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Law Guardian or Guardian Ad Litem?

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Every once in a while we read a decision in which the Supreme Court has appointed a guardian ad litem for a child in a custody case. Such appointments are unusual, since the rights and obligations of the guardian *ad litem* differ from those of a law guardian. What are the differences, and when is appointment of one or the other appropriate?

The Law Guardian

A law guardian is an attorney who is appointed to ensure that the best interests of the child, who is the subject of the litigation, are served, while the guardian *ad litem* is a person appointed to protect the rights and interests of a party to the action, who is under a disability. For many years, the appointment of a law guardian has been mandatory in certain Family Court proceedings, such as juvenile delinquency, PINS (Persons in Need of Supervision) and child protective proceedings. *See* FCA 249(a).

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. The Supreme Court has the same power as does Family Court to appoint a Law Guardian. *See* N.Y. Const., art. VI, § 7[a]; *Kagen v. Kagen*, 21 N.Y.2d 532. It has been held that the Supreme Court has inherent power and authority to designate counsel to represent children in custody cases. (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.")

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 Family Court for custody. 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 she 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. The Court of Appeals has held that there is "no authority to appoint a guardian ad litem after the proceeding [is] ended, in the absence of extraordinary circumstances". *Matter of D. Children*, 60 N.Y.2d 838 (1983) affirming 90 A.D.2d 348 for the reasons stated in the opinion at the Appellate Division. This rule should apply with equal force to a Law Guardian.

It appears that, unlike a guardian *ad litem*, the role of the law guardian is to represent the child, who is the subject of the dispute between the parents, rather than a party to the action who is under a disability, and to express the child's wishes to the court, not to assume the role of an adversary.

The "First Department Standards for Law Guardians" define 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 advisor to the child, and to advocate for the child's position in the litigation. The Law Guardian shall assess whether the child is impaired or unimpaired. Impairment is a child's inability to make knowledgeable, voluntary and considered judgments or to work effectively with his/her attorney." The standards provide that assessment of impairments by the law guardian shall include consideration of 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. Assessment of a child's impairment may also take into account factors external to the child, including a parent's mental illness, substance abuse or domestic violence.

The law guardian is required to advise the court of his/her conclusion of impairment and, if the child expresses a position, report to the court the child's stated position. Thereafter, the role of the law guardian is to assist the court in making an informed decision in the best interests of the child by ensuring that relevant evidence is obtained and presented to the court, including evidence that otherwise might not be presented, and by fully participating in the adjudicative process. The law guardian is directed by the rules 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. The standards also provide that a law guardian for a child shall 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 Guardian *Ad Litem*

Article 12 of the Civil Practice Law and Rules authorizes the court to appoint a guardian *ad litem* for any person, if the person before the court is under a disability. A guardian *ad litem* may only be appointed for a party to an action. He or she may be appointed for the child in a PINS proceeding or a juvenile delinquency proceeding. *See* FCA 741. In contrast, Family Court Act 249 and 22 NYCRR 202.16 of the court rules both authorize the court, in its discretion, to appoint a law guardian for a child in a custody case although the child is not a party to the action. The Law Guardian must be an attorney.

Neither the Family Court Act nor the court rules authorize the appointment of a guardian *ad litem* for a child who is not a party to the action. A guardian *ad litem* may be appointed for several different classes of persons, including infants and other parties under a disability. CPLR 1201. For example, such a person might be aged, frail, impaired, under the influence of alcohol or other substances, disabled because of a stroke, suffering from a debilitating physical or mental illness, missing, unknown, unborn or in jail. A guardian *ad litem* is appointed for various types of parties under disability pursuant to CPLR 1201 including "an adult incapable of adequately prosecuting or defending his rights," which can and does include a very large number of people with different types of disabilities, some of which may only be temporary.

CPLR 1201 refers to several types of parties who are required to appear by a guardian *ad litem*: 1) an infant who has no guardian of the property, parent or other person or agency having legal custody, or adult spouse with whom the infant resides; 2) an infant or person judicially declared to be incompetent, or conservatee if the court directs because of a conflict of interest or for other cause; or 3) an adult incapable of adequately prosecuting or defending his/her rights.

