

GIVING THE CHILDREN A MEANINGFUL VOICE: THE ROLE OF THE CHILD'S LAWYER IN CHILD PROTECTIVE, PERMANENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS¹

This article on the role of lawyers of the Juvenile Rights Practice of The Legal Aid Society represents policy guidelines of the Juvenile Rights Practice. These guidelines are the culmination of a process during which the JRP reexamined the proper role of Juvenile Rights attorneys, particularly in light of Chief Judge Judith S. Kaye's new Rules of the Chief Judge and recent New York State Bar Association standards that require lawyers for children like our Juvenile Rights lawyers to provide client-directed representation and not simply substitute the lawyer's judgment for the wishes of a child client.

Part One: Introduction

Abuse and neglect (child protective) and termination of parental rights proceedings in family court fit the traditional model for adversarial proceedings. A petition is filed by the child protective or foster care agency which is prosecuting the case. The agency is represented by counsel, who will marshal evidence and make arguments supporting the agency's position and otherwise attempt to achieve the agency's litigation goals. The agency's goal is to protect the child's interests as the agency perceives them, and thus the agency's lawyer will provide a mature perspective on the child's interests. Named as respondents in the proceeding are the child's parents, or, in a child protective proceeding, other persons legally responsible for the care of the child who are charged with acts constituting neglect and/or abuse. Typically, each respondent is assigned a different lawyer, who acts as loyal "defense counsel" and marshals evidence and makes arguments in support of the respondent's position, but also may advocate for the child's interests as the respondent perceives them. Often, the respondents have conflicting legal interests and perspectives, which are reflected in their lawyers' distinctive advocacy. In addition, it is not uncommon for non-respondent parents, and/or other relatives such as grandparents, to intervene in the proceeding to seek custody of the children. In many instances, these parties are represented by counsel as well.

The judge, of course, is charged with responsibility for making legal determinations regarding, *inter alia*, the sufficiency of the evidence supporting the allegations in the petition, and the appropriate disposition. Because these proceedings involve the safety and welfare of children, appellate courts have made it clear that judges have a duty to gather as much evidence as possible so that well-informed determinations can be made.

To ensure that another key perspective is considered by the judge, the subject child also is assigned a lawyer, who, in the vast majority of cases filed in New York City, is employed by The Legal Aid Society. Against this backdrop of competing parties and lawyers, the role of the child's lawyer seems clear. If, as they are bound collectively to do, the judge, and the lawyers

¹ The initial draft of this article was prepared by Gary Solomon, the Director of Legal Support for The Legal Aid Society's Juvenile Rights Practice, and was revised during a collaborative process involving other Society staff. This final version represents the official policy of The Legal Aid Society.

representing the agency, the respondents and any intervening relatives marshal all relevant evidence and also invoke the child's interests, the child's lawyer should be free to focus on the one missing ingredient in this adversarial process: presentation and advocacy of the child's expressed position, as developed and refined through the lawyer-client counseling process.

Despite all this, the role of a child's lawyer in Family Court proceedings has long been a controversial subject for academics and court practitioners. Academia has produced a surfeit of thought-provoking literature, staking out a number of highly nuanced positions, and the subject is addressed in ethics codes and opinions and in court decisions. While everyone agrees that the lawyer's counseling role is crucial when the client is a child, and that the lawyer and the child should develop primary litigation goals, and positions on other matters, in a collaborative process orchestrated by the lawyer, there are several schools of thought with respect to whether the lawyer, or the child, is entitled to make those litigation decisions that an adult client would be entitled to make. Among the "camps" that have been identified are: 1) those favoring a traditional attorney's role (representing what the child client wants, or the child's expressed interests); 2) those favoring a guardian *ad litem* role (representing what the lawyer determines to be in the child's best interest); 3) those who advocate lawyers' assuming one form or another of hybrid role -- somehow representing both positions to the court, or representing what the child wants unless the child's preference fails to meet some standard of reasonableness, or asking the court to appoint a separate GAL or attorney where client wishes and perceived interests divide; and 4) those who call for the child's lawyer to serve as a neutral fact finder presenting all relevant information to the court to ensure a full and comprehensive consideration of the child's actual circumstances. "For most attorneys, the age of the child (and, for some, the issues at stake) will affect which role is assumed. Those advocating the traditional attorney approach necessarily exclude children too young to speak, and most require that the children be old enough to engage in a rational decision-making process about the particular issue in question. Those advocating the guardian *ad litem* role for most children, generally still concede that at some age -- at least in the late teenage years -- children should be able to direct their counsel, on some, if not all, issues."²

² Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1700-1705 (1996); see also Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 1002 (2006) ("Most of the controversy . . . has focused on how to determine when the child has reached [the age at which she is entitled to client-directed representation], how to represent the impaired child, and the relationship between the role of guardians ad litem and the role of lawyers for children"); Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 33-34 (2000) ("In sum, the discussion often boils down to the questions of when is a child capable of directing the objectives of the representation, and what role the attorney should play for the child who lacks this capacity").

For additional discussions of the various models of representation, see Jean Koh Peters, *Representing Children in Child Protective Proceedings* (Lexis Law Publishing, 3rd Ed. 2001); Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769 (2001); Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J.; Robert E. Shepherd, Jr., "I Know the Child is My Client, But Who Am I?," 64 FORDHAM L. REV. 1917 (1996).

With respect to representation of children in New York, compare Angela D. Lurie, *Representing the Child-Client: Kids are People Too*, 11 N.Y.L. SCH. J. HUM. RTS. 205, 238-239 (1993) (author recognizes hybrid role of lawyer assigned as "law guardian," who should abide by wishes of children who are capable of making "considered cont'd on next page

The Legal Aid Society's Juvenile Rights Practice is committed to the zealous representation of its clients, and to granting clients the opportunity to participate in decision-making to the greatest extent possible. We believe that every client who can communicate his or her desires is capable of assisting her lawyer in important ways. With the respondents' and petitioner's lawyers, and any intervening parties' lawyers, focused on their clients' interests, and the judge focused on reaching a legally sound result, only the child's lawyer can provide the child with meaningful representation, and provide the court with factual information and legal arguments that enable the court to fully consider the child's unique perspective and thus make a truly well-informed decision.

Since the "children" involved in these proceedings can be as old as twenty, no one doubts that some of them are entitled to make litigation decisions that an adult client would make in similar circumstances. Before those decisions are made, however, there must be a dynamic lawyer-client counseling process, in which the lawyer, among other things, describes the nature of the proceeding, sets out and discusses the various options, educates the child about the advantages and risks involved in different courses of action, and works together with the child in developing her litigation goals and the steps designed to achieve them. Needless to say, when representing very young children, the lawyer must engage the child in a particularly far-reaching process. Viewed in this way, the representation is controlled neither by the lawyer nor the child: it is a collaboration between the two that is designed to assist the child in making well-informed and sound decisions. Thus, when we refer in this article to "client-directed" advocacy, we mean that the lawyer must take full account of the child's wishes, and when, at the end of the counseling process, there remains a conflict between what the child wants and what the lawyer believes is in the child's legal interest, the lawyer will sometimes be bound by the child's decision.

When does a child have the capacity to make decisions? At one end of the spectrum are infants, toddlers and verbal children who are unable to fully comprehend the nature of the proceeding and the issues raised, and communicate a preference and comprehensible reasons for it. The lawyer usually makes decisions for those children. At the other extreme are teenagers, who, it is generally agreed, do have the capacity to make decisions. In addition, for many years there has been a consensus among child advocates that a child usually has acquired this capacity by age ten. We go one step further, and agree with those who have argued that many children have this capacity by the age of seven, eight or nine. Indeed, seven-year-old children in New York can be charged with juvenile delinquency and, in such a proceeding, are entitled to constitutionally effective, client-directed representation regardless of what risks may be present in the child's home environment.

This model of representation clearly falls within the range of practices permitted under New York law, and is true to the prevailing view among academics and child advocates. This is made clear in the practice guide/discussion that follows, in which we have referenced New York's statutes, case law and court and professional responsibility rules, as well as academic and

judgment" and make decisions on behalf of children who are not) with Diane Somberg, *Defining the Role of Law Guardians in New York By Statute, Standards and Case Law*, 19 TOURO L. REV. 529, 566 (2003) (author prefers "best interests" model for law guardians in child protective proceedings).

other non-binding authorities, in an effort to synthesize the best ideas.

Part Two: Legal Background

New York Statutes and Court Rule

In child protective, permanency and termination of parental rights proceedings, the child has a statutory right to counsel. N.Y. Fam. Ct. Act §§ 249(a), 1016, 1090(a) (West, Westlaw, through 2007 legislation).³ According to N.Y. Fam. Ct. Act (“FCA”) § 241:

[The family court] act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by law guardians. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court.

FCA §§ 242, 249(a), and 1016 also state that the “law guardian” is assigned to “represent” the

³ A respondent parent has no automatic right to assigned counsel under the Federal Constitution. *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18, 32 (1981) (Constitution does not require appointment of counsel in every parental termination proceeding; but, when parent’s interests are at their strongest, State’s interests are at their weakest, and risks of error are at their peak, presumption against right to appointed counsel might be overcome). Thus, it could be that the subject child has no such right. Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 133-34 (1984).

However, it appears that the child has a right to counsel under the New York State Constitution. *Matter of Jamie TT.*, 191 A.D.2d 132, 136-137 (3d Dep’t 1993). In *Jamie TT.*, the Third Department noted that “Jamie had a strong interest in obtaining State intervention to protect her from further [sexual] abuse and to provide social and psychological services for the eventual rehabilitation of the family unit in an environment safe for her,” *id.* at 136, but there is no reason to think the State constitutional right to counsel exists only in abuse cases. This State constitutional right includes the right to the *effective* assistance of counsel. *Matter of Jamie TT.*, 191 A.D.2d at 136-137; *Matter of Erin G.*, 139 A.D.2d 737, 739 (2d Dep’t 1988); *see also Kenny A. v. Perdue*, 356 F.Supp.2d 1353, 1360-1361 (N.D. Ga. 2005) (employing three-part federal test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), court concludes that children have due process right to counsel under Georgia State Constitution).

