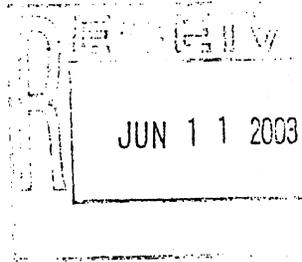


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June 10, 2003

John E. Finnerty, Esq.
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Mack-Cali Corporate Center
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Re: Subcommittee – Custody & Parenting Time

Dear John:

You have asked me to consider and report on the issues pertaining the roles of law guardians and guardian ad litem for children in private custody and parenting time matters. In doing so I have considered the research previously done by the committee members and my own research.

The Court's appointment of law guardians and guardians ad litem is permitted by N.J.S.A. 9:2-4. The statute in pertinent part states:

...The court, for good cause and upon its own motion, may appoint a guardian ad litem or an attorney or both to represent the minor child's interest. The court shall have the authority to award a counsel fee to the guardian ad litem and the attorney and to assess that cost between the parties to the litigation... N.J.S.A. 9:2-4(c).

In 1989 the New Jersey Supreme Court, with input from the Supreme Court's Family Practice Committee, adopted New Jersey Court Rule 5:8A and B, Appointment of Counsel for the Child and Appointment of Guardian Ad Litem respectively. See attachment A for the text of Rule 5:8A and 5:8B as amended in July 2000.

The Rules, comments and case law reveal fundamental distinctions between the counsel for the child, also known as law guardian, and guardian ad litem: The role of the guardian ad litem is very specifically articulated, anyone can be appointed a guardian ad litem for the child. In fact, there are no guidelines as to what qualities, training or education a guardian ad litem needs in order to perform the role of guardian ad litem. The comments however suggest that if a certain guardian ad litem can be also qualified as a needed expert in that case, then that particular guardian should be appointed. The guardian ad litem "represent[s] the best interest of the child or children" and his or her services are rendered "to the court on behalf of the child". The guardian ad litem must prepare "a written report" to the court and is an independent fact finder, investigator and evaluator as to what furthers the best interest of the child(ren). The guardian ad litem is thus a witness and as the rule provides "shall be available to testify and be subject to cross-examination".

The guardian ad litem is empowered by rule to interview "the children", "the parties" and "other persons possessing relevant information". He/she may "confer with counsel", "obtain relevant documentary evidence" and "confer with the court, on notice to counsel." The guardian ad litem may obtain the "assistance of independent experts" and the assistance of "a lawyer for the child", on leave of court. The guardian ad litem's involvement ends "on the entry of a Judgment of Divorce or an Order terminating the application for which the appointment was made, unless continued by the court. The guardian ad litem has no obligation to file a notice of appeal from a Judgment or Order or to participate in an appeal filed by a party".

The role of the counsel for the child /law guardian is somewhat more diverse. It is clear that the law guardian must be an attorney licensed to practice law in the State of New Jersey. As the child's attorney the law guardian takes an active part in the hearing and employs all methods of witness examination necessary but is not himself or herself a witness at the hearing. ". The law guardian duties extend to the appeals process, if an appeal is warranted.

In Matter of the Adoption of a Child by E.T. and T.T., 302 N.J. Super 533 (1997) the Court described the role of the law guardian as a zealous advocate for the client. By contrast the Court announced the role of the guardian ad litem as assisting the court in its determination of the child's best interest. In Matter of M. R., 135 N.J. 155 (1994), in the context of appointed counsel for an incompetent, the court elaborated on the distinctions between the law guardian and the guardian ad litem, it stated;

... In sum, several reasons support the distinction between an attorney and a guardian ad litem for an incompetent. First, the attorney and guardian ad litem may take different positions, with the attorney advocating a result consistent with the incompetent's preference and the guardian urging a result that is different but in the incompetent's best interests. Second, the attorney and guardian may differ in their approaches. When interviewing interested parties, the attorney for an incompetent should proceed through counsel, but often a guardian ad litem may communicate directly with other parties. Finally, a guardian may merely file a report with the court, but the attorney should zealously advocate the client's cause. Id at 175.

Interestingly the official comments state that attorneys appointed in abuse and neglect and termination cases should limit their role as counsel to the child under R. 5:8A, and not act in the capacity of a guardian ad litem under R. 5:8B

Rule 5:8A itself assigns duties to the law guardian which conflict with a strict attorney /client relationship and tend to confuse the standards with those of the guardian ad litem. The body of the Rule itself instructs the court to appoint counsel for the child when the trial court

concludes that a child's **best interest** is not being sufficiently protected by the attorneys for the parties. Further, in the comments to the Rule counsel for the child, the law guardian, is hailed as and independent legal advocate for the "**best interest of the child**"

A similar duality in the law guardian's role is seen in the law of the State of New York. The Family Court Act of 1970, defines the dual role of the law guardian as "counsel [1] to help protect the minor's interest and [2] to help them express their wishes to the court." Family Ct. Act, Sec. 241. In the Matter of Apel, 409 N.Y.S. 2d 928 (1978) the court found that the law guardian must act as both advocate and a guardian. By contrast New York courts assume that a guardian ad litem will operate on the best interest of the child. Marquez v Presbyterian Hospital, 608 N.Y.S. 2d 1012 (1994).

