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Assigned Counsel Eligibility of Minors in Criminal Court: No Parental Liability.

Introduction

In response to the growing fiscal crisis surrounding the funding of public defense, a major development has been the improper practice of mining individuals and families for funds to cover the costs of assigned representation by distorting the standards of eligibility. In this vein, there is a defective body of law that suggests that parents may be held liable for the expense of legal fees incurred by a county when counsel is assigned to represent a minor in the criminal courts. *See e.g. inter alia Matter of Plovnick v Klinger*, 10 A.D. 3d 84 (2d Dept. 2004); *People v Kearns*, 189 Misc. 2d. 283 (Supreme Court Queens County 2001); *Matter of Cheri H.*, 121 Misc. 2d 973 (Fam. Ct., Bronx Co. 1983); Op Att. Gen. [Inf] 89-44; *also People v Clemson*, 149 Misc. 2d 868 (Vill. Ct., Newark, Wayne Co. 1991); *Matter of Heysham*, 131 Misc. 2d 1007 (Fam. Ct., Oneida Co. 1986).[1]

The reasoning applied in this line of cases reveals a careless and conclusory merger of the statutory parental obligation for support under Family Court Act [FCA] § 413 as it may apply to the appointment of an Attorney for the Child in juvenile actions and the authority of a criminal court to terminate or modify a previously issued order of assignment of counsel to permit partial payment of attorneys fees under County Law § 722-d.

The analysis below will demonstrate that the reasoning of these few cases is fundamentally flawed and that there is in fact no binding parental obligation to bear the expense of legal fees necessary to represent a minor being prosecuted as an adult in criminal court. Specifically, the following conclusions will be established:

1. The rulings which uphold recovery of attorney's fees from parents for the representation of a minor for a criminal offense are unsound and promote unlawful policy and practice.
2. It is improper to take parental income into account in the first instance of determining whether it is necessary to assign counsel to represent a minor in criminal court.
3. A parent has no obligation to hire counsel to represent a minor child in criminal court--no obligation to the government, no obligation to the child.

[1] This line of cases was cited without analysis by the Appellate Division, Fourth Department in *Roulan v County of Onondaga*, 90AD3d 1617 (4th Dept 2011) *mod* 21 NY3d 902 (2013) as support for permitting a local Assigned Counsel Program to consider parental income in eligibility determinations for minors charged in criminal courts. However, the Court of Appeals subsequently ruled that the petitioners in the case had no standing in the matter and vacated the Fourth Department's ruling on this issue rendering it inconsequential.

1. The rulings which uphold recovery of attorneys' fees from parents for the representation of a minor for a criminal offense are unsound and promote unlawful policy and practice.

The Supreme and Family Court cases that underlie the concept that a parent may have an obligation to cover the cost of counsel for a minor being prosecuted in criminal court derive from non-criminal proceedings commenced in courts of separate jurisdiction than the criminal courts and address the appointment of Attorneys for the Child. *See e.g. Matter of Plovnick v Klinger*, 10 A.D. 3d 84 (2d Dept. 2004). Beyond this hollow precedent, there is no binding authority that upholds a criminal court's exercise of jurisdiction over parents to make a support finding and order the payment of attorney's fees; nor is there any binding interpretation of County Law § 722-d that allows a cause of action against non-party parents to recover the costs of assigning counsel to a minor in a criminal matter.

Rulings that maintain that parental income may be considered in determining eligibility of a minor for the assignment of counsel in a criminal case, or might permit the recovery of fees paid by the county for assignments of counsel using County Law § 722-d, are faulty in that they suggest action by a court without competent jurisdiction and promote causes of action not authorized by law. *See e.g. People v Kearns*, 189 Misc. 2d. 283 (Supreme Court Queens County 2001).

In particular, the consideration of parental income in an eligibility determination for the assignment of counsel in a criminal matter is theoretically founded in a support obligation pursuant to Family Court Act § 413 as it may pertain to costs related to the appointment of Attorneys for the Child in juvenile matters. As noted in *Matter of Plovnick, supra*, "[w]hile necessaries have traditionally been defined to include a child's most basic needs, such as food, clothing, shelter, and medical care, in appropriate circumstances the duty to provide necessaries may obligate a parent to provide a child with counsel [citations omitted]". Even under this authority, before any order may be issued requiring parents to enter proceedings and be subjected to an income determination, a support action would have to be initiated in the first instance in Family or Supreme Court to determine whether the circumstances are appropriate and the obligation exists. A criminal court where charges are pending against a minor simply does not have jurisdiction over non-party parents to conduct such an inquiry nor make such an order.