The process by which the lawyer’s effectiveness is evaluated depends upon the lawyer’s advocacy role. When the lawyer is providing client-directed representation, the lawyer’s effectiveness under constitutional and tort law is tested as it would be in a case involving an adult client. In contrast, when the lawyer makes decisions on behalf of a child who lacks capacity to direct the representation, the evaluation also takes into account the lawyer’s effectiveness in making decisions on behalf of the client. *Marquez v. The Presbyterian Hospital In The City Of New York*, 159 Misc.2d 617, 624-625 (Sup. Ct., Bronx County, 1994) (law guardian should ascertain and consider all relevant facts, and then exercise discretion in good faith and to the best of the lawyer’s ability).

child.⁴

Because FCA § 241 provides the child with a primary right to “counsel of [her] own choosing,” it appears that the hybrid term “law guardian,” which has generated much of the confusion in New York,⁵ merely substitutes for the term “counsel” when the lawyer has been assigned rather than chosen. Thus, a law guardian is *counsel for the child*, not a guardian *ad litem*, and has a traditional attorney-client relationship with the child. This is the view recently adopted in Section 7.2 of the Rules of the Chief Judge, which is entitled “Function of *the attorney for the child*” (emphasis supplied).⁶

Moreover, counsel chosen by the child certainly is obligated to advocate in a manner consistent with the child’s stated position: indeed, if the lawyer did otherwise, the child would be entitled to dismiss the lawyer and choose another one.⁷ Since the Legislature cannot have contemplated that children represented by an assigned “law guardian” have inferior rights, it follows that an assigned lawyer cannot substitute her own judgment for that of the child merely because the child is not in a position to choose counsel. And, because §241 defines *all* lawyers for the child -- the Family Court Act does not contain separate definitions applicable in each type of proceeding -- there is no reason to believe that lawyers for similarly situated children in different types of proceedings should assume different roles.

⁴ For comprehensive information regarding the approaches taken by other states, see Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. at 1074-1081.

⁵ Andrew Schepard, *The Law Guardian: A Need For Statutory Clarification*, N.Y.L.J., Sept. 14, 2000, at 3 (“The unique New York term ‘law guardian’ mixes the contradictory role of guardian and attorney in its title and a single person. It thus sends an ambiguous message. . .”); Douglas J. Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act § 241 (“The convoluted wording of this section reflects: (1) the underlying ambivalence of its drafters about the role of Law Guardians, and (2) the problems inherent in establishing guidelines for the representation of young people of varying degrees of maturity”).

This ambiguity and ambivalence were clearly on display in *Koppenhoefer v. Koppenhoefer*, 159 A.D.2d 113 (2d Dep’t 1990), where the Second Department noted that “in disputed custody/visitation litigation, the appointment of a law guardian has been recognized as appropriate and helpful to the court. The attorney may act as champion of the child’s best interests, as advocate for the child’s preferences, as investigator seeking the truth on controverted issues, or may serve to recommend alternatives for the court’s consideration (citations omitted).” *Id.* at 117.

⁶ See also *Cervera v. Bressler*, 50 A.D.3d 837 (2d Dep’t 2008) (court notes that at time of trial proceeding, attorney for child was “then known as the law guardian”); *New York State Bar Association Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings, Preface* (2007) (term “law guardian” is not used “because the label is outdated and confusing to attorneys and parties alike”); *State Bar Ethics Opinion 656*, N.Y.L.J., Jan. 21, 1994, at 2 (“Several commentators have noted that the [Family Court] Act’s drafters apparently envisioned law guardians to be ‘the equivalent to legal counsel,’ even if the term ‘guardian’ assigns to these lawyers some of the additional investigative and parental functions of the guardian *ad litem*”). Accordingly, for purposes of the rule in DR 7-104(A)(1), a child represented by a law guardian is considered a “party,” and, therefore, neither the respondent’s lawyer nor the petitioner’s lawyer may communicate with the child without the consent of the law guardian. *Id.* The child also enjoys the protection of the attorney-client privilege. *Matter of Angelina AA.*, 211 A.D.2d 951, 953 (3d Dep’t 1995) (law guardian could not testify where child had not waived privilege, since child had attorney-client relationship with law guardian).

⁷ *Matter of Elianne M.*, 196 A.D.2d 439, 440 (2d Dep’t 1993).

Again, this is the view adopted in §7.2 of the Rules of the Chief Judge, which states that in juvenile delinquency and person in need of supervision proceedings, “the attorney for the child must zealously defend the child,” and that in other proceedings, the child’s attorney “should be directed by the wishes of the child” if “the child is capable of knowing, voluntary and considered judgment,” even if the attorney “believes that what the child wants is not in the child’s best interests.” The attorney “would be justified in advocating a position that is contrary to the child’s wishes” when the attorney “is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child’s wishes is likely to result in a substantial risk of imminent, serious harm to the child....” Consistent with FCA § 241, Rule 7.2 also states that “[w]hen the attorney overrides the child’s wishes, the attorney must inform the court of the child’s expressed preference “if the child wants the attorney to do so.” Rule 7.2 was promulgated shortly after, and is consistent with, the New York State Bar Association’s Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings (*see below*).

New York Professional Responsibility Rules and Standards

Courts do take State professional responsibility rules into account when deciding related matters,⁸ which brings us to the New York State *Code of Professional Responsibility*. The Code’s Disciplinary Rules do not specifically cover these issues, but they are addressed in the Code’s Ethical Considerations.

The general rule is that the client makes fundamental litigation decisions. “In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions,” but “otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.”⁹ Disputes concerning what is best for the client must ordinarily be resolved in the client’s favor. The lawyer need not personally approve of the client’s position.¹⁰ While appearing in court, a lawyer should refrain from expressing a personal opinion concerning the matter at hand.¹¹

However, in discharging his or her duties, a lawyer may take into account a client’s disabilities. “The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition *or age* of a client. . .” (emphasis added).¹² “Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts

⁸ *See, e.g., People v. DePallo*, 96 N.Y.2d 437, 441 (2001).

⁹ N.Y. Code of Prof’l Responsibility, *EC* 7-7.

¹⁰ *Id.*, *EC* 7-17.

¹¹ *Id.*, *EC* 7-24.

¹² *Id.*, *EC* 7-11.

additional responsibilities upon the lawyer.”¹³ “If a client under disability has no legal representative, the lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his or her interests, regardless of whether the client is legally disqualified from performing certain acts, the lawyer should obtain from the client all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client.”¹⁴

Accordingly, while the lawyer must “obtain all possible aid” from the child, and thus should take her cue from the child to the greatest extent possible, the State Code does open the door to decision-making by lawyers when, after the lawyer-client counseling process has played out, the child and the lawyer cannot agree. However, the State Code provides no guidance to the lawyer who wonders *when* age should be considered a “disability” that permits the lawyer “to make decisions on behalf of the client.”¹⁵

The New York State Bar Association’s (“NYSBA”) Committee on Children and the Law issued, in 1996, its *Law Guardian Representation Standards*, which have guided courts and practitioners.¹⁶ The Standards admonished law guardians not to advocate for their own view of a child’s best interests: “By requiring the law guardian to protect the child’s ‘interests’ (rather than promote the ‘best interests’ of the child), the Legislature clearly intended law guardians to perform a function distinct from the judicial assessment of the best interest of the child.”¹⁷ The law guardian was instructed to determine the child’s “interests,” involve the child in decision-making to the greatest extent possible, and weigh the child’s wishes while taking into account the child’s level of maturity.¹⁸ The child’s “interests” were not defined, and the 1996 Standards “punted” on the issue of age guidelines. The NYSBA Committee on Children and the Law’s *Law*

¹³ *Id.*, EC 7-12.

¹⁴ *Id.* See Subha Lembach, *Representing Children in New York State: An Ethical Exploration of the Role of the Child’s Lawyer in Abuse and Neglect Proceedings*, 24 WHITTIER L. REV. 619, 637 (2003) (EC 7-12 “actually grants overt authority for the lawyer to Amake decisions on behalf of the client”).

¹⁵ See Lembach, *Representing Children in New York State: An Ethical Exploration of the Role of the Child’s Lawyer in Abuse and Neglect Proceedings*, 24 WHITTIER L. REV. at 637 (“Although both Ethical Considerations 7-11 and 7-12 seem rather detailed, they provide little direction for the lawyer of the child”).

¹⁶ See, e.g., *Matter of Dominique A. W.*, 17 A.D.3d 1038, 1039-1040 (4th Dep’t, 2005), *lv denied* 5 N.Y.3d 706 (while criticizing law guardian who acknowledged that he had never met the child, court cites client contact requirements in *Guidelines for Law Guardians in the Fourth Department* and *State Bar Law Guardian Representation Standards*); *Matter of Jamie TT.*, 191 A.D.2d at 137 (State Bar standards encourage law guardian to be familiar with possible evidentiary material and to question and cross-examine witnesses for a full presentation).

¹⁷ *New York State Bar Association Law Guardian Representation Standards, Introductory Commentary to Child Protective Proceedings Standards* (1996).

¹⁸ See *supra* note 17, *Child Protective Proceedings Standards* A-2, C-1, C-2, C-4, D-7, D-8, E-2, E-3, F-1, F-3.

Guardian Representation Standards, Volume II: Custody Cases (3d Ed., 2005) avoided the age issue as well.

In June 2007, the Committee on Children and the Law replaced the 1996 standards with new *Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings*. Unlike the 1996 version, these standards do take sides in the longstanding controversy, and stake out definitive positions, regarding the role and responsibilities of the child's lawyer.

"Whether retained or assigned, and whether called "counsel" or "law guardian," the child's attorney shall, to the greatest possible extent, maintain a traditional attorney-client relationship with the child. The attorney owes a duty of undivided loyalty to the child and shall advocate the child's position. In determining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances. There is a presumption that the attorney will adhere to the direction of a young client in the same manner that the attorney would follow the direction of a competent adult pursuant to Canon 7 of the Lawyers Code of Professional Responsibility and Ethical Consideration 7-8, even if the attorney for the child believes that what the child wants is not in the child's best interests. Unless a child is not capable of expressing a preference, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions, the attorney must not 'substitute judgment' in determining and advocating the child's position."¹⁹

Other Authorities

The traditional advocacy approach "appears to represent the majority approach among legal academics" in the United States.²⁰

¹⁹ *New York State Bar Association Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings, Standard A-1* (2007); see also *Standard A-3* (attorney may "substitute judgment and advocate in a manner that is contrary to a child's articulated preferences" when "[t]he attorney has concluded that the court's adoption of the child's expressed preference would expose the child to imminent danger of grave physical harm and that this danger could not be avoided by removing one or more individuals from the home, or by the provision of court-ordered services and /or supervision," or "[t]he attorney is convinced that the child is not competent due to an inability to understand the factual issues involved in the case, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions").

