# RE B (A MINOR) (WARDSHIP: GUARDIAN AD LITEM)

Family Division

Bush J

19 August 1988

*Wardship – Children joined as parties – Appointment of guardian ad litem – Guardian ad litem in juvenile court proceedings applying to be guardian in wardship proceedings – Matters to be taken into account in appointment of guardian ad litem.*

This was an application by a guardian ad litem appointed for juvenile court proceedings to be appointed guardian ad litem in wardship proceedings. She had represented the children when a care order was made in the juvenile court in October 1985 and was again appointed as guardian on an application in February 1988 to have the care order revoked. Subsequently all the parties agreed that the best way of dealing with the case was by wardship proceedings and an originating summons in wardship was issued. The registrar drew the attention of the parties to *Re A, B, C, and D (Minors) (Wardship: Guardian ad Litem)* [1988] 2 FLR 500 and made an order that the children be defendants and that the Official Solicitor be asked to represent them. The Official Solicitor informed the court that his service would be available, albeit with some delay, but that, subject to the approval of the parties and the court, he would have no objection to the application by the guardian ad litem in the juvenile court proceedings that she be allowed to continue to represent the children. The mother supported the application.

**Held** – refusing the application – where it was proper to appoint a guardian ad litem to represent children in wardship proceedings the court should appoint the Official Solicitor to act as guardian unless there was some compelling reason why another person should be preferred and the court was satisfied that the alternative candidate possessed the necessary expertise to form an objective assessment of the ward's interests and the same facilities as those available to the Official Solicitor for obtaining psychiatric, paediatric or other expert evidence. Other requirements for any prospective guardian were his ability to obtain the legal representation necessary in the High Court and remuneration for such representation and for himself, and the ability to provide continuity of representation possibly for many years. The applicant in the present case, with her long and close association with the children, would not be in a position to bring to the case the objectivity of the Official Solicitor, nor the expertise, authority and facilities available to his department.

*Re A, B, C and D (Minor) (Wardship: Guardian ad Litem)* [1988] 2 FLR 500 followed.

Per curiam: The Official Solicitor in custody cases was much more then a mere guardian ad litem; he was at once an *amicus curiae*, an independent solicitor acting for the children, an investigator, an adviser, and sometimes a supervisor (see p. 271B below).

**Cases referred to in judgment**

*A, B, C and D (Minors) (Wardship: Guardian ad Litem), Re* [1988] 2 FLR 500

*G (Official Solicitor's Costs), Re* (1982) 3 FLR 340; [1982] 1 WLR 438; [1982] 2 All ER 32

*Miss Barbara Slomnicka* for the mother;

*Mark Everall* for the local authority;

*Andrew Kirkwood* for the Official Solicitor;
*Miss Elizabeth Szwed* for the applicant.

**BUSH J:**
This is yet another application by a guardian ad litem appointed for juvenile court proceedings to be appointed guardian ad litem in the wardship proceedings which have taken the place of the juvenile court proceedings. The children involved are L, born on 29 December 1975, C, born on 7 December 1978, M, born on 10 September 1980, and C born on 20 September 1983. The mother had unfortunate relationships with men and herself became a drug addict. A place of safety order was made on 4 July 1985; an interim care order on 30 July 1985; and a full care order was made in favour of the local authority by the juvenile court on 8 October 1985.

On that occasion the present applicant, Mrs P, was the guardian ad litem. The children in care had been with foster-parents who were the former neighbours of the mother, a Mr and Mrs N, and the mother had from time to time had access.

In February 1988 the mother, having been the subject of a medical attempt to cure her of her drug addiction, pronounced herself cured, and indeed the guardian ad litem said in her preliminary report that there had been a tremendous change in her physical and emotional personality; and the mother was asking that the care order be revoked. The same guardian ad litem, Mrs P, was appointed for the purposes of those proceedings, but then eventually all the parties were agreed that there should be wardship proceedings as the best way of dealing with this particular case, and the originating summons in wardship was issued on 20 May 1988. The parties, including the local authority, went before the registrar, who drew their attention to the decision in *Re A, B, C and D (Minors) (Wardship: Guardian ad Litem)* [1988] 2 FLR 500, the judgment of Sheldon J of 20 April 1988, and made an order that the children be defendants, but that the Official Solicitor be asked to represent them. The wording of the order was that,

> 'the above-named minors be joined as the second, third, fourth and fifth defendants to these proceedings and, subject to his consent to act, the Official Solicitor be appointed to act as guardian ad litem of the said minors, with his attention being specifically drawn to the role already performed by the guardian ad litem in the juvenile court and the affidavit filed by her in the current proceedings'.

