
REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK

Matrimonial Commission



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program, and appoint neutral experts and law guardians.⁷ With respect to the appointment of forensic and financial experts, the court may expressly state the issues to be evaluated by the expert, the format and content of the expert's resulting report and a schedule for submission of the report to the court. The court may also determine at this time the parameters for payment of the experts and the law guardian for their service. This may be by the parties directly, through public funds, or some combination of these. The Commission recognizes that the appointment and payment process varies widely from court to court and across judicial districts and departments.⁸ To the extent possible, the Commission strives to respect these local practices in crafting its recommendations.

In large measure, the First and Second Judicial Department rules limit discovery in matrimonial actions to financial matters. However, in the Third and Fourth Departments, parties may also have discovery on grounds for divorce and custody issues. At the PC the court will order certain documents and information to be produced by each party to the other and set time frames within which this exchange must occur. During the discovery phase, it is often necessary to retain experts to evaluate certain marital assets for the purpose of equitable distribution. These assets can include the marital residence, businesses, pensions, licenses and educational degrees. The length of the discovery process varies depending on the complexity of the parties' assets. Typically the discovery phase lasts six (6) months; again, this may vary widely from case to case and court to court.

During the action, it is common for one or both parties to file an application for temporary (*pendente lite*) relief. This motion often seeks temporary maintenance or

⁷ The Commission acknowledges that the appointment of other experts or fiduciaries, such as a Guardian Ad Litem, or the referral to other services may be made during this conference as well. However, for the purposes of this Report, the Commission limits its discussion to the appointment of those individuals directly involved in the disposition of the matrimonial action or related proceeding.

⁸ The First and Second Departments permit the discretionary practice of directing parents with sufficient means to pay the law guardian's fee ("parental payment") in both the Supreme Court and Family Court, see *Trinh Quoc Tran v Tau Minh Tran*, 277 A.D.2d 49, 716 N.Y.S.2d 5 (1st Dept. 2000), *lv. dismissed*, 96 N.Y.2d 853, 754 N.E.2d 772, 729 N.Y.S.2d 669 (2001), *Plovnick v Klinger*, 10 A.D.3d 84, 781 N.Y.S. 2d 360 (2d Dept. 2004). The Fourth Department permits parental payment of law guardians in Supreme Court, but does not permit parental payment in Family Court, see *Lynda A.H. v Diane T.O.*, 243 A.D.2d 24, 673 N.Y.S.2d 989 (4th Dept. 1998), *lv. denied*, 92 N.Y.2d 811, 703 N.E.2d 269, 680 N.Y.S.2d 457 (1998). The Third Department, has held that law guardians shall be paid by the State and does not recognize parental payment as an option in any Supreme Court or Family Court proceedings. The Third Department has also held that there is no statutory or regulatory authority for payment of an appointed law guardian by a parent, and that the lack of parameters for a direct-pay system raises issues about the independence of the law guardian and concerns about fundamental fairness to all children. *Redder v Redder*, 17 A.D.3d 10, 792 N.Y.S.2d 201 (3d Dept. 2005); See also *Lips v Lips*, 284 A.D.2d 716, 725 N.Y.S.2d 763 (3d Dept. 2001).

Representation Standards by administrative rule. These standards should be viewed as a supplement to the Code of Professional Responsibility.⁴⁷

Mechanisms for Monitoring Performance. The Rules of the Appellate Divisions provide for periodic evaluations, annual re-certifications, continuing legal education, investigation of complaints made against attorneys for the child and, where appropriate, their removal from the list of certified attorneys.⁴⁸ The Commission recognizes the effort expended by each of the Appellate Divisions in the administration of their programs. Nevertheless, it is the Commission's recommendation that the Appellate Divisions examine their existing rules, particularly with regard to eligibility requirements and evaluations. Upon a review of testimony at the hearings, responses to the surveys prepared and distributed by the Commission and written submissions received, the Commission found several recurring issues of concern regarding the performance of the appointed attorneys for the child, including the following: investigation, case organization and gender bias. The Commission recommends that the areas of training of attorneys for the child should be expanded to include:

- various facets of custody litigation including, domestic violence, the use of protective orders, obtaining evidence and witnesses;
- case preparation, organization, investigation and trial skills;
- understanding the client's environment and recognizing support systems;
- child developmental concerns as they affect lawyer/client relationship and child/parent relationship;
- reading and examining forensic reports and techniques in cross-examining forensic experts and critiquing reports and recommendations;
- addressing one's own biases.

A recurring problem cited in the responses to the Commission's surveys relates to the court's expectations regarding the role of the attorney for the child. The court should not ask an attorney for the child for a recommendation or personal opinion. As stated earlier, the attorney for the child is not an arm of the court or a fiduciary and, as the attorney for the child, he or she must advocate on that child's behalf as is required of any other attorney in a civil proceeding or action. The attorney for the child is expected, however, to take a position in the litigation – in accordance with the considerations outlined earlier – and to use every appropriate means to advance that

⁴⁷ See Code of Prof. Resp., McKinney's Consol. Laws, Book 29 Appendix.

⁴⁸ See 22 NYCRR §§ 611, 679, 835 and 1032.

position.⁴⁹ Consistent with the earlier recommendations by this Commission regarding judicial training, it is essential that judges receive training in child development issues. Additionally, the following areas of judicial training should be expanded so that judges:

- shall not make improper requests for recommendations by the attorney for the child;
- shall not unduly rely on or delegate any judicial responsibilities to any attorney involved in the litigation, including the attorney for the child;
- shall not engage in *ex parte* communications;
- shall not request that the attorney for the child select the forensic expert;
- shall not request reports prepared by the attorney for the child.

Judges should be encouraged to appoint multiple attorneys when conflicts exist in representing more than one child in the family.

Compensation of the Attorney for the Child in Custody Cases. The Commission found that the discretionary practice of directing parents with sufficient means to pay an attorney's fee is not consistent throughout the four judicial departments of the State.⁵⁰ The Commission also notes that in matrimonial actions, Supreme Courts can provide for the payment of attorneys for the child with State funds pursuant to Family Court Act §245 and Judiciary Law § 35(3).⁵¹

To assure consistent and meaningful assistance of counsel to children and statewide uniformity in the availability of such counsel, the Commission recommends that the OCA seek to amend the Domestic Relations Law, the Family Court Act and the Judiciary Law, to expressly empower courts with the discretion to direct parents with sufficient means to pay the fee of the attorney for the child. It is hoped that this initiative would not only place the responsibility for the cost of these services upon those who can afford them, but also would reduce the case load and cost of publicly funded programs and assignments. The attorney for the child should advise the court if fees are not paid in a timely manner so that the court may act to facilitate payment.

⁴⁹ See *Matter of Graham v Graham*, 2005 WL 3489247 (N.Y.A.D. 3rd Dept), 2005 N.Y. Slip Op. 09781, at 3 (December 22, 2005).

⁵⁰ See *supra* n. 8.

⁵¹ A small minority of the Commission believes that each of the four Appellate Divisions should be permitted to continue to chart its own course – both administratively and with respect to its view of the law – on the issue of privately paid attorneys for the child.

The Commission further recommends that it be required whenever such an appointment is made that an Order be entered specifying the allocation of fees, the source of payment, the attorney's hourly rate, the frequency and reporting process of billing, the means for enforcement of payment, and any other relevant factors that will eliminate conflict in connection with the appointment of an attorney for the child.