In the case of recovering assigned counsel fees pursuant to County Law § 722-d, this section provides no standing to counties to initiate a claim to collect assigned counsel fees against parents of a minor represented by assigned counsel in a criminal court. Contemporaneous orders of partial payment issued at the time of the assignment of counsel are likewise not authorized by § 722-d. This statute only authorizes an acting assigned attorney in a pending matter to revisit the question of previously approved eligibility if circumstances arise to indicate that the *client* may no longer be eligible to receive the services of assigned counsel.

Analysis of the Flaws in the Underlying Case Law

The root of the confusion of issues and the basis for suggesting a parental obligation to pay for counsel in a criminal case on behalf of a minor child lies in the decision of *Matter of*

Cheri H., 121 Misc. 2d 973 (Fam.Co., Bronx Co. 1983). In that case, a Family Court [Judge Judy Sheindlin presiding], applying a convoluted analysis of inapposite law, ruled that a parent is responsible for attorneys' fees for the representation of a juvenile by a Law Guardian in Family Court pursuant to County Law § 722-d. The conclusion in this never reviewed case is unsustainable. The attorney in *Cheri H*. was a Law Guardian appointed to represent a juvenile in delinquency proceedings pursuant to Family Court Act § 249. The County Law, specifically article 18-B in which § 722-d is codified, has no bearing on the appointment of Law Guardians.

Family Court Act § 249 requires the Family Court to assign an Attorney for the Child [formerly known as a Law Guardian] to represent a juvenile in, *inter alia*, all delinquency and supervision proceedings under Articles 3 and 7. FCA §249 (a). Attorneys for the Child are assigned in accordance with whatever plan the Office of Court Administration has established pursuant to FCA § 243. Compensation for these services is provided for under FCA § 245 at the rates set forth in Judiciary Law § 35. The costs for Attorneys for the Child under § 245 are to be paid by the state as prescribed in FCA § 248. Nowhere in any of these sections of law is there any provision regarding the state recovering legal fees for Attorney for the Child from either the child or the parents.[2]

In *Matter of Cheri H.* the court's conclusion that the County Law applied to create a right of the state to recover the costs of the juvenile's attorneys fees in a delinquency proceeding was nothing short of a specious ruling. The representation of a minor in delinquency proceedings was and continues to be a state obligation and a state expense, payable pursuant to a system authorized and funded through the Office of Court Administration, in accordance with the rates set forth in Judiciary Law § 35. The County Law is irrelevant in such proceedings and no court has authority to order parents of a juvenile respondent in Family Court to cover any costs of representation under County Law § 722-d.

Compounding the confusion, the Attorney General irrationally adopted the reasoning of *Cheri H.* and opined that the precedent applied equally in the criminal courts to recover the costs of assigned counsel fees from parents arising from the representation of minors by assigned counsel. Op.Att.Gen [Inf] 89-44 [opinion rendered to county attorney wherein *Cheri H.* was cited as authority to support the issuance of § 722-d orders against the parents of minors as an obligation under FCA § 413].

Reliance on *Cheri H.* in later cases, such as *Matthews v Matthews* [30 Misc. 2d 681 (Sup.Ct., Nassau Co, 1961)] and *Fanelli v Barclay* [100 Misc. 2d 471 (D.C. Nassau Co. 1979)] as well as by the Attorney General has been consistently misplaced. These cases dealt strictly with the issue of attorneys fee awards in matrimonial support enforcement actions and specifically noted that as a matter of law attorneys fees *may* be considered as a support obligation when the legal services are rendered in an enforcement action for previously ordered support for which the parent is derelict. *Matthews, supra,* at 685, *accord Fanelli v Barclay, supra*. Both decisions are drawn on old, non-existent or re-codified sections of law, including the Children's Court Act and the Rules of Civil Practice.

[2] Conversely, counsel for indigent *adult* parties in specified Family Court proceedings are specifically authorized by statute to be assigned pursuant to the County Law article 18-B plan under FCA § 262.

FCA § 438 now specifically authorizes a Family Court to order the payment of attorneys' fees, payable directly to a party's attorney, in an action to *enforce* a support obligation when the failure to meet the obligation is found to be willful. This section also specifically provides for the recovery of counsel fees for the expenses incurred by a DSS attorney. In no manner do these cases or statutes create a general liability of parents to pay counsel fees for the representation of their minor children in either criminal or Family Court proceedings or to reimburse a county for the costs of assigned counsel fees under the County Law.

