

The County Perspective

Testimony submitted to the

*New York State Unified Court System
Commission on Parental Legal Representation*

by the

New York State Association of Counties



Wednesday, October 10, 2018

Charles H. Nesbitt, Jr., NYSAC President

Stephen J. Acquario, Executive Director

I. Introduction

Thank you, Chief Judge Janet DiFiore, for bringing us together to study this important court and state function. It is our hope that through your leadership, vision, and this task force process, we will strengthen the Family Court system.

Another thank you to the Commission on Parental Legal Representation for your hard work and focus. We can see from the list of organizations and individuals providing testimony, here and around the state, you are determined to get the most accurate data and facts to help pave the best path forward in the future of Family Court representation.

NYSAC and the counties of New York appreciate the invitation to provide testimony on this matter, as county government plays an integral role in the Family Court system. I'd also like to thank Ulster County Executive Mike Hein for his time, expertise, and public service to this important program.

In my testimony today, I will encourage the State to follow the model from Hurrell-Harring v. State to strengthen its constitutionally-mandated parental representation system. The improvements we have already seen in the criminal court system should and can occur in Family Court.

Who Is NYSAC?

The New York State Association of Counties (NYSAC) is the only statewide municipal association representing the interests of county government, including elected county executives, county supervisors, legislators, representatives, commissioners, administrators, and other county officials from the 62 counties of the state of New York, including the City of New York.

Local government is at the heart of New York State. NYSAC provides support and guidance to county officials in furtherance of their essential governmental functions. As the voice of county officials throughout New York State, NYSAC is steadfast in communicating the needs and recommendations of our members to state and federal lawmakers. We are proud to represent New York's counties and their elected and appointed officials.

II. The History of New York Family Court Parental Representation

New York has always been a national leader in understanding the need for Family Court and providing a system by which all interested parties and, most importantly, children, are protected. New York created its Family Courts through a State Constitutional amendment in 1961. Since this time, the State established the Family Court Act, and Family Court-related services have further defined how Family Court operates, with a focus on providing solutions to family disputes and helping individual family members with the safest and best path forward.

At times, judges in Family Court are faced with difficult and complex matters that can require the Court to remove a child from a home when it is in the best interest of the family and individual family members. Family Court cases have outcomes that are high stakes, as one can imagine concerns that all family members involved have their rights and best interests legally protected. Accordingly, individuals from within the same household often need separate counsel to guide them through this process and protect their individual rights.

In recognition of this fact, in 1975, the Legislature enacted legislation—drafted and introduced by OCA—which codifies a broad parental right to counsel.¹ Emphasizing potential infringements of parents’ “fundamental interests and rights, including the loss of a child’s society and the possibility of criminal charges,” the Legislature recognized counsel’s “indispensable” role in the “practical realization of due process of law” and in assisting the court “in making reasoned determinations of fact and proper orders of disposition.” (See Family Court Act § 261.) It is important to note that not only has our State legislature passed laws in this regard, but our courts have established that the parental right to assigned counsel means effective assistance of counsel under the State Constitution.

The most important comment I can deliver today is this: ***New York State should ensure fair meaning and execution of § 261 of the Family Court Act and adequately fund and properly provide counsel to address the complex issues between family, parents, and children.***

III. The Role of Counties within the Family Court System

When compared to other states, New York is unique in that it has set up a system where they task county governments with providing the majority of the State’s constitutionally-required services. New York county governments perform these required services with pride. Counties provide the people of New York with everything from criminal justice needs (Sherriff, DA, Public Defender) to social service needs (DSS), to health care (Public Health, Mental Health, Medicaid). These services also include counties providing counsel in Family Court to family members who cannot afford counsel.

Constraints on County Governments

Unfortunately, the State too often requires counties to pay for these mandated services themselves - this is what is meant by the term “unfunded state mandates.” The State has granted counties two main sources of revenue to pay for all required services: a portion of sales tax and property tax. Over the past decade, sales tax has been flat in upstate New York. Over that same period, county service costs, healthcare costs, and personnel costs have continued to rise.

As for property taxes, Chapter 97 of the Laws of 2011 established a tax levy limit (otherwise known as “the Property Tax Cap”). Under the tax cap, counties cannot simply

¹ See Family Court Act §§ 261, 262, and 1120.20

raise property taxes to improve or take on a new service. While this is good policy, considering New York was and still is amongst the highest property tax states in the nation, New York failed to enact accompanying legislation requiring the State to pay for any increased or new mandated services. Due to this localized financing structure, New York has placed itself in the dangerous position of being regressive against those most financially strapped areas of the state whose tax base is the least affluent and in the most need of providing indigent legal services to the poor in our communities. Surely, this is not what the State intended when it passed the property tax cap.

