bearing on the law guardian's fees because he was not

appointed pursuant to the 18-B assigned counsel plan.

Eventually the courts will be confronted with the sobering

question of whether they actually have authority to direct a parent

to pay the fees of a law guardian, and if so, how and when. As we

see it, remedial legislation may be in order.

The Supreme Court is limited by the provisions of the FCA and

Judiciary Law, leaving hardly a pebble upon which to build an

argument that the court has the inherent power to award counsel fees

to law guardians. Likewise, the Family Court is a court of limited

jurisdiction whose statutory authority is strictly limited and

construed.\*7 Nor is redress simple. The Court of Appeals has held

that the Appellate Division cannot make substantive law (or

corrective laws for that matter) by enacting procedural rules.\*8

Once such awards are authorized, a procedure must be established

to provide the parties with the right to challenge the necessity for

and reasonableness of the fees, including the fixation of the

initial retainer. Law guardians should not be given greater rights

than those of the parties and their attorneys.

The Appointments

The statutory authority for the appointment of law guardians in

FCA Sec.243 (a) provides that OCA may contract with the legal aid

society for it to provide law guardians. FCA Sec.Sec.243 (b) and (c)

permit the appellate division to contract with any qualified

attorneys to serve as law guardians or to designate a panel of law

guardians for the family court. It provides that if the Appellate

Division proceeds under subdivisions (b) or (c), the law guardians

compensation is governed by Judiciary Law Sec.35 (3), which provides

that assigned counsel ``shall at the conclusion of the

representation'' receive compensation at a rate not exceeding $40

per hour for time in court, and $25 per hour for time out of court.\*9

The 18-b rates are the same, with the additional proviso that

compensation pursuant to FCA Sec.262 may not exceed $800. Judiciary

Law Sec.35 (3) also provides that no assigned counsel shall seek or

accept any fee for representing the person for whom he/she is

assigned without approval of the court, and whenever it appears that

``such person'' is financially able to obtain counsel or make

partial payment for the representation, the court may terminate the

assignment or authorize payment to such counsel.

In extraordinary circumstances the court may provide for

compensation in excess of the foregoing limits. Each claim for

compensation must be submitted for approval to the court which made

the assignment or appointment. After the claim is approved by the

court, it must be certified to the comptroller for payment by the

state, from the funds appropriated for that purpose.

The New York Constitution provides in Article VI Sec.1 that the

Supreme Court shall have ``general jurisdiction in law and equity.''

However, this refers only to the jurisdiction that we inherited from

England and the jurisdiction possessed by the supreme court of New

York colony on July 4, 1776.\*10 In England, matrimonial matters were

dealt with solely by ecclesiastical courts and were part of its

ecclesiastical law, which we never adopted.

Thus, jurisdiction of the courts of New York in matrimonial

actions is limited to such powers as are expressly conferred upon

them by statute.\*11 The power of the Supreme Court over matrimonial

matters is derived solely by virtue of statutory grants of

authority. The statutory authority for counsel fee awards and

expenses is found in DRL Sec.Sec.237, 238 and 240, which authorize

counsel fee awards and expenses to spouses in matrimonial actions

but not to law guardians or forensic experts.

notes

(1) DRL Sec.237 provides for awards of counsel fees and expenses

payable by one spouse to the ``other spouse.''

(2) See Seitz v. Drogheo (1967) 21 NY2d 181, 234 NE2d 209, and

Kagen v. Kagen (1968) 21 NY2d 532, 236 NE2d 475.

(3) Koppenhoefer v. Koppenhoefer, 159 AD2d 113 (2d Dept., 1990).

(4) See CPLR 1202.

(5) Brandes and Weidman, ``The Role of the Law Guardian,'' New

York Law Journal, July 26, 1994, p. 3, col. 3.

(6) NYLJ, Sept. 8, 1995, p.27, col.3, Sup Ct, N.Y. Co.

(Silberman, J.).

(7) Borkowski v. Borkowski, 38 AD2d 752; Kagan v. Kagan, 75 AD2d

644. NY Const., Art. 6, Sec.13.

(8) Gair v. Peck, 6 NY2d 97.

(9) Jud Law Sec.35 (7) provides, in part, that counsel will be

compensated in accordance with its provisions whenever the supreme

court appoints counsel in a proceeding over which family court might

have exercised jurisdiction if it had been commenced there or

referred there, under circumstances which, if the proceeding were

pending in family court, it would be authorized by FCA 249 to

appoint a law guardian.

(10) This jurisdiction was legislatively described in section 64

of the former Civil Practice Act.

(11) Caldwell v. Caldwell (1948) 298 NY 146, 152, 81 NE2d 60, 64;

Erkenbrach v. Erkenbrach (1884) 96 NY 456, 462; Walker v. Walker

(1898) 155 NY 77, 80, 49 NE 663, 664; Burtis v. Burtis, 1 Hopk Ch

557.; Ackerman v. Ackerman (1910) 200 NY 72, 93 NE 192; Griffin v.

Griffin (1872) 47 NY 134. Weicker v. Weicker (1967, 1st Dept) 28

AD2d 138, affd 22 NY2d 8, 237 NE2d 876; Seitz v. Drogheo (1967) 21

NY2d 181, 234 NE2d 209; Langerman v. Langerman (1952) 303 NY 465,

104 NE 857.

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