

02-046

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS.

Juvenile court has no authority to appoint counsel for child who is subject of abuse and neglect, entrustment agreement, or petition for termination of residual parental rights, but must appoint guardian ad litem for such child.

Juvenile court has no authority to appoint guardian ad litem for juvenile defendant, in addition to appointment of legal counsel, to represent child in delinquency, child in need of services, or child in need of supervision proceeding.

Juvenile court has no authority to appoint guardian ad litem, in addition to appointment of legal counsel, to represent parent, guardian or other adult charged with abuse or neglect of child or parent or guardian who would be subjected to loss of residual parental rights.

In cases other than abuse and neglect, entrustment agreements, termination of parental rights, delinquency, or child in need of services or supervision, juvenile court may appoint either counsel or guardian ad litem, but not both.

The Honorable Robert N. Baldwin
Executive Secretary of the Supreme Court of Virginia
July 16, 2002

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You seek clarification of a recent opinion of the Attorney General concerning § 16.1-266 of the *Code of Virginia*.¹ First, you ask whether § 16.1-266(D), regarding the discretionary authority of the judge of a juvenile and domestic relations district court ("juvenile court") to appoint a guardian ad litem or counsel, is applicable in the same proceedings covered by § 16.1-266(A)-(C). Second, you ask whether § 16.1-266(D) permits the appointment of both a guardian ad litem and counsel for the same party.

Response

It is my opinion that § 16.1-266(D) is not applicable to proceedings within the purview of § 16.1-266(A)-(C), which makes such appointments mandatory in certain specific matters and proceedings. In all other matters covered by § 16.1-266(D), the judge may, in his discretion, appoint either a guardian ad litem or counsel, but not both.

Background

You relate that there are instances in which it is advisable to appoint both a guardian ad litem and counsel, given the distinction in their roles.² You express

concern that the prior opinion has a sweeping impact on the current practice of the juvenile courts in utilizing guardians ad litem.

Applicable Law and Discussion

The issue in the prior opinion concerned whether § 16.1-266 authorizes a juvenile court to appoint a guardian ad litem for a juvenile defendant, in addition to the appointment of legal counsel to represent the juvenile defendant.³ Based on the plain language of §§ 16.1-266(B) and (D), the opinion determined that a juvenile court has no authority to appoint a guardian ad litem for a juvenile defendant, in addition to the appointment of legal counsel to represent the child in a criminal or delinquency proceeding.⁴

Section 16.1-266(A) provides:

Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected or who is the subject of an entrustment agreement or a petition seeking termination of residual parental rights or who is otherwise before the court pursuant to subdivision A 4 of § 16.1-241,^[5] or § 63.2-1230,^[6] the court *shall appoint* a discreet and competent *attorney-at-law as guardian ad litem* to represent the child pursuant to § 16.1-266.1.^[7] [Emphasis added.]

Section 16.1-266(B) provides that, "[p]rior to the detention review hearing or the adjudicatory or transfer hearing ... involving a child who is alleged to be in need of services, in need of supervision or delinquent," the juvenile court shall advise of the child's right to counsel of his own choosing.⁸ Section 16.1-266(C) provides that, "[p]rior to the hearing by the court of any case involving a parent, guardian or other adult charged with abuse or neglect of a child or a parent or guardian who would be subjected to the loss of residual parental rights and responsibilities," prior to a hearing of alleged abuse or neglect, or the risk of abuse or neglect, of a child by a parent, guardian or other adult, and a hearing wherein "a parent could be subjected to the loss of residual parental rights, such person shall be informed of his right to counsel. If counsel cannot be employed⁹ or the right to counsel is not waived in writing¹⁰ prior to the juvenile court hearings described in § 16.1-266(B) and (C), "the court *shall appoint an attorney-at-law* to represent" such child or person.¹¹ (Emphasis added.) Section 16.1-266(D) provides that, "[i]n *all other cases* which in the discretion of the court require *counsel* or a *guardian ad litem* to represent the interests of the child or children or the parent or guardian, a discreet and competent attorney-at-law *may be appointed* by the court." (Emphasis added.)

"The jurisdiction, practice, and procedure of the juvenile ... courts are entirely statutory, and are set forth in Chapter 11 of Title 16.1," §§ 16.1-226 through 16.1-361.¹² The juvenile courts have "exclusive original jurisdiction" over the several cases, matters and proceedings enumerated in § 16.1-241.

