



FAMILY LAW SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (FL-2007-10) MINOR'S COUNSEL QUALIFICATIONS AND QUASI-JUDICIAL IMMUNITY

TO: Larry Doyle, Chief Legislative Counsel, State Bar Office of Governmental Affairs

FROM: Diane Wasznicky

DATE: June 7, 2006

RE: Adding §§3150.2 and 3150.5 to the Family Code re Minor's Counsel

SECTION ACTION AND CONTACTS:

Date of Approval by Section Executive Committee: April 7, 2006
Approval vote: 15-0

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DIGEST: This proposed legislation amends the Family Code by adding §§3150.2 and 3150.5 which set forth qualifications for Minor's Counsel and provide for quasi-judicial immunity for Minor's Counsel.

PURPOSE:

1. Existing Law: There are currently no provisions for qualifications of Minor's Counsel in family law or quasi-judicial immunity for family law minor's counsel.
2. The Problem: Minor's Counsel serve a valuable purpose for the court, parents and children in family law cases. However, concerns expressed about the Minor's Counsel role can be addressed by statutorily creating a minimum criteria/qualifications for appointment of Minor's Counsel in family law cases.

The most significant deterrent to qualified attorneys accepting appointment as Minor's Counsel is the growing number of parents who are bringing suits against Minor's Counsel in State and Federal Courts, more often than not primarily – if not solely – because they do not agree with Minor's Counsel's conduct on behalf of the child(ren) involved. These suits are seldom, if ever, well founded or determined to be meritorious but are exceedingly time-consuming and expensive to try and defend for attorneys. This is especially true since Minor's Counsel usually are serving for minimum hourly rates set by the County or pro bono.

Given the service Minor's Counsel provides to the court and families as neutral third parties appointed by the court, their value and efforts can be analogized to that of court appointed evaluators and mediators, who have quasi-judicial immunity conferred on them by case law (see Howard v. Drapkin, (1990) 222 CA3d 843, 853-854, 271 CR 893, 897-898). It is vital to address this issue for Minor's Counsel to stop the loss of qualified attorneys in this role.

3. The Remedy:
 - a. Insuring all, to the extent possible, of quality representation by Minor's Counsel by creating clear, objective criteria or qualifications for appointment as Minor's Counsel;
 - b. Clearly setting forth the procedure available to parents for raising complaints or issues regarding Minor's Counsel and request for termination of Minor's Counsel; and
 - c. Providing quasi-judicial immunity for such qualified Minor's Counsel analogous to that already provided to mediators and evaluators by case law.

ILLUSTRATIONS: If an attorney is appointed by the court to represent a minor in a family law case, the court can objectively assess that attorney's ability to provide such representation by applying the standards or criteria set forth.

If a parent then takes issue with some action or conduct of Minor's Counsel, that parent can file a motion with the appointing court and raise their concerns regarding Minor's Counsel's actions and even request termination of that Minor's Counsel's appointment. Ultimately, the parent or even the child (as an adult or through a Guardian Ad Litem) can report the Minor's Counsel to his or her licensing Board if the parent or child is not satisfied with the court's response to the concerns raised (this is the same remedy available now regarding mediators and evaluators), they would not be able to file or succeed with a lawsuit against the Minor's Counsel due to quasi-judicial immunity provision.

DOCUMENTATION: To the author's knowledge, there is only significant anecdotal evidence (actual lawsuits filed against existing Minor's Counsel in various counties over past

five to ten years) that a problem exists in being able to recruit and keep experienced Minor’s Counsel accepting cases. However, no one has yet indicated a belief that there is no problem.

HISTORY: This resolution was debated and approved (by an overwhelming majority) at the 2005 Conference of Delegates and has the unanimous support of the Family Law Section Executive Committee as written.

PENDING LITIGATION: None.

LIKELY SUPPORT AND OPPOSITION:

Support:

Family Law Attorneys
standardized
Judges
Consumer Attorneys Association
(formerly California Trial Lawyers
Association – board voted not to oppose)

Why?

Understanding of need for
qualifications and protection from frivolous
lawsuits

Oppose:

No groups or organizations have voiced opposition.

FISCAL IMPACT: None (setting forth qualifications for appointment of Minor’s Counsel creates no added cost to that already existing regarding minimal compensation courts provide to Minor’s Counsel)

GERMANENESS: The Family Law Section of the State Bar of California is made up of family law practitioners representing both parents and children. Issues relating to the protection of children, as well as the impact on parents, are within the specialized expertise and training of the members of the Family Law Section.

TEXT OF PROPOSAL

SECTION 1. Section 3150.5 is added to the Family Code, to read:

3150.5. (a) A parent or a party to a proceeding under Division 8 of the Family Code (Custody of Children) may request the appointing Court to terminate the appointment of a particular private counsel (previously appointed to represent the minor child(ren) in the case/matter) or resolve any complaint by a parent or party regarding the actions of the appointed attorney.

(b) Such a request shall be by noticed motion to the appointing family law court. The motion shall include a declaration under penalty of perjury by the moving party stating the basis and/or reasons for the request. The motion shall be filed and served in the same manner and time limits as any other family law motion.

(c) Such a motion shall be the only remedy at law to adjudicate any grievance or complaint by a parent or party to the proceeding regarding the actions of minor’s counsel.

(d) Private counsel appointed by the court pursuant to Section 3150.2, meeting the requirements set forth in subdivision (b) of Section 3150.2 and not retained by one party to advocate for the child, shall be entitled to quasi-judicial immunity for any communications and/or conduct during the course of counsel's duties as counsel for the minor child(ren) from date of appointment until the order relieving counsel from said appointment. Quasi-judicial immunity provided herein is the same as that currently provided to court appointed mediators, investigators and evaluators by case law.

SEC. 2. Section 3150.2 is added to the Family Code, to read:

(a) In order to ensure a high quality of expertise for appointed private counsel for minors, each court and/or county shall, within one year of this statute's enactment, create a Minor's Counsel panel of attorneys meeting the minimum standards/qualifications set forth below, for appointment in cases proceeding under Division 8 of the County Code requiring minor's counsel.

(b) Court-approved Minor's Counsel must provide verification of:

(1) Licensure as an attorney for at least five (5) years during which time period at least 50 percent of the attorney's practice was devoted to family law with substantial emphasis in custody cases;

(2) A minimum of eight (8) hours of training, accredited for MCLE and offered by the Judicial Council, State Bar, local Bar association, the court or other groups in subjects specifically relating to the representation of children;

(3) Professional liability insurance.

(c) Each court, subject to the exceptions below in (e), shall maintain a list of attorneys certified/qualified per the above requirements (Family Code §3150.2(b)). The qualified attorneys shall provide proof and/or verification of their meeting the qualification requirements to the court and annually certify to the court the following:

(1) Current license in good standing and proof of liability insurance;

(2) Completion of eight (8) hours per year of accredited continuing education in the area of custody and representing children.

(d) Each attorney appointed to represent minors shall notify the court within five (5) days of any public or private disciplinary proceeding by the State Bar, stating the basis of the complaint, result, notice of any reproof, probation and/or suspension.

(e) A court may appoint an attorney not on the court-approved Minor's Counsel list/panel in special circumstances, taking into consideration factors such as language, culture, special needs of children, other specialized training of the attorney, etc., unless appointment from outside the panel/list is otherwise prohibited by local Rule of Court.

(f) In counties where the attorney population and/or expertise does not make such a panel possible, each county and/or court is encouraged to form a partnership and/or regional panel of qualified attorneys willing to be appointed in the courts/counties participating in such a regional endeavor.