When a guardian *ad litem* is appointed, his or her authority relates only to the litigation and controversy before the court. The guardian *ad litem's* responsibility is to protect the rights and interests of a disabled individual who is a party to the litigation. The guardian *ad litem* must report to the court what he or she believes to be in the ward's best interests, whether or not it coincides with the wishes of the ward. *See Matter of Aho*, 39 N.Y.2d 241 (1976). In this respect the position of the guardian *ad litem* differs from that of an attorney hired by the ward, as the attorney hired by the ward must follow his client's subjective wishes, if proper, whether or not they are in that client's best interests

It was held in *Anonymous v. Anonymous*, 3 AD2d 590 (2d Dept. 1957), that "[t]he appointment of such a guardian [*ad litem*] would of course in no way amount to an adjudication of incompetency but would merely be a determination of the fact that the state of the record indicates a necessity for the court to intervene for the party's protection." (*See, W. v. M.*, NYLJ, 7/28/97, p. 25 (Sup. Ct. N.Y. Cty.), where the court concluded that it could appoint a CPLR 1201 guardian *ad litem* without medical documentation because no formal adjudication of incompetence had been rendered.)

Court Appointment

The court may appoint a guardian *ad litem* at any stage in the action, upon its own initiative or upon the motion of any one of several possible designated persons, including a "friend" or any other party to the action. The guardian *ad litem* is appointed to protect the rights and interests of the person under disability involved in litigation. He or she should investigate and write a report advising the court about what is in the best interests of the person (even if this is not what the person wants).

Party under Disability

If a party under disability is involved in litigation, the disabled party (whether as plaintiff or defendant) may not appear by an attorney, but must appear by an authorized person or a guardian

ad litem. A party under a disability within the meaning of CPLR 1201 cannot appear by an attorney. CPLR 321(a). See *Williamson v. Alleyne*, NYLJ, 3/27/95, p. 25 (Sup. Ct. Suffolk Co.); *Caruso v. Caputo*, 143 AD2d 795, 533 NYS2d 493 (2d Dept. 1988); *Soybel v. Gruber*, 132 Misc.2d 343 (Civ. Ct. N.Y. 1986); *Kushner v. Mollin*, 144 AD2d 649 (2d Dept. 1988); *DeSantis v. Bruen*, 165 Misc.2d 291 (Sup. Ct. Suffolk Cty. 1995).

If an attorney for a party knows or believes that a party is under a disability, he or she should take steps to see that a guardian *ad litem* is appointed. If one party knows that another party is under a disability, this fact must be brought to the court's attention for the court to make inquiry and determine whether a guardian *ad litem* should be appointed.

CPLR 1204 provides that no default judgment is valid against any party for whom a guardian *ad litem* is needed, unless the guardian *ad litem* is appointed and served. *New York Life Ins. Co. v. V.K.*, 1999, 184 Misc.2d 727; *State Bank of Albany v. Murray*, 27 A.D.2d 627 (3 Dept. 1966); *Wiberg v. Wiberg*, 1955, 1 Misc.2d 431 (1955). The failure to appoint a guardian *ad litem* makes the judgment void or voidable, depending upon whether the summons was or was not properly served on the disabled party pursuant to statute in order to obtain jurisdiction over that person. *Greenberg v. Schilb*, 192 Misc. 961 (1947).

Requirements for Appointment

The only requirement for the appointment of a guardian *ad litem* is that the court conclude the party is incapable of adequately protecting his or her rights (in the action or proceeding before the court), based upon the motion of a party or on the court's own initiative, which may include the court's observation of the litigant. The court has wide latitude in making such appointment and may exercise its discretion at any stage in the proceeding without the necessity of any formal adjudication of incompetency. CPLR Rule 1202 provides that the court in which an action is triable may appoint a guardian *ad litem* at any stage in the action upon the motion of an infant party if he or she is more than 14 years of age; or on motion of a relative, friend or a guardian, committee of the property, or conservator; or on motion of any other party to the action if a motion has not been made within 10 days after completion of service. An order appointing a guardian *ad litem* is not effective until a written consent of the proposed guardian has been submitted to the court, together with an affidavit stating facts showing his or her ability to answer for any damage sustained by his negligence or misconduct. CPLR 1202(c). See, e.g., *Application of Weingarten, supra*, 94 Misc.2d at 791 (pro forma allegations of financial responsibility will not suffice; affidavit must show present income, assets and liabilities). Except in Surrogate's Court (see SCPA § 404), a guardian *ad litem* need not be an attorney. *Bolsinger v. Bolsinger*, 144 A.D.2d 320 (2d Dept. 1988).

