LAW AND THE FAMILY

Compensation of Law Guardian

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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." It has been said[1] 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 courts consideration. The role of the law guardian appointed under the Family Court Act (FCA) was to be the same as the role of independent counsel.

Since the adoption of this rule, Supreme Court judges have been routinely appointing law guardians in custody cases and directing one or both of the parties to pay the legal fees of the law guardian, which in many instances, are arbitrarily set by the court. 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, while ignoring a needy spouse's need for counsel fees pendente lite.

Although the courts have been confronted with the question whether they actually have the authority to direct a parent to pay the fees of a law guardian, no appellate court has addressed the issue squarely. Although the court rule authorizes the appointment of a law guardian by the Supreme Court, neither the rule nor the Domestic Relations Law (DRL) provides for the payment of his fees, and we believe that legislation is needed to authorize such awards.[2]

It has been generally held that a court has inherent authority to designate counsel to represent children in a custody case. In addition to this inherent power, there is statutory authority for the court to appoint law guardians under FCA §249, which 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 carried over to the Supreme Court before the enactment of the rule.[3]

Who Will Pay Law Guardians?

The question of who will pay the law guardian's fee is another matter. Until now, it has always been the obligation of the state. FCA §243 (a) provides that the Office of Court Adminstration may contract with the Legal Aid Society for it to provide law guardians. FCA §§243 (b) and (c) permit the Appellate Division to contract with qualified attorneys to serve as law guardians or to designate a panel of law guardians for the Family Court.

If the Appellate Division proceeds under subdivisions (b) or (c), the law guardians' compensation is governed by Judiciary Law §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. Rates for 18-b lawyers are the same, with the additional provison that compensation pursuant to FCA §262 may not exceed $800.

Judiciary Law §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. 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. We doubt that many cases arise where a child is "financially able" to make such a payment.

No Authority to Direct Payment

In an earlier article[4] we commented that there appeared to be no authority to direct the parties to foot the law guardian's bill.

Anonymous v. Anonymous,[5] decided in September 1995 was the first case to address this issue. The parties' children, dissatisfied with the guardian ad litem appointed by the prior assigned judge, contacted an attorney after seeing his name in a magazine, and he made application on their behalf to be appointed as their law guardian. The court granted the motion and ordered the father to pay the law guardian's 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. 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 ... 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.

The court held, without citation to authority, that it had the authority to appoint the law guardian and that there was no distinction between the role of a law guardian and the role of an attorney individually selected by the children. It rejected the father's argument that the law guardian should be paid at the "18-b statutory rate" since it found that 18-b has no bearing on

the law guardian's fees because he was not appointed pursuant to the 18-B assigned counsel plan.

Parenthetically, we note that Judiciary Law §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.

Several cases decieded by the Second Department appear to authorize such awards but do not state the authority on which the determination is based. In *Wolfson v. Wolfson,*[6] both parties appealed from an order of the Family Court, which awarded the law guardian a legal fee of $31,002.52 and found that the mother and father were
jointly and severally liable for it. The Appellate Division noted that the Family Court's determination regarding the law guardian's fee, which was apparently based upon a stipulation, was not improper, citing *Hughes v. Hughes*.

The Appellate Division held that the court's direction that the parents be jointly and severally liable for the fee was an improvident exercise of its discretion where the parties had previously stipulated that the mother would be responsible for two-hirds of the fee and the father would be responsible for one-third.

In *Cliento v. Cliento,*[7] an action for a divorce, the defendant appealed from an order of the Supreme Court, which awarded the law guardian legal fees of $3,900 and directed the defendant to pay half. The Appellate Division affirmed, stating that the determination of the Supreme Court was not improper, also citing *Hughes*. In *Hughes v. Hughes,*[8] an action for a divorce, the defendant appealed from an order of the Supreme Court, which awarded the law guardian legal fees of $6,000 and directed him to pay half of it. The appellate division affirmed, stating that "under the particular circumstances presented here, the Supreme Court's determination was not improper."

