



John H. Lightfoot, Jr.
Chairman

State of New Hampshire Guardian ad Litem Board

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In the Matter of:
James Hurley
Disciplinary Hearing

Docket #2010 – 0014

DECISION AND ORDER

Before the New Hampshire Guardian ad Litem Board is a disciplinary proceeding of James Hurley, respondent, following a complaint filed by the Family Division Administrator, Brigitte Siff Holmes of a number of problems encountered by the Goffstown Family Division.

BACKGROUND INFORMATION

On August 20, 2010, the Guardian ad Litem Board received a letter from the Family Division Administrator, Brigitte Siff Holmes, of a number of serious problems they have experienced with Guardian ad Litem James Hurley (Court Docket #638-2009-DM-248).

At its meeting on September 24, 2010, the Board voted to proceed to a hearing, pursuant to its authority under RSA 490-C:4, I(g), to determine whether Mr. Hurley violated the rules of the Guardian ad Litem Board.

A notice of hearing was issued on October 20, 2010.

The issues to be addressed at the hearing were:

- I. Whether Mr. Hurley violated Gal 503.02(a) General Obligations of All Guardians Ad Litem, “Unless otherwise specified in an order or other instruction of the appointing court, a guardian ad litem shall at all times act in what he or she, in good faith, believes to be in the best interests of the recipient of services;” by ignoring orders from the Court and failing to carry out the duties assigned to him by the Court with no explanation such that the interests of the children were not protected and their case was unnecessarily delayed.
- II. Whether Mr. Hurley violated Gal 503.02(c) “A guardian ad litem shall perform those duties assigned to him or her by the appointing court,” by failing to communicate with the Court and failing to comply with the Court’s orders.
- III. Whether Mr. Hurley violated Gal 503.02(g), “If a guardian ad litem believes, in good faith, that there is no action that will enable him or her to obtain the skill or knowledge necessary under paragraph (e) above, the guardian ad litem shall so advise the appointing court” by failing to notify the Court of any reasons for his failure to comply with the Court’s orders.

IV. Whether Mr. Hurley violated Gal 503.02 (h) “a guardian ad litem shall comply with all statutes and case law relating to the duties and activities of, and the procedures applicable to, guardians ad litem in general and to the duties and activities of, and procedures applicable to, guardians ad litem in the particular type of case to which he or she has been appointed” by failing to investigate the children’s situation as required in the order of appointment.

V. Whether Mr. Hurley violated Gal 503.02 (i), “A guardian ad litem shall be able to identify the material legal and factual issues raised in the proceeding in which he or she serves” as demonstrated by his total failure to participate in the case beyond the initial filing of stipulations.

VI. Whether Mr. Hurley violated Gal 503.03 Timeliness. A guardian ad litem shall:

- (a) Undertake actions on behalf of a recipient of services in a manner that is sufficiently timely to avoid prejudice to the best interests of the recipient of services or such other object of appointment as specified in the orders or other instructions of the appointing court;
- (b) Adhere to all applicable deadlines imposed by an appointing court or by statute;
- (c) Timely appear for all scheduled hearings, conferences, mediation sessions and other court proceedings, unless excused by the court; and
- (d) Timely appear for all appointments with a recipient of services, witness, attorneys or other individual involved in a case to which a guardian ad litem has been appointed, unless:
 - 1. Alternative arrangements have been made in advance of the time scheduled for an appointment; or
 - 2. The inability to timely appear for the appointment is due to circumstances beyond the control of the guardian ad litem and the reasons for the inability to appear are conveyed as soon as is practicable to the person with whom the appointment was made.

VII. Whether Mr. Hurley violated Gal 503.04 Competency.

- (a) A guardian ad litem shall carry out the duties of his or her appointment with sufficient competence to complete the work without avoidable harm to the best interests of the recipient of services.
- (b) The competence required by (a) above shall include:
 - 1. Diligence, attention to detail and promptness in the scheduling and performance of the duties of the appointment;
 - 2. Preparation for the meetings, interviews and court appearances required by the appointment;
 - 3. Knowledge of the New Hampshire statutory and case law applicable to the duties of a guardian ad litem in the type of case to which he or she has been appointed;
 - 4. Knowledge of these rules; and

5. Knowledge of the procedures and requirements of the appointing court sufficient to carry out the duties of the appointment.

