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MERRIL SOBIE

The Meaningful Representation of Children: An Analysis of the State Bar Association Law Guardian Legislative Proposal

On January 25, 1991 the New York State Bar Association House of Delegates approved and adopted the final report and majority recommendations of the Association's Task Force on the Law Guardian System.[1] The report's central recommendation is legislation to improve and strengthen the system of affording representation to children who appear before the courts in a multitude of proceedings affecting their lives, including child abuse and neglect, custody, delinquency, adoption, termination of parental rights, person in need of supervision and foster care review hearings.

If the proposed legislation is enacted, administration and management of the system would continue, as at present, to be vested in the judicial branch of government. However, the Appellate Divisions would be granted increased flexibility and accountability in designating and managing law guardian panels. In addition, a statewide director of law guardian services would be appointed to assume the current functions performed by the Office of Court Administration and coordinate the system within the judiciary and with the Legislative and Executive branches. In addition, the method of appointing attorneys in specific cases would be codified and strengthened, and a statewide review and advisory committee would be established to monitor the overall system.

This article will outline the background and history of the law guardian system, summarize the Task Force proposal and analyze the proposal's effects. The intent is to present a synopsis of the issues addressed by the proposal, which has been forwarded to the Legislature for consideration during the 1992 session.

A. Background

When the New York Family Court was established in 1962 the Legislature, in a pioneering move, provided for the appointment of counsel to represent children who would appear before the new tribunal.[2] Coining the phrase "law guardian," a name whose origins are unclear, the statutes mandated the assignment of lawyers at state expense. Where a legal aid society provided representation, such as in New York City and Erie County, representation would be by contract. In all other cases the Appellate Divisions would designate a panel of private attorneys for that purpose. Contracting responsibilities were subsequently statutorily transferred to the Office of Court Administration, while panel representation continues to be an Appellate Division function (though the panel system is budgetarily dependent on the Office of Court Administration).[3]

Although in recent years the system has been expanded to encompass the Supreme and Surrogates Courts, and has grown exponentially in tandem with the children's law caseload, the statutory scheme first enacted in 1962 has remained virtually unamended. Administration is bifurcated between the Appellate Divisions and OCA, reports are neither mandated nor issued, and the appointment process itself is ad hoc within each county.

Shortly after the inauguration of the State Bar Association's Committee on Juvenile Justice and Child Welfare in the late 1970s the Committee commissioned a comprehensive study of the system.[4] Federal and private foundation funding was secured and the

[1] *Report and Recommendations of the Task Force on the Law Guardian System*, dated November 9, 1990; the Association's Executive Committee had earlier unanimously approved the document.

[2] See Family Court Act Section 241 *et. seq.*

[3] As the system has expanded, so have the costs. In fiscal 1962 less than $100,000.00 was spent for law guardian services— in the current fiscal year the amount appropriated exceeds thirty million dollars.

[4] Because representation is afforded primarily by the Juvenile Rights Division of the Legal Aid Society in New York City, which has a documented record of effective representation, the City was excluded from the study.

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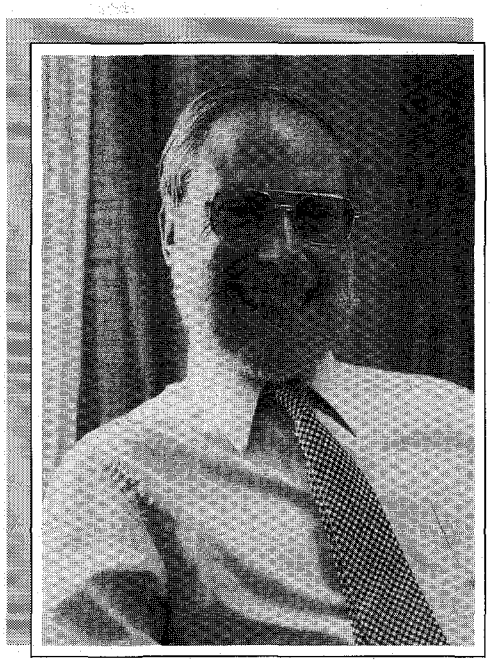
resultant report, Law Guardians in New York State: A Study of the Legal Representation of Children, was approved and published by the Association in 1984.[5]

The 1984 study found and documented serious deficiencies in the delivery of legal services. To cite but a few examples, in almost half the cases studied the law guardian had provided inadequate representation and had come to the hearing with, at best, only minimal preparation. In over one-third of the cases the law guardian did not speak to the child during the court proceedings. In many cases the attorney had not even met with his child client. Appeals were virtually nonexistent. Law guardians were not offered any training and were not provided with any support services. Only one-quarter of the law guardians considered themselves specialists in the field of children's law and seventy percent reported that they had been designated as law guardians without any screening, education or experience.