Like § 7.2 of the Rules of the Chief Judge, the State Bar Standards recognize that even when the attorney determines that the child lacks capacity, the attorney must communicate the child's expressed wishes to the court "unless the child has expressly instructed the attorney not to do so." *Standard A-3*. One writer, discussing § 7.2, wonders how the child's attorney, having determined that "the child lacks the capacity for knowing, voluntary and considered judgment," can nonetheless deem the child capable of "mak[ing] a knowing, voluntary and considered judgment as to whether the attorney should inform the judge of his or her articulated preference." Timothy M. Tippins, *The Ambiguous Role of Law Guardians*, N.Y.L.J., March 6, 2008, at 3. This is a fair point, yet it is likely that Rule 7.2 and Standard B-3 have in mind only cases in which a child with decision-making capacity has advised the attorney to take a position adversarial to the child's parents, but, for personal reasons, prefers that the attorney refrain from disclosing the child's expressed preferences.

²⁰ See, e.g., Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 cont'd on next page

For example, standards issued by the American Bar Association (“ABA”) take the view that when the lawyer is assigned under State law as *counsel for the child*, the lawyer cannot properly perform the functions of a guardian *ad litem*. If the child is capable of communicating a preference, the lawyer must provide client-directed representation. “These Standards do not accept the idea that children of certain ages are ‘impaired,’ ‘disabled,’ ‘incompetent,’ or lack capacity to determine their position in litigation.”²¹ Because “the child is a separate individual with potentially discrete and independent views,” “the child’s attorney must advocate the child’s articulated position * * * [i]n all but the exceptional case, such as with a preverbal child.”²² In an effort to preserve the role and functions of a lawyer, the ABA also asserts that when the child is unable to express a position or is incapable of understanding the legal or factual issues, the lawyer “should continue to represent the child’s legal interests and request appointment of a guardian *ad litem*. This limitation distinguishes the scope of independent decision-making of the child’s attorney and a person acting as guardian *ad litem*.”²³

The National Association of Counsel for Children (“NACC”) has responded to the ABA with standards that provide additional flexibility for lawyers representing very young clients. “While the default position for attorneys representing children under [NACC] standards is a client directed model, there will be occasions when the client directed model cannot serve the client and exceptions must be made. In such cases, the attorney may rely upon a substituted judgment process (similar to the role played by an attorney guardian *ad litem*), or call for the appointment of a guardian *ad litem*, depending upon the particular circumstances, as provided herein. To the extent that a child cannot meaningfully participate in the formulation of the client’s position (either because the child is preverbal, very young or for some other reason is incapable of judgment and meaningful communication), the attorney shall substitute his/her judgment for the child’s and formulate and present a position which serves the child’s interests.”²⁴

Requesting assignment of a GAL does not appear to be an option available to the child’s lawyer in New York; the Legislature has provided for assignment of a lawyer who either advocates for what the child wants or substitutes judgment, and has not authorized assignment of

CORNELL L.REV. 895, n.4 (1999).

²¹ A.B.A. *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, Commentary to Standard B-3* (1999).

²² See *supra* note 21, *Commentary to Standard A-1*; see also *Standard A-1* (“The term ‘child’s attorney’ means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client”); *Standard B-4* (“The child’s attorney should represent the child’s expressed preferences and follow the child’s direction throughout the course of litigation”).

²³ See *supra* note 21, *Commentary to Standard B-4(1)*.

²⁴ Nat’l Assoc. of Counsel for Children, A.B.A./N.A.C.C. *Revised Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, Standard B-4(1)* (1999).

a guardian *ad litem* as well.²⁵ However, in other respects, the NACC 's approach, which permits the lawyer to "substitute judgment," is more suitable for New York lawyers than the ABA's approach, which, on its face at least, requires lawyers to advocate for the expressed wishes of toddlers.

The Questions Left Unanswered

Although it is now clear that the default position for children's lawyers in New York is to advocate for the child's wishes, important issues remain unsettled. When does a child "lack[] the capacity for knowing, voluntary and considered judgment" within the meaning of § 7.2 of the Rules of the Chief Judge. What is "a substantial risk of imminent, serious harm to the child" within the meaning of § 7.2? Is there an approximate age at which a child is deemed competent to make decisions that bind the lawyer? Family Court Act § 241 requires the lawyer to protect the child's interests, not "best" interests, so when the lawyer makes decisions on behalf of the child, what are the "interests" the lawyer should protect? Does the child's lawyer protect the child's "legal" interests under the applicable statutes, and consider the child's "best" interests only when they are relevant to a determination of the child's "legal" interests?

Part Three: JRP'S Representation Model

Counseling the Client and Developing a Litigation Strategy

Lawyers are better able than clients to recognize when goals are unrealistic or may not actually advance the client's broader interests. Needless to say, this is especially true of lawyers who represent children. Thus, it is vitally important for the child's lawyer to work hard to help the child understand the lawyer's perspective and thinking. Also, because there are limits to a young child's ability to comprehend the lawyer-client relationship and to accurately communicate her wishes and goals, the lawyer needs to "educate the client about the lawyer-client relationship," and, when "confusion derives from developmentally imposed obstacles, the lawyer's attempt at clarification must engage that developmental process."²⁶

"The lawyer has a duty to explain to the child, in a developmentally appropriate manner, all information that will help the child to understand the proceedings, make decisions, and

²⁵ See *Fargnoli v. Faber*, 105 A.D.2d 523, 524 (3rd Dep't 1984) (law guardians, not guardians *ad litem*, should be appointed when minors are subject of proceedings in Family Court); *Anonymous v. Anonymous*, 70 Misc.2d 584, 585 (Fam. Ct., Rockland County, 1972) ("It would therefore clearly appear that the intention of the Legislature in enacting sections 241 and 249 of the Family Court Act was to provide for representation of a minor in a Family Court proceeding by a Law Guardian or counsel of his own choosing and not by a guardian *ad litem* pursuant to CPLR"). Moreover, by requesting appointment of a guardian *ad litem*, the lawyer, supposedly a loyal advocate, invites introduction of a new "player" into the proceeding who may well undermine the client's chances of achieving his or her stated goals. Cf. *A.B.A. Model Rules of Prof'l Conduct, Commentary to Rule 1.14* ("Disclosure of the client's diminished capacity could adversely affect the client's interests").

²⁶ Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. at 956.

otherwise provide the lawyer with meaningful input and guidance.”²⁷ The lawyer’s duties as counselor and advisor include: “[d]eveloping a thorough knowledge of the child’s circumstances and needs,”²⁸ “[i]nforming the child of the relevant facts and applicable laws,”²⁹ “[e]xplaining the practical effects of taking various positions, which may include the impact of such decisions on the child and other family members or on future legal proceedings,”³⁰ “[e]xpressing an opinion concerning the likelihood that the court will accept particular arguments,”³¹ “[p]roviding an assessment of the case and the best position for the child to take, and the reasons for such assessment,”³² and “[c]ounseling against or in favor of pursuing a particular position, and emphasizing the entire spectrum of consequences that might result from assertion of that position.”³³

Thus, in the end, “[t]he attorney’s responsibility to adhere to the client’s directions refers primarily to the child’s authority to make certain fundamental decisions when, at the end of the

²⁷ *N.Y.S.B.A. Standards, Standard A-2.*

²⁸ *Id. Standard A-2(1).*

²⁹ *Id. Standard A-2(2).*

³⁰ *Id. Standard A-2(3).*

³¹ *Id. Standard A-2(4).*

³² *Id. Standard A-2(5).*

³³ *Id. Standard A-2(6).* See also *Standard-EC 7-8* (lawyer should “bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer’s objective viewpoint,” should “exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations,” should “advise the client of the possible effect of each legal alternative,” and may “emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions”); *EC 7-3* (lawyer may assist client “in determining the course of future conduct and relationships”); *supra* note 21, *Commentary to Standard B-4* (lawyer may express opinion concerning likelihood of court or other parties accepting particular positions, and inform child of expert’s recommendations, and, since child “may agree with the lawyer for inappropriate reasons,” lawyer “needs to understand what the child knows and what factors are influencing the child’s decision,” and “should attempt to determine from the child’s opinion and reasoning what factors have been most influential or have been confusing or glided over by the child when deciding the best time to express his or her assessment of the case”); *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. 682, 684-685 (2006) (lawyer should “let the child talk” and “listen to the child,” begin with the child’s agenda, gather information from collateral sources, explain the attorney-client relationship, encourage the child to speak with others, explain the court process, help child understand that she has right to have wishes advocated for without attribution, and help child understand the different pressures operating on her); Robert D. Fleischner and Dara L. Schur, *Representing Clients Who Have or May Have “Diminished Capacity”: Ethics Issues*, 41 CLEARINGHOUSE REV. J. OF POVERTY LAW AND POLICY 346, 356 (September/October 2007) (“Clients often direct their attorneys to take positions that may undermine their long-term goals. When getting the client’s input on a strategic decision in a case, ask the client more than once and in different ways. For example, perhaps your client was experiencing disability-related difficulties when you first asked about a particular issue. Asking again at a different time may yield a more informed decision. Trying to get to know the client and gaining an understanding of the client’s long-term goals will help you in counseling the client about how to proceed in the short term”).

day, the lawyer and the child disagree,” and “representation is also ‘lawyer-directed’ in the sense that, particularly when representing a young child, a lawyer has the responsibility to bring his/her knowledge and expertise to bear in counseling the client to make sound decisions.”³⁴ In many instances, the child will follow the lawyer’s sound advice.³⁵

However, although the lawyer may attempt to persuade the child to select intermediate and long-term goals that are more realistic and appropriate than the goals identified by the child, the lawyer “must take care not to overwhelm the client’s will, and thus override the child’s actual wishes” and “must remain aware of the power dynamics inherent in adult/child relationships and remind the child that the attorney’s role is to assist clients in achieving their wishes and protecting their legal interests.”³⁶ The counseling role should be undertaken to enlighten and guide the client, not to remove the client as an obstacle to the achievement of what the lawyer wants. This is particularly important given that the lawyer “has an inordinate influence on the proceedings.”