It is axiomatic that, "where the language of a statute is free from ambiguity, its plain meaning is to be accepted."¹³ By its plain language, § 16.1-266(A)-(C) does not provide for appointment by the juvenile court of both a guardian ad litem and counsel in the hearings described in those subsections; each subsection specifically mentions one or the other. Generally, the "mention of a specific item in a statute implies that omitted items were not intended to be included within the

scope of the statute."¹⁴ In the limited circumstances specified in § 16.1-266(A)-(C), the court is required to appoint a guardian ad litem or counsel, as delineated in each subsection.¹⁵

The remaining jurisdictional areas of the juvenile court fall within the purview of § 16.1-266(D), and the appointment of a guardian ad litem or counsel in those cases is discretionary with the court. The ordinary meaning of the word "or" in § 16.1-266(D) is disjunctive and means that a court may appoint a guardian ad litem *or* counsel in those situations covered by that subsection. It is only when "necessary to effectuate the obvious intention of the legislature [that] disjunctive words may be construed as conjunctive, and *vice versa*."¹⁶ There is nothing in the language of § 16.1-266(D), or the section itself, "which points to the conclusion that it was the 'obvious intention of the legislature' that the word 'or' was intended to mean 'and.'"¹⁷ As such, it can be assumed "that the draftsman intended the word 'or' to have its ordinary, literal and disjunctive meaning."¹⁸

Conclusion

Consequently, it is my opinion that § 16.1-266(D), which provides discretionary authority for a judge to appoint a guardian ad litem or counsel, is not applicable to proceedings within the purview of § 16.1-266(A)-(C), which makes such appointments mandatory in certain specific matters and proceedings. It is also my opinion that a judge may appoint a guardian ad litem or counsel pursuant to § 16.1-266(D), but not both.

¹See op. no. 00-106 to Hon. W. Edward Meeks, III, Amherst Co. Commw. Att'y (Dec. 14, 2001), *available at* <http://www.vaag.com/media%20center/Opinions/2001opns/00-106.htm>.

²You note that the guardian ad litem represents the person's best interests, while the role of counsel is to represent the client's wishes. *Compare* Stanley v. Dep't of Social Services, 10 Va. App. 596, 601, 395 S.E.2d 199, 201 (1990), *aff'd*, 242 Va. 60, 63-64, 405 S.E.2d 621,

623 (1991), *and* Va. Sup. Ct. R. 8:6.

³See opinion cited *supra* note 1.

⁴See *id.*

⁵Section 16.1-241(A)(4) addresses a child before the juvenile court "[w]ho is the subject of an entrustment agreement ... or whose parent or parents for good cause desire to be relieved of his care and custody."

⁶Section 63.2-1230 pertains to the placement of children by parents or guardians with adoptive parents, effective October 1, 2002.

⁷Section 16.1-266.1 sets forth criteria to be included in the standards adopted by the Judicial Council of Virginia for attorneys appointed as guardians ad litem, and requires the Council to maintain and make available to the courts the names of attorneys who qualify, pursuant to the standards, to serve as such guardians.

⁸Va. Code Ann. § 16.1-266(B)(1) (LexisNexis Supp. 2002).

⁹Section 16.1-266(B)(2), (C)(2).

¹⁰Section 16.1-266(B)(3), (C)(3).

¹¹Section 16.1-266(B)(2), (C)(2).

¹²Walker v. Dept. of Public Welfare, 223 Va. 557, 562, 290 S.E.2d 887, 890 (1982); see also Fairfax County Dept. of Human Dev. v. Donald, 251 Va. 227, 229, 467 S.E.2d 803, 804 (1996).

¹³Portsmouth v. Chesapeake, 205 Va. 259, 269, 136 S.E.2d 817, 825 (1964), *quoted in* Charlottesville v. Albemarle, 214 Va. 365, 367, 200 S.E.2d 551, 553 (1973); see Harward v. Commonwealth, 229 Va. 363, 368, 330 S.E.2d 89, 92 (1985) (Russell, J., dissenting); 17 M.J. *Statutes* § 34 (1994).

¹⁴Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); see also Christiansburg v. Montgomery County, 216 Va. 654, 658, 222 S.E.2d 513, 516 (1976); Tate v. Ogg, 170 Va. 95, 103, 195 S.E. 496, 499 (1938); 2A Norman J. Singer, Sutherland Statutory Construction § 47:23 (6th ed. 2000) (*expressio unius est exclusio alterius*); Op. Va. Att'y Gen.: 1998 at 33, 34; 1992 at 145, 146.

¹⁵See, e.g., Wilson v. Commonwealth, 23 Va. App. 318, 325, 477 S.E.2d 7, 10 (1996) (determining that "§ 16.1-266(B), which mandates the appointment of counsel for juveniles appearing at delinquency hearings in courts not of record, states that juveniles enjoy only the right to counsel, not the right to guardians *ad litem*").

¹⁶I. D. A. v. La France Cleaners, 216 Va. 277, 280, 217 S.E.2d 879, 882 (1975) (quoting South East Pub. Service Corp. v. Com., 165 Va. 116, 122, 181 S.E. 448, 450 (1935)).

¹⁷South East Pub. Service Corp. v. Com., 165 Va. at 122, 181 S.E. at 450.

¹⁸*Id.*

[Back to July 2002 Index](#)