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The Representation of Children: A Summary and Analysis of the Bar Association Law Guardian Study*

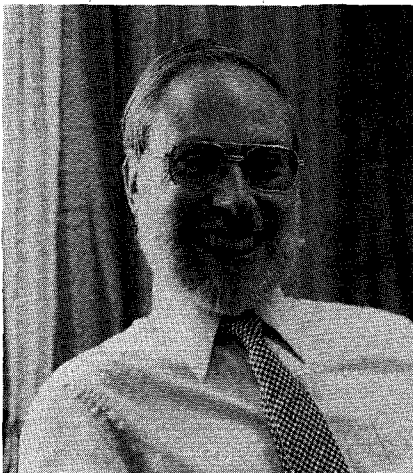
Background

Enacting the 1962 Family Court Act the Legislature, in a pioneer measure, provided for the appointment of law guardians to represent youngsters who appeared before the new court.¹ Originally limited to neglect, delinquency and person in need of supervision cases (PINS) "at the request of a minor" or on the court's own motion² the statute, Family Court Act Section 249, has been strengthened through seven successive amendments. Today the appointment of a law guardian is mandatory in delinquency, PINS, neglect, abuse, termination of parental rights, extension of placement and protective custody cases. Appointment may also be effected, on a discretionary basis, in any other family court proceeding including child custody, foster care review, paternity or support actions.

The Act further established three separate methods of appointing counsel (though more than one may be utilized for each county). Law guardians may be furnished by contract between the Office of Court Administration and a legal aid society, may be appointed from a panel of attorneys designated by the appropriate appellate division

or may be furnished by contract between an appellate division and one or more attorneys³ (the latter option, agreement with private attorneys, has never been implemented). Law guardians are also appointed to represent children involved in appeals⁴ or collateral proceedings, such as modification motions or habeas corpus actions.

New York was the first state to afford children legal representation. Historically, the children's courts had proceeded without counsel - with the exception of a rare appearance by a privately retained attorney, the courts heard and determined cases with only the parties, the judge and a probation officer present. Requiring the assignment of counsel for children marked the commencement of a trend which ultimately revolutionalized the



* New York State Bar Association, Law Guardians in New York State: A study of the legal representation of children, (April 1984).

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¹ A law guardian is defined as "... an attorney admitted to practice law in the state of New York and designated under this part to represent minors . . ."; F.C.A. §242

² See L. 1962, c 686, §249.

³ See F.C.A. §243

⁴ F.C.A. §1120

juvenile justice system. By the early 1970's, and in part as a reaction to the introduction of law guardians, most counties had established a formal prosecution service within the Family Court structure.⁵ Simultaneously, an increasing matrimonial caseload generated substantial private litigation. In but one generation the Family Court had been transformed from an informal pro se tribunal to an adversarial court. Ad hoc discussions of possible guilt and remedies were superseded by motion practice, testimony and summation.

Suprisingly, however, the law guardian system had never been studied on a comprehensive basis. Was the program fulfilling its mandate? Were children receiving adequate or competent legal services? What are, or should be, the applicable standards for representing youngsters? Is the law guardian system, currently budgeted at over ten million dollars per year, cost effective? The very words "law guardian" are opaque, suggesting, perhaps erroneously, a function different than legal counsel (astonishingly, there is no legislative history concerning the term's derivation, though the Act's draftsmen apparently believed that "law guardian" was the equivalent to legal counsel).⁶ Unfortunately, there has also been a dearth of appellate caselaw and consequently few decisions articulating the role of the law guardian or providing standards for the effective representation of minors. Law guardians have appeared in vast numbers of cases with little individual or systematic review.

For these reasons the New York State Bar Association Committee on Juvenile Justice, under the leadership of its chairman, Honorable Howard A. Levine, decided to sponsor and supervise a study of the law guardian program. The W. T. Grant Foundation, the Foundation for Child Development, and the New York State Division of

Criminal Justice Services generously financed the project. After receiving detailed proposals from several experienced organizations, the Institute for Child and Youth Policy studies, a subsidiary of Statewide Youth Advocacy, was selected as the grantee. Doctor Jane Knitzer was appointed as project director and a staff of attorneys, consultants and analysts assembled. In addition, a technical advisory committee was selected to assist the project, which remained under the auspices of the Juvenile Justice Committee and Justice Levine.