Determining the Child’s Capacity to Make Decisions

Generally

The lawyer’s determination of the child’s capacity to make decisions “should be made at the outset of the representation in accordance with a principled analytic framework.”³⁷ Among the criteria that should be used in assessing capacity are: the child’s developmental stage (cognitive ability, socialization, emotional development); the child’s expression of a relevant position (ability to communicate with lawyer, ability to articulate reasons); the child’s individual decision-making process (influence - coercion - exploitation, conformity, variability and consistency); and the child’s ability to understand consequences (risk of harm, finality of decision).³⁸

³⁴ See *supra* note 19, *Commentary to Standard A-2*.

³⁵ Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 *TOURO L. REV.* 745, 821 (2006) (“a ten year old child may wish to remain home with her drug addicted mother, but may understand and accept her counsel’s private statements that the court will never agree, and that the better course is to advocate for the help her mother needs, with the goal of minimizing the placement duration while maximizing visitation; as soon as mom is ready, counsel will advocate reunification”).

³⁶ See *supra* note 19, *Commentary to Standard A-2*.

³⁷ *City Bar Ethics Opinion 1997-2*, 1997 WL 1724482.

³⁸ *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301, 1313 (1996); see also *supra* note 19, *Standard A-3* (child’s attorney may “substitute judgment and advocate in a manner that is contrary to a child’s articulated preferences” when “[t]he attorney is convinced that the child is not competent due to an inability to understand the factual issues involved in the case, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions”); *supra* note 19, *Commentary to Standard A-3* (“[a]ll that is required is that the child have a basic understanding of issues and consequences”); *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 *NEV. L.J.* at 685.

A lawyer should not “bootstrap” during this process by treating what appears to the lawyer to be a bad decision by the child as conclusive evidence of a lack of capacity.³⁹ And, when the determination of capacity is a close call, the lawyer should seek the assistance of a qualified mental health professional, preferably one who is already involved with the child.⁴⁰

A determination regarding capacity is not an “all or nothing,” or immutable conclusion. A child may be capable of deciding some issues but not others. A child’s disability “is contextual, incremental, and may be intermittent. The child’s ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others.”⁴¹ Also, “[i]t is possible for the child client to develop from a child incapable of meaningful participation in the litigation. . . to a child capable of such participation during the course of the attorney client relationship. In such cases, the attorney shall move from the substituted judgment exception. . . to the default position of client directed representation. . . .”⁴²

The Child’s Age

In Appellate Division and trial court decisions, there is strong support for the view that the child’s lawyer ordinarily should provide traditional advocacy for teenagers. In *Matter of Albanese v. Lee*,⁴³ the First Department held that the Society for the Prevention of Cruelty to Children was properly relieved as guardian *ad litem* where the agency did not advocate the

³⁹ See *supra* note 19, *Commentary to Standard A-3* (“[w]hen considering whether the child has ‘capacity to perceive and comprehend the consequences of his or her decisions,’ the lawyer should not make judgments that turn on the level of maturity, sophistication, or ‘good judgment’ reflected in the child’s decision-making,” and “may not use substituted judgment merely because the attorney believes that another course of action would be ‘better’ for the child”); *City Bar Ethics Opinion 1997-2*, 1997 WL 1724482 (lawyer “should not conclude merely from the fact that a decision appears to be a bad one that the client is not making a reasoned decision”); Timothy M. Tippins, *The Ambiguous Role of Law Guardians*, N.Y.L.J., March 6, 2008, at 3 (“Must it not at least be considered that the child’s attorney, without any objective measure of the child’s capacity for considered judgment, will measure it by the extent to which the child’s wishes correspond with the attorney’s view of what is best for the child?”); Peter Margulies, *The Lawyer as Caregiver: Child Client’s Competence in Context*, 64 *FORDHAM L. REV.* 1473, 1485 (1996) (there is an “outcome test” under which the decision-maker is deemed competent “if the decision was substantively sound, from the vantage point of the judge, doctor, or other arbiter,” but “[m]odern trends have frowned on the invidious biases of the status test and the paternalistic and tautological character of the outcome test”).

⁴⁰ See *supra* note 19, *Commentary to Standard A-3* (“In certain complex cases, when evaluating whether the use of substituted judgment is permissible, the attorney may wish to consult a social worker or other mental health professional, keeping faithful to attorney-client confidentiality, for assistance in evaluating the child’s developmental status and capability”).

⁴¹ See *supra* note 21, *Commentary to Standard B-3*.

⁴² See *supra* note 24, *Standard B-4(3)*.

⁴³ 272 A.D.2d 81 (1st Dep’t 2000).

wishes of its fifteen-year-old client. In *Matter of Elianne M.*,⁴⁴ the Second Department held that “[w]here, as here, both the Law Guardian and the teenage child have explicitly expressed their failure to communicate, the child has indicated her lack of trust in her appointed representative, her fear that this representative will not effectively communicate her wishes to the court and her belief that the Law Guardian has been influenced by her adoptive mother, the proper course was to relieve the Law Guardian and permit substitution of counsel of the child’s choosing.”⁴⁵ In *Suzanne T. v. Arthur L. T.*,⁴⁶ where the law guardian, while reciting the fourteen-year-old child’s preference for the mother, recommended that custody remain with the father, the court recognized that the law guardian may assert a position which, in the law guardian’s independent judgment, would best promote the child’s interest even if that position is contrary to the wishes of the child, but impliedly criticized the law guardian by noting that *this* child was a very mature, strong-willed and articulate fourteen-year-old.⁴⁷ In *Marquez v. Presbyterian Hosp. in the City of New York*,⁴⁸ the court noted that “[t]he adversarial role for Law Guardians has, quite properly, predominated. . . . Recent cases, without any discussion of the issue, routinely treat Law Guardians as though they were counsel in a criminal case. (citations omitted).”⁴⁹

In the context of juvenile delinquency and persons in need of supervision proceedings as well, courts have recognized that an adolescent has presumptive authority to make fundamental litigation decisions.⁵⁰

Support for traditional representation of younger children can be found in *Matter of Scott L. v. Bruce N.*,⁵¹ where the court posited a hybrid lawyer/GAL role in which the child does not *control* the representation, but also recognized that children often should have controlling influence over the lawyer’s advocacy. The court observed that “[t]he extent to which the child’s wishes should influence the formulation of the position must vary according to the maturity, intelligence and emotional stability of the child in question. Where the child is a teen-ager of reasonably sound judgment, either a Law Guardian or a guardian ad litem would be very likely

⁴⁴ 196 A.D.2d 439.

⁴⁵ 196 A.D.2d at 440.

⁴⁶ 12 Misc.3d 691 (Fam. Ct., Monroe County, 2005).

⁴⁷ 12 Misc.3d at 694.

⁴⁸ 159 Misc.2d 617 (Sup. Ct., N.Y. County, 1994).

⁴⁹ 159 Misc.2d at 622. *See also Matter of Delaney v. Galeano*, 50 A.D.3d 1035 (2d Dep’t 2008) (where attorney for fourteen-year-old child appealed from order which denied his motion to hold respondent mother in contempt in visitation proceeding, Second Department, while citing 22 NYCRR §7.2(d)(2), dismissed appeal because child did not want appeal to proceed).

⁵⁰ *See, e.g., Matter of Sandra XX.*, 169 A.D.2d 992, 994 (3d Dep’t 1991); *see also City Bar Ethics Opinion 1997-2*, 1997 WL 1724482 (children above age of twelve generally will be capable of making considered judgments concerning the representation).

⁵¹ 134 Misc.2d 240 (Fam. Ct., N.Y. County, 1986).

to advocate for the outcome the child prefers, and properly so, since the wishes of a mature youngster also carry greater weight with the court than those of a younger child [citation omitted].” With respect to the seven and nine-year-old subject children, the court noted that “the Law Guardian might arguably feel obligated to assert the position in the case which the child desires, and asserting a position in a litigation involves much more than merely expressing the child’s wishes to the court.”⁵²

In *K.T. v. C.S.*,⁵³ the court found that where the ten-year-old child “was of sufficient age and maturity to express her own desires in an intelligent and compelling fashion,” there was “no indication that her testimony was coached or was not the product of her true desires,” and there was no indication “that [her] ability to express her views was compromised or that her desires were incompatible with the advancement of her best interests, the law guardian had an obligation to advocate those wishes.”

There are cases in which the lawyer’s decision to advocate a position contrary to the expressed wishes of the child has been approved. In *Carballeira v. Shumway*,⁵⁴ where the child’s lawyer advocated a position contrary to the expressed wishes of his eleven-year-old client, the Third Department noted that the law guardian “has the statutorily directed responsibility to represent the child’s wishes as well as to advocate the child’s best interest. Because the result desired by the child and the result that is in the child’s best interest may diverge, Law Guardians sometimes face a conflict in such advocacy (citations omitted).” When such a conflict exists, “[d]epending on the circumstances, ‘a Law Guardian may properly attempt to persuade the court to adopt a position which, in the Law Guardian’s independent judgment, would best promote the child’s interest, even if that position is contrary to the wishes of the child’ (citations omitted).”⁵⁵ Similar rulings have been issued in other custody proceedings.⁵⁶

However, it must be borne in mind that *Shumway* involved a custody dispute between biological parents, and so the child’s liberty interests were not nearly as compelling as they are when the State attempts to remove a child from the parents’ home.⁵⁷ Also, among the reasons

⁵² 134 Misc.2d at 243-244.

⁵³ N.Y.L.J., July 6, 2000, at 26 (Sup. Ct., Suffolk County).

⁵⁴ 273 A.D.2d 753 (3d Dep’t 2000), *lv denied*, 95 N.Y.2d 764.

⁵⁵ 273 A.D.2d at 755.

