LAW AND THE FAMILY

"Re-Examining The Role of the Law Guardian"

Joel R. Brandes

New York Law Journal

October 24, 2000

IN OUR JUNE column, we pointed out that the appointment of a law guardian in custody battles is often appropriate to safeguard the best interests of children because a competent law guardian may offset the adversarial character of the dispute and focus attention upon the child's best interests. We noted that appointment of a law guardian has become routine in contested custody cases, although no one has yet clearly defined the role of the law guardian in such cases.

Having the opportunity to observe judges, attorneys and law guardians in court on a daily basis, it appears to us that many law guardians in custody cases are assuming the traditional role of an attorney for a party, rather than the attorney for the subject of the proceeding. One possible reason law guardians are taking on this expanded role is that many judges have been routinely directing the parties to pay the legal fees of the law guardian, set at an arbitrary, hourly rate, without affording them a hearing, at which the necessity for the services, reasonableness of the fees and the parties financial circumstances are considered.

Many judges are sua sponte directing the parties to pay a retainer to the law guardian. These directives ignore the limitation imposed upon law guardian compensation, by Judiciary Law 35 (3), to the amount paid by the state. Another reason for this expanded role is because the Legislature has failed to define it.

For many years, the appointment of a law guardian has been mandatory in certain Family Court proceedings, such as juvenile delinquency, pins and child protective proceedings. [FN1]

Law Guardian Appointment

Family Court Act 249(a) vests the court with discretion in custody and visitation proceedings to appoint a law guardian. It authorizes the court "in any proceeding in which the court has jurisdiction," to appoint a law guardian to represent the child, when, in the opinion of the family court judge, such representation will serve the purposes of the act, if independent legal counsel is not available to the child. [FN2]It has been held that the Supreme Court has inherent power and authority to designate counsel to represent children in custody cases. [FN3]

The general rule is that the law guardian's appointment ends when the proceeding in which she was appointed is terminated. However, there are statutory exceptions to this rule. FCA 1120(b), enacted in 1988, provides for the continuation of the law guardian's appointment, after the proceeding terminates, without further court order or appointment where either the law guardian or a party to the original proceeding files a notice of appeal. FCA 1120(c) authorizes an appellate court to appoint a law guardian to represent a child in an appeal in a proceeding originating in the family court where a law guardian was not representing the child at the time of the entry of the order appealed from and when independent legal representation is not available to such child. Notably, FCA 1120(e) provides that law guardians appointed or continuing to represent a person under 1120 "shall be compensated in the same manner" provided by 35 of the judiciary law. Another exception is FCA 1016, added in 1990, which requires the court to appoint a law guardian to represent a child who has been allegedly abused or neglected, and provides for the continuation of the appointment under certain circumstances.

No other provision of law provides for the continuation of the law guardians' appointment after the custody proceeding terminates.

Recently, in Davis v. Davis, [FN4] the parties divorce judgment incorporated a stipulation providing that the parties would share custody and have equal time with their two children. The plaintiff subsequently moved to modify the shared custody schedule and the court appointed attorney Kadish as law guardian for the children in connection with that motion. The parties resolved plaintiffs' motion by a stipulation rescheduling the previously ordered shared custody schedule, which was incorporated into an order that modified the judgment of divorce.

Three years later Plaintiff contacted Kadish and informed him that the children no longer wished to reside with defendant. After speaking with the children, Kadish informed plaintiff that he would "require a $1,500 retainer to represent the children." Plaintiff paid Kadish $1,500 and a retainer agreement was signed.

By affidavit reciting his appointment as law guardian in the previous modification application, Kadish obtained an order directing defendant to show cause why an order should not be made, inter alia, modifying custody "from joint legal and physical custody to sole custody for the plaintiff." Kadish did not disclose in his affidavit that plaintiff had retained him to represent the children.

Defendant cross-moved for sole custody and to remove Kadish as law guardian on the ground that he was biased in favor of plaintiff. Plaintiff subsequently moved on his own behalf for sole custody, asserting that "[y]our Deponent freely admits to sending a check to Mr. Kadish in the amount of $1,500.00 during the Winter of 1997/98 as he was continuing to provide services and a needed outlet for my children, and it was unfair that he should do so without being compensated." He further asserted, "I have had minimal if any contact with Mr. Kadish other than sending him a fax or two with respect to certain incidents."

The Supreme Court refused to remove Mr. Kadish as law guardian. Thereafter, plaintiff paid an additional $1,500 to Mr. Kadish in anticipation of trial. After plaintiff testified at a deposition concerning the facts of his retention and payment of Mr. Kadish, defendant moved unsuccessfully to "reargue" her cross-motion seeking his removal. The court denied that motion and, following a plenary hearing, awarded plaintiff sole custody. It also directed that plaintiff and defendant each pay half of the unpaid balance of the law guardian's legal fees.

Appellate Division in 'Davis'

The Appellate Division held that Supreme Court should have granted renewal of the cross-motion and removed Kadish as law guardian before conducting the hearing. It held that a law guardian who has been retained and paid by one of the contesting parents "is indelibly cast, either actually or ostensibly, as partial to the parent who hired him or her. Both the best interests of the children and principles of fundamental fairness dictate that such practice not be countenanced." Children may be represented "by counsel to whom they are merely referred by a parent * * *. Parents may not, however, retain counsel for their children or become involved in the representation of their children because of the appearance or possibility of a conflict of interest or the likelihood that such interference will prevent the children's representation from being truly inde-pendent." It found that plaintiff's retention and payment of the law guardian created an unacceptable actual or ostensible bias in favor of plaintiff.