The study first developed a comprehensive methodology to evaluate the law guardian system. Questionnaires were distributed to every law guardian designated to serve a county family court. Extensive interviews were held with law guardians, judges, probation officers and social service officials. Fourteen "target" counties were selected, representing a sample of urban, suburban and rural environments as well as the four counties outside New York City which maintain legal aid society representation. For these counties project staff examined case records and law guardian vouchers, conducted courtroom observations and interviewed law guardians regarding specific cases they had been assigned. In three "target" counties observations and interviews were augmented by transcript analysis - the complete transcripts of approximately ninety cases involving several hundred appearances were evaluated to determine the extent and effectiveness of law guardian representation.

In addition, the staff interviewed twenty-four children placed in four different facilities concerning their perceptions of how they had been represented. With the assistance of consultants and Juvenile Justice Committee members, the project also drafted guidelines for each type of proceeding, detailing the steps law guardians should follow in representing children. Although New

York City was not selected as a site for intensive study, questionnaires were distributed and interviews were held with several officials. In the absence of intensive study, the project did not evaluate the level of representation within the New York City Family Court.

The study commenced in 1982 and was completed in early 1984. A final report was submitted by the Juvenile Justice Committee of the State Bar Association on April 26, 1984.⁷

Findings

The study's findings, detailed and statistically supported in the final report, present a very disturbing picture. For example, forty-five percent of the courtroom observations reflected either seriously inadequate or marginally adequate representation, while only twenty-seven percent were found to reflect acceptable standards of representation, and an additional four percent evidenced effective representation. When the cases which lack sufficient information to be evaluated are deducted, amounting to twenty-four percent of the proceedings studied, it becomes clear that substantially less than half the children receive even adequate representation.

Further, almost half the proceedings for which complete transcripts were analyzed revealed apparent appealable errors on the part of the law guardian or the judge. Yet, only sixteen percent of all law guardians reported ever filing a notice of appeal. Since approximately half the law guardians have served on panels for longer than five years and the mean annual case load

⁵ See, e.g., F.C.A. §254; by recent amendment only a "presentment agency" or prosecutor may file a juvenile delinquency petition (see F.C.A. §310.1).

⁶ (See Isaacs, *The Role of the Lawyer Representing Minors in the Family Court*, 12 Buffalo Law Review 501 (1963).

⁷ Copies of the final report or the report's executive summary may be obtained from the State Bar Association.

of assigned cases per law guardian was nineteen in 1981, the average law guardian has represented approximately one hundred children, but has never sought appellate review.⁸ (This is not to suggest that an attorney should always appeal every error, but one can safely assume that at least a small percentage should be reviewed). In a similar vein, only seventeen percent of the law guardians reported ever utilizing County Law Section 722-c provisions enabling the appointment of independent expert services, such as psychiatric or investigative assistance.

Many study cases were characterized by a serious lack of preparation. In approximately half the proceedings it appeared that the law guardian had accomplished little or no preparation prior to entering an admission or otherwise disposing of the case. In several cases the law guardian had not even met his young client prior to the hearing. The report is replete with specific examples of inadequacies which evidence a serious lack of protection to the child, frequently a victim of abuse or neglect.

In a separate subanalysis of one hundred delinquency cases filed in a high population county it was found

that admissions were entered in sixty-eight cases while only two cases resulted in fact-finding hearings or trial (the remaining thirty cases were dismissed or adjourned in contemplation of dismissal). Even more troubling was the fact that of seventy cases which reached disposition, the dispositional hearing was waived in all but one. Indeed, the dispositional hearing was waived in every case which a child was placed, thirty-five in all, including twenty placements with Division for Youth training schools (four placements were for periods in excess of the statutory maximum). Throughout the state dispositional hearings, probably the most vital stage in the juvenile justice process, are rare occurrences - the law guardians generally waive hearings in even the most serious cases.⁹

Other problems defined by the study include a lack of continuity or ongoing responsibility. In only about one third of the cases does a law guardian represent a child in sequential proceeding such as foster care reviews or extensions of placement. Substitution of law guardians within a proceeding occurs in eighteen percent of the cases; in counties serviced by a legal aid society the substitution rate is sixty-one percent.