⁵⁶ See, e.g., *Matter of James MM. v. June OO.*, 294 A.D.2d 630, 633 (3d Dep’t 2002) (law guardian did not violate duty to eleven and twelve-year-old clients when he filed neglect petition against mother, and recommended that father get custody, even though children preferred to stay with mother); *Armenio v. Armenio*, N.Y.L.J., Aug. 3, 1999, at 25 (Sup. Ct., Suffolk County) (law guardian properly made recommendation that was contrary to desires of children, ages eleven and nearly seven, where law guardian made “cogent legal and common sense arguments” as to why children’s expressed preferences were not consistent with their best interests); *Reed v. Reed*, 189 Misc.2d 734, 737 (Sup. Ct., Richmond County, 2001) (even if law guardian was not acting in accordance with wishes of six-year-old child, law guardian’s own position was relevant).

⁵⁷ Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, n.15 (in child protection proceedings, “children. . . face the risks of either returning to a dangerous home or severing their relationship with their entire immediate family”); Martin Guggenheim, *A Paradigm for Determining* cont’d on next page

underlying the *Shumway* ruling was the child's severely impaired condition. The court noted that the child suffered from several neurological disorders including Tourettes Syndrome, Obsessive-Compulsive Disorder and Attention Deficit Hyperactivity Disorder; that a psychologist had opined that the child was intelligent, but somewhat less mature than average, and could be easily manipulated by adults; that the child may have been blinded by his love for the mother, who exerted influence on his thoughts concerning custody; and that the child "did not articulate objective reasons for his preference" other than his dislike of discipline at the father's home and the lack of rules and discipline at the mother's home.⁵⁸

Moreover, in *Shumway*, the Third Department merely concluded that, in appropriate circumstances, a child's lawyer "may" adopt a position that is contrary to the wishes of the child, but did not suggest that a law guardian abuses her discretion when she chooses to assign dispositive weight to the child's position.⁵⁹

Viewed as a whole, then, these court decisions suggest that the child's lawyer ordinarily should give controlling weight to the desires of a teenage client, and, with respect to younger children, leave the lawyer with considerable discretion to assign appropriate, and, if the lawyer chooses, *controlling* weight to the child's wishes.

While "[a]ny specific [age-related line] will be an arbitrary choice to some extent,"⁶⁰ we believe that age-related guidelines are useful. Children as young as two or three, while capable of communicating wishes, cannot be granted decision-making authority under any rational representation model. As already noted, a consensus among child advocates has been reached regarding children age ten or older, who usually are deemed entitled to client-directed representation,⁶¹ and children under the age of seven, who usually are not. The advocacy model

the Role of Counsel for Children, 64 *FORDHAM L. REV.* 1399, 1426 (1996) (child's right in custody proceeding is to have the judge determine which caregiver will best serve child's interests).

⁵⁸ 273 A.D.2d at 755-756; *see also Matter of Amkia P.*, 179 Misc.2d 387, 389-390 (Fam. Ct., Bronx County, 1999) (law guardian for ten-year-old child in child protective proceeding properly advocated position at odds with child's expressed wishes where child was afflicted with chronic, debilitating and life-threatening illness, appeared to have little comprehension of severity and complexity of her disease or of precariousness of her situation if she was not provided with proper medical care, and was intelligent and poised but was "still a young child, and as such she lack[ed] the sophistication, experience and maturity to decide for herself what is in her best interest in the complicated medical predicament in which she [found] herself").

⁵⁹ *See* Schepard, *The Law Guardian: A Need For Statutory Clarification*, N.Y.L.J., Sept. 9, 2000, at 3 ("Carballeira seems to leave the decision about whether to serve as a guardian or as an attorney to the individual judgment of the appointee in a particular case. The court does not tell us if it would have been reversible error for the child's lawyer to advocate for the seemingly impaired child's preference, only that the lawyer properly exercised discretion not to do so").

⁶⁰ *Report of the Working Group on the Role of Age and Stage of Development*, 6 *NEV. L.J.* 623, 625 (2006); *see also City Bar Ethics Opinion 1997-2*, 1997 WL 1724482 ("The lawyer should not conclude that minors below a particular age are invariably unable to make reasoned judgments or that all verbal minors are invariably able to do so").

⁶¹ *See, e.g.,* Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 *TOURO L. REV.* at 820 ("Children above the age of ten usually comprehend the issues and are capable of formulating a position cont'd on next page

for children falling in that three-year gap has remained less certain. After revisiting these issues, we believe that many children between the ages of seven and ten are entitled to make decisions that an adult client would make. (We reiterate that when we refer in these pages to “client-directed representation,” we mean that the child has authority to make certain decisions at the conclusion of a complex process in which the lawyer, acting as counselor and adviser, works together with the child in developing the child’s goals and positions.)

There is ample support for viewing children as young as seven as being capable of making decisions. The *Commentary to NYSBA Standard A-3* states that “most children ages seven and above, and sometimes even younger, will have the capacity to make decisions that bind the lawyer with respect to fundamental issues such as where the child should live.” A similar conclusion was reached by a well-known authority in 1984.⁶² And, at the 2006 University of Nevada, Las Vegas *Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, a working group recommended adoption of a statutory presumption that lawyers should function as client-directed advocates for children age seven and above, and, with respect to children younger than seven, should “[g]ive due consideration to the view of the child in determining what position to advocate, and present to the court the views of the child.”⁶³

Moreover, New York has made seven the minimum age at which a child may be deemed competent to stand trial on a charge of juvenile delinquency,⁶⁴ and a “[b]road consensus now

with the assistance of counsel even if, on occasion, the assistance should be more structured than with an adult,” but, with clients between the ages of five and ten, “counsel faces or should face, the tricky task of maximizing the child’s input and participation without necessarily granting her a veto over her attorney’s position”); Douglas J. Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act, § 241 (“Often, the child’s ability to reach a ‘considered judgment,’ and hence the Law Guardian’s role, is clear,” such as when “an adolescent alleged to be abused or neglected may have a clear and rational opinion about whether his father’s occasional violence warrants his removal from the home”).

⁶² Guggenheim, *The Right To Be Represented But Not Heard: Reflections On Legal Representation For Children*, 59 N.Y.U. L. REV. at 91.

⁶³ *Report of the Working Group on the Role of Age and Stage of Development*, 6 NEV. L.J. 623; see also *Model Rules of Prof’l Conduct, Commentary to Rule 1.14* (2006) (client with diminished capacity “often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody”); Jaelyn Jean Jenkins, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 173 (2008) (“Studies have shown that children as young as 6 years of age have the capability to reason and understand. Certainly from age 6, and at ages even younger than that, children are capable of having and sharing their view of what happened in the past and what they would like to see happen in the future. This is especially true for foster children, who, by necessity, have had to grow up more quickly than their peers”); Donald Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (2006) (author endorses “a bright line test, say at seven”).

⁶⁴ N.Y. Fam. Ct. Act § 301.2(1). Indeed, the law of competency should be consulted when a lawyer is attempting to determine a child’s capacity to make decisions in this context. See, e.g., *People v Picozzi*, 106 A.D.2d 413, 414 (2d Dep’t 1984) (court should consider: (1) whether defendant is oriented to time and place; (2) whether defendant is able to perceive, recall and relate; (3) whether defendant has an understanding of the process of the trial and the roles of the judge, jury, prosecutor and defense attorney; (4) whether defendant can establish a working

exists within both the delinquency bar and the judiciary that lawyers for minors charged with crimes should take direction from their clients just as they would if their clients were adults.”⁶⁵ No exception has been carved out for cases in which the lawyer believes that the delinquency client is a neglected child.⁶⁶ Even assuming, *arguendo*, that the Legislature envisioned a slightly modified role for the lawyer when the defining purpose of the proceeding is to protect, rather than prosecute and obtain a finding of delinquency *against* the child -- indeed, that role *must* be modified when an infant is involved -- the fact remains that in child protective and permanency proceedings, the child faces a Fourth Amendment seizure,⁶⁷ removal/exclusion from the home, and involuntary confinement in a foster home or facility selected by the court or by governmental officials.⁶⁸ Thus, there is no reason why the “broad consensus” regarding the role of the lawyer in a delinquency proceeding should not guide the child’s lawyer in a child protective, permanency or termination of parental rights proceeding, particularly given the fact that the Family Court Act contains only one, generic description of the child’s lawyer.

Also, we know that by age seven a child’s social, language and cognitive abilities have become more complex and sophisticated:

“During the school-age years, children become increasingly sophisticated in understanding the perspectives of others. The preschool child tends to see the situations of others egocentrically

relationship with his attorney; (5) whether defendant has sufficient intelligence and judgment to listen to the advice of counsel and, based on that advice, appreciate (without necessarily adopting) the fact that one course of conduct may be more beneficial to him than another; (6) whether defendant is sufficiently stable to enable him to withstand the stresses of the trial without suffering a serious prolonged or permanent breakdown).

It is also worth noting that while a child is not presumed to possess the capacity to comprehend the special nature of a testimonial oath, and give sworn testimony in a juvenile delinquency or criminal proceeding, until age *nine*, appellate courts have found that children as young as seven were properly sworn. *See, e.g., Matter of Joseph C.*, 185 A.D.2d 883, 884 (2d Dep’t 1992); *People v. Hendy*, 159 A.D.2d 250 (1st Dep’t 1990), *lv denied*, 76 N.Y.2d 893.

⁶⁵ Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 Cornell L.Rev. 895, n.14. We note that the lawyer’s lack of control over the client’s decision-making in a juvenile delinquency (or N.Y. Fam. Ct. Act Article Seven persons in need of supervision proceeding) is intrinsic rather than exclusively a matter of role definition, since the child’s denial of guilt and/or refusal to plead guilty cannot be overridden.

⁶⁶ Guggenheim, *The Right to be Represented But not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. at 92.

⁶⁷ *Tenenbaum v. Williams*, 193 F.3d 581, 602 (2d Cir. 1999).

⁶⁸ Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 766 (“the child has an obvious cognizable interest in the outcome - it is her life and her interests that are at issue”); *A Child’s Right to Counsel: First Star’s National Report Card on Legal Representation for Children* (2007), at 7 (“In abuse and neglect hearings, the person with the most to gain or lose is the child. Consistent with traditional notions of a hearing, every party should have a right to be heard and children cannot be meaningfully heard without an advocate. There are crucial constitutional issues at stake in dependency proceedings for children: their liberty (are they going to be wards of the state or returned home?), their safety, and their statutory rights”).

and tries to assimilate another person's viewpoint into her own viewpoint. Beginning at age 6, the child becomes more able to see and acknowledge another person's different point of view. Over the next several years the child gradually realizes that there can be multiple ways of viewing a situation and can imagine how her own ideas appear to another person.

