

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-11739
Appeals Court 2014-P-1075
Probate & Family Court ES12P1792GD

Patrice Gianareles,

Petitioner

v.

Vincenzo Valenti & Patricia Zegarowski

Respondents

Brief of the Appellant
Appealing a Denial of a Motion to Vacate
by the Probate & Family Court Department, Essex Division (Ricci, J.)

Counsel for Appellant Patrice Gianareles:

Glenna Goldis
Northeast Justice Center
79 Merrimack St., Ste. 302
Lowell, MA 01852
Phone: (978) 888-0019
Fax: (978) 458-3481
ggoldis@njc-ma.org
BBO No. 601015

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after the application for direct appellate review was allowed.*

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I. Issues Presented for Review

- a. Are indigent parents facing guardianship petitions entitled to appointed counsel under art. X of the Massachusetts Constitution?
- b. Are self-represented parents facing guardianship petitions entitled to alternative procedural safeguards under the due process clauses of the State and Federal Constitutions?

II. Statement of the Case

Patrice Gianareles is a 19-year old woman who lost custody of her son to her grandmother, Patricia Zegarowski. Throughout the proceedings, Ms. Gianareles represented herself and Ms. Zegarowski was represented by counsel.

Ms. Zegarowski (hereinafter "Guardian") petitioned for guardianship when the child was a year old. Ms. Gianareles (hereinafter "Mother") contested the petition at two hearings. She then signed an agreement that gave her no enforceable right to see her son. The court entered a decree of guardianship based on a finding that Mother consented.

After obtaining counsel, Mother moved for the guardianship decree to be vacated under Mass. R. Civ. Proc. 60(b)(4). The court denied the motion without hearing. She

now appeals that denial. Mother argues that the court violated her rights to procedural due process by failing to appoint counsel for her and by failing to assess the fairness and reasonableness of her agreement, among other lapses.

Prior Proceedings

- a. On July 17, 2012, Guardian filed for guardianship of Vincenzo Valenti ("the child") in the Probate & Family Court Dept., Essex Div. under G.L. c. 190B, §5-204.
- b. The court ordered temporary guardianship on an emergency basis that day, and extended the order on August 1, 2012, and November 2, 2012.
- c. On December 7, 2012, Mother signed a document that stated she consented to guardianship ("consent"). Appendix, pp. 9-10.
- d. On December 27, 2012, the court (Ricci, J.) entered a Decree of Guardianship to Guardian ("decree"). Appx. 11-13. It stated that Mother consented to guardianship. Appx. 11.
- e. On May 14, 2013, Mother moved to vacate the decree under rule 60(b)(4).

- f. On June 3, 2013, the court denied the motion without hearing.
- g. On June 11, 2013, Mother filed a notice of appeal of the denial.
- h. On August 20, 2013, Mother filed a petition for review under G.L. c. 211, §3 in the Single Justice session of this Court.
- i. On September 11, 2013, the single justice (Spina, J.) denied the petition.
- j. On September 17, 2013, Mother appealed the denial.
- k. On January 6, 2014, the Supreme Judicial Court heard oral arguments on Mother's appeal.
- l. On March 19, 2014, the Court ordered that the single justice's denial be "modified to include a direction to the Probate and Family Court to assemble forthwith the record for purposes of the petitioner's appeal from the denial of her rule 60(b)(4) motion, and to transmit the assembled record to the Appeals Court." Appx. 19.
- m. On May 14, 2014, the single justice so modified the judgment.

- n. On June 27, 2014, the lower court transmitted the record.
- o. On July 10, 2014, the appeal was entered in the docket of the Appeals Court.
- p. On July 29, 2014, following trial, the lower court vacated the guardianship.

Relevant facts

- a. Mother was not represented by counsel at any time prior to the decree entering. Appx. 4-5; 14.
- b. The court found Mother to be "homeless" at the outset of the action. Appx. 20. This suggests that Mother was indigent.
- c. Mother was 17 years old when the proceedings began (Appx. 14) and 18 years old when she signed the consent (Appx. 15).
- d. The consent does not allow for Mother to see or otherwise contact the child. Appx. 9.
- e. The consent waives Mother's "rights to notice of hearings as required by the statutes." Id.
- f. The consent states that Mother "may be ordered to pay child support." Id.
- g. The court made no findings about the knowingness or voluntariness of Mother's agreement, or about

the fairness or reasonableness of the consent.