Incidents of Litigation

None of these cases address the long-time rule in New York that attorney's fees and expenses are incidents of litigation and may not be awarded to a party absent a statute or agreement.[9]

The First Department avoided the question in *Rotta v. Rotta*.[10] After the Office of Law Guardian declined to pay a law guardian's voucher, because a finding of indigency was never made and could not have been made, the Supreme Court made a discretionary award of $35,000 to the law guardian and directed the husband to pay it. The First Department held that the husband's challenge to the trial courts determination was not reviewable,

on the basis that the Court of Appeals held that such orders are essentially administrative in nature and are not amenable to judicial review.
In dicta, the First Department noted that even if the award was made independent of the statutory scheme, and subject to review by it, it would find that the award was an appropriate exercise of the court's discretion.
And *Stephens v. Stephens,*[11] it affirmed judgments totaling $20,600 in favor of the law guardian for her fees, finding the issues raised on appeal unpreserved for review. In dicta it stated that it was proper to direct the parties to pay the guardian's fee in excess of the rates in Judiciary Law §35(3) and that the fee could be enforced though DRL §244 (citing *Rotta*, supra).
Last month in *Matter of Lynda A.H.*, the Fourth Department appears to have addressed the issue when it held that the Family Court exceeded its statutory authority in directing the parties to pay the legal fees and expenses of the law guardian. It pointed out that the Family Court is a court of limited jurisdiction and may not exercise powers beyond those granted to it by statute.
The court acknowledged that the FCA provides that "law guardians shall be compensated and allowed expenses and disbursements in the same amounts established by [Judiciary Law §35 (3)]."[12] It noted that Judiciary Law §35 (3) provides that assigned counsel in original proceedings shall be compensated at the conclusion of his or her representation at a rate not exceeding $40 per hour in court and $25 per hour out of court up to a maximum of $800, unless extraordinary circumstances are shown, and that [a]ll expenses for compensation and reimbursement under (Judiciary Law §35) shall be a state charge to be paid out of funds appropriated to the administrative office for the courts for that purpose."
The Fourth Department concluded that the Family Court had no authority to compel the parties to pay the law guardian's legal fees and expenses.
Unfortunately, because of the wording of *Lynda A.H.*, some courts may construe it as merely holding that the Family Court has no statutory authority to direct the parties to pay the law guardian′s fees.
We urge the Legislature to amend the Judiciary Law to make it clear that its provisions for the payment of law guardians′ fees are applicable to Supreme Court actions as well as Family Court proceedings. The cost of obtaining justice in the Supreme Court should be no greater than obtaining it in the Family Court. In the event the Legislature chooses to shift this burden from the state to the public, a uniform statewide fee schedule should be established for the payment of law guardians′ fees that is within the financial means of the parties to pay.
If a fee schedule is not adopted, a procedure should be established to enable the parties to challenge the hourly rate, necessity for the services and the amount of the initial retainer paid to the law guardian. Children should not be denied the right to meaningful representation, nor should the parties be compelled to expend their life savings or deplete their marital estate in order to obtain justice.

Notes

(1) *Koppenhoefer v Koppenhoefer*, 159 AD2d 113 (2d Dept., 1990).
(2) The Court of Appeals has held in *Gair v. Peck,* 6 NY2d 97*,* that the Appellate Division cannot make substantive law by enacting procedural rules. Any rules they adopt must be consistent with existing legislation *A.G. Ship Maintenance v. Lezak* 69 NY2d 1.
(3) See *Seitz v. Drogheo* (1967) 21 NY2d 181; *Kagen v. Kagen* (1968) 21 NY2d 532.
(4) Brandes and Weidman, "The Role of the Law Guardian," *New York Law Journal,* July 26, 1994, page 3, col. 3.
(5) *NYLJ,* Sept. 8, 1995, page 27, col. 3, Sup. Ct., NY Co., (Silberman, J.); See also *Colangelo v. Colangelo*, NYS2d, 1998 WL 300910 (NY Supp); *C.E. v. P.E.*, *NYLJ,* July 14, 1998, page 26, col. 4, Sup. Ct, N.Y. Co. (Gische, J.).
(6) 228 AD2d 594 (2d Dept., 1996).
(7) 225 AD2d 648 (2d Dept., 1996).
(8) 224 AD2d 389 (2d Dept., 1996); See also *Patek v Patek*, 239 AD2d 327 (2d Dept., 1997); *Pasternack v. Pasternack*, __ AD2d __ , 669 NYS2d 940 (2d Dept., 1998); *Gadomski v Gadomski*, __ AD2d __ , 664 NYS2d 886 (3d Dept., 1997).
(9) *City of Buffalo v. Clement Co*, 28 NYS2d 241.
(10) 233 AD2d 152 (1st Dept., 1996).
(11) *NYLJ,* April 30, 1998, page 26, col. 4.
(12) Citing FCA §245 [c].
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