In their publication *Representing Children: Standards for Attorneys & Guardians Ad Litem in Custody or Visitation Proceedings*, the American Academy of Matrimonial Lawyers (hereinafter "AAML") sets forth their view that as an attorney appointed to represent a child, the focus is not "the best interest of the child" but rather the child's perspective and desires. According to the AAML an attorney appointed to represent a child must advocate for the goals set by that client, regardless of that attorney's personal values surrounding the outcome. This role is in contrast to that of the guardian ad litem, who must communicate the preferences of the child to the court but is not required to advocate for the client's personal preferences. The AAML categorizes its standard for law guardians and guardian ad litem as follows;

1. Counsel for children who are empowered to direct the role of counsel, referred to as an unimpaired client;
2. Counsel for children lacking the capacity to direct the role of counsel, referred to as the impaired client.
- 3 Guardian ad Litem (regardless of the child's capacity)

The AAML recognizes that counsel for the unimpaired child has a role similar to that of counsel for an unimpaired adult. The unimpaired child client therefore has the right to set the

goal of the representation. In contrast an impaired child is deemed as unable to set goals for the outcome. In this regard, the counsel of an impaired child cannot advocate a position for the outcome of any contested issues or the proceedings in general. Impairment depends on the child's age, degree of maturity, intelligence, level of comprehension, ability to communicate and other similar factors. It is up to counsel for the child to make the threshold judgment as whether a client is impaired or unimpaired. In New York the idea of levels of capacity dictating the role of the law guardian was given recognition in Matter of Scott L. v Bruce N., 509 N.Y.S. 2d 971 where the Court acknowledged that when a case involves very young children, there is virtually no distinction between the role of a law guardian and guardian ad litem.

The New Jersey Supreme Court adopted R. 5:8A and B before the release of the AAML standards. While addressing many of the AAML standards in the formulation of the R. 5:8A and B, it also differed from them on several key issues. The New Jersey Rules make no distinction between an impaired an unimpaired child, and do not require that counsel for the child or the law guardian make a determination on this issue. Most notably, the AAML takes the position that counsel for the unimpaired child is to follow the "child client's instructions whether in his or her own best interest..." In contrast the New Jersey Rule calls for the child's counsel to act as an independent legal advocate for the best interest of the child. This statement is problematic and goes to the very hart of the matter. Is the role of counsel for the child in New Jersey a client centered one as required by the ethics and professional practice rules, or somewhat lesser hybrid of the role of the traditional advocate and the role of the guardian ad litem? Are the appointments interchangeable and therefore a duplication of services?

Furthermore, other than the requirement that counsel for the child be an attorney licensed to practice law in the State of New Jersey R. 5:8A and B offer little instruction on the criteria for selection of law guardians and guardians ad litem or as to which is a more necessary

appointment. The comments to the Rule 5:8A provide that, if the appointment is for legal advocate, then counsel should be appointed.” See also Wilke v Culp, 196 N.J. Super. 487, 483 A.2d 420 (App. Div. 1984), certif. den. 99 N.J. 243,491 A.2d 728 (1985) (Child should have independent counsel instead of attorney hired by stepfather), Mayer v Mayer, 150 N.J. Super. 556, 376 A. 2d 214 (Ch. Div. 1977) (Independent counsel for children in custody cases should be used only where the interest of children are truly adverse to those of the parents, as where neither parent is a fit custodian), Doe v. State of NJ, Department of Human Services, Division of Youth and Family Services, 165 N.J. Super. 392, A2d 562 (App Div 1979) (Independent representation for the child is required where the child’s interest conflicts with the parents’ interest.

A further issue is raised when the guardian ad litem becomes aware that the child’s wishes are at variance with his/her best interest. Is the guardian ad litem then to petition the court for the child’s own counsel? What if the reverse is the case and the counsel for the child realizes that the child’s wishes are not in his/her best interest? Is it inimical to the zealous representation of the attorney for the child to petition the court for a guardian ad litem?

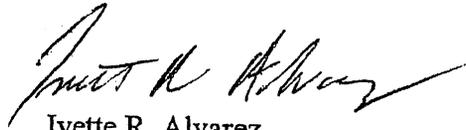
We can gain some insights and guidance on these issues from the discussion on appointment of advocates in the abuse and neglect arena by Donald N. Duquette in *Legal Representation for Children in Protection Proceedings : Two distinct Lawyer Roles are Required*. 34 FAMLQ 441 (Fall 2000). Duquette strongly cautions against trying to develop a single lawyer role for representing children as “that conflict between the two lawyer roles is irresolvable” and no one person should have unchecked authority to make decisions as to competency and ability to participate in the decisions. He suggests that the dichotomy of impaired and unimpaired is misguided, as “competence is a broader spectrum where children may be able to contribute in various amount to guide the representation if the lawyer properly incorporates the child’s unique individuality.” Id at 460. Duquette would have the client directed

attorney for the child (law guardian) provide the same “undivided loyalty, confidentiality, and competent representation to the child as is due to an adult.” He then calls upon the lawyer guardian (guardian ad litem) to aggressively represent the best interest of the child as determined by that lawyer. *Id.* at 458-459.

