

New York State Bar Association

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 790 – 10/27/05

Topic: Law Guardian's conflict of interest when child's parent received non-legal services from Guardian's employer.

Digest: Conflict may exist where Law Guardian is employed by agency that has provided services to parent of Guardian's ward.

Code: DR 5-101(A).

QUESTION

1. May a lawyer employed part-time by an agency that provides services in domestic violence matters accept Law Guardian assignments in the lawyer's private practice if a parent of the ward has received non-legal services from the agency?

FACTS

2. A non-profit agency provides services in domestic violence disputes and similar types of matters. The services performed range from non-legal services, such as counseling, mental health care, daycare, and other housing and poverty services, to legal representation in civil matters. The agency employs two part-time attorneys and a paralegal. The two attorneys are also appointed from time to time as Law Guardians in their private practices.¹

OPINION

3. A Law Guardian appointed by a court to represent the best interests of a child must carry out the Guardian's responsibilities as an advocate of the child's

¹ The Family Court Act lists situations where a court is to appoint a Law Guardian, including proceedings that involve custody disputes, juvenile delinquency, adoption or the placement of the child into the custody of a mental health facility. Family Ct. Act § 249 (2005). See also Family Court Act, Article 10 (abuse and neglect proceedings); Social Services Law §358-a (foster care approval proceedings); Social Services Law §392 (foster care review proceedings); Social Services Law §384 (termination of parental rights proceedings); Family Court Act, Article 7 (persons in need of supervision proceedings); Family Court Act, Article 3 (delinquency proceedings).

interests and preferences, and an active participant rather than as a neutral party. The Law Guardian's responsibilities can include interviewing persons relevant to the proceeding, obtaining applicable records, reviewing documents exchanged between the parties, making discovery demands and responding to the adversary's requests, participating in pre-trial negotiations and hearings, retaining independent experts, and taking an active role in the trial process.²

4. Because the Law Guardian is an advocate on behalf of the child, there is a potential for conflicts of interest when one of the child's parents has received non-legal services from an agency that employs the Law Guardian.³ DR 5-101 states:

A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's *financial, business, property, or personal interests*, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

(Emphasis added.)

5. It is in the public interest to encourage persons willing to undertake the duties of Law Guardian to do so, and persons employed by agencies providing poverty services are often peculiarly qualified to serve in that capacity. In the view of the Committee, the fact that the Law Guardian is employed by the agency does not, without more, constitute such a "financial, business, property or personal interest" that might reasonably be said to affect the Law Guardian's professional judgment in every case. Thus, such a lawyer is required to decline an appointment as Law

² See N.Y. State Bar Ass'n, Law Guardian Representation Standards, Vol. II (1999), *available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Shop/Law_Guardian_Representation_Standards_Vol__II__Custody_Cases/1999LAWGUARDIANREPVOLII.pdf; Fourth Department Law Guardian Program Administrative Handbook (2005), *available at* <http://www.courts.state.ny.us/ad4/>. See also *Weiglhofer v. Weiglhofer*, 1 A.D. 3d 786, 788, 766 N.Y.S.2d 727, 729 (3d Dep't 2003) ("Because it appears that Supreme Court ordered and relied on a 'report' from the Law Guardian, we take this opportunity to emphasize that a law guardian is the attorney for the children . . . and not an investigative arm of the court."); *Matter of Dominique v. Colleen C.-G.*, 17 A.D. 3d 1038, 1040, 794 N.Y.S.2d 195, 196 (4th Dep't 2005).

³ See, e.g., *Matter of Fagnoli v. Faber*, 105 A.D.2d 523, 525, 481 N.Y.S.2d 784, 786 (3d Dep't 1984) (declining to appoint non-profit organization as Guardian, finding that "the apparent contacts between petitioner [the mother] and the [non-profit organization] . . . demonstrate, at a minimum, the appearance of a possible conflict of interest, which may infringe upon the independent representation to which the daughters are entitled"); *B.A. v. L.A.*, 196 Misc. 2d 86, 94, 761 N.Y.S. 2d 805, 811 (Fam. Ct. Rockland Cty. 2003) (disqualifying Law Guardian and stating, "the Law Guardian's professional judgment reasonably may be influenced since her adversary [the lawyer for the parent] is a member and president of the Board of Directors of the Legal Aid Society, the agency by which she is employed").

Guardian on grounds of conflict of interest only when the lawyer's professional judgment will be or reasonably may be affected by his or her employment relationship with the agency.

6. Instances in which a conflict may arise between the lawyer's duty to the agency and a duty to the child include the following:

the agency's lay or professional staff are likely to testify adversely to the interests of the child on a material issue, necessitating that the Law Guardian cross-examine the staff member;

there is a potential claim that the agency failed to discharge its responsibilities to the ward, a claim that the Law Guardian would be obligated to evaluate;

the services provided by the agency otherwise will be a significant issue in the case, particularly if the Guardian has a management position with the agency;

the lawyer has knowledge of, or access to, information that is confidential to the agency (including the parents' records) that would be beneficial to the ward's case; and

the lawyer serves subpoenas on the agency that the agency opposes on grounds, for example, of confidentiality or privilege.

7. In these circumstances -- and others in which the lawyer's professional judgment or zeal on behalf of the client might be affected -- the lawyer should decline to serve as Law Guardian. If a conflict becomes apparent only after commencement of the Guardianship, the lawyer should withdraw at that time.
8. DR 5-101(A) permits a conflict to be waived if a "disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest." A conflict cannot be cured by consent of the child, however, because a minor is incapable of giving informed consent for purposes of the rule.⁴

⁴ See *Matter of H. Children*, 160 Misc. 2d 298, 301, 608 N.Y.S.2d 784, 786 (Fam. Ct. Kings Cty. 1994) ("As a matter of law, however, a minor must be presumed to lack the ability to knowingly make such a waiver."); *Shaikh v. Waiters*, 185 Misc. 2d 52, 56, 710 Ct. N.Y.S.2d 873, 877 (Sup. Nassau Cty. 2000) ("Consent to compromised representation by a minor is invalid, and the representation of multiple plaintiffs in such a situation is thus improper.")

CONCLUSION

9. Depending on the circumstances, a DR 5-101(A) conflict may exist when an agency's part-time lawyer employee acts as a Law Guardian for a child whose parent has received services from the agency, even though the lawyer performed no legal services for the parent at the agency. If a conflict exists, the child is unable to consent to the representation.

(23-05)