See Appx. 14-15.

III. Argument

a. This court has jurisdiction.

The denial of Mother's rule 60(b)(4) motion is a final, appealable order. *Gianareles v. Zegarowski*, 467 Mass. 1012, 1015 (2014).

Mother won her action for removal of the guardian, so a favorable ruling would not immediately affect her. This court "may answer a moot question likely ... to arise again in similar factual circumstances ... where appellate review could not be obtained before the recurring question would again be moot." *Metros v. Sec'y of Com.*, 396 Mass. 156, 159 (1985) (citations omitted).

The questions raised by this case will repeat in almost all cases involving indigent parents facing guardianship petitions. The questions evade review because the parents are unable to afford counsel to effectively litigate them; if they obtain free counsel (such as through a civil legal aid program), then the questions become moot for them and evade review.

Mother did not waive the rights that she now seeks to vindicate. "Waiver is the intentional relinquishment of a

known right or privilege" and the "law disfavors the implied waiver of constitutional rights." *In re Adoption of Gabe*, 84 Mass.App.Ct. 286, 293 (2013). Considering that the rights to counsel and other safeguards in guardianship have not yet been formally declared, it is virtually unfathomable that Mother knew about them and intended to waive them. See *id.* (rejecting the argument that a father had waived his right to counsel, where that right had not been formally established at the time of his trial).

b. The court should apply de novo review.

While ordinarily appeals of rule 60(b) motions are reviewed only for abuse of discretion, this case falls under an exception. "If a judgment is void . . . for failure to conform to the requirements of due process of law, the judge must vacate it." *Gianareles*, *supra*, 467 Mass. at 1014 (citations omitted).

c. Mother was entitled to appointed counsel.

Parents have a fundamental liberty interest in raising their children. *In re Erin*, 443 Mass. 567, 570 (2005). Mother's fundamental liberty interest should have been protected in the same way that it would have been protected in an action for termination of her parental rights ("TPR"). The decree practically was a TPR, and it set the

stage for Guardian to win a TPR action against Mother.

1. Parents are entitled to appointed counsel in all TPR actions.

Indigent parents are entitled to appointed counsel under art. 10 of the Massachusetts Declaration of Rights when contesting a TPR action filed by DCF. *Dept. of Pub. Welfare v. J.K.B.*, 379 Mass. 1, 3 (1979). The reason is that an "indigent parent facing the possible loss of a child cannot be said to have a meaningful right to be heard in a contested proceeding without the assistance of counsel." *Id.* at 4.

The right to appointed counsel extends to TPR actions filed by private parties because "the same fundamental, constitutionally protected interests are at stake, and the cost of erroneously terminating the parent's rights remains too high[.]" *Adoption of Meaghan*, 461 Mass. 1006, 1007 (2012).

This court elaborated on the logic behind *Meaghan*: "competent representation assists the judge. His or her essential task is the determination of the best interests of the child proposed for adoption. [...] All competent information and argument from the parties serves that purpose; a one-sided trial will endanger it." *Gabe*, *supra*,

84 Mass.App.Ct. at 292.¹

2. The decree was similar to a TPR decree and prejudiced the outcome of potential TPR actions.

The decree strengthened the child's relationship with the Guardian while for all intents and purposes severing his relationship with Mother. As a result, the decree made Mother vulnerable to TPR.

The decree is practically a TPR decree. It does not grant Mother any enforceable right to contact her child or any right to access the child's records. The only thing that distinguishes the decree from a TPR decree is the option it leaves Mother to return to court. But if she returns without a lawyer, she is liable to end up with another decree that resembles a TPR decree. It is absurd for the court to tell a parent that she is not entitled to a lawyer because her right to appear in court is not at stake.

Even if the guardianship decree is deemed "temporary" in contrast with the absolute permanency of TPR, that hardly diminishes the rights at stake. "[E]ven where a

¹ While not the subject of this appeal, it should be noted that children have an independent interest in more stringent guardianship procedures. In addition to depriving the judge of information at trial, current practices fail to detect agreements that are formed against the child's best interests; for example, in some cases the guardian may be less suitable than the parent.

child is placed outside the home for six months [...] the intrusion on the child's liberty interest in the parent-child relationship is 'substantial.'" *Hilary*, supra, 450 Mass. at 496 (quoting *In re Angela*, 445 Mass. 55, 62 (2005)).