Steps toward Refining the Issues

Matter of Heysham, 131 Misc. 2d 1007 (Fam. Ct. Oneida Co. 1986) addressed the discrete issues and correctly arrived at the opposite conclusion by an examination of more relevant law. *Heysham* considered the question of whether it was appropriate for the Family Court to consider parental income in determining whether a juvenile was eligible for assigned counsel on appeal. Citing CPLR § 1101(a), which governs applications to proceed as a poor person, the Oneida Family Court ruled that the statutory language permitted only the resources of the applicant to be considered. The Court stated further that

> [i]n interpreting this provision, we are guided by McKinney's Consolidated Laws of NY, Book 1, Statutes 74, which provides: "A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended."
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> Since the Legislature contemplated that the statute may be invoked on behalf of infants but did not provide that in such instance the resources of the parents would be considered, the court must construe such omission as an indication that such omission was intended. The court may not add, by implication, a provision to a statute which is clearly absent. *Heysham at 1010-1011.*

Heysham ultimately and correctly ruled that it would be improper to consider parental income in determining eligibility.

Regrettably the *Heysham* Court went on to muddy the once cleared waters by suggesting the possibility of a plenary action instituted by the county government in a court of competent jurisdiction to seek reimbursement for expenses incurred without specifying what court might have jurisdiction for such an action. Reference was again made to cases in which attorneys fees have been ordered in matrimonial support proceedings as possible precedents, but as discussed above, these precedents do not properly support a general obligation to cover assigned counsel fees in criminal courts or any other non-support action.

A well reasoned attempt at identifying the troubling aspects of this practice can be found in *People v Clemson*, 149 Misc. 2d 868 (Vill.Ct., Newark, Wayne Co. 1991). As in *Heysham*, the court in *Clemson* examined the jurisdictional defects of an order against parents to cover the costs of counsel fees for a minor charged in criminal court. *Clemson* highlighted the importance of providing counsel at the earliest possible moment noting that an inquiry into parental assets should not postpone the assignment of counsel. The court then explained why the criminal court is not authorized to take up such inquiry or issue an order against parents over whom it lacks *in personam* jurisdiction. The court in *Clemson* likewise concluded that the only way the county might claim against parents for the costs of representing a minor in a criminal matter would be in some "plenary proceeding" in an unspecified court of competent jurisdiction.

Heysham and *Clemson* are on the right track in condemning an illegal practice. However, when the analysis is pursued, it is clear that there no cause of action is available to initiate such a plenary proceeding.

Statutory and Jurisdictional Constraints

As noted in *Clemson*, given the jurisdictional and statutory constraints, any attempt to order parents to hire counsel or reimburse the county for the cost of representing a minor in criminal court would generate a procedural quagmire that would improperly delay the assignment of counsel in the first instance. *See also Hurrell-Harring v State of New York,* 15 N.Y.3d 8 *(2010).*

Before non-party parents may be forced to hire a lawyer or re-pay the county for the costs of assigning counsel to a minor in a criminal prosecution, a petition for a support inquiry would have to be initiated in Supreme or Family Court. If after such an inquiry, parents were not ordered to hire counsel, the matter would have to go back before the criminal court to conduct its required inquiry into whether the minor is eligible for assigned counsel as an individual or whether the child must proceed *pro se* if no assignment of counsel were granted. If, in the alternative, the parents were ordered to hire counsel as a support obligation and failed to do so for whatever reason, the criminal court would still have to make an inquiry into whether the minor may be individually eligible for the assignment of counsel. If the criminal court determined that the child must be assigned counsel, an assignment order should be issued. Only at that point would it be appropriate for the assigned attorney to consider whether to make an application to the assigning criminal court under § 722-d to have representation terminated or partial payment ordered. Subject to the discretion of the assigned attorney as provided in the statute, a previously issued support order might arguably be proffered as some evidence of the appropriateness of a § 722-d order, however in such circumstances any § 722-d order issued would be against the child, not the parents, because the parents are not subject to the jurisdiction of the criminal court.

