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COMMENTARY

THE "WHY" BEHIND APPOINTING GUARDIANS AD LITEM FOR CHILDREN IN DIVORCE PROCEEDINGS

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Experience discloses that a child of parents involved in divorce proceedings is the disenfranchised victim used as a pawn in a game of chess being played between its warring parents who frequently want the court to physically cut up and divide the child between them in the same manner that they have emotionally done theretofore.

The Wisconsin Supreme Court has been a forerunner in recognizing this background of custodial disputes in divorce proceedings and in acknowledging that children of divorce are interested and affected parties in the controversy between their parents. In 1955, in the case of *Edwards v. Edwards*,¹ the Wisconsin Supreme Court, upon remanding the matter for further hearing and testimony relative to custody, *recommended* to the trial court that a competent and disinterested attorney be appointed guardian ad litem² for the minor child and that such attorney be allowed adequate opportunity to (1) confer with the child well in advance of the hearing, (2) make such investigation as he deems advisable after such conference, and (3) call and take the testimony of witnesses. Such a guardian ad litem becomes a lawyer for the child actively participating in the proceedings and thereby affords representation to and for the child in matters concerning his welfare which may be before the court.

The court re-emphasized its concern for the child in *Kritzik v. Kritzik*³ when it said:

. . . In making his determination as to what conditions of a divorce judgment would best serve the interest of the children

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1. 270 Wis. 48, 70 N.W.2d 366 (1955).

2. "A guardian ad litem shall be an attorney admitted to practice in Wisconsin." [Wis. STATS. § 256.48(1) (1971)].

3. 21 Wis. 2d 442, 124 N.W.2d 581 (1963).

involved, the trial court does not function solely as an arbiter between two private parties. Rather in his role as a family court, the trial court represents the interests of society in promoting the stability and best interests of the family. It is his task to determine what provisions and terms would best guarantee an opportunity for the children involved to grow to mature and responsible citizens, regardless of the desires of the respective parties. This power, vested in the family court, reflects a recognition that children involved in a divorce are always disadvantaged parties, and the law must take affirmative steps to protect their welfare.⁴

Thus, the court seems to feel that the polestar always remains the welfare of the child.⁵

The court, in 1965, in *Wendland v. Wendland*,⁶ again recommended to the trial court that it give *serious consideration* to the appointment of a guardian ad litem to represent the children in further custody proceedings. This apparently was in recognition of the supreme court's feeling that the advisability and necessity for such an appointment needed further emphasis. And again in *Koslowsky v. Koslowsky*,⁷ the court both *recommended and commended* the practice of appointing a guardian ad litem to represent the interests of the children in those instances where the evidence is either nonexistent or inadequate to determine the comparative fitness of the parents and to determine where the best interests of the child are, or in cases where it is apparent that the dispute is centered on the desires of the parents rather than the best interests of the child.

In 1969, the supreme court issued a further directive relative to the appointment of a guardian ad litem for the minor child. The court concluded, in *Dees v. Dees*,⁸ that a guardian ad litem should have been appointed for the child in a dispute as to whether the welfare of the child would be better served by his remaining in a foster home with a minister and his wife where he had spent two formative years. The court stated: "A growing child is not a ping-pong ball to be literally batted back or forth from one home to another. . . ," and that if the appointment of such a legal representative for the interests of the child were to help make clear to the parents that the controlling consideration is the welfare of the

4. *Id.* at 448, 124 N.W.2d at 585.

5. *See*, Walker v. Walker, 24 Wis. 2d 570, 129 N.W.2d 134 (1964).

6. 29 Wis. 2d 145, 138 N.W.2d 185 (1965).

7. 41 Wis. 2d 274, 163 N.W.2d 632 (1969).

8. 41 Wis. 2d 434, 164 N.W.2d 282 (1969).

child, and not their wishes or desires, such would be an added plus.⁹ It is also interesting to note that the court allocated the cost of the guardian ad litem to the parents on an equitable basis.

In 1971, in *Weichman v. Weichman*,¹⁰ the court had before it the issue of whether paternal grandparents would be allowed visitation with a child whose father was in the Armed Forces. The lower court had granted such visitation. Although the supreme court agreed with the trial court's interpretation of the law that such visitation was permissible, it felt that the interests of the child were not sufficiently heard and determined by the lower court and therefore remanded the action for the purpose of holding an adequate hearing and directed the trial court to appoint a guardian ad litem for the child for that issue. The supreme court then remarked:

The child seems to be more of a football in the game of life than a player. A child has a right to grow up as naturally as he can under the circumstances of divorce. Those things which will aid him in his normal development as a human being, the court should allow him; those things which will harm his development should be forbidden. It is difficult enough for a child of a broken home to find its way through life without having the added burden of being the victim of hatred and hostility between his parents and relatives. Divorced parents and their kin should remember it is not their wishes or desires which are at stake but the welfare of the child who did not ask to be placed in the tragic circumstances he finds himself.¹¹

It should be noted that the court used the word "should" rather than "recommend" relative to the appointment of a guardian ad litem in this type of case. It must be concluded that the court felt that trial courts had not been paying sufficient heed to its recommendations and that, therefore, stronger language and action by it was required.