VIII. Whether Mr. Hurley violated Gal 503.12 Gathering and Reporting Facts and Other Information.

- (a) A guardian ad litem shall gather such facts and information regarding the family history, background, current circumstances, concerns and wishes of the recipient of services, from the recipient of services and from other sources, as will enable the guardian ad litem to:
 1. Form a good faith conclusion about the best interests of the recipient of services or about such other matters as directed by the orders or instructions of the appointing court; and
 2. Conduct his or her duties in conformity with these rules and the instructions of the appointing court.

as demonstrated by his failure to gather any facts, interview any witnesses or prepare any report for the Court.

IX. Whether Mr. Hurley violated Gal 503.15 Termination of Representation.

- (a) Upon the termination of a guardian ad litem's appointment, the guardian ad litem shall take such steps as he or she in good faith believes are necessary to protect the best interests of the recipient of services.
- (b) The steps described in (a) above shall include, but not be limited to, the following:
 1. Surrendering papers and property to which the recipient of services, the parties or the court may be entitled;
 2. Refunding and transferring any unearned fees; and
 3. To the extent possible, taking action in a sufficiently timely manner as to allow time for appointment of another guardian ad litem.

as demonstrated by his apparent de facto resignation as guardian ad litem without taking any such steps to protect the children involved.

X. Whether Mr. Hurley violated Gal 303.01 (h), that a guardian ad litem shall be of good character as demonstrated by his repeated failure to comply with Court orders and the rules of the Guardian ad Litem Board.

XI. If any of the above allegations are proven, whether and to what extent Mr. Hurley should be subjected to one or more disciplinary sanctions pursuant to Gal 402 (Revocation, Suspension, and Other Sanctions).

By the same order, John H. Lightfoot, Jr. was appointed presiding officer and Susan Duncan was appointed prosecutor.

There were no requests to intervene in the case.

HEARING

An adjudicatory hearing was held on Friday, November 19, 2010 in room 102 of the Legislative Office Building, Concord.

Present were: board members John H. Lightfoot, Jr., chair and presiding officer; Mark Jewell, Mary Beth Walz, Nina Gardner, Ann Larney.

Also present were James Hurley, respondent and Susan Duncan, prosecutor.

The record in the case consists of the letter from Brigette Siff Holmes. Exhibits were presented by both parties as follows:

Prosecution:

Exhibit 1:

Letter from Brigette Siff Holmes, Family Division (Part of official record)

Exhibit 2:

Notice of Decision: Order on appointment of GAL by the court

Exhibit 3:

Copy of the GAL Stipulations received/filed with the court

Respondent:

Exhibit A:

Payment schedule agreement signed by all parties

Exhibit B:

Motion to withdraw

Exhibit C:

Copy of handwritten letter, dated February 20, 2010, from a party in the case stating that he is enclosing the \$500 retainer.

Exhibit D:

Copy of envelope Exhibit C was mailed in, US Postage dated February 22, 2010

Exhibit E:

Letter to Attorney Greene from Mr. Hurley claiming to enclose the motion to withdraw and \$500 refund check for the retainer, unsigned and not verified by Attorney Greene

Ms Duncan presented the letter from Ms Holmes asserting:

On August 28, 2009 – Suzanne Decker was appointed as GAL in the Goffstown Family Division in a case that was brought forward. Ms Decker filed a Motion to Appoint a Substitute GAL, which was subsequently granted by the Court.

On October 21, 2009, both parties in the case agreed to the appointment of James S. Hurley (1340 Old Mammoth Road, Manchester 03104) as the Guardian ad Litem.

On November 9, 2009, Judge Lawrence appointed James S. Hurley GAL to replace Suzanne Decker to investigate where the child should attend school.

On December 3, 2009, the Court received a GAL stipulation from Mr. Hurley.

On February 22, 2010, the investigation by the Guardian ad Litem, Mr. Hurley, had still not commenced.

On April 6, 2010, a Motion for a Telephonic Structuring Conference regarding the Guardian ad Litem was filed.

On April 23, 2010, the court ordered that the GAL shall have the Preliminary report filed by May 2, 2010, and the Final report no later than July 9, 2010.

On July 13, 2010, the Court ordered that GAL Hurley contact the Clerk of the Goffstown Court on or before July 19, 2010. (Court staff mailed the order to GAL Hurley on July 13th to his last address of record. The mail was not returned to the court as undeliverable.)

Mr. Hurley did not contact the Court as ordered by July 19th.

On July 20, 2010, the Court ordered Mr. Hurley to appear to show cause why he should not be held in contempt and sanctioned. He was to have appeared on July 22, 2010, at 1:00 p.m. The hearing notice and order were mailed to GAL Hurley at his last address of record and again was not returned to the court as undeliverable.