* * *

As perspective taking improves, so does the child's ability to see below the surface of behavior and to attribute psychological qualities and motives to others. Up to age 8, children tend to describe others in terms of their behavior and physical characteristics. After 8, because of improving ability to analyze and synthesize information, they begin to describe others in terms of internal, psychological characteristics (citation omitted). . . . Children become more able to assess other people's intentions and the psychological resonances of communication.⁶⁹

* * *

By age 7 the child has a basic grasp of the syntactical and grammatical structures of her native language. . . . Although there is a range of language ability across individual children, school age children generally possess sufficient facility with language to express what they are thinking and to tell coherent narratives having a beginning, middle, and end.⁷⁰

* * *

By age 7, the child is moving away from egocentric thinking and is using logic. The child becomes aware that intuition based on an awareness of surface appearances is not always correct (citation omitted).⁷¹

Thus, we agree with those who "argue that children exhibit the ability to think rationally by the age of seven and sometimes even younger. They point out that the typical seven-year-old

⁶⁹ Douglas Davies, *Child Development: A Practitioner's Guide 346-347* (2d ed. Guilford Press 2004).

⁷⁰ Davies, *Child Development: A Practitioner's Guide*, at 353.

⁷¹ Davies, *Child Development: A Practitioner's Guide*, at 359.

can comprehend information, make causal connections between events, and use these skills to assess the relative attractiveness of various options.”⁷² While “GAL advocates. . . argue that children’s ability to engage in abstract thinking--in particular their ability to think through a range of merely hypothetical solutions--is highly compromised until adolescence,”⁷³ we do not believe that a child needs to arrive at that level of development in order to exert substantial influence over the lawyer’s decision making.⁷⁴

The Child’s Proper Role in the Search for Truth and the “Right” Result

Giving children a voice in the process “empowers children, the disempowered victims of the circumstances (whether abuse, neglect, or parental separation) leading to the court’s involvement. Lawyers who practice under the traditional attorney model are inspired by the considerable wisdom of children, whose judgment about their best interests often proves at least as sound as that of the adults who have substituted their own judgment. They also acknowledge children’s power, as the subjects of the decisions being made, to prevent decisions the children oppose from being effectively implemented.”⁷⁵ Denying the child a voice in the lawyer’s advocacy “reinforces. . . the lesson, learned most thoroughly by abused and neglected children,

⁷² Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L.REV. at 903-904. See also *supra* note 19, *Standard A-3* (“most children ages seven and above, and sometimes even younger, will have the capacity to make decisions that bind the lawyer with respect to fundamental issues such as where the child should live”); *Matter of Pedro M.*, 2008 WL 4379608 (Fam. Ct., Albany Co., 2008) (while addressing requirement that court consult child during permanency proceeding, court establishes guidelines that presume child age seven or over should be produced in court; court notes that age of seven is generally considered the “age of reason” and is when children acquire a sufficient facility with spoken language to be able to communicate with adults, and it is the age at which juveniles can be charged in juvenile delinquency and persons in need of supervision proceedings).

⁷³ Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. at 903-904; see also Buss, “You’re My What?” *The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 FORDHAM L. REV. at 1702-1703.

⁷⁴ See *supra* note 19, *Standard A-3* (“When considering whether the child has ‘capacity to perceive and comprehend the consequences of his or her decisions,’ the lawyer should not make judgments that turn on the level of maturity, sophistication, or ‘good judgment’ reflected in the child’s decision-making,” and “[a]ll that is required is that the child have a basic understanding of issues and consequences”); Linda Elrod, *Client-Directed Lawyers For Children: It Is The “Right” Thing To Do*, 27 PACE L. REV. 869, 912 (2007) (although some children arguably have capacity but lack judgment, “just because the child lacks the maturity to consider all the implications of a custody determination does not mean that their voice should be silenced”).

Given the inherent difficulty in determining a child’s capacity, one writer has opined that “[i]f the legal system is going to countenance the spectacle of an attorney actively arguing against the client’s stated objectives simply because the client is a child, then the issue of the child’s capacity or lack thereof must, at the very least, be subject to judicial scrutiny brought to bear in the face of record evidence supporting a finding with respect to the capacity question. The stakes are too high to allow otherwise.” Timothy M. Tippins, *The Ambiguous Role of Law Guardians*, N.Y.L.J., March 6, 2008, at 3.

⁷⁵ Buss, “You’re My What?” *The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 FORDHAM L. REV. at 1704-1705.

that he should not expect to have any control over his fate.”⁷⁶ It is also worth remembering that, given the psychological harm often caused by removal, and the physical and emotional health risks to which children are exposed while in foster care, a particular child’s desire to return home to neglectful parents may be far from irrational.⁷⁷

It is true that under New York law, the child’s lawyer is bound by FCA §241 to help the child express her wishes to the court, and thus the child will be heard. But the mere expression of a child’s wishes, by a lawyer who immediately turns around and undermines the child’s stated position by arguing for, or presenting evidence supporting, the opposite result, hardly provides the child with a *meaningful* voice.⁷⁸ “To place the burden of advocating the child’s ‘best interests’ on the lawyer for the child rather than merely advocating the child’s wishes is to deny the child an effective voice in the proceedings. Of course most abused or neglected children wish to go back to the abusive home, but who will articulate the child’s desires or wishes, however irrational it may seem to adults, if the lawyer for the minor will not do so?”⁷⁹ Again, it must be remembered that FCA §241 refers to the child’s “interests,” not the child’s “best interests.”

Admittedly, these determinations of a child’s capacity carry some potential for arbitrariness,⁸⁰ but they are likely to be far less values-driven than a lawyer’s decision to take a particular position on behalf of the client. This practice model limits the population of children for whom lawyers make decisions, and thus fosters consistency and reduces arbitrariness in child advocacy. Left to their own devices, many lawyers “are likely to arrive at decisions and advocate for positions on behalf of their child clients that are invariably based on what they believe to be best, based on the only value system they know, their own. Not only is there a significant chance

⁷⁶ Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. at 960.

⁷⁷ *Nicholson v. Scopetta*, 3 N.Y.3d 357, 382 (2004) (“particularized evidence must exist to justify [removal] determination, including, where appropriate, evidence of . . . the impact of removal on the child”); Martin Guggenheim, *How Children’s Lawyers Serve State Interests*, 6 NEV. L.J. 805, 822 (2006) (judges and lawyers should recognize that “risk is an inherent feature of all child custody decisions and that children are placed at risk whether they are removed from their parents’ custody or permitted to remain there”).

⁷⁸ Merrill Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y.L.J., Oct. 6, 1992, at 1 (“How can an attorney seriously state one position based on the child’s wishes and then, without further ado, take a different and conflicting position based on his perception of the child’s best interests?”). Of course, when the lawyer properly determines that the child lacks capacity -- and it must be remembered that children as young as three or four are capable of articulating a preference -- the awkwardness described by Sobie either does not exist, or is tolerable.

⁷⁹ Shepherd, “*I Know the Child is My Client, But Who Am I?*,” 64 FORDHAM L. REV. at 1942.

⁸⁰ Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. at 46 (“A lawyer predisposed to depart from the normal client-lawyer relationship in the representation of children will conclude that the differences in children’s developmental and life experience make such a relationship impossible. A lawyer predisposed, on the other hand, to maintain the normal client-lawyer relationship in her representation of children will conclude that, despite some differences in children’s development and experience, the relationship can nevertheless reasonably be maintained”).

that these decisions and ensuing positions may be against the best interest of the individual child, who is likely of a different race, ethnicity, and/or class than the legal representative, but it also leads to a system where the position taken by a child's attorney may largely be based, not on what would be best for the individual child with unique needs and values, but rather on the arbitrary chance of who was appointed to represent the particular child."⁸¹

While some people prefer that the child's lawyer always advocate in a manner consistent with her own, presumably mature perspective, rather than the wishes of the child,⁸² we believe that the role we have adopted for the child's lawyer enhances the court's search for the truth and for the right result. The respondents' lawyers are duty-bound to seek family reunification, and dismissal of the charges, if that is what their clients desire. Often, these goals are consistent with the child's interests. The petitioning agency's lawyer will prosecute the case and otherwise protect the agency's interests, which, too, may be consistent with the child's.⁸³ When the child is residing in foster care, the child's lawyer is duty-bound to advance the client's health and safety interests by, among other things, advocating for appropriate court-ordered services, treatment, and agency supervision. When the child is residing at home, a lawyer who is making decisions on behalf of the child will advocate for services, treatment, or supervision designed to render the home environment safe, while a lawyer providing client-directed representation for a child who wants to remain home will do the same as long as the court orders enhance the child's chances of remaining at home.⁸⁴ The judge, having no client, must focus on the law, and, when appropriate,

⁸¹ Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. at 36; see also Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, n.204 ("Absent any expertise about either what is best for children generally or what will best meet a particular child's idiosyncratic needs, it is my sense that lawyers making best interest judgments tend to focus disproportionate attention on avoiding the risk of physical harm and underestimate the importance of maintaining emotional attachments").

⁸² See Martin Guggenheim, *A Law Guardian By Any Other Name: A Critique of the Report of the Matrimonial Commission*, 27 PACE L. REV. 785, 809-810 (2007) ("Trial and appellate judges recognize that getting at the true facts in many cases can be difficult. Understandably, courts want any help they can get. For many judges deciding complex custody cases, the neutral child's lawyer is just what they are looking for to help them determine the best interests of the child. * * * A very large part of the value of children's lawyers, whether to the Court of Appeals or to trial judges, is the 'reassuring' quality that the result the law guardian chose to advocate comports with the result the court chose to reach").

⁸³ The New York City Administration for Children's Services website indicates that it employs more than 200 lawyers to handle child welfare matters in New York City Family Court. ACS's lawyers have child protective caseworkers and the agency's other considerable resources at their disposal, while, due to limited staffing, our lawyers are assisted by social workers only in a limited number of cases. See also Shepherd, *"I Know the Child is My Client, But Who Am I?"*, 64 FORDHAM L. REV. at 1941 ("Given the likely continuation of forces that militate against ideal representation -- poor compensation, large caseloads, occasional recalcitrant judges, little in the way of investigative and other resources -- a role that is familiar to the lawyer is more apt to be performed competently").

