



Duties of a Family Court Guardian Ad Litem

When a party before a court appears to be under a legal disability which would prevent him from being able to take part in legal proceedings, a court may appoint a guardian ad litem to assist the party to continue with its case. The purpose of this article is to give an overview of the statutory framework that governs the appointment of guardian ad litem, as well as discuss the powers an Article 12 Guardian Ad Litem has in the context of Family Court litigation.

At the outset, it should be noted that the term "guardian ad litem" is not statutorily defined in New York, though traditionally, a guardian ad litem for one under a disability functions as the litigant would function were it not for the disability.¹ In New York State, there are two statutes under which a court may appoint a guardian ad litem to assist a party under a disability: Article 12 of the New York Civil Practice Law and Rules ("Article 12 GAL") and Article 81 of the New York Mental Hygiene Law ("Article 81 GAL"). The roles of a guardian ad litem under Article 12 of the CPLR is much more prescribed than the role of a guardian ad litem appointed under Mental Hygiene Law Article 81.

Roles of Guardians

Under Article 12 of the New York Civil Practice Law and Rules, any

New York court may appoint a guardian ad litem on its own initiative when it finds, based on a preponderance of the evidence, that a party's condition impedes the party's ability to protect its rights.² Examples of conditions that can impede a party's ability to protect his rights include cultural, linguistic, physical, intellectual, or psychological incapacities.³ The duty of an Article 12 guardian ad litem is to protect the rights and interests of wards who, by virtue of a court appointing an Article 12 GAL, are deemed incapable of adequately protecting their rights and interests on their own.⁴

At this time, New York courts have not defined the exact parameters of an Article 12 GAL's powers, though it is "universally accepted" that an Article 12 GAL's powers are limited.⁵ New York courts have noted that, "An Article 12 guardianship is not a decision-making position, it is an appointment of assistance. The GAL provides invaluable service to the ward, such as applying for public assistance or arranging clean-ups for consenting Collyer wards [individuals who have allowed a public health nuisance to develop in their apartments due to their condition which induces compulsive hoarding tendencies]. Betterversed with the ways of the world and its bureaucracy than wards are, GALS should try to help realize their wards' wishes to the best of their judgment and abilities. As an officer

of the court, the GAL also acts as a liaison among the court, the opposing side, and the ward, informing them of things that might help the ward's case."⁶

Unlike a guardian ad litem appointed under Article 12 of the New York Civil Practice Law and Rules, a guardian ad litem appointed under Article 81 of New York Mental Hygiene Laws may only be appointed by a Supreme Court, or a County Court outside of the City of New York.⁷ For a court to appoint a Mental Hygiene Law Article 81 guardian ad litem, the court must determine, by clear and convincing evidence, that the party is unable to provide for personal needs and/or property management and they cannot adequately understand and appreciate the nature and consequences of their inability to care for themselves.⁸

A guardian appointed under Article 81 of the Mental Hygiene Law has a duty, at a minimum, to visit her ward four times a year and file an annual report with the court.⁹ Powers delegated to an Article 81 GAL include powers over the ward's property and personal needs.¹⁰

Family Court Litigation

In the context of Family Court litigation, judges of the New York State Family Courts may only appoint Article 12 GALs whose powers are limited to assisting their wards re-

alize their wishes to the best of the Article 12 GAL's judgment and abilities. Attorneys appointed as Family Court Article 12 GALs usually are appointed wards who are children, who lack legal capacity due to their infancy, though sometimes they are also appointed to adults, where the adults are perceived to lack legal capacity due to an apparent psychological incapacity.

In regards to Family Court Article 12 GALs who have been appointed over children in Juvenile Delinquency or PINS (persons in need of supervision) proceedings, it is often the case that the GALs are asked to stand in loco parentis where the parent has failed to appear in court with her child, or where the child's interests stand adverse to her parent's interests. As a matter of practice, the duties an Article 12 GAL for a child in these cases should include: (1) standing in loco parentis and advising the ward of the risks, benefits and consequences of different courses of action as discussed by the ward's attorney; and (2) standing in loco parentis and advising the court of what is perceived to be in the best interest of the ward.