The similarity between guardianship and TPR has been recognized in other states. A New York court appointed counsel to an indigent parent because "[w]hile guardianship does not have the legal finality of adoption, nevertheless the granting of guardianship [...] will de facto extinguish the basic parental right of rearing one's own child." *In re Guardianship of Daley*, 123 Misc.2d 139, 140 (1984). The South Dakota Supreme Court upheld the appointment of counsel to a parent facing guardianship proceedings, noting that the lower court "determined that the appointment of an attorney was necessary to safeguard Mother's fundamental right to the care, custody, and management of her children[.]" *In re Guardianship of S.M.N.*, 781 N.W.2d 213 (2010).

Guardianship sets the stage for TPR. A parent's fitness is key to determining the outcome of a TPR action. G.L. c. 210, § 3. Fitness includes a consideration of the child's relationships with his caregiver and with his

parents. G.L. c. 210, §3(c)(vii). In addition to considering whether there has been a "lengthy absence" of the parent from the child's life (*id.*), "there must be attention to the effect on this child of whatever separation from the [guardian] would come about if there is a transfer to the" parent. *Guardianship of Estelle*, 70 Mass.App.Ct. 575, 581-82 (2007) (citations omitted). The decree set the stage for a "lengthy absence" by Mother by failing to provide her a right to see the child. Where a parent's grounds for fighting a TPR petition were eroded during guardianship proceedings, her right to counsel in the TPR action is empty.

The constitutional rights afforded to parents facing TPR must also be afforded to parents facing guardianship. The actions are practically the same, and lapses in guardianship proceedings negate protections in TPR proceedings.

d. Mother was entitled to alternative procedural safeguards.

Under the Due Process Clause of the Federal Constitution, civil litigants are in some cases entitled to more procedural safeguards than simply notice and hearing. See *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011) (ruling

that the court may not incarcerate civil contemnors absent enhanced procedural safeguards). The same holds under the Massachusetts Constitution. *Liab. Investigative Fund Effort, Inc. v. Massachusetts Med. Prof'l Ins. Ass'n*, 418 Mass. 436, 443 (1994).

Because guardianship actions are brought by private parties, a modified *Mathews* analysis determines the amount of process due to parents. *Connecticut v. Doebr*, 501 U.S. 1, 10-11 (1991) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). See also *Turner*, *supra*, 131 S. Ct. at 2517-18 (applying *Mathews* factors "as relevant here").

In employing the analysis, the court must first consider the "private interest that will be affected [...]; second, [examine] the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, [...] (pay) principal attention to the interest of the [other party], with, nonetheless, due regard for any ancillary interest the government may have in providing greater protections." *Connecticut*, *supra*, 501 U.S. at 11.

The private interest at stake is a parent's right to raise her child, which is a fundamental right. *Erin*, *supra*, 443 Mass. at 570.

The risk of erroneous deprivation is high, especially in certain circumstances: when the petitioner is represented by counsel; when the parent is very young; and when the parent is emotional (typical when child custody is at stake). Custody decisions tend to rest on questions of credibility, and not, for example, on the "routine, standard, and unbiased medical reports" found to present a low risk of error in *Mathews*. *Mathews*, supra, 424 U.S. at 344.

Safeguards are potentially very valuable. Judicial review of settlements will screen out one-sided agreements. Notice to parents about the critical issues can give them valuable guidance as to how to proceed, so that they do not waste their opportunity to speak on irrelevant points or fail to raise relevant facts.

The petitioning party does not have any rights at stake, even after she has been established as a temporary guardian. A "guardianship is neither the equivalent of nor coextensive with parenthood." *In re Jamison*, 467 Mass. 269, 283 (2014). The child does have rights at stake. As noted in *Gabe*, supra, 84 Mass.App.Ct. at 292, protecting parents' rights serves children by assisting the judge in determining their best interests.

While it might be presumed that enhanced process exacts a cost on the Commonwealth, the reality is that laissez-faire litigation burdens the courts. Parents fail to defeat bogus accusations in early stages, so the cases drag on through one review hearing after another. In Mother's case, Mother abdicated after only a few hearings. This was very efficient—until she came back five months later with a petition to remove the guardian.

On balance, the paucity of safeguards for parents in guardianship actions is indefensible.

