
LAW AND THE FAMILY

"Adopting Law Guardian Standards"

Joel R. Brandes

[New York Law Journal](#)

November 27, 2001

IN THE PAST, we commented in this column that the exercise of the court's discretion to appoint a law guardian for the children in some custody battles is often appropriate to safeguard their best interests. [FN1] We expressed our opinion that appointing a law guardian had become routine in contested custody cases, although it is not always necessary to do so when custody is an issue, since children are not parties to the action, there is no need for one where the children are old enough to express their opinion to the court, and the added cost of paying a third attorney, at rates similar to those of the parties' attorneys (in Supreme Court) has the effect of denying the average wage earner access to the courts. Moreover, no one had defined the role of the law guardian in custody cases. [FN2] Is he the attorney for the child, acting as a zealous advocate on behalf of his client, or the guardian of the child, who reports to the court and testifies at the trial?

Legislation and Case Law

We looked to Family Court Act 241, which defines the role of the law guardian by providing that the law "... establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court...." We concluded that the role of the law guardian is to zealously represent the child in the dispute between the parents and to ascertain and express the child's wishes to the court. We found support for this conclusion in the language of FCA 241, which specifies that law guardians are "counsel," who "help protect" the children's interests and that they may only be appointed if independent legal representation is not available to that minor. It is apparent from FCA 241 that the role of the law guardian was to be the same as the role of independent counsel since FCA 242 requires law guardians to be attorneys and it has been held by the Appellate Division that the relationship between the

law guardian and the children is one of attorney-client, to which the attorney-client privilege attaches. [FN3]

We also pointed out that case law supported our conclusion. In *Matter of Elaine M.*, [FN4] a neglect proceeding, the First Department stated that law guardians are "counsel" who "help protect" the children's interests. In *Koppenhoefer v. Koppenhoefer*, [FN5] the Second Department held that the Law Guardian "may 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 may serve to recommend alternatives for the court's consideration ..."

In *P.V.P.*, [FN6] Justice Rigler noted that there was no distinction between private attorneys retained to represent a child in a custody dispute and "court-appointed counsel who are called Law Guardians." All attorneys representing children must be guided by the same set of principles: "to represent their clients the children." In *Stein v. Stein*, [FN7] a custody proceeding, the Family Court denied the father's motion to disqualify the law guardian on the grounds that she was biased against him and that her representation of the child was incompetent. The court held that the law guardian is not to decide between the parents. She is to participate in the fact-finding aspect of the case by questioning parties and witnesses and must, in the dispositional phase, ascertain as much as possible and represent to the court her client's point of view, what the child wants and what, in her considered judgment, would be best for the child. "First and foremost the law guardian is a lawyer, and subject, of course to the Code of Professional Responsibility."

The failure of a Law Guardian to develop such a point of view, and to take an active role in the case, has been found by the Appellate Division to be a dereliction of duty. [FN8]

The Third and Fourth Departments have held that it is reversible error to proceed with a hearing in the absence of the Law Guardian. In *Blank v. Blank*, [FN9] a custody proceeding, a law guardian had been appointed for the children, but at the hearing the court was advised by the parties that they had "waived" a law guardian. The Third Department held that this was error and reversed the order on the law, directing that the matter be heard on remittitur by a different judge, stating that "A Law Guardian is appointed to protect the rights of children, not for the benefit of parents"

In *Miller v. Miller*, [FN10] the Fourth Department held that Family Court erred in commencing the fact-finding hearing in the Law Guardian's absence. This was clearly a case where the appointment of a Law Guardian was appropriate. The reasons for Family Court's decision to proceed without the Law Guardian were the Law Guardian's illness, the absence of any objection on the part of the parties or their attorneys and the court's commitment to complete the hearing in an expeditious manner. The Appellate Division held that the willingness of the parties to proceed without the Law Guardian was irrelevant as Family Court

appointed the Law Guardian to protect the rights of the children, and the parties, who were each well represented by counsel, and it had no authority to waive that protection on the children's behalf.

The 'Carbellaria' Case

Last year, in *Carbellaria v. Shumway* [FN11] the petitioner alleged on appeal, inter alia, that the Law Guardian's conduct was improper because he advocated a position contrary to the expressed wishes of his client. He contended that where the represented child is old enough to articulate his or her wishes, the Law Guardian is required to advocate for the result desired by the child and prohibited from interjecting an independent view of what would best meet the child's needs. The Third Department rejected this position. It stated that the Law Guardian is the attorney for the child and must take an active role in the proceedings. In that role the Law Guardian has the responsibility to represent the child's wishes as well as to advocate the child's best interest. Because the result desired by the child and the result that is in the child's best interest may diverge, Law Guardians should consider that the child's preference is just one factor the trial court will consider and, depending on the circumstances, "a Law Guardian may properly attempt to persuade the court to adopt a position which, in the Law Guardian's independent judgment, would best promote the child's interest, even if that position is contrary to the wishes of the child." In finding that find that the Law Guardian did not act improperly, the court placed particular emphasis on the fact that the child was 11 years old, had several neurological disorders, was less mature than average and capable of easy manipulation by adults.