⁸⁴ "The extent and form of protection which the child desires may vary. Child "A" may want to be placed outside her home, perhaps with a relative, while in the same situation Child "B" may want to remain home with the parent supervised or with home based services." Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 783.

the child's best interests.⁸⁵ The judge also has broad discretion to solicit evidence the parties have not produced.⁸⁶ Thus, in the end, "the child's direction will merely give instructions to the lawyer. The child's views do not necessarily prevail. The process should be looked upon as a whole."⁸⁷ If the other lawyers and the judge fail to properly discharge their responsibilities, the solution lies in improving their performance, not in twisting out of shape the role and ethical responsibilities of the child's lawyer.⁸⁸ Indeed, "[i]f the strength of the adversary process lies in the full presentation and consideration of different points of view, then giving a greater voice to the child should not impair either fact-finding or decision-making."⁸⁹

Allocation of Decision-Making Authority

Of course, the child's lawyer must differentiate between those decisions a competent client is entitled to make, and those decisions -- involving litigation strategy -- that a lawyer is entitled to make. While the client usually makes decisions regarding matters "affecting the merits

⁸⁵ Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. at 1703-1704 ("Those who advocate assuming the traditional attorney role. . . point out that it is the judge, and not the child's lawyer, who is responsible for determining the child's best interests. The judge bases her decision on the evidence elicited through an adversarial process. . ."); Lembach, *Representing Children in New York State: An Ethical Exploration of the Role of the Child's Lawyer in Abuse and Neglect Proceedings*, 24 WHITTIER L. REV. at 640 ("Expressed interests advocates contend that the judge bears responsibility for determining what course of action is in the best interest of the child, and that the process for determining the best interest of the child is a product of the conventional adversarial model of lawyering").

⁸⁶ See N.Y. Fam. Ct. Act § 153 ("[t]he family court may issue a subpoena or in a proper case a warrant or other process to secure the attendance of an adult respondent or child or any other person whose testimony or presence at a hearing or proceeding is deemed by the court to be necessary, and to admit to, fix or accept bail, or parole him pending the completion of the hearing or proceeding"). Indeed, appellate courts have trumpeted the Family Court's responsibility to ensure that all relevant and material evidence is presented. See, e.g., *Matter of J.*, 274 A.D.2d 482 (2d Dep't 2000) (where doctor testified that he based diagnosis of sexual abuse on hospital records, family court should have determined whether records existed).

⁸⁷ Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. at 1247.

⁸⁸ "And finally, the argument goes, the child protective system and the court process are so underfunded and poorly conducted that, unless the child's attorney ensures that all relevant information is presented to the judge (regardless of whether it serves the child's expressed interests), the judge will be in no position to make an appropriate best interest determination." Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. at 1703.

⁸⁹ Ann M. Haralambie, *Response to the Working Group on Determining the Best Interest of the Child*, 64 FORDHAM L. REV. 2013, 2017 (1996); see also Jenkins, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. at 170 ("Having the youth in the courtroom, or bringing in the child's actual words, reinforces to the judge the idea that the child is a person, not simply a file. This changes the whole focus of the discussion taking place in the courtroom and forces the judge to see things through the gaze of the child"); A *Child's Right to Counsel: First Star's National Report Card on Legal Representation for Children*, at 7 ("Client-directed representation empowers the court to make the most prudent and wise decision as to the best interests of the child").

of the cause or substantially prejudicing the rights of the client,”⁹⁰ and thus “the child is entitled to determine the overall objectives to be pursued, the child’s attorney, as any adult’s lawyer, may make certain decisions with respect to the manner of achieving those objectives, particularly with respect to procedural matters,” and need not “consult with the child on matters which would not require consultation with an adult client.”⁹¹

In criminal proceedings, “the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal [citations omitted].”⁹² In a child protective, permanency, or termination of parental rights proceeding, the accused respondent should decide whether to go to trial or make an admission, whether to voluntarily take the stand and testify, and whether to agree to a proposed disposition. For the subject child in such a proceeding, who is not on trial, the principal concern is the child’s liberty interest in residing where he/she wants to and being safe in that environment, and in having visits with those individuals the child wishes to see. Accordingly, the child’s lawyer usually should be bound by a competent child’s wishes regarding those issues. If the child wants to return home, the lawyer would argue at a post-removal FCA §1028 hearing for the immediate return of the child, and/or argue at a fact-finding hearing for dismissal of the charges.

However, let us assume that the parents have agreed to waive a prompt §1028 hearing because their lawyers think it is best to wait until the timing is more advantageous, and that the child’s lawyer believes that a premature return to the home would place the child at undue risk and possibly sabotage the child’s long-term goal of family reunification. The child’s lawyer also may be concerned that a request for a §1028 hearing in such a case would be seen by the judge as frivolous, or at least odd given the parent’s failure to request a hearing. In this scenario, is the child’s continued desire for an immediate return to the parents a litigation goal over which the child has control? Or is ultimate reunification the litigation goal, and the lawyer has control over the pathway to that goal? While removal involves compelling liberty interests, and the lawyer must give considerable weight to the client’s desires, perhaps the lawyer should retain a measure of control and refrain from taking any ill-considered steps that the lawyer believes would reduce the chances of achieving the client’s long-term goal of family reunification.

Similarly, while dismissal of the petition upon a fact-finding hearing is a pathway to a child’s goal of reunification, perhaps the child’s lawyer, having determined that dismissal is an unrealistic goal, has discretion to contact the respondents’ lawyers and suggest that their clients

⁹⁰ *N.Y. Code of Prof’l Responsibility EC 7-7.*

⁹¹ *See supra* note 21, *Commentary to Standard B-4*; *see also Haziel v. United States*, 404 F.2d 1275, 1278 (D.C. Cir. 1968) (“The law allows counsel to speak for his client on many occasions. In an adversarial criminal proceeding, the client may be bound by his counsel’s calculated decision when trial tactics are involved. (citation omitted.) Such circumstances arise for the most part when the assertion of a claimed right may backfire if incorrect. Since these decisions must often be made in the heat of trial, and frequently involve nice calculations of procedural complexities and jurors’ likely reactions, the attorney must sometimes make the choice without consulting his client”).

⁹² *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

make judicial admissions, or, at a hearing, maneuver towards a finding on the least serious charge and/or elicit mitigation evidence.

Moreover, there are numerous decisions, *not* directly related to custody or fact-finding, that may be of interest to the child but properly lie within the lawyer's domain. For instance, a lawyer bound by a client's wishes to seek reunification certainly should not be bound by the child's opinion regarding treatment and services the parent should be required to accept, the frequency and nature of agency supervision, or other matters that may affect the child's chances of returning home.⁹³ In fact, it may be appropriate for the lawyer to request or agree to the provision of crucial mental health services *for the child* even though the child objects, when those services undoubtedly would serve the child's long-term litigation goals.

In sum, it is important to recognize that, even when the lawyer concludes that a child has the capacity to make decisions, some of the child's wishes may be put aside, or at least placed on a back burner, because the child's authority runs only to certain primary litigation goals, and not to the strategies designed to achieve them.

Decision-Making By the Lawyer: What is Substituted Judgment, Anyway?

Criteria For Lawyer's Decisions

In those cases in which the lawyer has properly decided to make decisions for the child, an important question remains: what criteria should the lawyer use? To answer this question, a distinction must be made between the lawyer's decisions regarding what the law requires, and decisions regarding what is best for the child. The often heard reference to "best interests" advocacy is an unfortunate one, since the statutes providing for assignment of counsel to the child do not use that terminology, and the child's best interests are often not part of the required analysis.

When the child's lawyer appears at a post-filing removal hearing, or at a hearing held upon a parent's application for the return of the child, the issue is whether there is an imminent risk to the child's life or health, not whether it would be better for the child to be residing outside the home.⁹⁴ At the Article Ten fact finding hearing, the issue is whether the parent's acts amount to abuse and/or neglect, and/or whether State intervention is necessary, not the child's best interests.⁹⁵ Even at a dispositional hearing, or a permanency hearing held prior to termination of

⁹³ Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 786 ("It may well be in the child's interests to advocate court-ordered services for his parent, thereby improving the home environment when the child is not removed or enhancing the possibility of reunification when the child has been placed").

⁹⁴ N.Y. Fam. Ct. Act §§ 1027(b)(i), 1028(b).

⁹⁵ See N.Y. Fam. Ct. Act § 1012; Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 806 (the "best interests" of the child are "largely irrelevant unless and until parental malfeasance has been proven"); Douglas Besharov, *Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings*, 20 J. FAM. L. 217, 220-234 (1981) (child's counsel should seek dismissal when there is no persuasive evidence of abuse or neglect; when the child, although abused or neglected in the past, faces no such danger in the future; when the child is protected by virtue of parents' cont'd on next page

parental rights, a critical factor in the court's custodial determination is whether a return of the child to the parent would present a risk of neglect or abuse.⁹⁶

In contrast, controversies in child protective proceedings that relate to parental and sibling visitation, or agency supervision, or treatment and services, or, when a return to a parent is not feasible, the choice of a custodian, do require the court, and thus the child's lawyer, to consider the child's best interests.⁹⁷ Of course, these "best interests" determinations often implicate the child's "legal interest in preserving her family's integrity and continuing her relationship with her family. . . ."⁹⁸

Other than the law, there is no proper basis for the lawyer's exercise of discretion when the child is not making decisions. Accordingly, while a lawyer engaged in client-directed advocacy will argue the child's position even if the lawyer believes the law mandates a different result -- for instance, a lawyer representing a seventeen-year-old child who wants to return home would argue for that result despite the lawyer's opinion that there may be some risk of harm -- a lawyer making decisions on behalf of the child "[m]ust conduct a thorough investigation, including interviewing the child, reviewing the evidence and applying it against the legal standard applicable to the particular stage of the proceeding," and, through this objective analysis, determine the child's "legal" interests. The lawyer has no right to make "best interests" determinations and act upon them when the law clearly states that a different standard applies.⁹⁹ Indeed, "[a] lawyer can bring a particularly valuable form of attention to a case by insisting upon statutory fidelity to the standards established through the democratic process to serve the needs of children and families."¹⁰⁰

Thus, if the child's lawyer does not believe that removal of the child is justified by an "imminent risk to life or health," as that risk was defined by the Court of Appeals in *Nicholson v. Scoppetta*,¹⁰¹ the lawyer should argue for a return of the child. If there is insufficient evidence of neglect at the fact-finding hearing, the lawyer should argue for dismissal. If the parents pose no threat to the child at the time of disposition and are legally entitled to custody, the lawyer should

voluntary acceptance of social services; and when harmful effects of state intervention outweigh danger child faces from parents); N.Y. Fam. Ct. Act § 1051(c) (even where there is sufficient evidence of neglect, court may dismiss petition if it "concludes that its aid is not required on the record before it").

