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September 3, 1982

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ATTORNEY GENERAL OPINION NO. 82-190

Mr. Keith D. Hoffman
Dickinson County Attorney
325 Broadway
Abilene, Kansas 67410

Re: Infants -- Visitation Rights of Grandparents -- Appointment of Guardian Ad Litem for Minor Child or Counsel for Indigent Parent

Synopsis: In a proceeding to determine grandparent visitation rights pursuant to K.S.A. 38-129, the appointment of a guardian ad litem for a child or an attorney for an indigent parent, is not statutorily required. Furthermore, visitation does not generally involve the type of interference with parental rights which necessitates such due process safeguards as the appointment of counsel or a guardian ad litem. However, a court may decide that, in certain circumstances, due process considerations justify appointment of counsel or a guardian ad litem. In the event of such appointments, the court is authorized to assess these expenses against either party pursuant to K.S.A. 38-131. Cited herein: K.S.A. 38-129, 38-131, 38-821.

* * *

Dear Mr. Hoffman:

As Dickinson County Attorney, you request our opinion on three questions concerning petitions for grandparent visitation pursuant to K.S.A. 38-129. Specifically, you inquire whether the court must appoint a

guardian ad litem for children involved in a proceeding under Chapter 38 of the Kansas Statutes Annotated. Your second inquiry concerns the necessity of appointing counsel for the indigent parent of a child involved in a visitation proceeding. Finally, you ask how the fees should be assessed if the court appoints a guardian ad litem or an attorney for the indigent parent.

K.S.A. 38-821 requires that a district court judge appoint a guardian ad litem for children "in all hearings pursuant to the juvenile code." (Emphasis added.) It is important to note that the juvenile code is wholly contained in Article 8 of Chapter 38 of the Kansas Statutes Annotated. K.S.A. 38-129 is not a part of the juvenile code and, consequently, the requirement of appointment of a guardian ad litem set forth in K.S.A. 38-821 is inapplicable to visitation proceedings under K.S.A. 38-129.

In Heilman v. Heilman, 181 Kan. 467 (1957), the Kansas Supreme Court discussed the appointment of a guardian ad litem to represent a child at a custody hearing. Upholding the trial court's refusal to appoint a guardian ad litem, the Kansas Supreme Court stated:

> "Here the minor child, although being the 'subject' of the litigation, was not a party litigant. He was present in court, as were his mother and grandmother to whom a divided custody order previously had been granted. Perhaps in a given case, and under peculiar and unusual circumstances, it would be proper to appoint a guardian ad litem to represent a minor child at a custody hearing, but there is nothing in the case before us to indicate the court erred in not following such procedure." Id. at 470-71.

The language of Heilman indicates that the Kansas Supreme Court considers the appointment of a guardian ad litem in custody cases to be discretionary, as opposed to mandatory. The court has traditionally held that in custody proceedings, "the paramount consideration of the court is the welfare and best interests of the child. The court has recognized in a long line of cases that the trial court is in the best position to judge whether the best interests of a child are being served . . . ." Gardner v. Gardner, 192 Kan. 529, 532 (1964). See also Patton v. Patton, 215 Kan. 377, 380 (1974).

Certainly visitation and custody proceedings are comparable, with the qualification that visitation rights are not as formidable as custody rights. Therefore, it is reasonably apparent that no greater protection need be afforded children involved in visitation proceedings than is required for their counterparts in custody cases.

Thus, in our opinion, the appointment of a guardian ad litem for a child involved in a visitation proceeding pursuant to K.S.A. 38-129 is not statutorily required and is purely a matter of judicial discretion.

Your second inquiry concerns whether a court must appoint counsel for an indigent parent of a child involved in a grandparent visitation proceeding. We are unable to locate any statute which requires appointment of counsel in a visitation case. However, in a case involving severance of parental rights, the Kansas Court of Appeals stated:

> "[T]here is no doubt that the relationship of natural parent and child is a fundamental right of which neither may be deprived without due process of law as guaranteed by the Constitution of the United States and the Kansas Bill of Rights. Nor can there by any doubt that, in such case, the right to counsel, either retained or appointed, is essential to due process." In Re Boehm, 3 Kan.App.2d 325, 326 (1979).

In Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981), the United States Supreme Court discussed appointment of counsel in the context of proceedings to terminate parental rights. The Court stated therein: "The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." Id. at 25. Applying this presumption to the area of parental rights, the Supreme Court emphasized: "This Court's decisions have made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection." Id. at 27, citing Stanley v. Illinois, 405 U.S. 645, 651 (1972).

The Supreme Court originally defined the elements to be evaluated in deciding what due process requires in Mathews v. Eldridge, 424 U.S. 319 (1976), as follows:

> "[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Id. at 334-35.

Referring to Mathews, the Court in Lassiter emphasized: "We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." Lassiter v. Dept. of Social Services, 452 U.S. at 27. Weighing the elements in Lassiter, the Court ultimately concluded that the Constitution does not require the appointment of counsel in every parental termination proceeding, deciding instead to "leave the decision whether due process calls for appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review." Id. at 31-32.

In a case involving a deprived child hearing, the Kansas Supreme Court enunciated essentially the same type of due process evaluation, declaring:

> "Constitutional due process requires the State to appoint counsel for an indigent parent in a deprived child hearing under K.S.A. 1980 Supp. 38-817 whenever the parent, unable to present his or her case properly, faces a substantial possibility of loss of custody and permanent severance of parental rights or of prolonged separation from the child." In Re Cooper, 230 Kan. 57, 68-69 (1981).

Construing the cited cases, it is our opinion that the decision to appoint counsel for an indigent parent in a proceeding involving parental rights lies in the sound discretion of the trial court. The factors to be considered and balanced by the court in reaching a decision include: "[T]he private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." Lassiter v. Dept. of Social Services, 452 U.S. at 27.

Therefore, it is our opinion that appointment of counsel is not statutorily required in visitation proceedings. Furthermore, we feel that although the granting of visitation rights to a grandparent generally would not seem to be a significant enough interference with parental rights to justify the appointment of counsel for indigent parents, it is conceivable that a court, in its discretion, might conclude that due process considerations justify appointment of counsel.

Your final inquiry concerns the assessment of guardian ad litem or attorney fees in the event a court determines that such appointments are necessary. K.S.A. 38-131, pertaining to grandparent visitation proceedings, states: "Costs and attorneys' fees may be awarded to either party as justice and equity may require." We believe guardian ad litem fees are properly considered costs and, therefore, are effectively provided for by K.S.A. 38-131, as are attorney fees, in the event the judge decides to assess such fees and costs against either party. However, we note that this provision is entirely discretionary. In the rare event that a judge decides to appoint a guardian ad litem or attorney, but decides not to assess the costs and fees to either party, there seems to be no provision for payment of these expenses. We are unable to locate any authority which provides a fund, or other means, designed to absorb such costs. We believe that any discussion on how this apparent oversight might best be resolved is most properly a matter for legislative consideration.

In summary, it is our opinion that, in a proceeding pursuant to K.S.A. 38-129, the appointment of a guardian ad litem for a child or an attorney for an indigent parent, is not statutorily required. Furthermore, we believe that visitation does not generally involve the type of interference with parental rights which necessitates such due process safeguards as the appointment of counsel or guardian ad litem. However, in cases involving children, the court historically has wide discretion in fulfilling its duty to promote the child's best interests. Therefore, it is conceivable that a court may, in its discretion, decide that, in certain circumstances, due process considerations justify appointment of counsel or a guardian ad litem. In the event of such appointments, the court is authorized to assess these expenses against either party pursuant to K.S.A. 38-131. However, if the judge should decide not to assess fees and costs to either party, there is no provision for the payment of such expenses.

Very truly yours,

Robert T. Stephan

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