

Response to the NYS Commission on Parental Legal Representation

COMMITTEE ON FAMILIES AND THE LAW¹

Families #2

August 14, 2018

Introduction

In response to the notice of public hearings, the Committee on Families and the Law of the New York State Bar Association makes this submission to the NYS Commission on Parental Legal Representation.

The New York State Bar Association has long been involved in addressing issues affecting families, children and the law. The Committees and Sections of the Association have prepared numerous reports and proposals on these important issues and those reports and proposals have been adopted as policy of the Association. The Association has also played a major role in responding to the need to ensure the quality of mandated representation and expand the availability of counsel for those unable to afford private counsel. For these reasons we welcome the opportunity to share our views about the questions raised by the Commission regarding parental legal representation.

Part I: Funding and Caseloads

Funding Changes, Caseload Standards and Other Quality Improvement Measures Are Needed To Ensure Quality Parental Representation

The current system for funding mandated parental representation in New York is inadequate in that it results in significant financial and oversight disparities between jurisdictions. In some jurisdictions the negative impact of this disparate funding and oversight on the ability of institutional offices and assigned counsel programs to provide quality parental legal representation is severe. Inadequate funding results in inappropriately high caseloads leading either to a reduced ability to provide effective assistance of counsel, or to burn-out for those who must work unreasonably long hours to provide zealous representation. Thus, many providers face serious challenges to their ability to recruit and retain, train and supervise, and adequately compensate attorneys willing to do this critically important work.

The mandated representation standards adopted by the NYSBA provide that an appropriate caseload for those who represent parents in child welfare cases is no more

¹ The NYSBA Committee on Mandated Representation, and the Committee on Children and the Law, join the Committee on Families and the Law in submitting these remarks.

than 50 active cases at a time. The current funding system makes it impossible for most providers to consistently observe these standards. In some jurisdictions, attorneys are faced with on-going caseloads that exceed 100 or more cases, making it impossible to provide effective representation without undue hardship.

The current hourly rates for 18-B assigned counsel services and ancillary non-attorney professional services (e.g., social workers, medical and psychological experts, translators, etc.) are inadequate. In many jurisdictions, available funding for staff attorneys employed by institutional providers is inadequate. The hourly rates for 18-B attorneys have not been raised for over fifteen years, and in some jurisdictions, staff attorneys providing mandated services with institutional providers are paid many thousands less annually than their counterparts who oppose them in Family Court. Assigned Counsel hourly rates must be raised and adequate funding must be provided to allow institutional providers to pay salaries comparable to counsel who oppose them in the Courts.

Part II: Timely Access to Counsel

The Early Assignment of Counsel Is Required To Enhance Parental Representation

Timely access to counsel is an essential element of the constitutional right to counsel. In Family Court cases involving the removal or threat of removal of a child, the failure to provide that constitutional right to counsel and the consequent failure to provide due process can result in irreparable harm to children and families. Failure to provide timely access is likely to result in the deprivation of a meaningful constitutional right to counsel and the loss of due process rights upon removal or the threat of removal of a child. Family Court dispositions that strengthen and maintain parent and child relationships are more likely when attorney and ancillary services such as social worker services are introduced as early in Family Court proceedings as possible.

The assignment of parental counsel as soon as an application is made for the removal of a child allows for meaningful legal representation prior to the removal of a child. In many jurisdictions, parents face imminent risk hearings and the loss of custody of a child without representation. For example, Section 262 and Article 10 of the Family Court Act currently only require the appointment of parental counsel upon the first appearance of the parent in court, while mandating the assignment of the Attorney for the Child immediately upon the application for removal. Legislative changes to require the assignment of counsel upon an application by a presentment agency for an imminent risk hearing would ensure effective parental representation during this highly critical stage of the proceedings.