GAL Hurley failed to appear before the Court as ordered on July 22, 2010. The Court subsequently appointed a new Guardian ad Litem in this case.

As of the date of Ms. Stiff's letter to the Guardian ad Litem Board (August 17, 2010), Mr. Hurley had still not contacted the Court (other than his filing of the Stipulation on December 3, 2009).

Mr. Hurley did not dispute the statements in the letter, but asserted that he had received only two communications from the court: the order of appointment received Nov. 13, 2009 and an order requiring delivery dates for the preliminary and final reports received April 27, 2010. He made various assertions about his communications with the court and the other parties. At the close of the hearing, the Board offered him an opportunity to file documentary evidence supporting these assertions. The only subsequent communication from Mr. Hurley received by the Board was a memo dated Dec. 8, 2010 which provided a purported timeline of events in the case.

Mr. Hurley's major argument is that mail pick-up and delivery at his residence, where he conducts his guardian ad litem business is inconsistent because his mailbox had been repeatedly vandalized between April, 2010 and July, 2010. He testified that on an unspecified date, most likely in July, 2010, his wife saw a car pull up to his mailbox, stuff things into it and drive away. She wrote down the telephone number and contacted the police who identified the individuals involved and the damage was paid for. In the December 8, 2010 memo he provided the name of the Manchester police officer who allegedly investigated the incidents, but did not provide a copy of any police report or other evidence of the vandalism. Mr. Hurley further asserted that there had been several communications between himself, the child and counsel in the case. Specifically, he asserted that he had mailed the GAL stipulation to the parties on Dec. 1, 2009, but did not receive the executed stipulations back from the parties until January 8 and 14, 2010, respectively. He further asserted he did not receive the retainer from the respondent in the case until March 1, 2010, and that once that was received; he mailed GAL questionnaires to the

parties on March 4, 2010. He further asserted he received the completed questionnaires back on March 24 and April 12, 2010 and that he had a home visit with the child and respondent on April 17, 2010. He asserted he held a conference call with counsel for the parties on April 23, 2010. He finally asserted that he mailed a motion to withdraw from the case to the Court on May 3, 2010 by placing it in the mailbox at his home. He stated that he assumed the motion had been granted, but stated he had received no order from the court granting his motion. As evidence of his filing the motion, he offered what purported to be copies of the motion and copies of letters to counsel.

As further evidence of his efforts to withdraw from the case, Mr. Hurley asserted that he had mailed a refund check to counsel for respondent representing the balance of the unearned retainer. He further acknowledged that the check, allegedly mailed in May, 2010 had not been cashed as of the October statement from his bank. No mention of this check is made in the December 8, 2010 memo from Mr. Hurley to the Board.

Mr. Hurley further testified that his mother was diagnosed with ALS in February, 2010 and died in June, 2010. In relation to this, Mr. Hurley testified he was under a great deal of stress, had lost weight, suffered from depression and was taking medication. He testified this created stress in his life such that he was unaware whether he had received notice from the court that his motion to withdraw had been granted.

As to his failure to complete the preliminary report in January as required by the order of appointment, Mr. Hurley testified he had not begun his investigation in the case because he did not receive a retainer from the respondent until March 1, 2010. He testified that he informed the parties of this delay, but did not notify the court.

FINDINGS OF FACT

Mr. Hurley received the notices from the Court on April 23, July 13 and July 20, 2010.

Mr. Hurley commenced his guardian ad litem investigation by sending questionnaires on March 4 and conducting a home visit with the child and respondent.

Mr. Hurley did not mail a motion to withdraw to the Court. Mr. Hurley did not take adequate steps to assure that a motion to withdraw was received by the Court.

Mr. Hurley did not mail a refund check to counsel for the respondent.

The Board finds that Mr. Hurley made no attempt to contact the Court subsequent to the filing of GAL stipulations on December 3, 2009.

RULINGS OF LAW

- I. Mr. Hurley violated Gal 503.02(a) by ignoring orders from the Court and failing to carry out duties assigned to him by the Court with no explanation.
- II. Mr. Hurley violated Gal 503.02(c) by failing to communicate with the Court and failing to comply with the Court's orders.
- III. Mr. Hurley did not violate Gal 503.02(g) in that his failure to communicate with the Court was not related to a lack of skill or knowledge about the issues raised in the case.