The Official Solicitor, in a letter of 7 July 1988, said:

> 'I am writing to inform you that, given Mrs P's existing familiarity with the case, I would not raise any objection to her continued representation of the children within wardship proceedings, provided that this course of action meets with the approval of all other parties and of the court and that she is fully acquainted with the various considerations stipulated at p. 4, para. (d) *et seq.* [ [1988] 2 FLR 500, 504] of Sheldon J's judgment in *Re A, B, C and D (Minors)* delivered on 20 April last.'

In the last paragraph the Official Solicitor said:

> 'If for any reason the court should deem it inappropriate to appoint Mrs P as these children's guardian ad litem within the wardship proceedings, I can confirm that my services will be available in the usual way, although I should point out that there would be likely to be some delay before I could commence my enquiries as a result of the very many other urgent and pressing matters which I have on hand at the present.'

Mr Kirkwood has amplified that today by saying that at that stage the Official Solicitor was not aware that the parties had not even got a date for setting down of this action, and that indeed it was unlikely to be heard until getting on for Christmas or before the New Year, and that in that event the Official Solicitor would have ample time to make his enquiries.

In *Re A, B, C and D (Minors) (Wardship: Guardian ad Litem)* (above) at p. 503A-D Sheldon J said:

> 'While not wishing in any way to denigrate the value of the help that can be given to the court by guardians ad litem other than the Official Solicitor, it must not be overlooked that the latter has the advantage of being supported by what Heilbron J described as "the expertise and authority of his office and his department" and that he is generally accepted as a person "who will form an objective and independent assessment of the ward's interests". Questions, indeed, that the court should always consider before appointing some other person to act as guardian is whether there is some compelling reason why he or she should be preferred to the Official Solicitor; whether the alternative candidate possesses the necessary expertise and experience to undertake the work; and whether he possesses corresponding facilities to those available to the Official Solicitor of obtaining any psychiatric, paediatric or other expert evidence that might be required, particularly at short notice. Further questions that should be considered, not only by the court but also by any prospective guardian, are as to his ability to obtain the legal representation necessary in the High Court and to obtain remuneration, not only for such representation, but also for himself: as I understand the position, the first is likely to be covered by legal aid, but not the second.'

It is also important to bear in mind the very special position of the Official Solicitor which was emphasized in *Re G (Official Solicitor's Costs)* (1982) 3 FLR 340 at pp. 343H – 344D, where Ormrod LJ, referring to an argument by Mr Swift, said:

> 'At one point in his argument Mr Swift observed that the Official Solicitor was not a welfare agency, a statement which would have startled generations of judges exercising the custodial jurisdiction, either in wardship or under statute, who have always regarded the Official Solicitor as an indispensable last resort when all other welfare agencies and services have, or are likely to fail. His assistance, but not as a mere guardian ad litem, has enabled the court to solve many intractable "welfare" problems.
> Wardship proceedings are, in fact, the exact converse of the cases cited by Mr Swift. The children are made defendants in order to give the

> Official Solicitor the *locus standi* of a guardian ad litem which enables him to take part in the proceedings. In the other class of case the Official Solicitor is made guardian ad litem as a necessary step in the plaintiff's action. In custody cases the Official Solicitor is much more than a mere guardian ad litem. He is at once an *amicus curiae*, an independent solicitor acting for the children, an investigator, an adviser, and sometimes a supervisor. Perhaps the nearest analogy is that of counsel to a tribunal of enquiry, a relatively new office but a valuable one. This, however, is not a new role for the Official Solicitor, as is borne out by *Supreme Court Practice* [1982] Vol. 2, p. 987, para. 3452A where the following passage is to be found:
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> > "The Official Solicitor is a servant of the court and may at any time be called upon by a judge to carry out an investigation or to assist the court to see that justice is done between the parties (see *Harbin v Masterman* [1896] 1 Ch 351, *per* A.L. Smith LJ, at p. 368, and *per* Rigby LJ at p. 371). He is appointed to act where, if this were not done, there would be a denial or miscarriage of justice" '