While the law guardian was removed and the order reversed on conflict of interest grounds, the Fourth Department pointed out in a footnote that it did "not address the apparent absence of either jurisdiction or standing in connection with the order to show cause" obtained by Kadish. [FN5] Davis draws our attention to the attempt by the "law guardian" to commence a custody modification proceeding on behalf of the children, and the "apparent absence of jurisdiction and standing" on his part to do so. It also calls into question the meaning of the brief memorandum decision of the First Department in Matter of B., [FN6] which affirmed an Order of the Family Court, in a child custody proceeding, that denied respondents' motion to dismiss the proceeding on the ground that the child's law guardian lacked standing to bring it. In the memorandum the court stated that in " its dual role as advocate for and guardian of the subject child" the law guardian "clearly has an interest in the welfare of the child sufficient to give it standing to seek a change of custody." We suspect that the court considered the law guardian a "next friend" and did not grant the child "standing" to bring a custody proceeding through its law guardian.

What 'Davis' Missed

We believe that had the Davis court addressed the question of either jurisdiction or standing in connection with the order to show cause obtained by Kadish it would have concluded that neither existed.

The best interests of the child are the objective of custody and visitation proceedings, which are governed by statute. The child does not have standing to bring a custody proceeding, on his own or by his attorney. DRL 70(a) specifically grants standing to "either parent" to "apply to the supreme court for a writ of habeas corpus" regarding adjudication of custody and visitation matters. DRL 240 is silent as to who may petition the court in a custody dispute, but the focus is on "parents." FCA 651(b) is also silent as to precisely who has standing to petition. The child is not a party to the action or proceeding and is not entitled to any relief. She is the subject of the action and obtaining her custody or visitation with her is the object of the action. The child is not "a necessary party" who "ought to be joined if complete relief is to be accorded between the parties to the action or who might be inequitably affected by a judgment in the action" within the meaning of CPLR 1001. Nor is he a person who may assert any right to relief with either the plaintiff or defendant, who may be joined in the discretion of the court, within the meaning of CPLR 1002.

Although FCA 249(a) gives the Family Court Judge broad discretion to appoint a law guardian in "any proceeding in which the court has jurisdiction," a proceeding must be pending. Thus, the law

guardian may not act after the custody proceeding is ended. According to the Court of Appeals, there is "no authority to appoint a guardian ad litem after the proceeding [is] ended, in the absence of extraordinary circumstances" [FN7] and this rule should apply with equal force to a law guardian.

In Blauvelt v. Blauvelt, [FN8] the Supreme Court directed the continuation of the appointment of the law guardian in any future proceedings. The Appellate Division reversed and held that since the appointment of a law guardian in a custody proceeding is discretionary the court exceeded its authority in appointing the law guardian for any and all future proceedings involving the parties' child. The determination as to whether a law guardian will be necessary in a future proceeding should be made at the time of the proceeding. Blauvelt teaches us that custody and visitation proceedings terminate when an order is made determining the proceeding, and that the law guardian's authority, as well as the authority of the court to appoint a law guardian ceases upon the entry of the order. [FN9]

We believe that the role of the law guardian is to represent the child, who is the subject of the dispute between the parents, and to express the child's wishes to the court, not to assume the role of an adversary. In such a situation the role of the law guardian should be similar to that of a mediator rather than a litigator.

FN(1) See FCA 249(a)

FN(2) Supreme Court has the same power as that of Family Court to appoint a law guardian. See, N.Y. Const., art. VI, 7[a]; Kagen v. Kagen, 21 N.Y.2d 532, 536, 289 N.Y.S.2d 195, 236 N.E.2d 475.

FN(3) 22 NYCRR 202.16(f) also provides that the court "may appoint a law guardian for the infant children, or may direct the parties to submit to the court, a list of suitable law guardians for selection by the court."

FN(4) 269 A.D.2d 82, 711 N.Y.S.2d 663) (4th Dept., 2000).

FN(5) Citing Blauvelt v. Blauvelt, infra.

FN(6) 227 AD2D 315, 642 NYS2D 685 (1st Dept., 1996).

FN(7) Matter of D. Children, 60 N.Y.2d 838, 458 N.E.2d 383, 470 N.Y.S.2d 142 (1983) affirming 90 A.D.2d 348, 456 N.Y.S.2d 1002 for the reasons stated in the opinion at the Appellate Division.

FN(8) 219 A.D.2d 694, 631 N.Y.S.2d 760) (2d Dept., 1995).

FN(9) To the same effect is Matter of D. Children, 90 A.D.2d 348, 456 N.Y.S.2d 1002 (4th Dept.,1982) aff'd on opn of Appellate Division, 60 NY2d 838, 470 NYS2d 142 where the Appellate Division held that a guardian ad litem appointed in connection with a proceeding to approve the voluntary transfer instrument had no authority to act after the instrument was approved, because the approval of the instrument ended the proceeding.

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 and Law and the Family New York Forms (both, published by West Group).

10/24/2000 NYLJ 3, (col. 1)

END OF DOCUMENT