When appointed to adults in a child protective proceeding, Article 12 GALs should assist their clients in obtaining and completing services as requested by either the Administration for Children's Services or the court. An Article 12 GAL's experience in dealing with administrative agencies and service providers can be of great assistance to a ward with limited intellectual or psychological ability.

When appointed to adults in custody, guardianship or visitation proceedings, an Article 12 GAL can assist a client in understanding a proposed agreement, as well as advise the court as to what the GAL thinks is in the ward's best interest. If the client and Article 12 GAL do not agree as to the settlement posi-

tion for claims brought by the ward, the ward's position must be adopted. New York courts have found, however, that where the Article 12 GAL's position is opposite to the ward's as to custody, guardianship, or visitation claims brought against the ward, the court may adopt the Article 12 GAL's position if in the totality of the circumstances, the Article 12 GAL's position is in the best interest of the children.¹¹

With the exception of settling claims against a ward in a custody, guardianship or visitation proceeding, the general rule is that an Article 12 GAL does not have authority to substitute a client's judgment in a Family Court proceeding. New York courts have set forth that, "Until the Ward has been through the rigorous process of being appointed a Supreme Court Article 81 guardian and has been declared judicially incompetent by Supreme Court, the ward's right to self determination remains intact."¹²

Best Practice

For best practice, where issues of settlement versus a hearing arise, and where the ward and GAL are of one mind as to the course of action to be pursued, the attorney for the ward should pursue this course to achieve the client's goals. If the ward and Article 12 GAL disagree as to course of action, and the Article 12 GAL determines that the ward is unable to provide for his or her personal needs and cannot adequately understand and appreciate the nature and consequences of his inability to care for himself, the Article 12 GAL should make an application to adult protective services to commence an Article 81 proceeding and ask the court for a stay of the Family Court proceedings pending an Article 81 proceeding.

If, however, the disagreement between the ward and his Article 12 GAL is simply a matter of opinion, and the

ward is otherwise competent to take care of himself and understand the proceedings, an Article 81 proceeding is not appropriate and the GAL should submit to both the ward's counsel and the court the ward's position and the GAL's position for the court as to whether to accept settlement, go forward to trial, or for the court to issue an order for adult protective services to commence an Article 81 proceeding.

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Endnotes:

1. See *In the Matter of Scott L.*, 134 Misc.2d 240, 242, 509 N.Y.S. 971, 973 (Family Court, NY County, 1986).
2. See NY CPLR 1202 (Lexis 2011); see also *New York Life Ins. v. V.K.*, 184 Misc. 2d 727, 734, 711 N.Y.S.2d 90 (Civ. Ct. of the City of New York, New York Co. 1999).
3. *1234 Broadway v. Feng Chai Lin*, 25 Misc.3d 476, 484, 883 N.Y.S.2d 864, 872 (Civ. Ct. of the City of New York, New York Co. 2009).
4. *Id.* at 482, 870.
5. *Id.*
6. *Id.* at 495, 880.
7. N.Y. Mental Hygiene Law §81.04(a) (Lexis 2011).
8. N.Y. Mental Hygiene Law §§81.04(b)(1),(2) (Lexis 2011).
9. N.Y. Mental Hygiene Law §81.20(a) (Lexis 2011).
10. N.Y. Mental Hygiene Law §§81.21 and 81.22 (Lexis 2011).
11. See *Feliciano v. Nielson*, 290 A.D.2d 834; 736 N.Y.S.2d 510 (3d Dept. 2002) (Article 12 GAL can settle custody and visitation matters opposite client if settlement is in client's best interest and court can ascertain best interest of children); see also *Brodcom W. Dev. v. Perez*, 26 Misc.3d 1239A; 907 N.Y.S.2d 435; 2010 NY Slip Op 504680 (Family Court, New York County, 2010) (While GAL may recommend a proposed stipulation, GAL may not unilaterally bind ward; it is the court that must determine whether to accept the stipulation based on the totality of the circumstances).
12. *Id.* at 488, 875.