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**SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-20 - QUEENS COUNTY**

125-01 QUEENS BOULEVARD – ANNEX
KEW GARDENS, NY 11415

P R E S E N T :

HONORABLE ROGER N. ROSENGARTEN, JUSTICE

THE PEOPLE OF THE STATE OF NEW YORK

**: Ind. No. 3525/2000
Motion:N/A**

-against-

:

: Submitted: September 07, 2001

PATRICK KEARNS,

**: Hearing: *Eligibility for Assigned Counsel
County Law Section 722-d***

Defendant.

**The following papers numbered
1 to submitted in this motion.**

**BY: Paul Montgomery, Esq.
OFFICE OF MICHELLE MAXIAN
LEGAL AID SOCIETY
For the Defendant**

**HON. RICHARD A. BROWN, D.A.
District Attorney, Queens County
BY: Lynne Kurtz-Citrin , Esq.
For the People**

Papers Numbered

**Notice of Motion and Affidavits Annexed
Answering and Reply Affidavits**

After an eligibility hearing pursuant to *County Law Section 722-d*, held before this Court on September 4, 2001, The Legal Aid Society is directed to bill the defendant's father, Alan Kearns for the cost of legal representation to his son from the inception of their involvement in this matter through trial, in accordance with the rates set forth pursuant to *County Law Section 722-b*. Alan Kearns is directed to remit the total amount billed in the form of a money order or certified check made to the Commissioner of Finance of the City of New York, and to deliver such payment to the Commissioner of Finance at 1 Centre Street, New York, New York in accordance with the annexed Memorandum of this date.

This constitutes the order of the Court.

Date: September 7, 2001

ROGER N. ROSENGARTEN

J.S.C.
MEMORANDUM

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THE PEOPLE OF THE STATE OF NEW YORK :

BY ROSENGARTEN, J.

-against :

DATE: September 7, 2001

PATRICK KEARNS,

INDICTMENT NO.: 3525/00

Defendant. :

-----X

Defendant was charged, under indictment number 3525/00, with Robbery in the First Degree, Robbery in the Second Degree, and related charges. After a jury trial before this Court, the defendant was found not guilty of the felony charges, and guilty of misdemeanor weapons and possession of stolen property charges. At the time of his arrest on October 25, 2000, the defendant, who was born on November 16, 1980, was nineteen years old, and resided with his father in Far Rockaway, Queens, in a home owned by his father. He has been very capably represented throughout in this matter by assigned counsel, The Office of Michelle Maxian, which is The Legal Aid Society, mandated to represent indigent defendants in Queens County. The case came before this Court for trial, at which time the defendant was being held on ten-thousand dollars cash bail. During the course of jury selection, on or about August 29, 2001, the defendant's father, Alan Kearns, posted the cash sum of ten-thousand dollars to satisfy the bail condition and the defendant was released in court. Defense counsel, employed by the Legal Aid Society, made the Court aware that his client had made bail and had been released. Based upon this information, on August 31, 2001, the Court directed the defendant's parent, Alan Kearns, to appear for an inquiry into his son's eligibility for assigned

counsel, to be held on September 4, 2001.

ELIGIBILITY HEARING - COUNTY LAW SECTION 722-d

Upon reviewing the testimony, and the applicable case law, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

As stated, *supra*, an inquiry was held before this Court on September 4, 2001. The Court examined the defendant's father, Alan Kearns, whom the Court found credible. After due consideration, this Court finds the following facts:

Alan Kearns testified that the defendant, Patrick Kearns, is his son, and that he is currently under twenty-one years of age. Alan Kearns is his son's sole means of support. He has no other dependents other than the defendant. The defendant resides with him in a home which Alan Kearns owns in Queens County. Alan Kearns failed to produce his prior three years New York State and Federal Income Tax filings as directed by the Court in its order dated August 31, 2001. He stated that is gainfully employed as an oil truck delivery driver for a home heating oil company and takes home \$680 dollars a week (\$35,000 per year). In addition to his base pay, he earns substantial overtime during the winter heating season months. Alan Kearns was unable to state the precise amount of his overtime pay. Since the defendant's father failed to provide tax records which would have shown his exact gross pay, despite being ordered to do so, the Court will assume that he earns in excess of the \$39, 375 required for presumptive eligibility for assigned counsel for a household consisting of two

persons pursuant to the Eligibility Guidelines of the Second Department. The value of the home which Mr. Kearns owns in Far Rockaway, according to Mr. Kearns, is approximately between \$135, 000 -145,000. The home has a mortgage outstanding of \$86,000. His mortgage payment is \$808.58 per month. A computer search on the property conducted by the Court revealed no other outstanding liens. He has no bank accounts or stocks or bonds. He does have a checking account. The defendant's father posted ten-thousand dollars cash bail on behalf of his son from the proceeds of a compensation settlement which he received in the amount of \$11,000. During the trial, the defendant also confirmed his age and the fact that he resides with his father, who supports him.