I pause to say that in this case, because of the ages of particularly the elder children, the difficulty of the case and of the probability that the case will need oversight for many years to come, it is recognized by all parties that the children should be made defendants and for that purpose to have a guardian ad litem. With all due respect to Mrs P, she would not bring, as a guardian ad litem, to this case the expertise and the objectivity of the Official Solicitor. During the course of argument counsel on behalf of Mrs P referred to the fact that the local authority saw Mrs P as a mediator and that she had great uses in that respect. Miss Slomnicka on behalf of the mother (who supports the appointment of Mrs P – the local authority do not support it but do not object to it) said that Mrs P was very useful in conciliation. No doubt skills in conciliation are very valuable in their place, but they are not here appropriate at this stage.

There are dangers here for a guardian ad litem who is too close to the action and who may be at risk of losing that objectivity which it is desirable should be exercised in this case and in which the Official Solicitor is so skilled.

One other suggestion was that the solicitor who instructs Miss Szwed should be made the guardian ad litem because he is an officer of the court, and that he should then call Miss P as a witness and use her services, for which he would have to obtain legal aid approval, to make further enquiries and report on behalf of the mother. Again that does not give the court the reliable objectivity of the Official Solicitor and his office. I am not suggesting by that that the solicitor concerned would be in any way behaving improperly or forgetting his duty as an officer of the court. It is nevertheless recognized that solicitors who have to deal with lay clients and expert witnesses sometimes get too involved and too close to the action for true objectivity.

It is said that this is a special case because of the length of time that Mrs P has been involved in it and her knowledge of the case. I have indicated one possible danger because of her close knowledge of the parties concerned. There is also the question of remuneration. I do not propose to deal with the very able arguments of counsel for the local authority and

counsel for Mrs P as to how she is going to get paid. One suggestion was that the local authority should be ordered to pay her costs in any event at this stage. I would regard such an order as premature. Another suggestion was that she should be appointed guardian ad litem and then apply to the Law Society for approval of expenditure, and then take, if that had an unsatisfactory result, judicial review proceedings to come before a Divisional Court –contemplating judicial review proceedings for a decision that has not already been made. Merely to set out these arguments in general form is to show the difficulties involved in taking the course proposed by Mrs P.

There is another matter which is of the greatest importance in this case, and that is continuity, because this is the kind of case where matters will not necessarily be concluded by the judge when he makes his decision at the hearing. This is the kind of case in which oversight for many years to come will be necessary. Again one asks: at the end of a case where Mrs P is guardian ad litem, what happens next? Who pays her next? Does she have to make more applications for legal aid just to oversee the matter? It is doubtful whether such an application would necessarily be approved. These difficulties emphasize more than ever the wisdom of having the Official Solicitor act with the authority of his office and with the continuity that he can bring to the welfare of these children.

The Official Solicitor has said that he takes into account the work done by Mrs P and he would have to consider (and it is a matter entirely for his discretion) whether he would employ Mrs P. Miss Szwed has asked virtually for undertakings on the part of the Official Solicitor that he would employ Mrs P before she could agree to any course, and that she would be employed not only as a reporter, but also as an active social worker in the scheme of things. The Official Solicitor cannot give such undertakings, and indeed should not be expected to. The Official Solicitor will make his enquiries and bear in mind Mrs P's contribution, and make up his mind what, if any, use he can make of Mrs P herself. It is a matter entirely for him. The fact that Miss Szwed, on behalf of Mrs P, put forward these objections to agreeing to the Official Solicitor being appointed and wanting these undertakings as to what he was to do in the future illustrates beyond a peradventure the danger of appointing guardians ad litem who do not fall into the category and the special position of the Official Solicitor. In this case there are no reasons which would lead me to the conclusion that Mrs P ought to be appointed as guardian ad litem, and there is ample reason why the Official Solicitor should be so appointed and should act.

Solicitors: *P William Ackroyd* for the mother;
The Borough Solicitor for the local authority;
The Official Solicitor.

**P.H.**