MAINE FAMILY LAW ADVISORY COMMISSION

Report to Maine Supreme Judicial Court
On
Recommendations for Amending
the Maine Rules for Guardians ad Litem

The Family Law Advisory Commission is pleased to offer the following comments on the *Recommendations for Amending the Maine Rules for Guardians ad Litem* ("Proposed Rules") contained in the January 14, 2013 Report to the Supreme Judicial Court by the Guardian ad Litem Stakeholders Group.

Despite the negative attention recently focused upon them, guardians ad litem in Maine have played an essential role in family and child protection proceedings. Their work is, and has been, instrumental in assuring positive outcomes for children. In the face of pressures from dwindling budgets, burgeoning dockets, disappointed litigants, and heightened expectations, guardians ad litem have performed their duties in a responsive, professional and timely manner. Their services are highly valued by judges and magistrates.

In response to criticisms of the guardian ad litem system, both the Judicial Branch and the Maine Legislature have undertaken efforts of reform with respect to the appointment, qualifications, performance and oversight of guardians ad litem. The convening of the Stakeholders Group to examine the Maine Rules for Guardians ad Litem was one effort undertaken by the Judicial Branch. In January the Stakeholders Group issued its report recommending changes to the current rules. During its recently concluded session, the Legislature considered a number of bills proposing various reforms. At the end of June the Legislature enacted an amended version of one of those bills, LD 872. The Governor signed this bill into law on July 8th as P.L. 2013, c. 406.

Chapter 406 adopts an approach generally consistent with the Proposed Rules. In several instances the new statute appears to import directly a number of provisions from the Proposed Rules, and in other instances the statute adopts a general framework and directs the Supreme Judicial Court to provide more detailed regulation through rulemaking. Thus, Chapter 406 not only enacts some independent reforms but it also codifies changes envisioned by the Proposed Rules and sets the stage for adoption of complimentary rules. With regard to the interplay between the new statute and the Proposed Rules, these comments focus on areas anticipated but not expressly covered by the statute as well as a few instances in which there are inconsistencies between the Proposed Rules and the statute.

1. Changes in Duties and Scope of Work of Title 19-A Guardians ad Litem

Perhaps the most important substantive change proposed by the new rules is the re-calibration of the scope of the duties of guardians ad litem appointed in family matters under Title 19-A. Through the adoption of the three types of appointment orders and the uncoupling of Title 19-A guardians ad litem from the "Standards of Practice" set out as Appendix A to the current rules, the Proposed Rules envision that guardians ad litem in Title 19-A cases will have fewer prescribed duties than their Title 22 counterparts, will operate within a more circumscribed scope of responsibilities, and will have those responsibilities identified and set early in the case. This approach is generally endorsed in the new statute, although specific responsibility for defining the scope of a guardian ad litem's duties is left to case-by-case determination through the court-created order of appointment.

Initially, many—including some FLAC members—had concerns about this change in approach to appointment and use of guardians ad litem in Title 19-A matters. However, it appears from anecdotal reports that this approach has been well received so far. Even though the rule changes have not been formally adopted, judges and magistrates have effectively been following the new approach for several months now, as earlier this year they were instructed by the Chief Judge of the District Court to begin using a new appointment form that employs the approach set forth in Proposed Rule 5.

Magistrates, judges, lawyers and guardians ad litem with whom we have spoken offered positive comments, although some reservations and concerns were expressed as well. The approach contemplated by Proposed Rule 5 and reflected in the use of the new appointment order results commonly in a narrower scope of work for the guardian ad litem, with all duties and responsibilities as well as payment details expressly prescribed in the initial appointment order. While this serves to make clear at the outset precisely what the guardian ad litem's scope of work will be and thus may help to address some of the root causes of recent complaints directed at guardians ad litem, it may also have the unintended effect of requiring more court events later in a case as a guardian ad litem's investigation reveals the need for additional work not contemplated by the initial appointment order. This could prompt the need for additional status conferences and result in delay and/or increased expense. And, more time and experience will tell whether or not the quality of information provided by guardians ad litem in Title 19-A cases will be affected by the reduced scope of their appointments.

2. Applicability to Title 18-A Actions

The Proposed Rules expressly apply to guardians ad litem appointed in Title 19-A cases and Title 22 cases. However, the standards and requirements

set out in the new statute extend as well to guardians ad litem in Title 18-A matters. See the new statute at 4 M.R.S. §1554(1) (guardian ad litem responsibilities); §1555 (guardian ad litem appointments); and §1557 (guardian ad litem complaint process). The Proposed Rules should be clarified in this regard.