Policies concerning the continuity and substitution of counsel for youngsters have never been adopted (with the notable exception of the New York City Legal Aid Society). Many children are consequently confronted with a different attorney at every appearance; rapport or confidence, essential to the child victim or respondent, cannot be achieved and the "law guardian of the day" cannot adequately evaluate the case or provide effective representation and counselling.

Further, there is complete absence of class action suits or special litigation, which may be the only effective method of instituting change or enforcing rights on a systematic basis. Children in placement are not afforded representation and there is a lack of standards regarding law guardian responsibilities (for example, responsibilities concerning post dispositional measures have never evolved - many law guardians do not even review complicated dispositional orders for possible errors). To cite but one additional example, the caseload in counties which depend on legal aid society representation frequently reaches staggering proportions. In one major county each full time law guardian represents over eight hundred separate children per year, a number which precludes any semblance of effective representation.

To be sure, fault should not be lightly laid at the feet of the law guardians. Training and continuing education programs, crucial to effective representation, are unavailable in large areas of the state. Forty-two percent of the law guardians reported a complete absence of pertinent educational programs. Similarly, there is nowhere a law guardian can turn for help in drafting

⁸ Extrapolating the data further, it would appear that less than one in 600 cases are appealed (since less than one sixth of all law guardians has ever filed a notice, much less perfected an appeal).

⁹ It is at the dispositional hearing that the best interests of the child are determined through expert reports, testimony, cross-examination and argument; see e.g., F.C.A. §§350.4, 352.2, 623 and 1052.



papers or exploring programs for children in need.

Moreover, the system as presently constituted is needlessly bifurcated. The office of Court Administration is responsible for contracts with legal aid societies while the appellate divisions are responsible for panel attorneys (this was not always so - between 1962 and 1974 the appellate divisions held complete responsibility). One result is that the "mix" between panel and institutional representation has not changed in twenty years despite the substantial growth of family courts and the even sharper increase in defense, prosecution and private bar participation; a determination of the type of representation to be furnished in a given county (from among the three statutory options) is apparently no one's responsibility. Law guardians (full-time and part-time) are almost never evaluated, nor has a grievance procedure been formulated (in many counties the "panel" list is largely outdated - several law guardians reported that they had not been assigned a case within the past five years). To cite but one additional impediment, reimbursement rates are minimal and payment may be subject to extensive delay.

Many law guardians nevertheless perform admirably; for example, close to one-third of the cases studied evidenced adequate or effective representation. Indeed, given the system's constraints, the level of performance and devotion indicate an encouraging potential. With appropriate support and accountability the system can work well. The central problem is that the present statutory and administrative framework serves well neither the law guardians nor the children they represent. Modification is essential if New York's children are to continue to receive counsel, legal assistance and protection.

Recommendations and Implementation

One major solution, as proposed

in the study, is legislative restructuring. Several axioms framed the recommendation and should continue to guide the Legislature, the bench and the bar. First, the basic concept of representation by individual law guardians, full time and part time, is a sound one. Second, legal services should be maintained on a county basis with provisions for both local attorney and legal service organization participation. Third, the law guardians must be assisted in fulfilling their difficult mandate; the range of services should encompass comprehensive training, dissemination of pertinent material, continuing legal education, expert services and consultation. Fourth, statewide monitoring and policy development is needed in such areas as effective assistance of counsel, reimbursable services, continuing representation and appeals. Fifth, representation should be extended to those limited areas which are not presently covered, such as children in placement. Last, the state, through the Bar Association, should adopt comprehensive standards and guidelines to assist the law guardians and the courts (this aspect involves bar rather than legislative action).

The Juvenile Justice Committee is currently drafting legislation for submission to the 1985 session. Basically, the proposed amendments would establish a state office of law guardian services to supervise and monitor the system. Governance would be vested in a board of directors appointed by the Governor, the Chief Judge and the President of the Bar Association. The board would establish policies, contract with legal service organizations and designate local panels to serve each family court. Separate panels or contracts would be established for appeals. The office would implement policies, provide a means of representation for children in placement and develop educational programs, updates and expert assistance to New York's two thousand law guardians. For

the first time, unified policies and evaluations could be established. So too, for the first time law guardians would have a "home" in which to seek needed guidance and consultation.¹⁰ The intent is to improve the quality of representation and to enhance the ability and responsibility of the law guardians while preserving the character of individual local representation.