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These deficiencies were present throughout the state, in large counties and in small counties, in areas in which a legal aid society provided representation and in areas in which a private panel attorney provided representation. The study concluded that all too often the mandate for counsel resulted in "phantom representation."

As a result of the study and conclusions, the State Bar Association recommended legislation to establish a "Law Guardian Office" within the Executive to establish and administer a revised system. Other recommendations included the adoption of standards to represent children, the development of law guardian support services, and statutorily mandated reports and accountability requirements.

In response, the Appellate Divisions and the Bar Association undertook several measures to improve the system. Each Appellate Division appointed a Law Guardian Director to oversee the system, and establish training programs for law guardians. The State Bar Association sponsored and subsequently published law guardian standards for representing children. The introduction of legislation was deferred in light of the efforts to enhance the representation of children.

After the passage of three years, the Committee on Juvenile Justice and Child Welfare decided to commission an independent follow-up study to measure the improvement and the then current status of representation. The new study, prepared by the Institute of Judicial Administration at New York University School of Law, was completed in 1988.[6] IJA found that substantial progress had been made in training law guardians, in providing information to lawyers who represent children, and in administering the panels. However, the overall level of representation continued to be seriously inadequate and there had been no improvement in the effectiveness of representation in individual cases. Lawyers were still ill prepared. To cite one additional example, an appellate practice had not yet developed. Further, the bifurcated system remained largely unaccountable. The follow-up study recommended that management teams be established in each county and further recommended that legislation was necessary to insure accountability and establish a cohesive system.

B. The Task Force

After reviewing the IJA report, the State Bar Association Executive Committee determined that an overall review should be commenced to recommend the future course of the law guardian system. Accordingly, in January 1989 a Bar Association Task Force was appointed "...to work with the courts and to develop court rules and, if necessary, legislative proposals designed to improve the quality of legal representation of children in our State."[7] Following a thorough review and meetings with judges and administrators, including the four Presiding Justices, the Chief Administrative Judge and the Law Guardian Directors, the Task Force presented its report and recommendations to the House of Delegates in January 1991.

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[5] Co-authored by Jane Knitzer and Merril Sobie, the report was approved by the Executive Committee on April 26, 1984.

[6] *Follow-up Report on Law Guardians in New York State: A Study of the Legal Representation of Children in 1987,* dated May 1988.

[7] Minutes, Executive Committee, October 27, 1988.

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C. The Task Force Proposal

The Task Force unanimously agreed that in the past several years considerable progress has been achieved in several areas, including the training and screening of law guardians. It also unanimously concluded that the system should remain within the Judiciary, with the Appellate Divisions exercising primary responsibility for the delivery of legal services to children. Last, the Task Force unanimously agreed that comprehensive legislation was needed to modernize the thirty-year-old statutory pattern, improve the appointive process, streamline the bifurcated administration, infuse accountability, and encourage ongoing review. However, the Task Force could not reach unanimity concerning the necessary administrative organization within the Judiciary to achieve these objectives. The legislation outlined below represents the view of a substantial Task Force majority.[8]

The proposal is perhaps best summarized by outlining the organizations which would be directly effected. These include the Appellate Divisions, the State Director of Law Guardian Services, the Trial Courts and the proposed Review and Advisory Board.