CONCLUSIONS OF LAW

Initially, this Court finds that the defendant's father , Alan Kearns, is legally responsible for providing the cost of legal expenses to the defendant, Patrick Kearns.

Pursuant to Family Court Act Section 413(1)(a),

Except as provided in subdivision two of this section, the parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine. The court shall make its award for child support pursuant to the provisions of this subdivision. The court may vary from the amount of the basic child support obligation determined pursuant to paragraph (c) of this subdivision only in accordance with paragraph (f) of this subdivision.

Courts have held that legal services rendered to an unemancipated child are considered

"necessities" for which a father may be held liable. (*see, Matter of Cheri H.*, 121 Misc.2d 973 [Fam. Ct., Bronx Co. 1983]; *see also Fanelli v. Barclay*, 100 Misc.2d 471 [Dist. Ct. Nassau Co. 1979]). "The unemancipated child without means who has been provided with necessities may reasonably look to his father to bear the full responsibility for the costs thereof without regard to the fact that free legal services *may be* available to indigents." (*Fanelli, supra*, at 475).

Pursuant to County Law Section 722-d,

Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise.

The Office of the Attorney General of the State of New York , in Informal Opinion No. 89-44 (1989 NY AG Lexis 51; 1989 Op. Atty. Gen. 126) addressed the questions of whether the assets of the parents of an unemancipated defendant under twenty-one may be taken into consideration in determining eligibility for County Law Article 18-B representation; and whether the costs of representation can be recouped from the parents where the parents have sufficient assets to render them and their children under age twenty-one ineligible for Article 18-B representation. After a review of salient statutory and case authority, the Opinion concluded that

Inasmuch as it is the parents of an unemancipated child under age 21 who are responsible for the child's necessary legal expenses, the parents are the true party whose financial ability to obtain counsel is at issue.

Accordingly, it is appropriate for the county to inquire into the parents' assets in order to determine an application for article 18-B representation for an unemancipated child under age 21 (see generally, *Matter of Legal Aid Soc. of Nassau Co. v Samenga*, 39 AD2d 912,

913 [2d Dept, 1972]; *People v Bell*, 119 Misc 2d 274, 275 [Sup Ct, Queens Co, 1983]; *People v Wheat*, 80 Misc 2d 844 [Co Ct, Suffolk Co, 1975]). If at any time during the action the parents of an unemancipated child under age 21 appear to be financially able to pay for their child's legal defense, the county may recover its costs for legal defense in accordance with County Law, § 722-d. (*citations as in original*)

As one court observed, "County Law Section 722-d appears to be a grossly underutilized weapon in the battle of balancing a defendant's right to counsel and the exploding financial burden to the State of providing free representation to those who are not fully able to afford private counsel". (*see, People v. Alessi*, 154 Misc.2d 322, 324 [Sup. Ct. Kings Co. 1992]). Numerous policy considerations underscore this statutory directive. County Law 722 (2) mandates representation by the Legal Aid Society for persons charged with a crime who are financially unable to obtain counsel. The provision of these services is based upon eligibility guidelines promulgated by the Judicial Department overseeing such program, which require the court assigning counsel to review the income and financial status of the defendant, or, in the case of an unemancipated child, of the responsible parent or adult, and to screen for eligibility. The Appellate Division, Second Department guidelines provide that defendants charged with felonies are presumptively eligible for assigned counsel when the gross household income is at or below 350% of the federal poverty standard. The caseloads of these organizations are already overwhelmed by a plurality of indigent individuals who are presumptively eligible for these services at the expense of the taxpayers, by virtue of meeting the sanctioned guidelines. Courts should not stand idly by to allow services intended for those living at or below the poverty level to be dispensed to those who are middle class, have paying jobs which supply them with the ability to purchase a home, to supply an unemancipated child with the necessities of living, and to raise and post a substantial cash bail. These individuals are capable of affording counsel and should be compelled to do so. In instances where the

responsible parent is unwilling to shoulder the burden, and the child avails himself of legal services earmarked for the indigent, the Court can and should intercede pursuant to County Law 722-d. (see *discussion*, Family Court Act Section 413, *infra*). Thereafter, the Court should mandate reimbursement to the state, county or city funding authority, so that the funds can be properly relegated to their intended purpose, thereby promoting the efficient distribution of legal resources. In this Court's opinion, it works a grave disservice to the private defense bar, assigned defense counsel, and the criminal justice system itself to allow individuals who can well afford to pay for legal services to obtain free services for the indigent as a means of avoiding their obligation to support their children.

While it would have been within this Court's power, pursuant to County Law 722-d to terminate assigned counsel representation during the trial, and to declare a mistrial, the Court declined to do so at the trial stage for several reasons. First, this Court agrees with the Court's reasoning in *People v. Clemson*, 149 Misc.2d 868 (Village Ct. Wayne Co. 1991) and finds that a Court presiding over a criminal trial 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. (see, *Matter of Cheri H.*, 121 Misc.2d 973 [Fam. Ct., Bronx Co. 1983]). Moreover, a termination of assigned representation at the trial stage would only serve to interrupt the continuity of representation, and to forestall the disposition of this matter, on which substantial unrecoverable time and money has already been expended on assigned representation, not to mention the resources expended by the Unified Court System to bring this matter to a speedy conclusion. The better practice, on the eve of trial or at trial, in this Court's view, is to allow the trial to proceed in an orderly and expeditious fashion, and to thereafter proceed in accordance with County Law 722-d, and Family Court Act Section 413 to mandate repayment of legal expenses.