This was the threshold conclusion reached by the court in People *v Kearns*, *supra* [189 Misc. 2d 283 (Sup. Ct. Queens Co 2001)], the most recent criminal court to address the tortured reasoning of *Cheri H, et al*. In *Kearns*, the court conceded that as "a court presiding over a criminal trial it [has] no compulsory authority to direct an unwilling parent, who is not a party to the criminal action, and over whom the court lacks jurisdiction, to provide counsel for an

unemancipated minor." *Kearns, supra* at 288, *citing People v Clemson, infra*, 149 Misc. 2d 868 (Vill.Ct., Newark, Wayne Co. 1991).

Despite the lack of jurisdiction over the parents, the court in *Kearns* ultimately issued an order for the parents to cover the costs of the child's representation. In the absence of any existing procedure to effect some kind of parental contribution as contemplated by *Cheri H* or its progeny, the *Kearns* court held that "the governmental entity furnishing such services to an unemancipated child can maintain a cause of action against any responsible parent, over whom jurisdiction can be obtained, which may be prosecuted in any court of competent jurisdiction by its attorneys (i.e., the Corporation Counsel of the City of New York in the case of New York City)." *Kearns* at 289-290. This, of course, begs the question as to what authority the *Kearns* court had to declare the right to a cause of action of one non-party against another non-party.

In the *Kearns* "Final Determination", the court ordered: "The Legal Aid Society is directed to submit a bill to the defendant's father, Alan Kearns, for the cost of the legal representation to his son from the inception of their involvement in this matter through trial, and for any further proceedings on his behalf in accordance with the rate schedule set forth pursuant to County Law § 722-b, applicable to assigned counsel." *Ibid.*

Given that in this instance, it was defense counsel that raised the issue before the court after assignment, as necessitated under County Law § 722-d, such a direction may hypothetically be supportable, but only if the above-described procedure were undertaken resulting in a valid underlying support finding reached by a Supreme or Family Court with requisite subject matter and personal jurisdiction over the non-party parents authorized to subject them to a civil monetary claim in favor of the non-party county government. There is no subsequent history related to the *Kearns* case indicating whether the court's decision or order was indeed actionable in any forum.

2. It is improper to take parental income into account in the first instance of determining whether it is necessary to assign counsel to represent a minor in criminal court.

The responsibility of the judiciary to appoint counsel to all criminal defendants who are financially unable to hire a lawyer is a principle of fundamental constitutional import. *People v. Witenski*, 15 N.Y.2d 392 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The right to counsel is personal to the defendant and may be given up only upon a knowing, intelligent and voluntary waiver. *Johnson v Zerbst*, 304 U.S. 458 (1938).

"Indigency" or the inability to pay, likewise, is personal, and in determining whether a person should be permitted to proceed as a poor person the state may not take into account the financial ability of relatives or friends. *Fullan v Commissioner of Corrections of the State of New York*, 891 F.2d 1007 (2d Cir. 1989); *Matter of Heysham, supra*. *See also* Memorandum of the Judicial Conference of the State of New York (Nov. 11, 1965); ABA Standards for Criminal Justice, Providing Defense Services (1982), Standard 5-6.1 *Eligibility*; NLADA, Standards for Defender Services Standard II(1) *Eligibility and Scope of Representation*; National Advisory

Commission on Criminal Justice Standards and Goals, Courts (1972) Standard 13.2 *Payment for Public Representation*.

A minor over the age of 16 years is subject to the jurisdiction of the criminal court under Penal Law § 30.00 and is, therefore, entitled to all the benefits of an adult in any criminal proceeding. CPL §§ 180.10, 180.75, 725, *et seq.*

Criminal courts have no jurisdiction or authority to issue a collateral order of liability against a non-party parent for the payment of legal fees for assigned counsel in a criminal court based upon an alleged support obligation under FCA § 413. FCA § 115; *Cf. Rush v Mordue*, 68 NY2d 348 (1986) [holding, *inter alia*, that prohibition lies when a court acts in excess of authorized power in matters over which it has jurisdiction].

The Assignment of Counsel in the First Instance

When an individual first comes before a criminal court, the court is obligated to ensure that the individual is represented by counsel. CPL §§ 170.10; 180.10; 210.15; *Hurrell-Harring v State of New York*, 15 N.Y.3d 8 *(2010)*. The court must inquire as to whether the individual is able to obtain counsel. If the person is not able to obtain counsel, then counsel must be assigned to represent the individual at the expense of the government. In New York, the court must assign counsel pursuant to whatever plan the county has adopted under article 18-B of the County Law.

