

MASSACHUSETTS

# Family Law Journal

May 2008  
Volume 26 • Issue No. 3

## INSIDE:

- Sarah Roxburgh and Lauren Vitale are both 3L students at New England School of Law. Their studies have focused primarily on family law and domestic violence issues. On behalf of the National Lawyer's Guild, they recently co-hosted a panel discussion at New England School of Law concerning domestic violence issues in the context of the current immigration climate. Both students have worked for Greater Boston Legal Services. (see pages 41)
- Attorney Sally R. Gaglino has been in private practice for 20 years, and she concentrates her practice in advertising, entertainment, new media, child performance and probate and family law with the Gaglino Law Group. She contributed to the writing of the MA child performers statute and lobbied for its passage, pro bono, on behalf of child performers. Attorney Gaglino is a proud member of the adjunct faculty at Suffolk University Law School where she has been teaching Entertainment Law since 1990. (see page 52)
- Illustration by Matt Giuffre [www.matthewgiuffre.com](http://www.matthewgiuffre.com). Mr. Giuffre, at age 16, contracted with the Bayer Corporation for the sale of certain of his works, and was successful in doing so. The funds earned in that process, preserved by his parents, were used by him to pay for college. (see page 53)



LexisNexis™

Matthew Bender™

EDITOR'S NOTE: Comments and suggestions are welcome from the readership as we continually seek to improve the quality of the Massachusetts Family Law Journal. As always, we encourage the readership to submit articles of interest and decisions for publication. If you have any article, new case law, ruling or paper that you would like to submit for publication, please contact Attorney Calvin J. Heintz at [cheintz@bostonllp.com](mailto:cheintz@bostonllp.com).

## DOMESTIC VIOLENCE AND THE CIVIL GIDEON MOVEMENT

By  
Lauren E. Vitale

### INTRODUCTION

A stark imbalance diminishes the bargaining power wielded by pro se litigants when facing parties represented by counsel in domestic violence matters. Although this disparity is partially due to pro se litigants' lack of familiarity with the legal system, it is compounded by the disparity in bargaining power inherent in abusive relationships before the parties even step into court.

When the opposing party is able to retain counsel, pro se litigants face a daunting set of problems. Despite the availability of a number of alternative legal resources designed to assist unrepresented litigants, the practical constraints of such programs prevent them from providing assistance sufficient to ensure equal footing between the parties. Additionally, the ethical rules do not adequately provide for the increasingly common occurrence in which one party is able to retain counsel while the other is pro se. Accordingly, attorney misconduct is unchecked due to both this lack of proscription and the lack of a monitoring system enforcing those rules that are in place.

The frequency of settlement in family law matters and especially domestic violence cases also disadvantage pro se victims of abuse. These victims are often unable to negotiate effectively and protect their rights when forming the initial settlement agreement. Subsequent lack of oversight by courts when evaluating the settlement magnifies the inequity and denies the pro se victims judicial protection of their rights. These factors in combination will increase the likelihood that victims of domestic abuse will forfeit significant rights when their abuser has counsel. Such a result directly contravenes society's joint interest in protecting victims of domestic violence from further abuse and promoting justice in the legal system.

The Civil Gideon movement attempts to solve these problems and promote fairness in cases involving domestic abuse by providing a civil

*continued on page 42*

violence services and their availability in the home country.<sup>24</sup> Note that some Boston USCIS officers are unaware of petitioner's right to file under all three grounds, and this right might need to be vigorously asserted.<sup>25</sup> See *Matter of Anderson* (If the I-751 petition is denied on one ground, the CR cannot seek review on additional grounds).<sup>26</sup>

### **I-360 VAWA Self-Petition**

The I-751 waiver does not apply to immigrants whose LPR spouse has never filed a petition on their behalf or who has withdrawn filed papers.<sup>27</sup> VAWA addressed this concern by extending the ability to self-petition to *married* battered immigrants who had never attained CR status.<sup>28</sup> It provides that a married battered immigrant may self-petition without any participation from her spouse, obtain work authorization once approved, and subsequently file for independent permanent legal status.<sup>29</sup>