One paramount concern is the almost total lack of appeals. As previously noted, only sixteen percent of the panel law guardians have ever initiated an appeal. Similarly, three of the four legal aid societies outside of New York City were involved in only nine appeals during the 1980-81 state fiscal year (including appeals which may have been initiated by opposing counsel). The need to encourage review is further underscored by the fact that almost half the proceedings in which transcripts were evaluated involved apparently appealable errors.

The absence of appellate practice has resulted in several undesirable consequences. First, there is no check on judicial authority - clearly illegal trial decisions are not challenged, not to mention cases where the existence of error may not be clear or which may involve possible abuses of discretion. Second, and of perhaps greater significance, the absence of appellate review has dilatoriously affected the system of representation as a whole. It is through case law development that statutes are interpreted, constitutional issues are resolved and responsibility is clarified. It is through the appellate process that existing uncertainties and conflicts concerning the law guardians' role may be resolved. After twenty years, for

¹⁰ A law guardian frequently must assure the delivery of essential psychiatric, psychological, social and educational services for his young client. In cases where the child has been victimized, such as abuse, the implementation of such services may be the most important goal. For this purpose expert services may be essential.

example, the question of whether law guardians represent the child or the child's "best interest" remains largely unanswered. The important issue of effective representation for juveniles has hardly been addressed. In the long run, encouraging appeals may constitute one of the most important law guardian reforms, for it is the key to developing effective law guardian standards.

Legislation to simplify the appellate process, particularly the assignment of law guardians and reimbursement for time and expenses, hence constitutes a priority item of the study's implementation agenda. For example, the responsibility of law guardians to initiate appeals should be clarified (one "model" which might be adapted is the appellate division rules governing appeals in criminal cases). New methods of assignment should be tried, such as the designation of specialized appellate law guardian panels at the departmental level. Caselaw development is one goal for which the legislative, the bench and the bar can work together.

The articulation of representation standards is the focus of the final study recommendation - the adoption of guidelines and explanatory commentary by the New York State Bar Association. Guidelines encompassing most types of proceedings for which a law guardian may be assigned (e.g. delinquency, child protective, foster care review) were drafted by the project and are appended to the final report. The next step is to refine the guidelines and prepare practice commentary to assist law guardians in representing the child client. The final product should constitute a valuable training tool, checklist and resource. The State Bar Foundation has generously agreed to fund this endeavor under Juvenile Justice Committee auspices. A completed volume will be presented to the house of delegates this coming spring and subsequently be distributed throughout the state.

Conclusion

The law guardian system constitutes a unique opportunity to protect the interests and rights of New York's children. Inaugurated in 1962 and expanded greatly in the past twenty years, the system's goals are laudatory. However, a lack of structure and responsibility has seriously compromised the effectiveness of counsel. Representation is frequently characterized by perfunctory preparation and a waiver of substantive and procedural rights. Moreover, the system is needlessly bifurcated and incapable of providing the education, experience and assistance required for effective counsel.

The Bar Association study provides a blueprint for improvement. Legislative restructuring to establish an independent board and office capable of establishing policies and monitoring the system, as well as providing educational and support

services, is one priority. In addition, use of the appellate process must be encouraged and standards of representation adopted through guideline promulgation and appellate review. The objective is to improve and augment the level of representation while preserving the current system of an individualized representation.

Implementation is not a facile task. The preparation of guidelines and commentary, the drafting of legislation and the presentation of findings and recommendations have already commenced. Over the next several months the Bar Association, the Governor's Office, the Legislature and the Judiciary should work together to enact appropriate legislation. Only then can progressive measures be implemented and funded so that New York's children may be afforded the representation they need and merit.



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upon the occurrence of a catastrophic event. There must be some safeguard promulgated to prevent abuse of the clearly inequitable bargaining position inherent to the insured/insurer relationship which can be manipulated to force an

unconscionable alteration of the insurer's obligations after the insured's full performance. Punitive damages for bad faith refusal provides the necessary remedy and acts as an equalizing force without penalizing the insurer's right to a good faith investigation.