In this regard, the former Judicial Conference of the State of New York determined that:

> Under any plan, in order to prevent any delay in arraignment, the court *should assign counsel upon a declaration of indigency*. Subsequent investigation by counsel is permissible and contemplated. If any financial questionnaire is to be completed after tentative assignment, the questions should not be unduly numerous and *no questions should be put which might be* self-incriminatory or *irrelevant, such as inquiries into the assets of relatives or friends*. (Italics supplied) Memorandum of the Judicial Conference of the State of New York dated 11/16/1965.

Inquiries into the assets of third parties, including the parents, are precluded. Any purported application of family law or Family Court jurisdiction related to parental support obligations in criminal court with regard to assigned counsel eligibility is inappropriate. *Id.; see also Matter of Heysham*, *supra.* The issue of whether the payment of counsel fees on behalf of a minor consitutes a support obligation is in all accounts a question of fact dependent on the circumstances of the family and the parent-child relationship and cannot be cursorily resolved against a parent by a criminal court in the course of a determination of the minor accused's right to the assignment of counsel.

The only legislation in New York that contemplates partial contribution in any form is County Law § 722-d. As discussed previously, that section permits court ordered partial

payments by defendants under limited circumstances. Any other compensation scheme that would require a person to repay the county for appointed legal services for which he or she was eligible at the time of the representation would be unauthorized. Op.Att.Gen. [Inf] 85-78.

County Law § 722-d: Partial Payment Orders

Nothing in § 722-d authorizes a court to prospectively order partial payment of assigned counsel fees during the initial eligibility determination process for the assignment of counsel. At most, the statute provides that if, at some point during the course of representation, assigned counsel determines that the assigned representation should be terminated based on the represented individual's newly discovered ability to hire counsel, then under County Law § 722-d, counsel may seek to withdraw or have reimbursement for services rendered ordered. Such a motion, obviously, should not be granted unless the right to counsel continues to be protected. In other words, it would be highly inappropriate for a court to discontinue representation by assigned counsel based on some new eligibility determination if the individual is left without representation thereafter (*See People v Kearns, supra; People v Clemson, supra;*). If assigned counsel is to be altogether relieved based on the ability of the individual to hire counsel, the relief order should be granted only when new counsel enters an appearance and is ready to proceed.

In addition, under this section, if during the course of the representation counsel determines that an individual is able to bear some of the costs of the representation but is not able to hire private counsel, currently assigned counsel may likewise notify the court of the need to consider an order requiring the individual to contribute to the cost of the representation.

As noted above in the discussion of *People v Kearns*, County Law §722-d authorizes criminal courts to terminate an assignment or order partial payment/contribution only upon application of counsel. This section does not authorize a court to act *sua sponte* with regard to payment for legal services of assigned counsel (*Matter of LAS v Samenga*, 39 A.D.2d 912 (2d Dept. 1967); *see also People v Bell*, 119 Misc. 2d 274 (Sup.Ct., Queens Co. 1983); Op.Att.Gen. [Inf] 85-78). Nor does it authorize the consideration of the income of third parties in determining whether it is necessary to appoint counsel (*Fullan v Commissioner, supra;* Memorandum of the Judicial Conference, 11/15/65, *supra*).

Although a criminal court may have the authority to order payment for legal services by an individual receiving assigned counsel representation upon the application of counsel under § 722-d, such an order would give rise to a cause of action only against the individual being represented and only to the extent to which the order authorizes.

Criminal Court's Lack of Jurisdiction and Limited Interest

Pursuant to FCA § 115 the Family Court has *exclusive original jurisdiction* over support matters under article 4 of the Family Court Act, which would include enforcement of the support provisions set forth in § 413. Under the circumstances, a criminal court is without jurisdiction or authority to render an order against the parents of a minor defendant as a support obligation under FCA § 413.

Once the accused is represented by counsel, by whatever process, the issue of who pays for the services becomes a collateral one and not subject to the jurisdiction of the criminal court beyond that authorized under § 722-d. An order for payment under that section may or may not be sustained depending on the circumstances.

It cannot be overemphasized that the only interest a criminal court has in eligibility issues arises out of its obligation to ensure that defendant has counsel. Whether the county can hold a parent liable for the assignment of counsel fees under FCA § 413 is a collateral matter not within the scope of the criminal trial court's authority to resolve criminal charges.

3. A parent has no obligation to hire counsel to represent a minor child in criminal court-- no obligation to the child, no obligation to the government.