Recently, the Statewide Administrative Judge for Matrimonial Matters promulgated a "Law Guardian Definition and Standards," which we have been advised, are only in effect in the First Department. [FN12] These rules, which define a Law Guardian and the role of the Law Guardian in matrimonial litigation, appears to comport with our attempt to define the role of the Law Guardian. Although the child is not a party to such an action the rules clearly indicate that the Law Guardian should act as any other attorney representing a litigant in a contested custody matter.

The rule defines a law guardian "as an attorney representing a child in a custody or visitation proceeding and in any appeals therefrom. It is the responsibility of the law guardian to act as an adviser to the child and to advocate for the child's position in the litigation." Since the Law Guardian is representing a person who is under a disability, she is directed to assess whether the child is impaired or unimpaired. Impairment is defined as a child's inability to make knowledgeable, voluntary and considered judgments or to work effectively with his or her attorney. In assessing some child's impairment, the Law Guardian is instructed to consider such factors as the child's age, level of maturity, developmental ability, emotional status, ability to articulate his/her desires and any other facts that impact upon the child's ability to make knowledgeable, voluntary and considered

judgments or to work effectively with his or her attorney. The assessment may also take into account factors external to the child including a parent's mental illness, substance abuse or domestic violence.

The Standards provide that the law guardian must advise the court of his or her conclusion as to the child's impairment and, if the child expresses a position, report to the court the child's stated position. He is directed to "advocate for the child's stated position if the law guardian, on his/her own or with the assistance of a mental health professional and after investigation and assessment of the situation, determines that the child is unimpaired." Thereafter, he is charged to "assist the court" in making its decision "by ensuring that relevant evidence is obtained and presented to the court, including evidence that otherwise might not be presented to the court, and by otherwise fully participating in the adjudicative process."

The Standards clearly indicate that the role of the Law Guardian is only to serve as the child's attorney, just as any other attorney for an adverse party. This is crystallized by the admonishments that "a law guardian shall not act as an advocate for any party other than the child," that he shall ask the court to assign additional counsel he discovers a potential or actual conflict in his or her representation of multiple children in the same family and that he "will act in a manner consistent with the Lawyers Code of Professional Responsibility." In the absence of counsel's permission a law guardian may not engage in ex parte communications with the court, may not communicate with the parties and may not act as a witness or submit any written reports to the court at any point during the proceedings or in any subsequent proceedings.

The Law Guardian is also directed not to "assume the role of social worker or mental health professional," but to seek the assistance of such professionals on behalf of the child when appropriate.

A Law Guardian may not participate in contested monetary issues raised in a matrimonial proceeding such as equitable distribution, maintenance and child support, except where relevant to custody and visitation determinations.

Conclusion

We welcome the promulgation by the Statewide Administrative Judge for Matrimonial Matters of uniform standards defining the role of the Law Guardian in custody cases and urge that these rules be adopted on a statewide basis.

Joel R. Brandes has law offices in Garden City and New York City. He co-authored the nine-volume Law and the Family New York 2nd Ed. and Law and the Family New York Forms (both published by West Group).

FN(1) See Brandes, "Re-examining the Role of the Law Guardian" The New York Law Journal, 10-24-2000, P. 3, Col. 1; Brandes, "Role of the Law Guardian," NYLJ, 6-27-2000, P. 3, Col. 1; and Brandes, "Law Guardian's Compensation," NYLJ, 7- 28-98, P. 3, Col. 1.

FN(2) See Schepard, "The Law Guardian: A Need for Statutory Clarification," NYLJ, 9-14-2000, P. 3, Col.1; Sobie, "Representing Child Clients : Role of Counsel or Law Guardian," NYLJ, 10-16-92, P.1, Col.3; Guggenheim, "Represented But Not Heard: Reflections on Legal Representation of Children," 59 NYULR 76 (1984),

FN(3) Bentley v. Bentley, 86 App Div 2d 926, 448 NYS2d 559 (3rd Dept., 1982); Matter of Scott L. v. Bruce N., 134 Misc 2d 240, 509 NYS2d 971, (Fam.Ct.,1986), noted that "guardian ad litem" is not statutorily defined, and that one need not be an attorney, while the Law guardian's role and functions are defined by FCA 241.

FN(4) 196 App Div 2d 439 , 601 NYS2d 481 (1st Dept., 1993).

FN(5) 159 App Div 2d 113, 558 NYS2d 596 (2d Dept., 1990).

FN(6)NYLJ, 11-10-92, P.29,Col.3,Sup.Ct., Kings Co. [Rigler,J.].

FN(7) 130 Misc 2d 609, 496 NYS2d 902 (Fam. Ct.,1985).

FN(8) Matter of Jasmine H., 88 AD2d 996.

FN(9) 124 App Div 2d 1010, 509 NYS2d 217 (4th Dept., 1986).

FN(10) 220 A.D.2d 133, 644 N.Y.S.2d 579 (3d Dept., 1996).

FN(11) 273 A.D.2d 753, 710 N.Y.S.2d 149 (3d Dept., 2000).

FN(12) They are available on the News page on our Web site at www.brandeslaw.com

11/27/2001 NYLJ 3, (col. 1)

END OF DOCUMENT