

Opinion No. 73-73

November 20, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: All Probate Judges

QUESTIONS

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What is the jurisdiction of a probate judge in the matter of appointing a guardian for a minor in the probate of an estate by that probate judge? Specifically does Section 13-14-9, N.M.S.A., 1953 Comp. (1972 Interim Supp.) of the Children's Code remove jurisdiction from the probate court which previously had been accorded by Sections 32-1-7 and 30-2-7, N.M.S.A., 1953 Comp.

CONCLUSION

See analysis.

OPINION

{*143} ANALYSIS

This question was answered in Opinion of the Attorney General No. 72-52, dated September 28, 1972. As that opinion notes, Section 13-14-9(B)(5), N.M.S.A., 1953 Comp., which is a part of the Children's Code, provides as follows:

"B. The court [children's court division of the district court] has exclusive original jurisdiction of the following proceedings under other laws which will be controlled by the provisions of the other laws without regard to provisions of the Children's Code:

* * *

(5) to determine the custody of, or to appoint a custodian or a guardian for a minor . . ."

The "other laws" referred to in the quoted section which are relevant to this question are Section 32-1-7, N.M.S.A., 1953 Comp. and Section 30-2-7, N.M.S.A., 1953 Comp.

Section 32-1-7, **supra**, a section in the statutes which deals generally with guardians and minors, provides:

"32-1-7. When guardian may be appointed -- Control of guardianship -- Duration. -- The children's and family court divisions of the district court have power to appoint guardians

for minors when one [1] or both of the parents have died and the minor has any property in his own right, or if it appears to the court that a guardian is necessary for the personal welfare of the minor. The court has the control and superintendence of guardians and their wards. Guardianship shall continue until minors become eighteen [18] years old except as otherwise provided by law."

This section was amended in 1972, at the time the Children's Code was enacted. The amendment substituted "children's and family court divisions of the district court" for "courts of probate" and made other changes. Therefore, the intent obviously was to place jurisdiction in the children's court for appointment of a guardian.

However, Section 30-2-7, **supra**, which deals specifically with minors and incompetents in probate matters, provides:

"30-2-7. Minors and incompetents, guardians ad litem. -- If it shall appear that any of the heirs-at-law, devisees or legatees are minors, or persons of unsound mind, the court shall, after service of such notice being made upon such minor or incompetent person and prior to examining the attesting witnesses to any will or hearing any objections to such will or the probate of the same, **appoint some attorney as guardian ad litem for such minors or persons of unsound mind, to appear in the probate court in their behalf in connection with the probate of such will**, and to represent them at such hearing, and all subsequent hearings on appeal, and in all matters in connection with the administration of said estate. The guardian of the person or next friend of any such minor, or person of unsound mind, shall have the preferential right to apply for the appointment of a guardian ad litem, if application is made for such appointment within five [5] days after {~~*144~~} service of such notice upon the minor or person of unsound mind. If no such application is made within said five-day period, then the appointment of such guardian ad litem may be made upon the motion of any other interested party or by the court upon its own motion." (Emphasis added)

This section was not amended in 1972, and it places jurisdiction for appointment of a guardian ad litem in connection with probate matters in the probate court. If there were a conflict between Section 30-2-7, **supra**, and Section 13-14-9(B)(5), **supra**, and if the two statutes dealt with the same subject matter, the latter statute, being a part of the 1972 Children's Code would prevail, as stated in Attorney General Opinion No. 72-52. The two statutes do not deal with the same subject matter, as a careful reading of all the relevant statutes reflects. Section 13-14-9(B)(5), **supra**, and Section 32-1-7, **supra**, provide for appointment of a guardian, which guardian serves until the minor becomes 18 years of age (except as otherwise provided by law). Black's Law Dictionary (rev. 4th ed. 1968) defines a guardian by appointment of court as one who:

". . . has custody of the infant until attainment of full age."

Undoubtedly, under New Mexico law, the appointment of such a guardian lies with the Children's and Family Court Divisions of the District Court.

Section 30-2-7, **supra**, provides for appointment of a guardian ad litem to represent the minor in all matters in connection with the administration of the estate of which the minor is an heir. This guardianship lasts only so long as administration of the estate continues. Black's Law Dictionary defines a guardian ad litem as:

". . . a guardian appointed by a court of justice to prosecute or defend for an infant in any suit to which he may be a party . . . This kind of guardian has no right to interfere with the infant's person or property."

See **Blackwell v. Vance Trucking Company**, 139 F. Supp. 103 (E.D.S.C. 1956).

The fact that a guardianship and a guardianship ad litem are two distinct relationships is evidenced by the language of Section 30-2-7, **supra**:

"The **guardian** of the person or next friend of any such minor, or person of unsound mind, shall have the preferential right to apply for the appointment of a **guardian ad litem**. . ." (Emphasis added)

It is only the appointment of a general guardian as defined in Section 13-14-3(G), N.M.S.A., 1953 C.OMP. (1973 Supp.) and Section 32-1-7, **supra**, which is within the exclusive jurisdiction of the Children's and Family Court Division of the District Court. The appointment of a guardian ad litem for purposes of probate is within the jurisdiction of the Probate Court.

We are of the opinion that under the relevant statutes, the Probate Court may appoint a guardian ad litem for purposes of estate administration but a guardian for purposes of custody and care of the minor must be appointed by the District Court.

To the extent inconsistent with this opinion, Attorney General Opinion No. 72-52 is hereby modified.

By: Jane E. Pendleton

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