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SPRINGFIELD

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FILE NO. S-1458

FAMILY LAW:
Venue and Notice Requirements
in Pre-adoption Custody
Proceedings

Honorable Michael M. Mihm
State's Attorney of Peoria County
Peoria County Court House
Peoria, Illinois 61602

Dear Mr. Mihm:

I have your letter in which you ask about venue and notice in dependency proceedings under the Juvenile Court Act. You also ask if it is appropriate for the court to appoint as guardian ad litem in adoption proceedings an attorney who also represents a child welfare agency in other matters.

Under section 2-6 of the Juvenile Court Act (Ill. Rev. Stat. 1977, ch. 37, par. 702-6):

> "(1) Venue in any case lies in the county where the minor resides or is found. * * *
>
> (2) If proceedings are commenced in any county other than that of the minor's residence, the court in which the proceedings were initiated

> may at any time before or after adjudication of wardship transfer the case to the county of the minor's residence by transmitting to the court in that county an authenticated copy of the court record, including all documents, petitions and orders filed therein, and the minute orders and docket entries of the court. * * *" (Emphasis added.)

The definition of the word "residence" varies throughout the Illinois statutes, with the result that its meaning has to be determined from the context in which it appears. Here, the language of the section indicates that "residence" includes the place in which the child is living at the time of the filing of the petition.

Under ordinary circumstances, the residence of a child is unambiguous: it is that of its parents. (Saxe v. Board of Education (1917), 206 Ill. App. 381.) Upon separation of the parents, a child's residence is still clear: it is that of the parent who has custody. (Crawley v. Bauchens (1973), 13 Ill. App. 3d 791.) In the event that a child is given up by its parents, however, its residence becomes uncertain. In such cases, it is frequently stated that the child assumes the residence of the person responsible for it. Donlon v. Miller (1976), 42 Ill. App. 3d 64.

The wording of section 2-6 indicates that this last view is effectively that of the statute regardless of how the word "resides" is interpreted. If the place

where the child "resides" is taken to be that of its parent(s), then the statute acts to allow the place in which the child is currently living to be an appropriate site of venue by adding the language "or is found." If, on the other hand, the legislature regarded "resides" as ambiguous, it clarified the uncertainty by adding "or is found" to indicate that the living place of the child, as suggested by Donlon, is the child's residence for purposes of section 2-6. Thus, under either interpretation of the word, the reference to the place in which the child "resides or is found" includes the place in which it is living at the time of institution of the suit. Consequently, a child in the care of an individual or agency in Peoria County "resides or is found" there for the purposes of determining venue.

Your second question asks about notification to parents. Section 4-1 of the Juvenile Court Act (Ill. Rev. Stat. 1977, ch. 37, par. 704-1) requires that petitions set forth the names of the parents of the child concerning whom the proceedings are being held. Paragraph (1) of section 4-3 (Ill. Rev. Stat. 1977, ch. 37, par. 704-3) states:

> "(1) When a petition is filed, the clerk of the court shall issue a summons with a copy of the petition attached. The summons shall be directed to the minor and to each person named as a respondent in the petition. If in the petition the name of any respondent is alleged to be unknown, he shall be designated as respon-

> dent under the style of 'All whom it may Concern'." (Emphasis added.)

Section 4-4 provides:

> "(1) If service on individuals as provided in Section 4-3 is not made on any respondent within a reasonable time or if it appears that any respondent resides outside the State, service may be made by certified mail. * * *
>
> (2) If service cannot be made by certified mail, or if any person is made a respondent under the designation of 'All whom it may Concern', service may be made by publication. The clerk of the court as soon as possible shall cause publication to be made once in a newspaper of general circulation in the county where the action is pending. Notice by publication is not required in any case when the person alleged to have legal custody of the minor has been served with summons personally or by certified mail, but the court may not issue any order or judgment against any person who cannot be served with process other than by publication unless notice by publication is given or unless that person appears. * * *
>
> * * * "

Thus the statutory scheme for the giving of notice requires that due diligence be used to notify a putative father in person or by certified mail, but provides that if he cannot be located, notice by publication is sufficient. This complies with the obligation imposed by the Supreme Court in Stanley v. Illinois (1972), 405 U.S. 645, as interpreted by opinion No. S-475. (1972 Ill. Att'y Gen. Op. 140.) Since publication is adequate notice to a person required to be notified in section 4-3, and since the action is properly brought in the county in which the

child is physically present at the time of institution of the proceedings, publication "in a newspaper of general circulation" in Peoria under section 4-4 is adequate notice.

In your final question, you ask whether an attorney who represents a child welfare agency in other matters can be appointed guardian ad litem in dependency proceedings which are initiated by the child welfare agency or where a representative of the agency may be appointed guardian of the child with the power to consent to adoption.

An attorney has the duty to avoid representation of adverse interests:

> " * * *
>
> * * * '[The rule against representing conflicting interests] is a rigid one, designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties. * * *
>
> * * * "

(In re LaPinska (1978), 72 Ill. 2d 461, 469.)

The heart of the conflict of interest rule is the impairment of independent judgment. In the situation you have presented, the rights and interests of the minor child may often be adverse to those of the child welfare agency.

The provision for appointment of a guardian ad litem is an explicit recognition of the potential conflict. In Scheffki v. C.,M.,St.P.&P.R.R.Co (1971), 1 Ill. App. 3d 557, 561, the court stated:

> " * * *
>
> * * * It is the public policy of this state that rights of minors be carefully guarded. * * *
>
> * * * "

The guardian ad litem's independent judgment may be impaired where he has knowledge that vigorous representation of the minor's interests may have personal adverse economic consequences. It should be further noted that a close working relationship between the attorney and the agency on other matters may tend to raise a question in the minds of outsiders when that attorney is appointed guardian ad litem in the situation you have described. Ethical canon 9 of the Illinois Code of Professional Responsibility directs an attorney to "avoid even the appearance of professional impropriety".

Accordingly, it is my opinion that in the situation you have presented, an attorney who represents

the agency in other matters should not accept an appointment as a guardian ad litem in cases where the agency is involved in the manner which you have described.

Very truly yours,

ATTORNEY GENERAL