

Confusion on the Role of Law Guardians

The Matrimonial Commission's Report and the Need for Change

By Nancy S. Erickson

In February 2006, after holding many hearings throughout the state, the Matrimonial Commission appointed by Judge Judith Kaye and headed by Judge Sondra Miller issued a final report addressing many issues important to the matrimonial bar, including issues regarding law guardians for children. The Commission made a good start in the quest to deal with problems surrounding the law guardian system; for example, it recommended that the term "law guardian" be replaced by "attorney for the child" (AC), because the term "law guardian" can cause confusion in the minds of attorneys and litigants alike. However, in spite of the clarification a name change might bring, there remains much confusion as to the role and power of the AC. Without clarity on this issue, the children, the courts and the public will remain unprotected against ACs who misuse their power in that role.

MISUSE OF POWER BY ATTORNEYS FOR CHILDREN

I have been involved in cases where I had reason to believe that the law guardian was not doing his/her job or was actively attempting to gain judicial approval for a course of action that would be harmful to the law guardian's client. In some cases, the law guardian communicated with the child so infrequently that it would have been impossible for the law guardian to be familiar enough with the case to be able to represent the child at all. For example, in one case I am familiar with, a child told his therapist that he would kill himself if he continued to be forced to visit — even under supervision — with the father who had sexually abused him and had threatened to kill his mother. The boy's law guardian had spoken with him only once and took no action even to seek out the facts, much less to protect the child. In fact, he worked closely with the attorney for the father to make sure that no unfavorable orders were issued against the father.

In another case, the law guardian sought a change of custody from a protective parent to an abusive parent. By bringing the motion himself, the law guardian made it appear as though the child was the one seeking the change of custody, not the abusive parent. In fact, the child was adamant that he did not want custody changed, and there was substantial evidence to lead to the conclusion that the abusive parent was seeking a change of custody in order to avoid payment of child support.

The issues created by law guardians who fail to do their jobs adequately or properly is widespread throughout the United States: Cases of law guardians ignoring their clients' wishes, and even intimidating their clients, have been reported in many states. These problems have recently been publicized in the acclaimed PBS documentary, aired late last year, "Breaking the Silence: Children's Stories." Some of the children in that documentary are members of a group called Courageous Kids. Their Web site — www.courageouskids.net — contains narratives by children who were placed into the hands of abusers by judges who based their decisions on recommendations from law guardians (or forensic evaluators) who favored the abusive parent. For example, one young man wrote a declaration at age 17, after escaping from his abusive father's custody, in which he stated: "[A]t first I thought [my law guardian] was on my side. He was my lawyer and was appointed for my best interests. Again, I was wrong. ... He told the court lies about what I wanted ... I expressed how I thought the supervision [of visitation by my mother] was not necessary, yet the court heard [the law guardian] say otherwise ... I asked [my law guardian] to make that motion [for custody to my mother] for me, and he did not ... He was no help. Instead he was hurting me ... I lost trust for most everyone in my life."

New York law needs to define the role of the AC and put in safeguards so that the child's position cannot be concealed from the court.

THE GENERAL RULE

The Commission recommends the adoption of the Statewide Law Guardian Advisory Committee's working definition of the role of the attorney for the child, which begins as follows:

The law guardian is the attorney for the child ... In [] types of proceedings [other than JD proceedings], it is the responsibility of the law guardian to diligently advocate the child's position in the litigation. In ascertaining that position, the law guardian must consult with and advise the child to the extent possible and in a manner consistent with the child's capacities. If the child is capable of a knowing, voluntary and considered judgment, the law guardian

should be directed by the wishes of the child, even if the law guardian believes that what the child wants is not in the child's best interest. Matrimonial Commission: Report to the Chief Judge of the State of New York, February 2006, p. 39-40.

