

## IN PRACTICE

## LEGAL PROFESSION

# The Court Appointment Itself Does Not Always Ensure Immunity

BY STEVEN K. MIGNOGNA

In litigation generally, and in probate disputes specifically, the court often appoints counsel. In New Jersey, for example, in guardianship proceedings, R. 4:86-4 requires the appointment of counsel for the alleged incapacitated person. Often, trust and estate litigation centers on bitter family disputes, and emotions — and claims of liability — can erupt. A pivotal question thus arises as to whether those appointed by the court are immune from such liability. Surprisingly, the law is not as extensive or settled as one might expect. In fact, in large measure, attorneys need to draw analogies to other contexts in which professionals are appointed.

The general rule, in New Jersey and nationally, is that the court-appointed person enjoys immunity from liability only under certain circumstances. As discussed below, immunity does not necessarily follow from the court appointment, and the details and nature of

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the court appointment seem to govern whether immunity applies.

The starting point is the general rule that, when judges act within the scope of their official duties, they are immune from liability. *Delbridge v. Office of Public Defender*, 569 A.2d 854, 859 (N.J. Super. Ct. Law Div. 1989). Immunity may also be enjoyed when quasi-judicial officials act within the scope of their official duties. Further, the immunity may be absolute or qualified.

In New Jersey, as in many states, while immunity generally exists, its scope is not as clear as one might assume. For instance, in *Levine v. Wiss & Co.*, 478 A.2d 397 (N.J. 1984), the defendants were selected by litigants in a contested matrimonial case and appointed by the court to act as an impartial expert in rendering a binding valuation of a business asset for the purposes of equitable distribution. The court concluded that the defendants were not entitled to immunity from liability. The defendants tried to argue they should be granted the immunity given to an arbitrator, however, the court found that because defendants were not arbitrators and did not “remotely resemble arbitrators,” they should not be granted this immunity. With regard to the fact that the defendants were court-appointed,

the court reasoned that “a court appointment is not a talisman for immunity.” The court categorized the defendants as “creatures of contract, retained by the parties to perform a specific duty.”

On the other hand, a court-appointed accountant may enjoy immunity when the accountant is appointed by the court and the appointment did not confirm an agreement between the parties. In a recent unpublished opinion, *Sable v. Abo*, No. L-3290-08, 2010 WL 173513 (N.J. Super. Ct. App. Div. January 20, 2010), the defendant, a certified public accountant, was appointed by the court as temporary guardian of plaintiff’s father’s property and was ordered to review and provide the court and parties with an accounting of the financial transactions made and also to testify. When plaintiff brought an action against defendant for negligent misrepresentations, defendant argued that he was entitled to absolute immunity from liability. The court held that defendant was entitled to immunity for the actions taken and statements made during the judicial proceedings. To support its conclusion, the court relied on a case where a defendant was entitled to immunity from liability arising from communications and statements because of the litigation privilege. The court drew a parallel to *P.T.*, stating that

the rationale for applying the litigation privilege in *P.T.* applied to the case at hand because the court's ability to obtain a candid evaluation would be "severely compromised" if the defendants were not entitled to absolute immunity for the information provided to the court.

In *Sable*, the court noted that, unlike *Levine*, the parties to the litigation did not retain the defendants, but instead the defendants were appointed by the court. Further, in *Sable*, the court appointment did not confirm an agreement between the parties for services. Finally, the *Sable* court reasoned that a contract existed between the court and defendants, but in *Levine* there was a contract between the defendants and the parties to the litigation.

In another context, in *Delbridge*, 569 A.2d 854, two of the defendants were the Office of the Public Defender, Law Guardian Program, and the Assistant Deputy Public Defender, who represented the interests of the minor plaintiffs. When suit was brought against defendants, the court held that defendants had absolute immunity. The court relied on a New Jersey Supreme Court decision in finding that court officers exercising judicial functions enjoy immunity. It followed that the defendants were therefore immune, having been appointed to represent the interests of the child plaintiffs. The court further noted that the immunity of a judicial officer is absolute, despite allegations of malice or corruption. With regard to appointed law guardians specifically, the court relied on two federal appellate court opinions that found law guardians should be given immunity "[b]ecause they are an integral part of the judicial process." Finally, the court explained that giving immunity to law guardians generally, as well as in the case at hand, is consistent with New Jersey law: "Those integrally related to the judicial process should not be subject to 'private prosecutions whenever the

passions or resentments of disappointed suitors might dictate . . . 'To do so would 'interfere with their independence and destroy their authority.'"

Alternatively, a person who is court-appointed from the public defender's office to represent adult parents in a child abuse and neglect proceeding may instead be entitled to qualified immunity, as opposed to absolute immunity. In *Delbridge*, the court concluded the defendants who were appointed to represent the interests of the parents in the proceedings could be sued by the parents for legal malpractice, conspiracy, or other intentional misconduct. The court relied on federal law which said that the public defender appointed to represent the interests of an adult enjoys a qualified immunity. The court also distinguished public defenders from prosecutors in that prosecutors serve the interests of society as a whole, while public defenders are more similar to private attorneys who act only on their client's behalf.

By contrast, in *P.T. v. Richard Hall Cmty. Mental Health Care Ctr.*, 837 A.2d 427 (N.J. Super. Ct. Law Div. 2000), *aff'd*, 837 A.2d 377 (N.J. Super. Ct. App. Div. 2003), the defendant was a court-appointed expert psychologist, in a child support proceeding, who was sued for professional malpractice. The court concluded the defendant was entitled to absolute immunity. First, relying on *Delbridge*, the court used a functional analysis and decided the defendant's role was like that of a law guardian in that she was called upon to look to the best interests of the child. The court contrasted the defendant's role from that of a public defender assigned to represent a litigant. Under this functional analysis, the court concluded that because the defendant functioned as part of the court, the defendant enjoyed absolute immunity. Furthermore, the court found that it came to the same conclusion using a broader public policy approach.

The court reasoned that "strong public policy reasons mandate that she [the court-appointed psychologist] be able to perform that role with candor and without fear of reprisal, lest her judgment be clouded or her willingness to serve be diminished."

Relatively little precedent clarifies the level of immunity that attorneys enjoy when appointed by a court. For example, under *Starr v. Reinfeld*, 630 A.2d 801 (N.J. Super. Ct. App. Div. 1993), an attorney who is court-appointed to sell a house for litigants in a divorce proceeding may not be entitled to absolute immunity from a suit brought by bona fide purchasers. In that case, the defendant was an attorney who was court-appointed to sell a marital estate and then subsequently sued by the purchasers of the home. The court concluded that the defendant was not entitled to absolute judicial immunity by relying on *Levine*. Despite the fact that the defendant was court-appointed, "he performed none of the traditional discretion, decision-making function of a judge," and instead he dealt with the general public in attempting to sell real estate. Further, the defendant was compensated for his services in performing a standard commercial transaction. The court distinguished the case at hand from cases where an attorney was appointed to sell marital real estate and was found immune from suits by the disputing parties. Instead, the claim was made by bona fide purchasers. For these reasons, the court found no reason to extend judicial immunity to the defendant.

Whether a court-appointed person enjoys immunity depends on the situation. In practice, the broad protection of judicial immunity appears to cover those appointed, and of course judges would hesitate to appoint attorneys and then see them put at risk. Nevertheless, the appointment itself does not always ensure immunity. ■