1980 WL 121095 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
March 14, 1980

***1** Mr. Vinton D. Lide
General Counsel
South Carolina Department of Social Services
Post Office Box 1520
Columbia, South Carolina 29202

Dear Mr. Lide:
In your letter of February 19, 1980, you have asked the opinion of this Office on two questions concerning the Child Protection Act of 1977 (Code of Laws of South Carolina, §§ 20-10-10 through 20-10-190, 1979 Cum. Supp.).

Your first question is whether the Family Court has the authority to tax the guardian ad litem attorney's fee (see § 20-10-180) to DSS. You elaborated on this question in a telephone conversation wondering which agency—state or county—could be taxed if, indeed, the court had the authority to tax.

Your second question is whether the Attorney General must approve the appointment of guardian ad litem under the Act.

To answer your first question: First, a court must generally have contractual or statutory authority to tax costs and attorney's fees. Singleton v. Collins, 251 S.C. 208, 161 S.E.2d 246 (1968); Hegler v. Gulf Insurance Co., 270 S.C. 548, 243 S.E.2d 443 (1978). Second, a losing party is normally the only one taxed with such costs and fees. § 15-37-20, Code of Laws of South Carolina, 1976, [costs]; 20 C.J.S. Costs § 218(b) [attorney's fees]. (Note though that a court of equity may ignore this general rule. See Wilson v. Padgett, 266 S.C. 556, 225 S.E.2d 185 [1976]).

Section 20-10-180 of the Act says, ‘Any child subject to any judicial proceeding under this chapter shall be appointed legal counsel and a guardian ad litem by the Family Court.’ The Act does not provide for how this ‘legal counsel’ is to be paid. However, Family Court Rule 3.9 authorizes the Court to tax the fee for the guardian ad litem's attorney. This rule was promulgated by the Supreme Court under South Carolina Constitution Art. V, § 4 and has the force of law. See 21 C.J.S. Courts § 176(a), 172(a).

Thus, to answer the first question in part, the court does have the authority to require a losing party to an action under the Act to pay the fee of the guardian ad litem's attorney. It remains to ask whether the county or the state DSS should pay this fee.

Although the county and state departments were created as separate agencies (see generally, Chapters 1 & 3, Title 43, 1976 Code as amended), the state department has supervisory powers over the counties, and the counties act as agents for the state department. 1976-77 Ops. Att'y Gen., Op. 77-219, p. 168.

However, the Child Protection Act specifically differentiates between the two departments. The Act sets out two distinct entities for providing child protection services and imposes different duties on these entities. The county DSS is named as the ‘local child protective service agency’. § 20-10-20(O); § 20-10-110(D). The state DSS is charged with creating a ‘protective Services Unit.’ § 20-10-20(I), § 20-10-110(B).

The county DSS has the duty to investigate suspected incidents of abuse. §20-10-120(C). If the county's investigation bears out its suspicion, it may take legal action to remove the child from the parents or guardians. §20-10-170. The county department

is charged with the investigation of claims, mediation among the parents and children and the handling of all court matters. See generally, §§ 20-10-120, 20-10-170.

***2** The state agency, on the other hand, is charged mainly with the duties of record keeping, coordination of policy, training and making reports. §§ 20-10-110, 20-10-130, 20-10-150, 20-10-20(I).

Thus, it is the county department that works with the persons involved in child abuse and it is the county department that decides when to take legal action. Further, it is the county that actually takes such action.

It is elementary that a court may not tax a non-party with attorney's fees. Walker v. Doty, 76 S.C. 464, 57 S.E. 181 (1907); see also 20 C.J.S. Costs § 120. Under the Act, the county department, not the state department, is—at least technically—the party to court actions. The county should then apparently be charged with the fee. It is, however, arguable either that (1) the county may bring an action in the state department's name as well, or (2) the county department's agency relationship with the state department makes the state department automatically a party to the county action. Therefore the answer to your first question is not clear-cut. However, because the Act so pointedly differentiates between the state and county departments, it is the opinion of this Office that the county department is the more appropriate department to bear the fee for the attorney for the guardian ad litem. I note again, of course, that the court should ordinarily charge this fee only to the losing party.

As to your second question, it is the opinion of this Office that the Attorney General does not have to approve the appointment of an attorney who serves as guardian ad litem or attorney for guardian ad litem under the Act. The Attorney General must approve only the attorneys who are ‘employed’ by the State. § 1-7-80, 1976 Code. See also: Proviso (4) and (5) Sec. 10, Part 1, Act No. 199 of 1979 Acts [General Appropriation Act]. Under the Act, the guardian ad litem is not ‘employed’ by DSS. Rather, the guardian ad litem, or the guardian ad litem's attorney, is appointed by the court to represent the child's interest. It is not the responsibility of the county department to appoint a guardian ad litem and the child's interest may sometimes conflict with that of the county. (This even though the court usually appoints the guardian ad litem upon recommendation by the county; and even though the county in good faith and with good reason believes its position to be best for the child.)
Sincerely,

Eugene W. Yates, III
Assistant Attorney General

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