- IV. Mr. Hurley violated Gal 503.02 (h) in that he failed to investigate the child's situation and submit a preliminary report to the Court in January, 2010 as required by the order of appointment without requesting a postponement from the Court.
- V. Mr. Hurley did not violate Gal 503.02 (i) in that he did participate in some case-related activities between December 1, 2009 and May 3, 2010.
- VI. Mr. Hurley violated Gal 503.03 in that he did not comply with the schedule required by the order of appointment and later court orders, which led to unnecessary delays.
- VII. Mr. Hurley violated Gal 503.04 in that he failed to act diligently, promptly and with attention to detail in performing his duties as a guardian ad litem by failing to comply with Court-ordered deadlines.
- VIII. Mr. Hurley violated Gal 503.12 in part, in that although he gathered information regarding the case, he made no effort to prepare or submit a report to court as required.
- IX. Mr. Hurley violated Gal 503.15 in that by ceasing to carry out his duties as a guardian ad litem without a court order accepting his motion to withdraw, he did not take steps to protect the best interests of the recipient of services.
- X. Mr. Hurley violated Gal 303.01 (h) in that the violations of the above rules demonstrate he is not of good character.
- XI. Extenuating circumstances exist pursuant Gal 503.01(e) in that the serious illness of his mother created stress in his life that made it difficult to attend to responsibilities as a guardian ad litem.

DISCUSSION AND CONCLUSION

Mr. Hurley's assertion that he did not receive the court notices of July 13, 2010 and July 20, 2010 is not credible. This was during the period of the alleged vandalism to his mailbox. However, he asserts the vandalism continued from April through July, and he received other mail involving the case during that period, and he failed to provide the Board with any documentary evidence that vandalism was occurring despite being given time beyond the hearing to do so.

Mr. Hurley's assertion that he mailed a motion to withdraw on May 3, 2010 is not credible. The Board finds that the letter from Ms. Holmes which does not refer to the receipt of any such motion to withdraw clearly implies that no motion was received. Furthermore, Mr. Hurley does not argue that he received any acknowledgement from the Court that his motion had been received or acted on. Even if the Board were to conclude that a motion had been mailed and that it had not been delivered because of vandalism, Mr. Hurley did not take adequate steps to assure receipt. If he believed his mailbox was subject to vandalism, he owed a duty to the Court to take reasonable steps to avoid using that mailbox.

Mr. Hurley's assertion that he mailed a refund check to counsel is not credible. He offered no proof that it had been mailed and his explanation that he rarely balanced the statement on the trust account is not persuasive as to why he had not noticed it had not been cashed. He did not offer any documentary evidence such as a cancelled check or a contemporaneous entry in a check register.

The Board gave no weight to the copies of motions and letters submitted by Mr. Hurley because they did not have any indicia of having been created and mailed at the time he asserted. They could just as easily been created on a computer on the day of the hearing.

Mr. Hurley's lack of good faith is demonstrated in several ways. His assumption that the order granting his withdrawal had been granted without checking with the Court the Board takes as, at best, an attempt to remain intentionally ignorant. A guardian ad litem is responsible directly to the appointing court, and must, at all times, be held to a high standard of candor with the court. Furthermore, his statement that he mailed a motion to the Court using a mailbox that, according to him, he knew was subject to vandalism that might interfere with the delivery of important mail demonstrates a willful disregard for his obligations to the Court. His lack of credibility in this regard further demonstrates lack of good faith in that the Board concludes no motions were mailed. Similarly, his failure to provide any documentary evidence of a refund check being written or mailed causes the Board to conclude that Mr. Hurley continues to be less than forthcoming with the Board.

Mr. Hurley failed from virtually the beginning to comply with Court orders. The Board recognizes that it is standard practice for guardians ad litem to wait until a retainer is received to begin their investigations, and Mr. Hurley did not violate any ethical requirement in doing so. However, once it became clear that this delay would cause him to miss the deadline for filing a preliminary report with the Court in January 2010; he was required to file a motion with the Court explaining the situation and requesting an extension. His failure to do demonstrates his understanding of the importance of complying with court orders, which practice continued through his formal termination in the case on July 22, 2010.

The Board finds that the illness and death of Mr. Hurley's mother created an understandable problem for him and made it difficult to complete his duties as guardian ad litem. However, this is a mitigating, not exculpatory circumstance. A guardian ad litem's duty to the Court is not casual. Even in the sad and difficult situation in which Mr. Hurley found himself, he was required to formally request to withdraw from the case, and to do whatever was necessary to protect the best interests of the recipient of services until that request was granted. The Board has considered this in deciding on the sanction to impose on Mr. Hurley.