Duquette suggests training for guardians that focuses on the recognition of substituted judgment and cultural competence, while giving weight to the child’s expressed wishes on some issues if not all. He emphasized the importance of training guardians on how to elicit the child’s preference in a developmentally appropriate manner. *Id.* at 463. Further Duquette offers two options for prioritizing appointments. The first option is the bright line rule, where a guardian ad litem is appointed in every proceeding for a child under the age of fourteen. If the child is over fourteen, an appointment of an attorney for the child is in order. The second option is borrowed from the Michigan statute on this subject. Michigan appoints a lawyer for the child, only in the instance where the guardian ad litem’s assessment of best interests is in conflict with the wishes of the child.

In New Jersey the court may appoint a guardian ad litem or an attorney for the child, or both, in private custody and parenting time proceedings. While the role for the guardian ad litem pursuant to the court rules is rather clear, the role for the attorney for the child is confusing and at odds with an attorney’s duty of representation to a client. It is also unclear from the Rules under what circumstances, for what purpose and at what point in the proceedings a guardian ad litem or an attorney for the child is to be considered. Finally, other than for the requirement that an attorney for the child must be an attorney licensed to practice law in the State of New Jersey the Rules are devoid of any guidelines as to what qualifications, criteria, training and education a guardian ad litem and law guardian for the child should have.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ivette R. Alvarez", with a long, sweeping horizontal stroke extending to the right.

Ivette R. Alvarez

Cc: Hon Bradley J. Ferencz, J.S.C.
Hon. Sheldon R. Franklin, J.S.C.
Jane R. Altman, Esq.

ATTACHMENT A

RULE 5:8A. APPOINTMENT OF COUNSEL FOR THE CHILD

In all cases where custody or parenting time/visitation is an issue, the court may, on application of either party or the child or children in custody or parenting time/visitation dispute, or on its own motion, appoint counsel on behalf of the child or children. Counsel shall be an attorney licensed to practice in the courts of the State of New Jersey and shall serve as the child's lawyer. The appointment of counsel should occur when the court concludes that a child's best interest is not being sufficiently protected by the attorneys for the parties. Counsel may, on an interim basis or at the conclusion of the litigation, apply for an award of fees and costs with an appropriate affidavit of services, and the trial court shall award fees and costs, assessing it against either or both parties.

RULE 5:8B. APPOINTMENT OF GUARDIAN AD LITEM

(a) Appointment. In all cases where custody or parenting time/visitation is an issue, a guardian ad litem may be appointed by court order to represent the best interest of the child or children if the circumstances warrant such an appointment. The services rendered by a guardian ad litem shall be to the court on behalf of the child. A guardian ad litem may be appointed by the court on its own motion or on application of either or both of the parents. The guardian ad litem shall file a written report with the court setting forth findings and recommendations and the

basis thereof, and shall be available to testify and be subject to cross-examination.

In addition to the preparation of a written report and the obligation to testify and be cross examined thereon, the duties of a guardian may include, but need not be limited to the following:

1. Interviewing the child and parties.
2. Interviewing other persons possessing relevant information.
3. Obtaining relevant documentary evidence.
4. Conferring with counsel for the parties.
5. Conferring with the court, on notice to counsel.
6. Obtaining the assistance of independent experts, on leave of court.
7. Obtaining the assistance of a lawyer for the child (Rule 5:8A) on leave of court.
8. Such other matter as the guardian ad litem may request, on leave of court.

(b) Objection or Refusal of Appointment. A proposed guardian ad litem shall have the right to consent or to decline to serve as such, notice of such decision to be in writing to the court with copies to counsel. The parties shall have a right to object to the person appointed as guardian ad litem on good cause shown.

(c) Term. The term of the guardian ad litem shall end on the entry of a Judgment of Divorce or an Order terminating the application for which the appointment was made, unless continued by the court. The guardian ad litem shall have no obligation to file a notice of appeal from a Judgment or Order or to participate in an appeal filed by a party.

(d) Fee. The hourly rate to be charged by the guardian ad litem shall be fixed in the initial appointing order and the guardian ad litem shall submit informational monthly statements to the parties. The court shall have the power and discretion to fix a retainer in the appointing order and to allocate final payment of the guardian ad litem fee between the parties. The guardian ad litem shall submit a certification of services at the conclusion of the matter, on notice to the parties, who will thereafter be afforded the right to respond prior to the court fixing the final fee.