In order to self-petition for waiver of the joint filing requirement under VAWA, the petitioner must submit evidence paralleling that described above for the I-751 waiver. In addition, however, the petitioner must show that she is the current spouse of a U.S. Citizen or LPR, that she entered into the marriage in good faith, that she is currently residing in the U.S. and resided with the batterer at some point, that she is a person of good moral character, that she and/or her child has been subjected to battering or extreme cruelty during the marriage, and that she and/or her children would suffer extreme hardship if deported.<sup>30</sup>

Note the critical distinction between an I-751 waiver and an I-360 waiver: the I-360 waiver only applies to *married* battered immigrants and, therefore, the petition must be filed prior to the divorce.<sup>31</sup> Moreover, upon filing for permanent legal status, the same grounds of inadmissibility apply to the petitioner as to any immigrant.<sup>32</sup> Of particular concern here is whether the petitioner is a public charge, which will render her inadmissible for permanent legal status unless she only received public

benefits for a brief period during transition.<sup>33</sup> The victim's financial independence could be dispositive.

### **CONCLUSION**

In order to provide competent representation to a client seeking a divorce who is a domestic violence victim lacking independent legal status, family law practitioners should familiarize themselves with family-based immigration laws, in addition to consulting an immigration attorney.<sup>34</sup> This may require both probing a divorce client to determine if she has been the subject of domestic violence, in addition to questioning her regarding her legal status, as she may be reluctant to offer such information. Ultimately, the family law advocate should ensure that his client understands her options, so that she may make an informed decision as to whether and when she divorces and petitions for independent legal status.

## **CHILD PERFORMERS IN MASSACHUSETTS**

By  
Sally R. Gaglino

### **INTRODUCTION**

To clarify protections afforded by statute to child performers, the Administrative Office of the Probate and Family Court Department has endorsed a new petitioning process for parents and/or guardians to submit when seeking court allowance of a contract between child performers and contracting entities. The goals are to ensure fair contract terms and to preserve the child's earnings under the oversight and direction of a limited guardianship until the child reaches age 18 wherein, by operation of law, the funds are distributed to him or her.

### **A. Statutory Authority**

G. L. c. 231 s. 85 p 1/2 ("Child Performers Statute") authorizes the court to make a determination regarding the fairness of the contract, the suitability of the proposed guardian and approve the establishment of the proposed preservation account until the child reaches the age eighteen.<sup>1</sup> Once the petition(s) is/are approved and a decree enters, thus removing the contractual disability of

<sup>24</sup> 8 C.F.R. § 240.58(b).

<sup>25</sup> Mandell, *supra* note 2, at. § 11.2hh.4.

<sup>26</sup> *Matter of Anderson*, 20 I. & N. 888 (BIA 1994).

<sup>27</sup> The Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 8 C.F.R. § 204.2(c); Immigration and Nationality Act of 1952, *supra* note 8.

<sup>31</sup> Immigration and Nationality Act of 1952, *supra* note 8.

<sup>32</sup> *Id.*

<sup>33</sup> Lewis, *supra* note 1, at 338.

<sup>34</sup> Mass. R. Prof. C. 1.1.

<sup>1</sup> G.L. c. 231 s. 85 p 1/2 states in relevant part: The court shall have the power to appoint a guardian of the property to oversee the child's funds ... Such guardian shall render accountings as sets forth in section one of chapter two hundred and six.



nonage, the child is bound by the terms of the contract. The statute, as with other statutes protecting the interest of minors, provides that the probate and family court shall retain jurisdiction to revoke the approval, if upon cause shown, such action is necessary for the well being of the child.

The required procedure underscores the need for a close scrutiny of the contractual terms and the provisions in the preservation account managed by a suitable limited guardian.

In relevant part, G.L. c. 231 s.85 pl/2 states:

The statute sets forth criteria that shall be considered by the court in assessing the adequacy of the plan for the protection of earnings as follows:

- (i) the interest of the petitioner in the contract or proposed contract or in the child's performance under said contract;
- (ii) the parties who are entitled to the child's earnings, and, if the child is not so entitled, facts regarding the

property and financial circumstances of the parent or parents or legal guardian or other third party;

- (iii) a bank or trust account used expressly for the deposit of fees generated under the contract and the relationship of any proposed trustee over the child's funds;
- (iv) the percentage of fees generated which are intended for deposit; and
- (v) the child's financial advisor or other third party who shall render investment advice and administer the bank or trust account.

