

An Interview with Nina Gardner

by Sabrina C. Beavens, Esq.

On October 10, 2011, *Trial Bar News* met with the Executive Director of the New Hampshire Judicial Council, Nina C. Gardner. Ms. Gardner has led the Judicial Council for more than twenty (20) years, earning a reputation as a tireless advocate for programs such as New Hampshire Legal Assistance and the Office of the Public Defender. The New Hampshire Bar Foundation has recognized her work with the presentation of the Frank Kenison Award in 2005. Leaders from the bench, bar and advocacy community sing her praises.

We met for this interview on Columbus Day, providing an unplanned but appropriate analogy to the discovery of a New World. Over the past year, Ms. Gardner found herself in the cross hairs of legislative battles over budget cuts that pitted legislators, the Governor, GALs, and attorneys against one another. Facing a Governor and Legislature focused on implementing across the board budget cuts, and legislators voicing mistrust of the GAL system, Ms. Gardner fought to protect programs she believes both essential, constitutionally mandated and cost- efficient. The loss of funding

for legal counsel for parents in abuse and neglect cases weighs on Ms. Gardner, but her insight into the frustrations of legislators advocating for such cuts reflects her keen understanding of the programs, the core issues, and the challenges in program administration. Whether our stop at this New World turns out to be the beginning of a new page in history or just a brief detour until then reinstatement of long standing programs remains to be seen.

TBN: Could you tell us about your background before serving as the Judicial Council's Executive Director?

NG: My career in state government began in the 70s when I worked for the New Hampshire Legislature in the Office of Legislative Services as the Director of Research from 1972 to 1979. I loved the environment of the Legislature and fell in love with the legislative process. When I left, I knew I wanted to return someday. After spending several years at home raising my children, the position of the Executive Director of the Judicial Council became available and in December 1988 my current journey began.



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SABRINA C. BEAVENS recently re-joined Iurillo & Associates, P.A. based in St. Petersburg, Florida after practicing with Burns, Bryant, Cox, Rockefeller & Durkin, P.A. for three years. Sabrina's areas of concentration include Foreclosure Litigation, Bankruptcy, Creditors' Rights, and Business Law and Litigation.

TBN: Could you describe how the role of the Judicial Council had changed from when you first worked for the Legislature to when you first started as its Executive Director?

NG: I knew about the Judicial Council and the functions it had historically performed. What I didn't realize was how much the Judicial Council's role had evolved: from a think tank into a group identified with the funding of indigent defense. When the Public Defender broke away from New Hampshire Legal Assistance in the early 80s, I believe, it found a home here in terms of statutory connection and oversight.


TBN: Did you have any past experience with criminal justice?

NG: Overseeing the funding for the Public Defender program was a transition for me. I knew what a felony was, I knew what a misdemeanor was, but I wasn't exactly sure of much more. I was fortunate because I had a 6 month transition with David Garfunkel, who was


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then the head of the New Hampshire Public Defender program. He taught me what I know about crime. I had the opportunity to learn from David, in terms of what indigent defense was, how it sort of all fit together, what the responsibilities of the Judicial Council were, including the program it ran and it continues to run, which is its own Contract Attorney program as a back up to the Public Defender.

TBN: We hear a lot now about the need to change the way certain programs are administered between the Courts and your office, however the Public Defender program appears to run fairly smooth. Is there a particular reason for that?

NG: What made my job here easier was is that there was an audit done just as David Garfunkel and Jo Ellen Orcutt, who was my predecessor in this job, were leaving. There was a legislative budget assistant audit done that looked at how New Hampshire funded indigent defense and a number of people have said that I have been the major beneficiary of that. I was. There is no question that because the Legislature looked at its own report and began to understand that you need to fund certain things upfront or you will be perennially in crisis. I never got to that moment probably until where we are now and so for those intervening 20 years a lot of funding issues that now mark the landscape disappeared, particularly on the criminal side. What I mean by that is the Legislature fully funded the Public Defender to a certain level. They funded the contract program and then they began to really fund assigned counsel. Prior to the study, some attorneys waited ten months for payment. And the audit concluded that this system was a bad way to do business. So that began this era of just a better flow of money, a better system.

TBN: How was it that the Judicial Council and you in particular came to be involved in the Guardian Ad Litem program in marital cases?