Up to 1971, a number of bills had been presented to the Wisconsin legislature which would have made it mandatory to appoint a guardian ad litem for the children in divorce proceedings, but none of these bills were ever adopted. The supreme court, therefore, invoked its rule-making power and, effective as of July 1, 1971, it created a statutory section which provides as follows:

In any action for an annulment, divorce, legal separation, or

9. *Id.* at 444, 164 N.W.2d at 287.

10. 50 Wis. 2d 731, 184 N.W.2d 882 (1971).

11. *Id.* at 736, 184 N.W.2d at 885.

otherwise affecting marriage, when the court has reason for special concern as to the future welfare of the minor children, the court *shall* appoint a guardian ad litem to represent such children. If a guardian ad litem is appointed, the court shall direct either or both parties to pay the fee of the guardian ad litem, the amount of which fee shall be approved by the court. In the event of indigency on the part of both parties the court, in its discretion, may direct that the fee of the guardian ad litem be paid by the county of venue.¹²

Without a doubt many felt and still feel that the appointment of a guardian ad litem adds to the expense of the divorce proceedings. But as the Wisconsin Supreme Court has pointed out:

[S]uch expense will be rewarding if the interests of the children are better served. This extra consideration is due the children who are not to be buffeted around as mere chattels in a divorce controversy, but rather are to be treated as interested and affected parties whose welfare should be the prime concern of the court in its custody determination.¹³

Some may become disturbed by reason of the fact that the public, represented by the county of venue, can be directed to pay the guardian's fee if the parents are both indigent. On the other side of the coin is the fact that the public is the ultimate loser in any event since children of divorce whose welfare is neglected or not properly considered tend to become the neglected, dependent or delinquent children involved in juvenile court proceedings, later-life criminal court proceedings, or potential litigants in future divorce proceedings. At that point the public is called upon to expend far more for or on account of these people than the mere guardian ad litem fee in the current divorce action between the parents. Bearing in mind that the law in Wisconsin requires appointment of counsel for minors who are parties to any proceedings and that a minor child is not only an interested but also a disadvantaged person in his parents' divorce action, is it not fitting for society to furnish that child with proper representation for the protection of his interests in the matrimonial dispute as is done for those indigents accused of crimes?

Of course, the primary liability rests upon the parents if they have funds with which to pay the fee. In that instance the court

12. WIS. STATS. § 247.045 (1971). [Emphasis added].

13. *Wendland v. Wendland*, 29 Wis. 2d 145, 156, 138 N.W.2d 185, 191 (1964).

places the burden on the shoulders of one or both parents, as it deems fitting and proper.

Many times the parents, rather than the public, voice objection to or criticism of a guardian ad litem appointment and his fee. This objection has little sound merit. The child was not brought into this world by reason of its own asking but instead by reason of the act or acts of the parents; and neither has the child created the dispute that is before the court.

Too frequently custody is bargained away as part of the "deal" when financial matters have been resolved, without regard to the interest and welfare of the child. In such instances the court is asked to award custody based solely upon the stipulation of the parties. However, it is the duty of the court to make its own determination as to custody based, not upon the mere stipulation and agreement of the parties, but on findings made after holding an adequate hearing directed to that issue.¹⁴

In this situation there must be someone available to inform the court what the child has to say and what is in his best interests. A child's feelings should be given consideration by the court in its custodial and visitation determinations if the court is satisfied that his statements and wishes are genuine and not the result of improper influence, persuasion or threats by either or both parents. This knowledge by the court may often tilt the dispute towards a sounder resolution of the problem.

Following the lead of Wisconsin in espousing the philosophy of representation for children, other states have begun to move along in the same direction in recognition of the fact that the best interests and general welfare of at least minor children can be promoted only when such representation is afforded them.¹⁵

In some of the remaining states which have not as yet traveled along this path objection is mainly based on either (1) excessive expense to the parties or public, or (2) the creation of a patronage system by the court. To those fearful of the excessive expenses, I say this minimal expenditure for the welfare of the children and consequent protection of society, it being a fact that neglected children tend to become institutionalized or public charges in some other respect, is an investment in reduction of future public and private expense for the same children either as such or when they

14. *Weichman v. Weichman*, 50 Wis. 2d 731, 737, 184 N.W.2d 882, 885 (1971).

