Court Appointed Special Advocate/Guardian ad Litem

4/30/10

In **In Re Paternity of N.L.P.**, 926 N.E.2d 20 (Ind. 2010), the Court reversed the trial court orders which found that: (1) an attorney guardian ad litem's fees of $38,000 were unreasonable and (2) reduced the guardian ad litem fees to $20,000. Finding that the trial court erred by failing to enforce the parents' written agreements, the Court remanded the case for further proceedings. Father's paternity was established in 2001, and a long-running custody dispute between Father and Mother ensued. Mother was granted physical custody of the child and Father was granted temporary supervised visitation, ordered to pay child support, and ordered to provide medical insurance for the child. After Father filed his second contempt petition regarding visitation, Father and Mother, each of whom was represented by separate counsel, filed a joint petition for the appointment of a guardian ad litem. Father and Mother specifically requested the court to appoint attorney Jill Swope to interview the parties and make recommendations to resolve the visitation and parenting problems. The court granted the motion. Mother and Father executed separate but identically worded letters of agreement for engagement of guardian ad litem services which set forth Swope's hourly billing rate of $150 per hour, that the parties would be billed by the quarter hour, and the parties would be billed for various expenses including long-distance telephone calls, postage, fax charges, photocopies, and travel expenses. The agreement was ambiguous on whether each party would be responsible for one-half of the fees and expenses or whether the parties would be held jointly responsible for the total amount billed. Swope remained involved in the paternity matter from February 2004 through March 2008, when she requested to be released from service. During this four year period, Swope prepared and submitted two court-ordered GAL reports; made multiple home visits to both parent's household; supervised parenting time exchanges under court order; supervised parenting time on more than one occasion; visited the child's school; reviewed parenting time records and video/audio recordings; had conversations with therapists, school officials, teachers, Department of Child Services personnel, law enforcement personnel, staff at the supervised parenting time facility, the custodial evaluator, child, parents, and other family members. Swope also reviewed numerous records, prepared and submitted several pleadings on the child's behalf, and prepared for and attended hearings on multiple occasions, including the six-day hearing in 2007 in which she participated through testimony as well as cross-examination of witnesses. The quality of Swope's work was never in dispute. At the trial court's direction, Swope submitted her request for guardian ad litem fees which included billing statements and time records that established incurred fees and expenses as of October 23, 2007, in a total amount of $34,800, for which Father had paid $11,480.80 and Mother had paid

$2,678.32. The trial court issued its order on December 27, 2007, which modified custody to Father, modified child support, and ordered Mother's visitation to be limited and supervised. These orders were not at issue in this appeal. As to Swope's guardian ad litem fee request, the trial court determined that "although the GAL has conducted a thorough investigation, the GAL fees are not reasonable." The trial court's determination was based on the following findings: (1) Swope charged by the quarter hour, rather than tenths per hour; (2) charges for long-distance calls, copying, and faxing should have been included as overhead in the total hourly rate; (3) the income of the parties and their ability pay, and (4) some of the services Swope provided duplicated the services provided by the court appointed custody evaluator. Declaring that both Mother and Father are responsible for paying one-half of the fees, the trial court reduced the guardian ad litem fees to $20,000. Swope filed a motion to correct error. The trial court denied the motion after a hearing, but acknowledged error in basing its unreasonableness finding on Swope's billing by the quarter hour. Swope appealed, but neither Mother nor Father filed a brief in response. The Court of Appeals, on its opinion at 898 N.E.2d 403 (Ind. Ct. App. 2008) vacated in part the trial court's order and remanded the case for determination of the reasonableness of the $20,000 fee. The Court of Appeals determined sua sponte that Swope's fees were unreasonable because Swope was acting as both a guardian ad litem and an attorney and "should have billed her duties separately and differentiated between when she was performing duties as the GAL and when she was performing legal work as an attorney." In Re N.L.P., 898 N.E.2d at 408. The Supreme Court granted transfer thereby vacating the opinion of the Court of Appeals.

The Court held that, because there was no evidence that the parties' agreements were void as against public policy, and the trial court made no findings as such, the court was bound to enforce the terms and conditions of the agreements. Id. at 25. The Court noted that in a paternity custody dispute, the attorneys representing the competing adults must effectively represent the interests of their clients, but the interests of the adults are not always consistent with the best interests of the child. Id. at 23. The Court cited IC 31-32-3-1, stating that the trial court is empowered to appoint a representative for the child in the form of a guardian ad litem, or court appointed special advocate, or both. Id. The Court further quoted IC 31-14-18-2(a), which states the trial court may order a party to an action to pay: "(1) a reasonable amount for the cost to the other party of maintaining an action under this article; and (2) a reasonable amount for attorney's fees, including amounts for legal services provided and costs incurred, before the commencement of the proceedings or after entry of judgment." Id. The Court stated that both the trial court and the Court of Appeals focused on the reasonableness of the requested guardian ad litem fees, but this focus is misplaced. Id. The Court noted that the clients neither contested the guardian ad litem's bill nor participated on appeal. Id. The Court opined that the reasonableness of the guardian ad litem's compensation will likely be subject to the trial court's discretion in cases where there are no terms of engagement other than those setting forth the duties and responsibilities of the guardian ad litem. Id. The Court contrasted such situations from the instant case, where the parties separately entered into written agreements with the guardian ad litem that set forth hourly rates among other matters. Id. The Courts regularly emphasize the very strong presumption of the enforceability of contracts that represent the freely

bargained agreement of the parties. Id. The Court noted that trial courts may of course refuse to enforce private agreements on public policy agreements, such as: (1) agreements that contravene a statute; (2) agreements that clearly tend to injure the public in some way; or (3) agreements that are otherwise contrary to the declare public policy of this State, but there has been no contention that the agreements between the parents and the guardian ad litem fall into any of these categories. Id. at 24. The Court saw no reason for the trial court to modify the terms of the parties' agreements or to means test the agreements absent any cap on fees or provisions in the agreements related to the parents' ability to pay. Id. In response to the trial court's finding that some of the services for which the guardian ad litem requested payment duplicated those provided by a court-ordered custody evaluator, the Court stated,

> "To the extent there was any duplication, the services performed by the custody evaluator were performed for the benefit of the court; and those performed by the guardian ad litem were for the benefit of Child. It is not unusual in litigation that the same or similar services are duplicated for the benefit of different parties and the court." Id.

The Court did not reach the question of the factors a trial court should consider in determining the reasonableness of the amount requested for guardian ad litem fees in the absence of a written agreement. Id. The Court noted in passing its disagreement with colleagues on the Court of Appeals that a person acting as a guardian ad litem and as an attorney should bill separately for her service and failing to do so means that the resulting fees are presumptively unreasonable. Id. at 24-25. The Court said that both attorney and non-attorney guardians ad litem have the same statutory responsibility (IC 31-9-2-50) and the lines are blurred when a guardian ad litem is also an attorney. Id. at 25. The Court stated that a two-tiered billing system that attempts to parse which particular services are unique to an attorney and which are not is at least unnecessary and at most unworkable. Id. The Court also observed that some trial courts have largely addressed the issue of guardian ad litem fees by local rule. Id.