The New York State Legislature has exclusive authority to legislate in the area of parental responsibility for the acts of a minor and therefore a locality has no authority to promulgate legislation in the field. *See* Op. Att. Gen. [Inf] 77-308.

At common law, parents had the obligation to bear the fair and reasonable expenses of their offspring's upbringing. This obligation encompassed basic needs: food, shelter, and clothing. In New York, this rule has been codified and defined in FCA § 413, *et seq*. According to this statute, parents are liable, within their means, for the reasonable expenses of providing "care, maintenance and education" of their minor children up to the age of 21 years. FCA § 413. Care, maintenance and education are statutorily defined to include "necessary shelter, food, clothing, care, medical attention, expenses of confinement, the expense of education, payment of funeral expenses, and other proper and reasonable expenses". FCA § 416.

Responsibilities under this statute flow from the parent to the child, and if the parent fails to provide any of these services, then the child is vested with a cause of action against the parent for support. Social Services Law [SSL] § 101. If or when parents fail to provide adequate and reasonable support, the government is statutorily obligated to step in and provide the necessary services. FCA § 515. As noted above, it has been held that: "While necessaries have traditionally been defined to include a child's most basic needs, such as food, clothing, shelter, and medical care, in appropriate circumstances the duty to provide necessaries may obligate a parent to provide a child with counsel [citations omitted]" *Matter of Plovnick v Klinger, supra.*

Taken together, these rules of law indicate, at minimum, the need for an inquiry in a proper forum into whether the prosecution of a minor as an adult in criminal court constitutes appropriate circumstances to hold parents liable for the cost of defense counsel. If such an inquiry were to be called for, standing would lie with the minor seeking to force a parent to pay attorney's fees and would involve a case-by-case determination taking into consideration all the attendant facts and circumstances. Absent a legislative mandate that currently does not exist, a County, either alone or through its assigned counsel program, is not vested with standing to intitiate this type of claim. .

No Parental Duty to the Government.

FCA § 413 does not create an obligation of parents to the government to support their minor children. The statute simply codifies a common law obligation that flows from the parent to the child. The only way the government may assert this obligation as a cause of action is if the government has assumed the responsibility of support owed under § 413, in accordance with FCA § 515. Under the circumstances provided in § 515, the agent of the child, which in New York would be the Department of Social Services [DSS], may seek indemnification or contribution under Social Services Law §§ 101-a and 102 for the costs related to support that have been taken over by the government. In this regard parental liability is, as provided by the statute, a function of the parents' reasonable means to provide such support.

Nothing in these or any other Acts provides for a cause of action under § 413 by the state or local government to recover the costs of legal fees incurred while defending a minor on criminal charges.[3]

The obligation of the government to provide counsel in a criminal matter does not arise from any common law duty owed the child from the parent, nor is such a duty created in the statutory obligations of parents to support their children under FCA § 413. Rather, the government's obligation in this respect flows from a constitutional mandate that no individual may be held for a crime without the assistance of counsel. A county government's right to recover attorneys' fees arising out of an appointment of counsel in a criminal case is not sustained by a general application of these sections of family law.

No Parental Duty to the Child: the Necessity and Purpose of an Inquiry

The existence of a parent-child duty addresses whether legal expenses fall within the catch-all phrase "other proper and reasonable expenses" of FCA § 416, thereby making parents legally obligated to hire a lawyer to represent their minor child in criminal court. The answer here again, is no, they do not. Aside from the previously noted statutory sections that exclude such obligation, the right of a minor to claim a right to support under § 413 may be deemed relinquished by the actions of the minor and the circumstances of the case.

Emancipation

In general, parental obligations to a minor child are suspended if it can be demonstrated that the minor was *emancipated*, or acting independently and outside the reasonable control and supervision of the parents. Voluntary emancipation generally results from the minor's renunciation of the control and authority of the parents accompanied by acts of independence, economic or otherwise.

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[3] Nor is there any applicable theory of vicarious liability. In New York, there exists limited statutory parental liability for certain willful, malicious and unlawful conduct which is codified in the General Obligations Law [GOL] § 3-112. This section creates a specific cause of action between a plaintiff and a parent of a minor malfeasant between 10 and 18 years of age for a limited civil recovery, which would not exist absent the statute. It does not create any cause of action for a third party county claimant against a non-party parent of a malfeasant (*e.g.* minor child-defendant) to recover the collateral costs of assigned counsel in a criminal prosecution.