Once established, the limited guardian is required to file annual accounts assuring the preservation of funds and suitable investment strategy. In the absence of this requirement, the court would lack sufficient information to monitor and assess that the statutory purpose, to protect the child's earnings, has been sufficiently met. This is precisely why the statute incorporates mandatory filing as reflected in G.L. c. 206 s.1. Construing the statute in harmony with guardianship of a minor practice, G.L. c. 201 s. 1 et seq., gives rise to consistency envisioned by

the legislature wherein the statutory language leads to the logical and sensible result<sup>2</sup> of protecting the child's earnings until s/he reaches eighteen years of age.<sup>3</sup> Upon the child reaching the age of 18, the guardian shall prepare and submit a final account and distribute all assets to the child.<sup>4</sup>

What distinguishes the statutory requirements from other circumstances involving trusts benefiting a child, is that the source of funding is generated from the child's own earnings.<sup>5</sup> For this reason, the use of the funds during the child's minority is limited as further delineated in this article, and not subject to the exercise of the broad discretion that is frequently applicable in other trusts. Depending on the particular circumstances and the provisions or lack thereof of the trust instrument, which fails to address suitable investment protocol, the court may find it advisable to appoint an attorney for the child in furtherance of his/her best interest to be paid by the petitioner.<sup>6</sup> This is to be distinguished from the more common circumstance in which parents, from their own resources, establish trusts for the support, maintenance, welfare and/or education of their children. In contrast, trust provisions for a child performer that includes discretionary powers of the trustee, which exceed the preservation language of the statute, contravenes the law. The preserved funds are meant to be protected and suitably invested; when the child turns eighteen, the money earned is then received. Unless sooner discharged, the guardian will remain in office until the child reaches eighteen.<sup>7</sup>

<sup>2</sup> See *Commonwealth vs. O'Keefe*, 48 Mass. App. Court 566, 567 (2000). See also *Commonwealth vs. Welch*, 444 Mass. 80 (2005) referencing that "Statutes should be interpreted as a whole to constitute a consistent and harmonious provision. A statute is to be interpreted according to the intent of the legislature ascertained from all of its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment ... and the main object to be accomplished."

<sup>3</sup> See G.L. c. 201 s. 4.

<sup>4</sup> Customarily, upon the child's approval and assent to the account, the account, without further hearing, is allowed and the guardian discharged. Although this streamlines the procedural requirements, in no way does it negate the necessity of a final account filing.

<sup>5</sup> For this reason, neither the petitioners nor the contracting entity are permitted to vary the statutory requirements, overriding the payout date from 18 years to some future age e.g., 21, 23, 25.

<sup>6</sup> Payment of these attorneys fees assessed against the petitioner is to be distinguished from Guardian *ad litem* fees which, by statute, are assessed against the contracting entity.

<sup>7</sup> Cross, Fleischer, and Elder, *Guardianship and Conservatorship in Massachusetts* (Lexis, Second Edition, 2000, Supplement 2007). See Chapter 9-Guardianship of Minors.

### Uniform Trust to Minors Act

Reliance on the provisions of the Uniform Trust to Minors Act, G.L. c. 201A, mutually exclusive of guardianship filing, is ill placed and insufficient to provide the shield of protection required when the child's earnings are at issue. The heightened standards required under the child performer statute are conceptually grounded on the distinction that these are unequivocally the child's earnings to be saved, not gifts or inheritance but income generated by the child's labor. See G. L. c. 201A.<sup>8</sup>

### B. Unequal Bargaining Power

The need for new petitions is best illustrated by the fact that of 59 separate entertainment petitions submitted in one county through June 2007, those cases did not include a separate guardianship petition for the child. Simply, none of that money was escrowed and protected by annual reviews as required by statute without the accountability required of a guardian. Rather, the funds were deposited substantially into U/T/M/A accounts, quashing the court's continuing involvement through its protective annual reviews. The risk at stake to these children is highly significant since the average contractual agreement, factored at minimum union scale, is approximately \$18,000.00. Thus, based on these contracts alone, the sums involved could well exceed the million-dollar mark.