It is undisputed that the defendant herein is under twenty-one, and unemancipated, and has remained so during the pendency of this criminal proceeding. He may thus properly look to his father for the cost of legal representation. (Family Court Act Section 413). Using the Eligibility Guidelines established by the Second Department as a benchmark, the Court finds Alan Kearns, the defendant's father, ineligible for assigned counsel for his son. Moreover, he owns a home, in which he has conservatively over fifty-thousand dollars of equity interest. Accordingly, in the interest of justice, pursuant to County Law Section 722-d, this Court directs the recoupment of costs for legal services provided by The Legal Aid Society for the representation of the defendant in this matter.

The only remaining issue before this Court is the appropriate method for payment and/or recoupment of the costs of legal representation. County Law Section 722-d is silent as to the sanctioned procedural vehicle for recoupment of the cost of legal services. This Court opines that the Legislature should intervene to amend County Law Section 722-d to provide a prescribed procedural mechanism for recoupment of the costs authorized by this section.

This Court looks to other courts addressing this issue for guidance. In two reported cases, the defendant himself was directed to make partial reimbursement of legal expenses pursuant to County Law Section 722-d. (see, *People v. Alessi*, 154 Misc.2d 322 [Sup. Ct. Kings Co. 1992] [defendant posing \$10,000 bail ordered to make partial payment of \$2700 to the Legal Aid Society]; *People v. Rex Lee Bell*, 119 Misc.2d 274 [Sup. Ct. Queens Co. 1983] [defendant directed to pay \$1500 towards the cost of his legal representation by the Legal Aid Society]). In both cases, the defendant was a party properly subject to the jurisdiction of the court. In *Fanelli v. John Barclay*, 100 Misc.2d 471 [Dist. Ct. Second Dist. Nassau Co.], the attorney of an unemancipated client in a support proceeding who brought an action in District Court against the responsible father was permitted to recover the fair and reasonable value of the services performed on

behalf of the defendant's son. In only one reported case, *Matter of Cheri H.*, 121 Misc.2d 973 (Fam. Ct. Bronx Co., 1983) did the Court summarily order the responsible parent of a juvenile, who was not a party to the action or subject to the jurisdiction of the Court, to reimburse the State for legal services provided on behalf of his daughter in a delinquency proceeding. In *People v. Clemson*, 149 Misc.2d 868 (Village Ct. Wayne Co. 1991), the Court faulted the procedure prescribed in *Matter of Cheri H.* for two reasons: First, the Court in *Cheri H.* failed to delineate a basis for jurisdiction over the respondent's father for the purpose of making and/or enforcing an order directing payment, instead seeming to implicitly hold that County Law Section 722-d authorizes direct payment from a parent to a governmental entity to pay for legal services rendered to an unemancipated minor. (*People v. Clemson, supra* at 873.) In addition, *Cheri H.* did not set forth any procedure for enforcing the court's order, or for bringing an action, should payment not be made, instead referring the matter to the Attorney General of the State of New York, the Commissioner of Finance of the City of New York, and the Corporation Counsel of the City of New York for "appropriate action", without delineating what that action should be. (*People v. Clemson, supra* at 872).

This Court, similarly to the court in *People Clemson*, holds that County Law Section 722-d does not, *ipso facto*, confer jurisdiction over the parent of an unemancipated minor to empower the court to summarily extract payment from the parent. To hold otherwise would be to circumvent jurisdictional and due process prerequisites. Instead, 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.)

FINAL DETERMINATION

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 Article 18-B, Section 722-b, applicable to assigned counsel.

Alan Kearns is directed to remit the total amount billed in the form of a money order or certified check made to the Commissioner of Finance of the City of New York, and to deliver such payment to the Commissioner of Finance at 1 Centre Street, New York, New York.

The Commissioner of Finance is directed to allocate the payment toward reimbursement of funds disbursed by the City of New York pursuant to its contract with the Legal Aid Society.

In the event of non-payment by Mr. Kearns, the Corporation Counsel of the City of New York is directed to take all necessary steps to commence a proceeding against Alan Kearns to recoup the monies expended, pursuant to County Law Section 722-d.

The foregoing constitutes the decision and Order of the Court.

The Clerk of the Court is directed to forward a copy of this memorandum and order to the attorney for the defendant, to the District Attorney, to Alan Kearns at the address of his current place of residence, to the Commissioner of Finance of the City of New York, and to the Corporation Counsel of the City of New York.

Dated: September 7, 2001

ROGER N. ROSENGARTEN
J.S.C.