Constructive emancipation occurs by operation of law when a minor becomes independent of the parents either by marriage, joining the military, becoming gainfully employed, or otherwise removing him-or-herself from the control and supervision of the parent without cause. *See generally Parker v Stage*, 43 N.Y.2d 128 (1977); *Roe v Doe*, 29 N.Y.2d 188 (1971). Thus, even the support statute itself, FCA § 413, has been construed to permit a court to decline to enforce the obligations thereunder where to do otherwise would be unjust or inequitable.

In both *Roe* and *Parker*, the court was faced with the question of whether a minor's conduct had resulted in the relinquishment of rights under the support statute. In the end, the Court pronounced a policy that where a minor has voluntarily and without cause removed him-or-herself from the authority and supervision of the parents, then the parents may be relieved from any continuing support obligation. In *Parker*, the Court specifically rejected the notion that parents are strictly liable for support obligations, and held that the discretion lies with the court of inquiry to determine whether it would be fair or equitable to compel the parents to bear the burden of support obligations.

In *Roe v Doe*, the claimant was a college aged daughter who was suing to compel her father to pay her college expenses. The father had agreed to pay all the daughter's expenses under the stipulation that she reside in the dormitory on the campus. The daughter defied this rule and moved into an off-campus apartment with a friend. She got a job, finished the school year and registered to return in the fall. During the summer vacation the daughter did not come home, rather she resided with the family of a friend. The daughter claimed that her father was obligated to pay her school fees so she could return to college. The Court of Appeals declined to hold the father to any statutory support obligations, finding that by her actions the daughter forfeited the right to demand support.

Parker v Stage, presented a similar situation where an 18-year-old daughter left the family home against the wishes of the parent and went to live with a paramour. She subsequently gave birth out of wedlock and applied for public assistance. The DSS filed a claim under SSL 101-a (3) to compel the father to pay for the support of the daughter. The Court of Appeals applied the policy announced in *Roe v Doe* and ruled that equity precluded the enforcement of the support statute in circumstances such as the ones present. The *Parker* court ruled that if the minor's conduct has been such that it would preclude recovery by the minor as a matter of equity, then the statute could not be used to summarily authorize recovery by the DSS. The right of DSS under SSL § 101-a, the Court held, flows directly from, and is limited to, the extent of the minor's ability to recover.

More recently, the Appellate Division, Second Department, concluded

> Although a parent's duty to support his or her child until the child reaches the age of 21 years is a matter of fundamental public policy in New York, it has long been recognized that a child may be deemed emancipated, and thus forfeit the right to support, where the child voluntarily and without

> sufficient cause leaves the parent's home and withdraws from parental control and guidance. *Alice C. V Bernard G. C.*, 193 A.D.2d 97 (Second Department, 1993) citing *Matter of Roe v Doe*, 29 NY2d 188.

Based on this line of cases, then, before a parent can be compelled to make support payments under FCA § 413, at the very minimum there must be an inquiry into the nature of the relationship between the minor and the parents that would determine the equity of enforcing any obligation contemplated by that statute. In order to do so, any claimant would be required to demonstrate standing to raise the cause of action in a court of competent jurisdiction.

The criminal forum where a minor has been charged with a penal offense and seeks the appointment of counsel is not a court of competent jurisdiction for this type of inquiry and the county government has no standing to institute such a claim against the parents under SSL §§ 101-a or 102. *See* FCA § 115.

Constructive Emancipation and the Representation of Minors in Criminal Courts

When a minor is charged in criminal court with a penal offense, a constructive emancipation has occurred that suspends, at least pending further inquiry by a court of competent jurisdiction, the parental obligation, if any, to provide financial support or legal fees.

The Court of Appeals has ruled that parental obligations under FCA § 413 may be applied to the costs of medical care, treatment and confinement when the minor child is before the Family Court, because the nature of the proceeding is designed to reinforce the family unit and attempt to assist the parents in fulfilling their moral and civil obligations for rearing their children. *Jesmer v Dundoni, 29* NY2d 5 (1971). In situations where the DSS and Family Court have stepped in and made referrals to treatment programs to assist in supervising the child, the parents remain an integral part of the planning and implementation of the supervised intervention and are therefore still liable under §413 for reasonable care, maintenance and education. *Jesmer, supra*, at 11.