1. The Appellate Divisions. Each Appellate Division would, as at present, designate and administer panels of law guardians for each county. But the Appellate Divisions would be granted significant additional discretion in formulating and administering the appropriate panels. For example, the Supreme and Surrogates Courts would be included and separate panels for specific types of proceedings would be permitted. In cases involving extraordinarily complex or lengthy litigation, an Appellate Division could compensate a law guardian in an amount greater than the rigid hourly rates provided in the Judiciary law. The Appellate Divisions would also be authorized to adopt law guardian rules and regulations and would be required to promulgate rules governing critical law guardian procedures, such as certification, appointment, and grievance procedures.

The proposed legislation would codify the position of Departmental Law Guardian Director and the directors would be granted wide statutory authority and responsibilities, including budgeting, oversight of law guardians, educational programs, payment to law guardians and administration. The directors would also have the ability and the mandate to provide support services for law guardians.

2. The State Law Guardian Director. Under the proposed legislation, a State Law Guardian Director, appointed by the Chief Judge with the advice and consent of the Administrative Board, would assume the law

[8] The minority presented an alternative legislative proposal which would vest complete administrative responsibility for the entire system in the Appellate Divisions.

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guardian administrative responsibilities now exercised by the Office of Court Administration. The Director would enter into and monitor agreements for organizational representation, prepare and implement a state budget and approve vouchers. The State Director, with the departmental law guardian directors, would evaluate services and adopt a law guardian plan for each county. Last, the Director would be the principal spokesperson for the system, would report and be held accountable, and would coordinate the system within the judiciary and with essential Legislative and Executive agencies.

3. The Trial Courts. The current statute governing the appointment of individual law guardians, Family Court Act Section 249, would be amended. The section would be broadened to include appointments by the Supreme and Surrogates Courts, thus incorporating recent legislation providing for such appointment. Absent extraordinary circumstances, the Courts would be required to appoint law guardians on a rotational basis. The provision, coupled with the provision for specialized panel designations by the Appellate Divisions, is designed to insure that judges appoint appropriate law guardians on a fair and equitable basis. Additionally, the assignment of an attorney to represent a child would be extended to include important collateral proceedings, such as a habeas corpus writ or a stay, and relevant subsequent proceedings, such as modification or enforcement.

4. The Review and Advisory Board. The final structural provision is the establishment of a statewide Review and Advisory Board. Members would be appointed by the Chief Judge, upon nomination by the Presiding Justices, the Governor, the State Bar Association President, and Legislative leaders. Members would not be compensated, although the Board would maintain a small paid staff.

The Review and Advisory Board would have no operational or administrative authority. Its functions would be limited to review and advice. Its establishment is modeled upon the successful Department Law Guardian Advisory Committees and similar state entities, such as the State Council on Children and Families.

D. The Proposal's Goals

The over-arching objective is to provide meaningful representation to children. There of course exists no "quick fix" to instantly achieve consistently meaningful representation. But the legislative proposal, if enacted, would establish a structure and a statutory mandate to rationalize and improve the law guardian system. Minimum standards would be established by Court rule, the mechanism for appointing attorneys in individual cases would be clarified and improved to ensure, or at least maximize, the assignment of competent counsel on a fair basis, case continuity would be provided, and a more flexible system introduced. Specific plans for providing representation for each county would be mandated; for the first time each of the state's diverse counties would be comprehensively surveyed so that a specific need could be addressed. Training and support services, such as social work and investigatory assistance, would be mandated. A statewide Director, appointed by the Administrative Board, would oversee organizational representation and become the spokesperson for the system's needs. Continuing progress would be achieved, or at least encouraged, through reports and accountability mechanisms, as well as the establishment of a statewide Advisory Board.

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The intent is to accomplish these goals while maintaining the system within the judiciary. Thus the Appellate Divisions would continue to administer the system of panel representation, but would gain the flexibility of specialized panels. The trial courts would continue to appoint counsel in individual cases. County plans would be tailored to the needs of each locality. The proposal is not radical, but one designed to build upon and improve the present system.

Conclusion

The Law Guardian System is essential to the tens of thousands of children who are assigned counsel each year. Begun as an experiment in 1962, the system has expanded exponentially. The Bar Association legislative proposal would enable the Appellate Divisions, the Chief Judge and the trial courts, including the Family Court, to further improve the system and to provide a higher level of meaningful representation throughout the State. Enactment would represent the culmination of a decade of studies and provide substantial benefits to New York's children.

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