15. See, Foster & Freed, *A Bill of Rights for Children*, 6 ABA FAMILY LAW QUARTERLY 343, 355-356 (1972).

become adults.

To those who are fearful of possible patronage of the court, I say that the experience in Wisconsin has not disclosed any such deviation from sound judicial purpose. Our experience is that the interest of parents and the public, as well as those of children, are served and protected by this added representation. Most frequently the tensions and hostility between the parents is alleviated or removed when the impartial guardian ad litem has made his proper investigation and report concerning the best interests and general welfare of the children resulting in not only the custodial issue but all of the other issues between the parents being resolved without the necessity of a long bitter battle in the arena of the courtroom.

But such a result can only be accomplished when the guardian ad litem has had an ample and adequate opportunity to: (1) interview the parents or any other interested parties; (2) confer with the children; (3) examine the social worker's report and recommendation; (4) request examination of the children and parents, or any of them, by a qualified psychiatrist or clinical psychologist or both; (5) locate and subpoena witnesses; (6) attend the hearing and put in such proof as may be necessary and desirable; and (7) make a recommendation to the court. Upon such thorough action by the guardian ad litem, coupled with the other evidence and any social worker's report and recommendation, the court is in a position to make suitable and adequate findings for the best interest of the minor children.

The National Conference of Commissioners on Uniform State Laws has drafted its Uniform Marriage and Divorce Act, with amendments adopted on August 27, 1971, and submitted it to the House of Delegates of the American Bar Association in February, 1972, for its approval and recommendation. The Act provides that the court *may* appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody and visitation.¹⁶

Upon strong opposition by the ABA Family Law Section to the Uniform Act, the ABA House of Delegates rejected approval of the Act and recommended to its Family Law Section that it either prepare suggested revisions of the Act or prepare a new draft of the Uniform Act and submit the same to the Uniform Law Commissioners and to the ABA House of Delegates for reconsideration.

16. UNIFORM MARRIAGE & DIVORCE ACT (1971) § 310.

The ABA Family Law Section has prepared its proposed revised Uniform Marriage and Divorce Act which has not yet been considered by the ABA House of Delegates or the Uniform Law Commissioners. Among the revisions in the proposal is the provision that now *requires* the court to appoint an attorney, who may be a member of the court system personnel, to independently represent the interests of a minor, dependent or incompetent child with respect to support, custody, visitation, and any other matter dealing with the child's welfare in a proceeding brought pursuant to the Act.¹⁷ The comment to this section points out that it is not enough to merely confer discretion on the court to appoint counsel for children because experience shows that this will not be done. Also, independent representation for the children may tend to mitigate the adversary character of the proceedings and cause the parties and their counsel to be more reasonable. Further, such representation may prevent the bartering away of the best interests of the children by the parties for other advantages.

Also among the Family Law Section's proposed revisions is a provision that the court appointed attorney of any child, as well as any party or child himself, may request conciliation services to aid in the resolution of disputes concerning maintenance, division of property, child support, custody or visitation, and other ancillary matters.¹⁸ It is hoped that, where reconciliation of a broken home is not achievable, conciliation services will be made available so that an amicable disposition of a very distasteful war between spouses can be avoided. Additionally, conciliation services can be used to teach divorcing parents how to live separately and harmoniously for the sake of the children. This procedure will have a greater hypnotic effect towards tranquilizing the hatreds, tensions and hostility between the spouses than the mere removal of grounds for divorce under so-called easy and speedy "no-fault divorce."

In conclusion, it is the writer's considered opinion that the mandatory appointment of a guardian ad litem for children should be a requisite in all matrimonial proceedings. Further, conciliation, as well as reconciliation, services should likewise be a mandatory requisite of these proceedings which are fraught with more emo-

17. PROPOSED UNIFORM MARRIAGE AND DIVORCE ACT § 310. This represents a proposed revision to the Uniform Marriage and Divorce Act prepared by the ABA Family Law Section in 1972.

18. *Id.*, § 305(c).

tional tension than legal problems. The ultimate goal should be the removal of the adversary concept from the area in which children are involved. Wisconsin has opened the door and started on the road towards this goal. The Family Law Section of the ABA has proposed the means of paving the balance of this road. Let all courts and states follow through and travel the complete length of this road for the sake of our children and society's future.