Thus, the general rule is that the attorney for the child should determine what the child's position is and then advocate for it, even if the AC believes that would not be in the best interests of the child. This seems simple and straightforward; however, since the child does not appear in court, there is no way that the child (or anyone else) would ever necessarily know whether or not the AC is advocating the child's position.

Consequently, although the general rule is a good one in theory, there are problems with it in practice, because the child's position could be misrepresented by an AC. The misrepresentation could be by an overzealous, overprotective AC who believed, in good faith, that the child's position would turn out to be contrary to the child's best interests. Alternatively, the misrepresentation could be by a misguided AC who viewed the child's attachment to his/her mother as having been induced in the child by so-called "parental alienation." For more than a decade, "parental alienation" has been the favorite defense of the abuser, because it shifts the court's scrutiny away from the abuser toward the protective parent. Finally, the misrepresentation could be an intentional falsehood by a corrupt AC who had made a deal with the disfavored parent. Any of these alternatives would violate the child's right to have a voice in the proceedings, and the parent's right to due process.

EXCEPTIONS TO THE GENERAL RULE

The Matrimonial Commission

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Report indicates that there is an exception to the general rule that the AC must represent the child's position. The report states:

However, when the law guardian is convinced either that the child lacks the capacity for making a knowing, voluntary, and considered judgment or that following the child's wishes is likely to result in a risk of physical or emotional harm to the child, the law guardian would be justified in taking a position that is contrary to the child's wishes. In these circumstances, the law guardian should report the child's articulated wishes to the court if the child wants the law guardian to do so, notwithstanding the law guardian's position. *Id.* at 40.

This means that in two circumstances, the AC is permitted to take a position contrary to that of his/her client, just because the AC — not the court — has decided either that the child lacks capacity to make his/her own decision on this matter or that following the child's wishes "is likely to result in a risk of physical or emotional harm to the child."

What right or ability does the AC have to make these determinations? It is properly up to the judge to make these determinations. It is dangerous to leave such determinations to the AC, because it allows the AC to advocate for a position the child does not want, without any checks to make sure that the AC is not corrupt or is not simply following his or her own individual beliefs about what is best for a child.

The only guidance given by the Matrimonial Commission is to state that one of the first tasks of the AC must be to "assess the child's ability to make a knowledgeable, voluntary and considered judgment, based on age, level of maturity, developmental ability, emotional status, and ability to articulate his/her desire." This *sounds* good, but lawyers do not learn in law school how to make such assessments, and there is nothing in the training for law guardians that would provide them with such expertise. In fact, it is questionable whether many mental health practitioners — unless they were specially trained in child

psychology and in interviewing children — would be able to make such assessments either.

If the AC decides that the child lacks capacity or that following the child's wishes is likely to result in risk of harm to the child, then perhaps the judge should assess the child in camera and decide whether the AC should be permitted to take a position different from that of his/her client. If the AC is simply going to advocate what he or she thinks is in the child's best interests, that is not the proper role of the AC. It is the role of the judge to determine what is in the child's best interests.

MORE WORK LIES AHEAD

With these kinds of cases and concerns as backdrops, it appears that the Matrimonial Commission, or the individuals and organizations seeking to put into effect the recommendations of the Commission, may have more work to do.

An adult can fire his/her attorney, but the child may be trapped in a relationship with a law guardian who does not represent the child, and the child's voice may never be heard. There needs to be some mechanism for the child to report to the court that the law guardian is not representing the child properly. Additionally, there may need to be an ombudsperson for a parent to go to if the child is unable or unwilling to report to the court about a law guardian's failings.

At this time in Britain, the government is going through a similar inquiry concerning how the voice of children will be best heard in custody cases — indirectly, through their own solicitors, or directly, by appearing before the judge. Dyer, Clare, "Children to get New Voice in Divorce Cases," *The Guardian*, 10/9/06, at <http://www.guardian.co.uk/front-page/story/0,1891002,00.html>. No jurisdiction has yet discovered the perfect solution, but we must continue to work toward it.



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