However, the Court in *Jesmer* distinguished between the minor being held under the supervision of the Family Courts, whose jurisdiction lies with maintaining the family unit, and a minor before the criminal courts whose jurisdiction lies with the protection of the public despite the interests of the family. In the latter case, the government is responsible for the maintenance of the minor offender in order to protect the public, and it is equitable therefore that the expense be borne by the government. An important factor in this distinction is that in Family Court the parents are, to a certain extent, participants in the proceedings, whereas in the criminal forum the interests of the parents are replaced by the interests of the public. Thus, being specifically excluded from the resolution of the criminal proceedings, the parents are equitably relieved from the financial obligations related thereto. *Jesmer* at 9-11.

The Orange County Family Court has directly addressed the issues of *constructive emancipation* and parental obligations to minor children who are charged with criminal conduct in criminal court. In *Orange DSS v Clavijo*, 172 Misc. 2d 87 (Fam. Ct., Orange Co. 1997), it

was held that parents are not obligated to support a minor child between the ages of 18 and 21 who as a result of an arrest on felony charges, becomes the recipient of public assistance. The situation arose after a 19 year old minor child was arrested on burglary charges and was placed in a drug treatment program by the Department of Social Services upon being found eligible for public assistance. DSS then sought to recover the costs of the treatment from the parents under the authority of Social Services Law § 101-a and FCA § 413. The court denied the claim, citing *Roe* and *Parker* in ruling that the doctrine of *constructive emancipation* was applicable because, by his actions, the minor had placed himself beyond parental control so that he could not be supervised by his parents or accept guidance from them. The court noted that there was no showing of any derogation of a duty by the parents owed to the minor, and therefore the minor had no claim against the parent to cover the cost of "support" in this instance. If the minor had no claim, the DSS had no cause of action under SSL §§ 101-a or 102.

The significance of *Clavijo* is readily apparent. Where a minor has clearly acted of his or her own volition in a manner outside the reasonable expectations of behavior deemed appropriate by the parents, then the minor cannot retain the right to compel the parents to "support" this conduct. Under the doctrine of *constructive emancipation*, the parents are thereby relieved of any financial obligations that may arise from such conduct. *See also* The Age of Majority and Emancipation, Brandes & Weidman, 211 N.Y.L.J. 3 (June 28, 1994).

It should be beyond dispute that parents would not be presumed to condone or encourage criminal activity by a minor child if that child were in fact within the supervision and control of the parent. The reasoning is similar to negligent entrustment cases where there would be parental liability if, and only if, it can be shown that the parent knew of the dangerous activity and was in a position to control it. *See discussion LaTorre v Genesee Mgt*. 90 N.Y.2d 576 (1997). When a minor engages in criminal conduct in a situation where the parents have no knowledge of the minor's activities, and thereby no ability to exercise control, then for purposes of parental liability, the minor is effectively, *constructively*, emancipated, and the parents are relieved of their support obligations under the statute.

The doctrine of constructive emancipation applies to prevent enforcement of support obligations under FCA § 413 and further bars recovery by the state Department of Social Services for support obligations otherwise available under law. In light of this, the complete lack of jurisdictional authority aside, it would be exceedingly unjust and inequitable to permit a criminal court to nonetheless require parents of an emancipated minor to bear the responsibility of attorneys' fees under the very same support statute.

Conversely, there are young people who would choose to protect their parents from the anxiety that would naturally arise in such circumstances. Thus, an important consideration in this regard relates to the minor's right to privacy in choosing not to notify either parent when facing criminal charges. As noted above, voluntary emancipation by a minor is available at the age of 16 years. Except for the prescribed drinking age under ABC § 65 and support provisions of FCA § 413, the legal age of majority is 18 years old. FCA § 119(c); Domestic Relations Law § 2; CPLR § 105(j). Therefore, persons between the ages of 16 and 21 years of age, who stand before a court accused of a criminal offense and who are to be prosecuted as adults, are entitled to exercise their right to declare emancipation (in the case of the 16-17 year old) or proceed as an

individual who has reached the age of majority without the involvement of their parents. *Compare Bellotti v. Baird*, 443 U.S. 622 (1979) [to the extent that statutory provision precludes right of minor to demonstrate to court sufficient maturity and competence to make important medical decisions with treating physician without parental consultation or consent, statute is unconstitutional].

Conclusion

Any attempt by a criminal court to order a parent to make partial payment for attorney fees or reimburse the government for the expense of assigning counsel is unauthorized by law. Contemplation of parental income in an eligibility determination is irrelevant and inappropriate and undermines the constitutional right to counsel to which minors are entitled.