NG: With the crisis in indigent defense

funding gone, the Judicial Council was able to start to look at other issues. For example, during the second full legislative session I was here, Representative Julie Brown of Rochester put in a bill to establish a guardian ad litem program modeled like the Public Defender. I opposed the program because I did not believe that the Judicial Council was ready, nor did I think it was the right mix. The role of the guardian ad litem was not in its infancy for sure, but clearly the dominant role of the guardian ad litem in marital cases was not yet set. So the bill did not go anywhere. But from that point on I became somehow involved with guardians ad litem. Senator Eleanor Podles, the lobbyist of the Bar, Matt Epstein, who felt strongly that guardians ad litem should not just be restricted to lawyers, and I worked with Chief Justice Dalianis on the issue. As a former Marital Master, Chief Justice Dalianis knew a lot about guardians ad litem and we all began looking at the building of the standards that the Supreme Court ultimately adopted.

TBN: What time period are we talking about?

NG: This is the period leading up to 1995. In approximately 1994 or 1995, the Supreme Court began to look at guardian ad litem issues based upon this sort of construct that people felt that guardians should be both lawyers and non-lawyers which was strongly advocated by the Bar at that point. The Supreme Court itself did an application process, did a training process, and that remained in place for quite a long time. In the meantime, the Judicial Council and Nina Gardner became involved with the initiative of the family court.

TBN: Why was the family court identified as a division in need of possible change?

NG: What you saw with the development of the family court was a sense that family law cases had somehow become a step child in the process. For the family

involved, there could clearly be nothing more important and so the Judicial Council and the courts became involved with the development of, and the expansion of, the Family Division. We were facing the significant influx and the number of divorce cases and the beginning of the expansion of the role of guardians ad litem.

TBN: At that point, was there public funding for GALs?

NG: There was a fund that the Court had established which was funded by a portion of the filing fee. Around 1997, the Court shifted that fund to me.

TBN: Was there ever a time when the funds from filing fees supported the GAL Fund?

NG: By the mid 90s, the Judicial Council was paying the bills of GALs out of the fund. But, the fund never was adequate. The Court itself always had to shuffle around money to cover the costs. When they transferred it to me, I immediately faced the same shortfall as the Court always did.

TBN: So what happened?

NG: When administration of the GAL fund was transferred it to me, statutory language was added that allowed me to draw warrants. In practice, the ability to keep paying those bills was automatic. Each year, the Legislature would appropriate X amount of dollars, recognizing that I had an ability to go back and request more money. Around 2001, the draw on the fund began to rise and therefore my need to go draw warrants continued to increase. I had conversations with the Legislature at that point, and the Governor, so everybody was aware of it, but the system was working and it was not addressed head on.

TBN: Why not appropriate the actual dollars the program needed?

NG: In my initial budget each year, I would request real dollars. Based upon

the history of the warrant, I would say to the Legislature, "You are appropriating me X amount of dollars, but I am actually spending X plus the warrant. You need to recognize that." And they would, but when push came to shove, they would say "I bet you could draw a warrant, Nina." This budgeting process was the same with both Republicans and Democrats. It was a non-partisan approach to the issue. But I could see that this pattern could not continue.

TBN: So politically it was better for the Legislature to underfund the program?

NG: Yes, because it gave them that money to do something else with. It was just the way we did it for a long time. Everybody knew that at some point it posed a problem. The problem arose. Every Governor had been aware of it, but as we approached this budget cycle, for the first time the historical funding practice did not matter.

TBN: Can you explain the budget cuts the Governor asked you to make?

NG: As a result of the indigent defense audit that I talked about way back in the early late 1980's that I was the beneficiary of, I was given statutory authority at that time to be able to go back and get funds if I needed them by going to the Legislative Fiscal Committee and Governor & Council. So when we started the FY12 budget process, so long ago, I had drawn \$2.55 million dollars between warrants and additional appropriations in FY11. The formula given to me by the Governor's budget person was a 6% cut from our FY11 appropriation. That set the stage for where we are.

TBN: How did the Council analyze how to decide what to cut?

NG: One of the things that I did was I made a chart for the Legislature that showed our constitutional responsibilities, our statutory responsibilities, and the other things we did. The last category was the Legal Assistance program.



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Right above that was probably the CASA funding. Representation of children in abuse and neglect cases is federally mandated so that is right above the constitutional items in terms of the priorities. The Council determined that its first priority was the constitutionally mandated Indigent Defense Delivery System.

The Governor looked to the Judicial Council to make recommendations for things over which statutory change could be made. The Council looked at what were the places where there was statutory authority and what was being provided. There were 2 places - the role of the guardian ad litem in marital cases and the representation of parents in abuse and neglect cases.