Accordingly, if there is one take away from this testimony, please note: ***Counties cannot afford to take on any new or increased function, no matter how important, without the State meeting the accompanying fiscal costs.*** Counties do not have the revenue streams nor the reserves to add any additional service costs. Doing so would result in cuts and poorer services in all other county functions, with disparate impacts from county to county.

High caseloads, insufficient resources, lack of professional and administrative support services all are attributable to lack of dedicated resources to institutional providers. similar to criminal court, county governments are not in a position to ensure effective Counsel is consistently provided in the Family Court System.

IV. The Role of 18B Counsel within the Family Court System

Article 18-B of the County Law requires each county and the City of New York to maintain a plan for the provision of assigned counsel to indigent persons. What is commonly referred to as “18B counsel” from counties are predominantly private sector attorneys that are paid through county government funds to represent those that cannot afford counsel for themselves.

This system is more commonly known to the public in criminal courts, but the importance and the cost of public defense and 18B attorneys is just as high in the Family Court setting. In fact, depending on the case, Family Court can be more complex as all family member parties may need separate representation.

To control this cost, many counties have come up with proactive and innovative plans to provide this service while being fiscally responsible to taxpayers. Some county plans include a layered system by which parent or guardian representation only reaches private 18B attorneys when one of its county operated departments is conflicted out. These county-operated system providers include a public defender’s office, a conflict defenders office and even (in come counties) a special family court counsel office. These offices provide counties with a fixed cost for representation because they are salaried employees.

Recommendations

NYSAC believes it would be good public policy for the State to offer grants matching dollar for dollar savings for this type of forward thinking in order to encourage more

counties to look at ways to improve their system. Institutional incentives breed creativity and can help improve the system to help those in need.

This does not mean to imply all county systems will be less costly with reduced 18B private representation. Public Defenders and Conflict Defender Officers do provide fixed costs and private 18B costs can fluctuate year by year. In fact, it is possible and even common for a Family Court case to have separate counsel for each parent or guardian or other related family members involved where 18B's are needed no matter what plan has been adopted. With conflicts of counsel representation and/or up to four attorneys needed for one family case, 18B's are needed and used no matter the system. Again, it is a county responsibility and cost to provide each individual with this counsel. It is difficult to calculate the exact annual cost for counties to provide for this service; NYSAC estimates these county government expenses reach between \$125 to \$150 million annually.

One recommendation to control costs and lower the Court's calendar burden would be to increase mediation services to avoid appearances in court. In addition to the costs associated to the government, the amount of time currently spent in court can be disruptive to families as the parents who understandably make this their top priority can risk losing significant job pay and even job loss to attend these judicial hearings. This can only make the situation before the court and that of the family worse. Mediation services could help families avoid court time.

V. The Role of Judges within the Family Court System

Judges play an integral role in how and when counsel is provided to parents and guardians in Family Court. This process for counsel selection can vary county by county depending on the 18B plan and system and the relationship between the Judge and the county. However, in every county, it is the Family Court Judge that has final say on when (eligibility standards) and who is providing parent/guardian counsel as well as determining if an 18B representation bill is overly inflated for a given case. Due to this oversight power in the system it is vital counties and the Judge have continued communication to make the system function in the best manner possible. Counties can find themselves often with an 18B bill and know little to nothing about the background facts and therefore will not be in a position to know if this is a valid charge. These charges are important to get right, as in some counties, the cost of the 18B panel exceed the internal Public Defender's Office costs.

Recommendations

Counties have responded to NYSAC offering input on small changes in the system that could yield positive results. One issue that can drive up 18B costs is our Family Courts are overcrowded and there is a long waiting period to be called for a case. While awaiting to be heard, the taxpayer is being billed for 18B costs. This is not the Court's nor the Judge's fault. However, some of these costs could be lowered if we structured a new calendar and better coordinate to allow 18B representation cases to go first. That

way those waiting longer to be called to court will be the fixed cost attorneys (PD and Conflict Defender).

Additionally, more training and communication regarding who is eligible for counsel would help control costs. Counsel for those in need is of utmost importance. However, the current process can lead to counsel being assigned without fully understanding their fiscal status. Counties are the last to know, and may never find out, if one was given representation that should not have been eligible under the guidelines. Again, more training and communication with the county can help with this process.