SANCTIONS

Gal 402.02 Standard for Imposition of Penalties and Sanctions provides the standards for imposing sanctions on certified guardians ad litem who have been found by the Board to have violated the requirements of RSA 490-C and rules adopted by the Guardian ad Litem Board.

Gal 402.02

(a) In determining whether or which sanctions or penalties to impose in a particular case, the board shall:

(1) Consider whether extenuating circumstances exist pursuant to Gal 503.01 (e); and

(2) In the absence of extenuating circumstances, consider the following when determining the penalty or sanction, or the combination of penalties or sanctions, to be imposed:

- a. The nature and magnitude of the infraction, including the nature of the harm that was, or may have been, caused by the act or omission at issue;
- b. Whether a particular penalty is prescribed by the rules of the board;
- c. The particular circumstances relating to the act or omission at issue;
- d. The probable reason or reasons for the act or omission;
- e. The person's past history of discipline, sanction or penalty, if any, imposed by the board, or by any other entity charged with overseeing the conduct of the person charged;
- f. Whether the person has cooperated with any investigation into the matter under consideration; and
- g. Whether the person may have violated the ethical standard and standard of practice set forth at Gal 503.02 (a), relating to acting in the best interests of the recipient of services.

(b) In cases in which a penalty or sanction is to be imposed, the board shall impose such penalty or sanction, or combination of penalties and sanctions, as it concludes:

(1) Takes into account the factors set forth in (a) (2) above;

(2) Will likely:

- a. Convey to the person the importance of adhering to the requirements of the rule or law violated, or rules and laws generally; or
- b. Assist the person in conforming his or her future conduct to the requirements of rules or law, either in general or as they relate to the functions of guardians ad litem;

(3) Will likely serve as a general deterrent to the commission of a similar violation by other persons in the future;

(4) Is or are not disproportionate to the magnitude of the act or omission at issue;

(5) Will likely be perceived by the general public as fair in light of the particular circumstances of the offense; and

(6) Will not, if imposed, be likely to increase a risk of harm to the health, safety, welfare or best interests of any recipient of services or potential recipient of services.

As noted, the Board finds that extenuating circumstances exist pursuant to Gal 503.01(e)

THEREFORE IT IS ORDERED that James Hurley is conditionally certified pursuant to Gal 402.03 (c) solely for the purposes of imposing the discipline of revocation.

IT IS FURTHER ORDERED that James Hurley's certification is revoked pursuant Gal 402.01 (a)(1).

IT IS FURTHER ORDERED that pursuant to Gal 402.03(d) conditional certification for the purposes of disciplinary revocation under paragraph (c) above shall: (1) Not preclude the imposition of additional sanctions, either before or after revocation, under the standards set forth in Gal 402.02; (2) Be solely for the purposes of imposing the sanction of revocation; (3) Not be construed or represented by the person conditionally certified as a conclusion by the board that the person so conditionally certified meets the qualifications of Gal 303.01 or Gal 401.10; and (4) Expire immediately upon the imposition of the sanction of revocation.

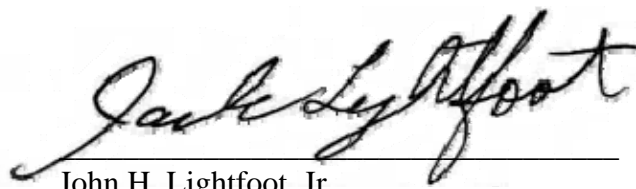
IT IS FURTHER ORDERED that respondent James Hurley immediately notify any courts in which he currently holds an appointment as guardian ad litem of the results of this disciplinary hearing.

IT IS FURTHER ORDERED that a copy of this order be delivered to the Administrative Office of the Courts and the Administrative Judges of the Superior, Probate, District and Family Division Courts.

Appeals from orders of the Board may be taken pursuant to RSA 541. See RSA 490-C:8. Within 30 days of the date of this decision, the respondent may appeal by petition for a writ of certiorari to the New Hampshire Supreme Court. See RSA 541:6.

BY ORDER OF THE BOARD

DATE: December 29, 2010



John H. Lightfoot, Jr.
Board Chair

cc: Susan Duncan, Prosecutor, c/o Guardian ad Litem Board, 25 Capitol St., room 120, Concord, NH 03301

James Hurley, 1340 Old Mammoth Road, Manchester, NH 03104

Rosemary Wiant, Assistant Attorney General, NH Department of Justice, 33 Capitol Street, Concord, NH 03301