In *W. v. M.*, NYLJ, 7/28/97, p. 25 (Sup. Ct. N.Y. Cty.), an action for a divorce, Justice Eileen Bransten found that "the powers of a CPLR 1201 guardian *ad litem* are ... necessarily limited by the continued presumption of defendant's mental competency for all purposes other than defendant's ability to properly address and litigate the matters at hand." Justice Bransten further found that "[w]hile a CPLR 1201 guardian *ad litem* cannot force defendant to comply with court orders, defendant should be represented by an attorney who is not obligated to respond to defendant's ever-changing and irrational whims. In serving defendant's best interests, the

appointed guardian ad litem shall exercise his independent professional discretion as he undertakes the difficult task of representing a defendant who is largely self destructive." The decision points out that a guardian ad litem is supposed to recommend and report on a "best interests" approach even if it is not what the person might want.

SCPA § 404(1) provides that a guardian *ad litem* shall be an attorney admitted to practice in New York. Before entering upon his duties he must file a consent to act and, unless he has previously done so, a statement of no interest adverse to or in conflict with the person under the disability. He must file an appearance and take such steps with diligence as deemed necessary to represent and protect the interests of the person under disability. He must file a report of his activities together with his recommendation upon the termination of his duties or at such other time as directed by the court.

FCA § 741 provides that in a proceeding and at the commencement of any hearing under article 7, the court shall appoint a law guardian and shall, unless inappropriate, also appoint a guardian *ad litem* for the respondent. At any hearing under article 7, the court must also, unless inappropriate, appoint a guardian *ad litem* who shall be present at such hearing and any subsequent hearing.

Even the Compensation Schemes Differ

CPLR § 1204 provides that a court may award a guardian *ad litem* reasonable compensation for his or her services. It may require that the award be paid by any other party, or from any recovery had on behalf of the person whom the guardian represents, or from the other property of the person whom the guardian represents. A statutory prerequisite to an order allowing compensation is the submission of an affidavit by the guardian ad litem, or his or her attorney, documenting the services rendered, so as to enable the court to determine the value of the services provided. *See, e.g., Bolsinger v. Bolsinger*, 144 A.D.2d 320 (2d Dept. 1988) (compensation must be fixed with due regard to responsibility, time and attention required in performance of guardian's duties, results obtained, and availability of funds).

In contrast, the courts have held that although there is no statute authorizing the court to award a Law Guardian legal fees, there is inherent authority to direct the parties to the custody proceeding to pay the fees of the Law Guardian. *Rotta v Rotta*, 233 AD2d 152 (1st Dept.1996). It has also been held that a party has a right to a hearing to challenge the reasonableness of the fee awarded to a Law Guardian. For instance, in *Matter of Plovnick v. Klinger*, No. 2003-00661, 2003 WL 23695381 (N.Y.A.D. 2 Dept.) the Appellate Division, Second Department, held that Family Court could depart from the public payment scheme for assigned law guardians which is established by the judiciary law and that where parents have sufficient means, they may be directed to pay such fees. It noted that where the court has elected to exercise its authority to direct one or both parents to pay the law guardian's fees, it may establish a reasonable hourly fee that exceeds the statutory rates set forth for the representation of indigent parties in Judiciary Law 35(3). However, if a parent who has been directed to pay a fee contests a law guardian's claims relative to the time expended and the reasonable value of the services provided, he or she should be afforded a hearing on this issue. The decision conflicts with that of the Fourth Department in *In Re Lynda A.H. v. Diane T.O.*, 243 A.D.2d 24, which held that because family

courts are courts of limited jurisdiction, their ability to award compensation is capped by the Judiciary Law, and that the fees of Law Guardians should be paid pursuant to the provisions of the Judiciary Law.

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