Part III: Structural Issues

Adequately Funded and Well Structured Institutional and Assigned Counsel Providers Are Needed For Quality Parental Representation Statewide

If structural issues are not addressed, we believe many of the fundamental problems noted herein are likely to continue. Where there are adequately funded independent

institutional providers, these institutional providers and their staff attorneys and supervisors are able to provide comprehensive initial and ongoing training and direct program and case management, supervision, expert services and office and IT support for the attorneys to ensure the highest quality of parental representation possible. The same resources and independence in representation is needed for the members of the Assigned Counsel Panels. Adequately funded and well-structured Assigned Counsel Panels can provide high quality mandated representation in Family Court when the administrators are able to ensure that the attorneys have engaged in necessary training, have access to necessary support and non-attorney professional services, are practicing according to appropriate standards and have the assurance that they can provide high quality, independent representation.

Part IV: Model and Scope of Representation

Multi-Disciplinary Models of Practice Enhance Parental Representation

Standards adopted by the NYSBA call for an interdisciplinary team approach in Family Court that involves attorneys skilled in multiple related practice areas, as well as social workers, investigators and parent advocates to ensure parental representation according to adopted standards of practice. This approach is proven to be the most effective in keeping families together. Families are unnecessarily disrupted when reasonable efforts to keep them together or reunite them are not employed. Such efforts include securing adequate assessments and services to ameliorate the conditions that create safety risks. Timely reduction and removal of risks preserve and strengthen the family; shorten placements; or make placements unnecessary. Factual investigation, expert assessments and zealous advocacy through a team approach provides the strongest possible defense for the family.

Providers who can ensure the seamless provision of representation in administrative proceedings and matrimonial, family, criminal and appellate cases provide the highest quality parental representation. Clients are more likely to follow through on engaging in the social and legal services they need to resolve their Family Court problem when barriers to accessing these services are eliminated or reduced. Also, legal and social service providers who work together or who are in close contact during the pendency of the case are able to be more effective in coordinating their services and resolving issues expeditiously.

Part V: Financial Eligibility Criteria and Procedures Acknowledging Jurisdictional Differences Will Improve Access to Parental Representation

Effective and prompt provision of counsel to parents is critical for one facing a loss of liberty or parental rights, and counsel should be assigned whenever one demonstrably possesses inadequate financial ability to hire an attorney. Gross differences between jurisdictions and among providers that result in a deprivation of the right to counsel in some jurisdictions must be addressed. Fair and reasonable criteria for determining

presumptive eligibility for assigned counsel that allow for discretionary factors in the interest of justice should be established with some uniformity.

Whether or not one is financially able to retain counsel depends on a variety of factors, including jurisdictional differences such as the cost of living and the going rate for counsel, and other relevant income and resource - related factors. Therefore, such standards must take jurisdictional differences into account. In addition, changes in eligibility for an assigned counsel could result in increased numbers of those who qualify which will require increased overall funding to maintain appropriate caseloads.

Part VI: Statewide Oversight Role

Statewide Oversight Will Enhance Parental Representation

Statewide standards, state monitoring and oversight, coordination of training, supervision and non-attorney professional assistance resources are essential to ensure uniformly high quality parental representation throughout the state. The resources and structure now being put into place as the result of the Hurrell-Harring lawsuit settlement and subsequent legislation to enhance criminal representation statewide is already producing positive results. A similar approach, including the adoption of standards and practice, the availability of training and resources and the requirement of accountability, would result in comparable benefits for parents in Family Court.

Part VII: Global Issues

A Statewide Funding and Oversight Scheme Will Ensure Quality Parental Representation Statewide

The provision of high quality parental representation makes it possible for the child welfare system and the Family Court to function properly. Statewide funding and oversight would promote the application of New York State law which is premised on the belief that it is in the best interest of children to be cared for by their parents and which mandates that the Courts and child welfare agencies ensure that reasonable efforts are made to maintain or reunite families. Legislation that shifts the responsibility for funding of parental representation to the State is needed to ensure high quality parental representation uniformly throughout the state. The Commission should recommend and support such legislation.

Conclusion

We thank Chief Judge DiFiore for recognizing the importance of ensuring the quality of representation for persons eligible for assigned counsel in family law matters. We look forward to cooperating with the Commission as it under takes its work.