TBN: What is your response to the criticism that other programs should have been targeted first?

NG: These were very difficult choices, as they were for all departments, and the Judicial Branch, and we have to remember this is a process that started at the agency level, went to the Governor, to the House, to the Senate, and to a Committee of Conference.

TBN: Were there additional cuts?

NG: Yes. For the first time in my time here, the Public Defender program is funded at less than it was the previous

term, which is very significant in terms of the employees that are there, and the case load that is there. The Judicial Council budget was also reduced.

TBN: Where are the remaining funds of your budget allocated?

NG: The rest of the budget consists of the Contract Attorney Program at \$2 million. Assigned Counsel is also in our budget. There are funds for Services Other than Counsel in this budget which pays for those services in criminal cases that are necessary for the defense of the case. Those are the main lines of the budget. In addition, there is the Judicial Council's own operating budget for 3.75 employees.

TBN: What about New Hampshire Legal Assistance and the CASA program?

NG: We reduced funding for New Hampshire Legal Assistance by several hundred thousand dollars but left it in place. When it got to the Legislature, the Legislature took all of the budget reductions I had proposed, which were the reductions of guardians ad litem, the reductions of the representation of parents and abuse and neglect and then the House took all of the rest of New Hampshire Legal Assistance which was more than a million more. But the Senate put back \$700,000. As for the

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CASA program, coming out of this budget cycle we reduced CASA to \$490,000. Support for this program is based upon the fact that it is a well respected cost-efficient means to provide quality representation for children.

TBN: The process you are describing seems very cold and mechanical. What was the tone of this session?

NG: It was a mixed bag. When you are in finance it's all about dollars and what I think was particularly a different challenge this time was that I was dealing in finance with a committee that was essentially new and they were really not tied to the policy pieces at all. There were other legislative sessions in which legislators on the House Finance Committee understood the issues and were more ready to consider policy. This time they were not. This was sheer finance. So the conversation about the roles of the GAL came up in a number of opportunities in other committees where they were talking about the roles of marital masters or guardians ad litem, but what you were feeling and seeing was this very strong opinion about these programs based upon the work of people out in the field. Everybody had a story to tell about a bad divorce or a guardian ad litem. There wasn't traction that I saw that could produce any different result.

TBN: With the GAL funding cut, how was the issue of payment for GALs who had already been appointed addressed?

NG: Judge Kelly, the Administrative Judge of the District and Family Division, issued an order telling GALs to be out of cases by June 1st with the hope that I would be able to process all of the bills by the end of the month. We processed 1,135 individual invoices in here in the month of June on family cases alone. This was over \$900,000 in a single month.

TBN: Were you concerned about receiving additional bills which had been submitted by the deadline but not received by your office?

NG: Yes. I anticipated that invoices would get caught up in court files and consequently received late, which was not fair to the GAL who had done the work in good faith and followed Judge Kelly's Order. I asked the Legislature to give me access to the portion of the filing fees accumulated from July of 2010 through June 30 of 2011 for the GAL Fund so that I could pay trailing bills that were still in the courts. As of the 1st of October I still had about \$111,000 of the initial allocation of \$240,000 left. I have another batch of bills that I have worked on over

the weekend that is going to take some more of that money and what I am continuing to see is that there are bills that are still stuck in the courts and people don't know they are stuck until they look through their payables and realize the bills aren't paid. Most people know I have paid everything so when they call me I will refer them to the courts. Low and behold a week later the bill arrives here, properly submitted and signed by a judge, but the bill was never forwarded to me.

TBN: What alternatives did the Council consider to completely cutting funding for counsel for parents in abuse and neglect cases?

NG: I was certainly unsure about what to do about representation of parents in abuse and neglect cases, it was a very tough decision. I had access to a number of lawyers who looked at this issue. There were certainly differences of opinion. I asked whether there was a place where I could draw a line and say here is the time when a right to counsel attaches. That was an elusive marker for all of us. The reason it was important was if you left that discretion to the judges they would appoint and I could not get funds to pay for the appointments. Again, all through this process, because it's in the domain of the finance world, there wasn't a policy conversation. The only money I was successfully able to get was what I call "trailing money." People need to remember that in the prior legislative session to this one, DCYF had decided not to fund representation of parents and abuse and neglect. People forget that and the reason they forget it is because I agreed early on to take it.