3. Clear and Consistent Articulation of "Goals" vs. "Standards of Performance" vs. "Standards of Conduct" for All Guardians Ad Litem

The Proposed Rules, particularly now in light of Chapter 406, are somewhat confusing with regard to defining the standards of performance and practice for guardians ad litem. First, as reflected in the title of this paragraph, the rules and the statute use three different terms—"goals", "standards of performance", and "standards of conduct"—to refer to the same concept. See Proposed Rules 1(b), 3(a), 6; and the new statute at 4 M.R.S. §1554(2). In addition, the "duties" of Title 19-A guardians ad litem and Title 22 guardians ad litem are currently set out as well in 19-A M.R.S. §1507(3)(A) and 22 M.R.S. § 4005(1), respectively. Second, the differentiation between guardians ad litem based on the type of case in which they are appointed (Title 19-A cases vs. Title 22 cases), together with the apparent proposed "repeal" of the "Standards of Practice," Appendix A to the current guardian ad litem rules (which currently apply to all guardians ad litem regardless of case type) is also confusing. In FLAC's view, there ought to be one uniform standard of conduct applicable to all guardians ad litem that prescribes baseline ethical guidelines and best practice guidelines. That is to say, in our view there ought to be guidelines for all guardians ad litem as to how they conduct themselves in their role as court-appointed agents. As to what specific duties and responsibilities attend a particular appointment, such can be prescribed according to the type of case in question, either by statute or by rule.

4. System for Handling Complaints Against Guardians ad Litem; Complaints in Pending Cases

Section 1557 of the new statute requires the Court to establish a process for addressing complaints against guardians ad litem as well as disciplinary issues. Proposed Rule 3(c) indicates that a complaint and disciplinary process will be addressed separately in another rule, and is not within the scope of these Proposed Rules. It is FLAC's understanding that the committee headed by Justice Silver may be reconvened to finalize the guardian ad litem oversight, complaint and disciplinary processes.

Although the new statute leaves development of a complaint and disciplinary process to the Court via rulemaking, Chapter 406 does prescribe some requirements, including a requirement that whatever complaint process is developed by rule shall provide for "at least . . . [t]he ability of a party to make a complaint before the final judgment as well as after the final

judgment." 4 M.R.S. §1557(1)(A) (Emphasis added). This specific requirement departs from the current approach of handling complaints in pending cases, in which the presiding judge in the matter hears and resolves complaints about the guardian ad litem. Proposed Rule 3(c)(1) would have continued the current practice, although that may now be revisited in light of Section 1557(1)(A)'s express requirement. It is FLAC's view that the statute's mandate for a parallel or alternative complaint process in pending cases is not desirable and may be problematic. Such a process could be susceptible to abuse by litigants seeking to gain a tactical advantage in a pending matter. It could result in delays and uncertainty in open family matters. We hope the Court will be careful in constructing any such process in order to minimize or avoid such mischief.

5. Wishes of the Child

Sections 1555(5) and 1556(4) of the new statute provide that the guardian ad litem "shall make the wishes of the child known to the court if the child has expressed them, regardless of the recommendation of the guardian ad litem." This is consistent with current law. See 19-A M.R.S. §1507(4). Proposed Rule 5(b)(8) mirrors this language, but adds: "however, the guardian shall not encourage the child to express his or her wishes or choose between parents, unless the child has chosen to express such wishes to the guardian without prompting from the guardian." It is the view of most FLAC members that, for the sake of clarity and consistency, the Court may wish to consider omitting this language so that the Proposed Rules reflect the statutory standard.

6. Miscellaneous Provisions

In addition to the discrepancies noted above, there are other minor differences between the Proposed Rules and the new statute that the Court may wish to address and reconcile in the final version of the new rules, including:

- Proposed Rule 1(b)'s list contains language in subsections 1 and 7, respectively, that states in pertinent part that a guardian ad litem is expected to "advocate on behalf of the child's best interests" and "advocate that steps are taken to protect the child from harmful communication." Subsection 6 requires that guardians ad litem "work effectively and efficiently with other professionals involved in the assessment or treatment of the child and/or parties to a child's case." In our view, these additional "goals" and expectations are important, are within the Court's rule-making authority, and are not precluded by the Legislature's omission of them in the statute.

- Proposed Rule 2(a)(1)'s specification that an unrostered guardian ad litem will be on a pro bono basis is narrower that what the statute seems to permit. See 4 M.R.S. §1555(1)(A).

- Proposed Rule 2(a)(1)'s references to "judge" should be consistent with §1555(1)(A)'s references to "the court."

- Proposed Rule 5(c)(12) states that the guardian ad litem "*should* protect the interest of the child who is a witness in any judicial proceeding relating to the case in which the guardian ad litem has been appointed"; and §1556(2)(G) reads, "*shall* protect the interest of the child who is a witness in any judicial proceeding relating to the case in which the guardian ad litem has been appointed."

Thank you for the opportunity of providing comments on the rule changes under consideration.

Dated July 22, 2013

Respectfully submitted by the Maine Family Law Advisory Commission

Judge Wayne R. Douglas, Maine District Court, Chair
Justice Andrew M. Horton, Maine Superior Court
Judge James E. Mitchell, Kennebec County Probate Court
Magistrate Paul D. Matthews, Maine District Court
Franklin Brooks, Public Member
Edward S. David, Esq., Maine State Bar Association Representative
Juliet Holmes-Smith, Esq., Volunteer Lawyers Project
Diane E. Kenty, Esq., CADRES Director, Judicial Branch
Margaret Lavoie, Esq., Maine State Bar Association Representative
Peg Libby, Public Member
Kevin Wells, Esq., Counsel to Maine DHHS