Finally, as you know, there is a total attorney fee cost cap for these matters that is set at \$4,400.00. However, the Court itself can and often does allow for counsel to exceed this cap when finding extraordinary circumstances. And considering how common it is for counsel to exceed these costs, aren't these costs simply "ordinary" and not "extraordinary"? What is the judicial definition of extraordinary?

VI. Applying the Hurrel-Harring Model to Family Court

As stated above, counties providing 18-B and Public Defender counsel to those in need for criminal matters is well documented. In its 2005 Interim Report, the Kaye Commission prudently studied this system and concluded while counties are doing the best they can to provide indigent defense services, the only way to improve the system is for the State to step up and take over the fiscal responsibilities of this program. Chief Judge Judith Kaye noted in the report that the Commission's "mandate was limited to indigent criminal defense;" however, "identical problems affect representation of adults in family court. This representation, carried out by the same 18-B providers, with the same staff, under the same statutory scheme . . . needs to be addressed."

In April 2017, Governor Andrew Cuomo and the State legislature, through a bill sponsored by Assemblywoman Patricia Fahy and Senator John DeFrancisco, fulfilled the promise to improve the criminal justice system and reimburse 100% of the costs to the counties and New York City for certain statewide improvements in criminal defense provided to persons who are financially unable to obtain counsel ("indigent criminal defense" or "criminal defense"). The final FY 2018 State budget included two groundbreaking statutory amendments. Executive Law § 832 (4) now gives the New York State Office of Indigent Legal Services ("ILS") the authority and duty to develop plans to: (a) ensure that each criminal defendant eligible for mandated representation is represented by counsel at arraignment; (b) establish numerical caseload/workload standards for each provider of indigent criminal defense representation; and (c) improve the quality of representation in indigent criminal defense statewide. ILS submitted those plans on December 1, 2017. Further, County Law § 722-e was amended to specify that the State will cover the costs to implement the reform plans produced by ILS, thereby relieving the counties of the burden to alone pay for indigent criminal defense.

However, and unfortunately, the State did not enact all the provisions of the Fahy/DeFrancisco legislation. This bill would have covered all current county criminal indigent defense costs (over \$300 million annually) – and, the reason we are here today – this bill recognized and paid for Family Court counsel. All advocates seeking a better criminal justice and Family Court system agreed that this original bill was the best way forward to improve these needed services and representation. Advocates seeking lower property taxes and good government fiscal responsibility agreed as well. This version of the bill is the best way to improve the criminal justice and Family Court system. The system will be improved when it is funded by the State because it will no longer be restricted by property tax caps and limitations of disparate impacts.

It should not take a Hurrell-Harring v. State-type lawsuit to ensure counsel is provided at critical stages in the Family Court proceedings. The fair and responsible execution of § 261 of the Family Court Act provides the necessary path to follow.

We have already seen the county-provided criminal indigent defense system improve as the State has stepped up to provide more funding and require greater professional structure of that system.

The next frontier is the financing of current mandated parental representation. The State provides very little to support the efforts of litigants in Family Court and yet it mandates that counties and the City of New York provide this support through increases in local taxation. This hurts the local taxpayers as they must shoulder the burden of a system the State created but was unwilling to financially support. This also hurts the local governments who must annually grapple with the challenges of supporting a system that appears to grow exponentially, with widely varying impacts throughout the state (with the greatest relative burden falling on the poorest of New York's communities).

VII. Conclusion

It is respectfully submitted, the State has a Constitutional obligation to ensure quality counsel for those in need, including parents and children in Family Court, not just in criminal court. Providing quality counsel to those in need will give fair meaning and interpretation to § 261 of the Family Court Act. This quite simply is the right public policy for the people of New York State.

I contend that there is no greater need for counsel, no greater potential for harm and loss than a parent facing the possibility of losing their right to raise and directly care for their child.

The question before us should not be do we need to improve our Family Court counsel system as the answer to this an obvious yes. The question before you is how do we get there.

Throughout this testimony we provided some answers. Counties, the State, and the Courts must work together to create efficiencies in the current system. We should better

coordinate Court calendars to ensure 18B counsel are used more efficiently. We can offer more mediation prior to court. We can offer State incentives and reward counties that create innovative solutions or share services with other governmental bodies.

However, these options will help, but they will not fix the system. Ultimately, the State needs to step up and strengthen its constitutionally-mandated parental representation system. Again, the need for Family Court representation is no less serious than the need for those faced by the accused in a criminal matter; therefore, the State needs to follow the same logic used in Hurrell-Harring and the original Fahy/ DeFrancisco bill. The improvements we have already seen in the criminal court system should and can occur in Family Court, as well.