TBN: So funding for representation of parents in abuse and neglect cases was only recently moved to the JC?

NG: Yes. I was told by DCYF the costs would be about \$899,000. Well, the first year under the JC's umbrella it was \$1,200,000. The costs have always been unpredictable. That has been a major part of the problem.

TBN: Why did DCYF decide not to fund it?

NG: They were under budget pressure to reduce costs, and they didn't do what I ended up doing which was the more complete package. They simply said we are not going to pay counsel for parents. When the Governor's office saw this occurring 2 years ago we began conversations and all through the budget process 2 years ago the negotiation was how much money did I really need and they gave me back half of the \$1,200,000; they gave me \$600,000 and then over the course of the year in my trips to the Fiscal Committee and Governor's Council I continued to get additional monies for 2 years for this line. This is part of that \$2.55 million story that I went into this budget cycle with. This is a highly unpredictable cost. Nobody is controlling it. The judges just appointed because the statute says they could and people did the work, filed motions, and the bills got paid.

TBN: When the funding was cut, what was the procedure for payment of outstanding fees?

NG: The attorneys were not restricted to a June 1st timeline like the GALs. Judges were literally appointing attorneys on June 30th because they could and there was no reason not to, the statute was still in place. So the "trailing funds" made available were to cover fees for cases that were in the system.

TBN: What is the status of those funds?

NG: The funds are almost exhausted. As I am sitting here with you today, there is \$6,719 left. I have over \$128,000 worth of bills sitting here to be paid. I am required under the statutes to provide reports to the Fiscal Committee on the use of the trailing funds. The Fiscal Committee now has a report that says I have \$111,000 left of marital money and another report that says I have \$6,719 left of the abuse and neglect money, but as of October 1, I have

\$127,000 of bills sitting here in abuse and neglect. Bills come every day and I state in my report this is an area in which we need to find some solution or some plan. I've requested to meet with some of the Senate and House finance people to update them on the status of this shortfall and see what the next steps might be, what ideas there are, what next steps there are, etc.

TBN: How did we get to the point where some of the legislators perceived that certain programs were not being appropriately managed?

NG: You ask the question that I think is hardest for a business directed Legislature. And that is, am I a poor manager because I can't manage this money? Am I incompetent because I don't know what the bills are out there? The answer to all those questions is, I believe, neither. Really the issue is, it's a very difficult process in which to know what you've got out there for liabilities. I am generally the last to know. This makes budgeting extremely difficult.

TBN: What I am hearing is that you had a lot of concern for the attorneys who practiced in the areas that were cut and attempted to fill in the gap as to how their bills were going to be paid.

NG: My parents ran a small business, and my husband and I carried it on. We met payrolls every week. I understand cash flow. It's probably why, in some ways, why I think I've been a good person for this job. I do care about the small firms that do this work. I do care about the sole practitioners who are asking me what do I do next and I don't have an answer for that question. My issue is trying to find a path to get this money or get these obligations met somehow. I know the group of attorneys who practiced in this area and am aware that this was a particularly devastating kind of loss to them. Many people specialized in this work; many people have done it for years. When I was at the court last week I reported that one firm had 22% of the

invoices, and 16% of the dollars, in the pile of unpaid invoices in my office. What happens to that firm?

The marital piece was cleaner. It was cleaner because there was more awareness of it earlier. The Governor referenced it in his speech on the floor when he laid out his budget, so that piece was out there from February 15th. What was much harder about the abuse and neglect piece was first of all people didn't believe it could happen and second it all happened very much at the end of the process. What I did that was different than DCYF was I didn't just take the money out of the budget, which I think is one way, but it still left a liability with no means to address it. I thought it was fairer to the practitioners and it was fairer to the process, not to leave a process in place that just had unlimited economic impact, in the range of a million or more dollars annually.

TBN: What do you expect in the next budget session?

NG: I am sure I am going to have to continue to justify all of the expenditures that are being made on the criminal side. There is nothing in the criminal case load that is causing it, at this point, to go down. But I don't know that I see an easy path back for some of the programs that were cut, short of a court decision, and then some means of giving predictability to the costs. I think the old system struggled with its unpredictability, its lack of control and the lack of control by the people who are paying the bills and funding it. Whatever emerges going forward has to address that. The days of being able to reach back and get dollars are, I think, long gone. The economy just doesn't let that model work. I also believe there will need to be a shared liability for costs with those who receive them.

TBN: Thank you for sharing your time and insight, Nina, it has truly been an invaluable experience. 