It is anticipated that the number of child performers who will be affected by adequate enforcement of the statute will continue to grow. The Commonwealth of Massachusetts has now become a mecca for the Entertainment industries due to laudable legislative and other proactive developmental initiatives.<sup>9</sup> These emergent opportunities must be balanced by the enforcement of statutory protections which guard against the inherent unequal bargaining power held by the contracting entities and parents who, either through naïveté or other motivations, may not act in furtherance of the child's best interest.

<sup>8</sup> § 14. "Use of Custodial Property" illustrates this point.

(a) A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (i) the duty or ability of the custodian personally or of any other person to support the minor, or (ii) any other income or property of the minor which may be applicable or available for that purpose.

<sup>9</sup> Both Norfolk and Plymouth counties, by its local boards and consultants, are presently working through efforts to create acres of film studio production space. In the event either or both locales transform, so may the dockets of Norfolk Probate Court and Plymouth Probate Court with filings by petitioning parents/guardians on behalf of their child(ren) as performers.

The dual role parents and/or legal guardians customarily play emphasizes the point. Even surety bond filing is no substitute for protection without ongoing court review. Simply, the legislative mandate for the filing of annual accounts offers the court the essential opportunity to hold a fiduciary accountable for preserving a child's earnings.

#### **The Role of the Guardian ad Litem**

To assist the court in the evaluation of the adequacy of the petition, the contract and the choice of guardians, the statute explicitly allows for the appointment of a Guardian ad litem (GAL).

The form contains the following provisions:

- *The guardian ad litem is hereby appointed to represent the interests of the minor child. The guardian ad litem shall review the petition for approval of an entertainment contract for the minor and appointment of a limited guardian, and the proposed contract, the plan for the protection of earnings, and to report to the Court as to whether the contract is in the best interest of the child and in compliance with the statute.*
- *The guardian ad litem shall investigate as to whether the proposed limited guardian(s) is/are suitable and further, whether the sureties on his/her/their bond is/are adequate.*

Of particular importance is the need to adhere to the provisions contained in Paragraph 10(A)(5) of the petition, attached hereto. The petition requires entry of a percentage of the child's earnings intended for deposit. Presumptively, if 100 percent of the child's earnings are not deposited, a list of anticipated expenses to be paid from that source must be described in the petition. The expenses allowed are intended to be limited to those relating to the fulfillment of the child's professional performance. Otherwise, the statutory purpose to protect the earnings would

be nullified. Acceptable expenditures<sup>10</sup> may include lessons directly related to the child's performances, auditions, and travel costs for the child including room and board.<sup>11</sup>

The Report that the GAL is required to file must address all those issues. The need for thorough scrutiny is made all the more important when parents are represented by the contracting entity's attorney. Whether motivated by financial constraints or concern that, if they hire independent counsel to review the agreement, their child might risk loss of the opportunity, the GAL may well be the only impartial person<sup>12</sup> to review the contract<sup>13</sup> and meet with the child to ascertain the child's wishes. It is regrettably common practice of some production companies that parents are often given merely a weekend to review the contract which frequently comprises unfamiliar terms and conditions and which may incorporate other contract(s) by reference. Depending on the circumstances, therefore, the GAL may include in the investigation a private meeting with the parent(s)/petitioners and, in certain instances, key entity staff who will be working with the child on set, location or in studio.

#### **C. The New Petition**

Due to the profound importance of the presence of a limited guardian in conjunction with the petition for allowance of the contract, the Administrative Office of the Probate and Family Court has endorsed new forms, which include and integrate the limited guardianship petition with the petition for approval of entertainment contract for a minor. One petition has been created to address the process as a whole. Of importance, the forms have been crafted to provide bench and bar with the information required for consideration by judges and the standards on which allowance should be based in a judicial decree.

<sup>10</sup> Which are not reimbursable by the contracting entity.

<sup>11</sup> Mutually exclusive of other family members.

<sup>12</sup> Aside from the presiding justice.

<sup>13</sup> Together with any other contract(s) incorporated therein by reference.