Among other safeguards, the court should make findings about agreements. Massachusetts' *Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants* advises judges to "review the terms of settlement agreements [...] with the parties," "determine whether the agreement was entered into voluntarily" and, where a self-represented litigant is waiving substantive rights, to determine "whether the waiver is knowing and voluntary." Judges must find that the separation agreements of divorcing parties (whether represented by counsel or not) are "not the product of fraud or coercion," and that they are "fair and reasonable" if their financial aspects are to be enforced. *Knox v. Remick*, 371 Mass. 433, 436 (1976).

In Mother's case, the court would not have even needed to inquire of Mother in order to determine that the agreement was not fair. On its face, the consent took practically everything from Mother, right down to notice of hearings. It did not give her anything in return, such as enforceable visitation rights or access to records.

Probate Court judges should pay at least as much attention to agreements about children as they do to agreements about money. They should not incorporate guardianship agreements into court orders until they are satisfied that the agreements are fair and reasonable, understood by the parties, and entered into knowingly and voluntarily.

Litigants do not decide to settle in a vacuum. They are influenced by how the court has acted so far. For example, if a parent has lost a hearing for temporary guardianship under G.L. c. 190B, §5-204(b), she might assume she has no chance of winning a guardianship trial (erroneously, since the two are defined by different substantive and procedural standards).

To ensure fundamental fairness at the end of the process, then, the court should erect safeguards at the beginning. When issuing temporary orders, it should make

findings about what "substantial harm" it is aiming to prevent. The court also should notify parents that they have a right to a trial, where petitioners will have to prove their case by evidence. Finally, the court should notify self-represented litigants before every hearing about the critical issues of fact and law. *Turner*, supra, 131 S. Ct. at 2519.

Turner is limited to simple cases where the opposing party is self-represented. *Id.* at 2520. In Mother's case, Guardian was represented and a variety of facts were potentially material. Therefore, the safeguards described in *Turner* are the bare minimum that should be established here, not an ideal. In addition to the *Turner* safeguards, courts should provide parents with educational materials and the contact information of civil legal aid programs.

Courts should also account for the reality that self-represented parents are unlikely to effect discovery. To protect children's rights, the court should conduct its own inquiry into every petitioner, including their DCF history, criminal history, and living situation. Probation departments and court-appointed guardian ad litem could assist.

IV. Conclusion

Guardianship decrees deprive parents of a fundamental right. The courts barely provide any process to parents before issuing guardianship decrees. This is unconstitutional.

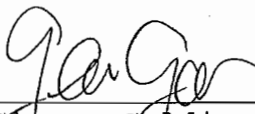
Mother asks that this Court:

- A. Declare a right to appointed counsel, paid by the Commonwealth, for all indigent parents who are sued for guardianship of their children;
- B. Declare that a court may not enter any guardianship decree or temporary guardianship order on the ground of parental consent until it has found that:
 1. The parties have entered into a fair and reasonable agreement,
 2. The agreement is understood by all parties, and
 3. The parties have entered into the agreement knowingly and voluntarily;
- C. Declare that a court may not enter any temporary guardianship order on the basis of "likelihood of substantial harm to the minor" unless it makes particularized findings about the nature of the harm to be avoided;

- D. Declare that at all guardianship hearings, the court must notify parents of the critical issues of fact and law, and of their right to a trial by evidence;
- E: Order anything else that it deems just.

Respectfully submitted,
Patrice Gianareles by her
attorney,

Date: 8/18/14

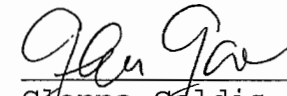


Glenna Goldis (#601015)
Northeast Justice Center
79 Merrimack St., Ste. 302
Lowell, MA 01852
p/ (978) 888-0019
f/ (978) 458-3481
ggoldis@njc-ma.org

Certificate of Compliance

This brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Date: 8/18/14



Glenna Goldis (#601015)

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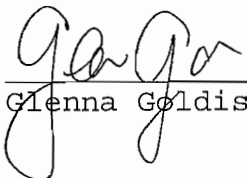
I hereby certify that today, August 18, 2014, I mailed two copies of the above brief and supporting materials to the following:

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Karen Galat (counsel of record for Respondent-Guardian
Patricia Zegarowski)
29 Water St.
Newburyport, MA 01950

Vincenzo Valenti (Respondent-Father)
15 Crane Ave.
Peabody, MA 01960

Date: 8/18/14



Glenna Goldis (#601015)