

CPLR 1201: Beyer Limited to Special Circumstance Situation

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ARTICLE 12—INFANTS AND INCOMPETENTS

CPLR 1201: *Beyer limited to special circumstance situation.*

In *Application of Pugach*,⁴⁸ the appellate division was concerned with the jurisdiction of the trial court and the propriety of its appointment of a guardian ad litem under CPLR 1201.⁴⁹ The case involved an application to vacate a trust indenture created by an incompetent. Upon the presentation of the order to show cause, a guardian ad litem was appointed for the infant beneficiary of the trust.

The court held that there was jurisdiction both to make the appointment and to provide compensation for the guardian. However, the court noted that the better procedure would have been to defer appointment of the guardian ad litem until the infant failed to appear by her natural guardian.

In the prior first department case of *In re Beyer*,⁵⁰ the court, confronted with a situation somewhat similar to *Pugach*, said that a court should wait for application by the persons entitled to move for an appointment of a guardian ad litem, before making an appointment on its own initiative. However, the court added that appointment is permitted without prior applications by the persons so entitled where the infant's interests would be endangered if the usual procedure were employed.

As a result of *Pugach* and *Beyer*, it seems that the natural guardian should be given the opportunity to appear on behalf of the infant.⁵¹ Then, if no appearance is made by the natural guardian, a guardian ad litem should be appointed. However, in a situation where there are special circumstances presented, the court has the power to designate a guardian ad litem to appear for the infant or incompetent.

ARTICLE 22—STAY, MOTIONS, ORDERS AND MANDATES

CPLR 2214(b): *Failure to serve notice of motion within statutory time held a non-jurisdictional defect.*

In *Coonrad v. Walco*,⁵² the supreme court, Albany County, held that the failure to serve a notice of motion for a bill of par-

⁴⁸ 29 App. Div. 2d 518, 285 N.Y.S.2d 258 (1st Dep't 1967).

⁴⁹ CPLR 1201 provides for the appointment of a guardian ad litem for an infant, who has no parent or guardian of his property, and for an infant or incompetent where there is a conflict of interest or other cause.

⁵⁰ 21 App. Div. 2d 152, 249 N.Y.S.2d 320 (1st Dep't 1964).

⁵¹ "CPLR 1201 and 1202, effecting a change from the practice under the Civil Practice Act, indicates a legislative preference for the appearance of the natural guardian." *In re Legget's Trust*, 25 App. Div. 2d 727, 728, 268 N.Y.S.2d 911, 913 (1st Dep't 1966) (mem.).

⁵² 55 Misc. 2d 557, 285 N.Y.S.2d 421 (Sup. Ct. Albany County 1967).