⁹⁶ N.Y. Fam. Ct. Act § 1089(d); *Matter of Kenneth G.*, 39 A.D.2d 709 (2d Dept. 1972) (burden is on agency to establish parent's present inability to provide adequate care).

⁹⁷ See *supra* note 19, *Commentary to Standard A-4*.

⁹⁸ Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 *TOURO L. REV.* at 784-785. See also *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 *NEV. L.J.* at 685 (lawyer should "[a]dopt a position requiring the least intrusive state intervention").

⁹⁹ See *supra* note 19, *Standard A-4; Commentary to Standard A-4*.

¹⁰⁰ Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 *CORNELL L. REV.* at 959.

¹⁰¹ 3 N.Y.3d 357 (2004).

not argue for placement. Of course, because courts often focus on “best interests” rather than the governing legal standard, the lawyer “must become adept at translating her proposals to the court into the language of ‘best interests.’”¹⁰²

It has been suggested that lawyers are not qualified to make “best interests” determinations.¹⁰³ Certainly that will be true in some instances, and so, when making decisions that do have a “best interests” element, the child’s lawyer should employ a decision-making process that takes full account of the child’s wishes and life circumstances. The mistake made by many lawyers is to view client-directed advocacy and lawyer-directed advocacy as two distinct processes; having made a determination that the child lacks capacity to direct the representation, the lawyer proceeds to make decisions while pushing the child and her concerns to the periphery. But young children, even if not entitled to direct the lawyer, can make a substantial contribution to the lawyer’s decision-making process.

It could be said that the lawyer’s goal is to determine what position the child would take if he/she had the capacity to direct the representation.¹⁰⁴ Thus, effective representation “requires attorneys to be self-aware and respectful of the full context in which the client lives.”¹⁰⁵ Using a multi-disciplinary approach, the lawyer should formulate a position “through the use of objective criteria, rather than solely the life experience or instinct of the attorney. The criteria shall include but not be limited to: Determine the child’s circumstances through a full and efficient investigation; Assess the child at the moment of the determination; Examine each option in light of the two child welfare paradigms; psychological parent and family network; and Utilize medical, mental health, educational, social work and other experts.”¹⁰⁶

¹⁰² Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1515 (1996).

¹⁰³ See, e.g., Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. at 1525 (“The total discretion model . . . gives a lawyer a job for which he is neither trained nor qualified, prevents the lawyer from doing the job that he is qualified to do, and creates an unjust system where similar clients are not represented similarly”).

¹⁰⁴ *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. at 685.

¹⁰⁵ *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 593 (2006).

¹⁰⁶ See *supra* note 24, *Standard B-4(1)*. See also *supra* note 19, *Standard A-4* (in formulating substituted judgment, attorney “[s]hould consider the value of consulting a social worker or other mental health professional to assist the attorney in determining whether it is appropriate to override the child’s articulated position”); Marty Beyer, *Developmentally-Sound Practice in Family and Juvenile Court*, 6 NEV. L.J. 1215 (2006) (“Developmentally-sound practice in Family and Juvenile Court means seeing the complex and unique combination of trauma, disabilities and childish thinking behind the behavior of each child or adolescent”); *Marquez v. The Presbyterian Hosp. in the City of New York*, 159 Misc.2d 617, 625 (in order to provide effective assistance, lawyer should ascertain and consider all relevant facts, and then exercise discretion in good faith and to the best of the lawyer’s ability).

“Contextualized representation is particularly important because there are often vast socioeconomic or racial gaps between the attorneys and the clients they serve. As a result of these disparities, attorneys may not appreciate all of the particular legal and social dimensions of the presenting problem that is the initial or primary subject of the representation; the importance of the child’s family, race, ethnicity, language, culture, gender, sexuality, schooling, and home; and the child’s developmental status, physical and mental health, and other client-related matters outside the discipline of law.”¹⁰⁷

In connection with her conception of the “child in context,”¹⁰⁸ Professor Koh Peters poses seven questions “to keep lawyers for children honest”:

- (1) In making decisions about the representation, am I seeing the case, as much as I can, from my client’s point of view, rather than from an adult’s point of view?
- (2) Does the child understand as much as I can explain about what is happening in his case?
- (3) If my client were an adult, would I be taking the same actions, making the same decisions and treating her in the same way?
- (4) If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?

¹⁰⁷ *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. at 593-594; see also *supra* note 19, *Standard C-1* (“The attorney should take steps to educate him/herself in order to be reasonably culturally competent regarding the child’s ethnicity and culture”); *supra* note 19, *Commentary to Standard A-4* (when considering child’s best interests, “the lawyer’s formulation of a position should be accomplished through the use of objective criteria, rather than the life experience or instinct of the attorney,” and “[t]he lawyer should take into account the full context in which the client lives, including the importance of the child’s family, race, ethnicity, language, culture, schooling, and other matters outside the discipline of law”); *Report of the Working Group on the Role of Age and Stage of Development*, 6 NEV. L.J. at 666.

¹⁰⁸ “[Professor Koh Peters’s] model of representation posits three defaults, three umbrella principles, and seven questions to keep us honest. The defaults, principles, and questions restrict the attorney’s subjective discretion and require that the attorney develop a ‘thickly detailed’ understanding of ‘the child-in-context.’ The representation is, therefore, more objective and principled. First, the relationship default requires the attorney to meet and get to know the child, unless there is ‘weighty independent evidence that the meeting would serve the client no purpose or would yield such a minimal benefit to the client that it is outweighed by the costs to the client of planning such a visit.’ Second, the competency default views the child’s competency along a spectrum within which the child can contribute as much as possible to the representation. Finally, the advocacy default requires the attorney to represent the child’s expressed preference about issues unless the client cannot do so adequately in his or her own interest. An alternative to the advocacy default exists when addressing the situation where the attorney must represent the child’s best interests. Under the alternate default, the child’s voice, not the lawyer’s, continues to be a major focus. These defaults represent the starting place from which the attorney must individualize the representation to allow maximum participation of the child, reflecting that child’s uniqueness.” Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 HAMLIN J. PUB. L. & POL’Y 177, 184-185 (2006).

- (5) Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for the child?
- (6) Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?
- (7) Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?”¹⁰⁹

In the end, “if the child’s lawyer has spent the time necessary to understand the child’s needs from the child’s perspective and to establish rapport with the child, the range of what constitutes the child’s best available legal interests will be acceptably narrowed.”¹¹⁰

It is true that when the lawyer makes decisions on behalf of the child, the lawyer’s advocacy can overlap with the judge’s function. Moreover, one lawyer may have a different view of the law than another.¹¹¹ And, even lawyers who employ an individualized, *client-focused* analysis are not immune to the taint of subjectivity.¹¹² For these reasons, it has been suggested that the lawyer for an infant, with no client and guided only by the law and the lawyer’s potentially biased opinions, has no legitimate role to play and should not participate in the fact finding hearing.¹¹³ In reality, however, this option is not open at any stage of the proceeding to a

¹⁰⁹ Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. at 1511; see also Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. at 70-77; Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 FORDHAM L. REV. 1955 (1996).

¹¹⁰ Ann M. Haralambie, *Response to the Working Group on Determining the Best Interest of the Child*, 64 FORDHAM L. REV. at 2017.

¹¹¹ Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. at 53 (attorney for young child “who seeks to enforce [statutory] mandates will be forced to use substantial discretion in interpreting . . . which legal interests are present, and what will be required to satisfy those interests in a given proceeding”).

¹¹² Peter Margulies, *Lawyering for Children: Confidentiality Meets Context*, 81 ST. JOHN’S L. REV. 601, 618 (2007) (“In the child welfare setting. . . hindsight bias magnifies the perception that measures taken by government can readily prevent tragedies such as the deaths of young children due to abuse. In reality, preventing such tragedies requires dealing with a large number of variables, and incurring substantial opportunity costs, such as taking children away from a substantial number of parents who may be fit”); Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. at 1526 (it is “inevitable that the lawyer will sometimes resort to personal value choices, including references to his own childhood, stereotypical views of clients whose backgrounds differ from his, and his own lay understanding of child development and children’s needs, in assessing a client’s best interests. Especially for practitioners who must take cases in high volume, the temptation to rely on gut instinct, stereotype, or even bias is overwhelming”); Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. at n. 202 (lawyer must be careful, for “[t]he distinction between advocating statutory fidelity, on the one hand, and advocating the lawyer’s own objectives, on the other, sometimes will prove elusive”).

¹¹³ Guggenheim, *The Right To Be Represented But Not Heard: Reflections On Legal Representation For Children*, 59 N.Y.U. L. REV. at 138.

lawyer who has been assigned by the court and is expected to participate, or to a law firm that is under State contract to provide representation to children in these proceedings.

More importantly, it is not true that the lawyer has no role to play. There are a number of important matters to be addressed during the often lengthy delays between the filing of the petition and the fact finding hearing. Moreover, unlike the judge, the child's lawyer is in a position to conduct a full investigation outside of court and supply the child with an advocate who is in possession of all the facts and takes full account of the child's wishes.¹¹⁴

"In all circumstances where an attorney is substituting judgment in a manner that is contrary to a child's articulated position or preferences, the attorney must inform the court that this is the basis upon which the attorney will be advocating the legal interests of the child."¹¹⁵ The lawyer should state the basis for disagreeing with the child's stated position.¹¹⁶ The lawyer also must ensure that the child's wishes are communicated to the court.¹¹⁷

¹¹⁴ Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 817 ("The younger child would be effectively unrepresented and, at least in the absence of a guardian ad litem, would have no representative to argue for his interests"); Duquette, *Two Distinct Roles/Bright Line Test*, 6 Nev. L.J. at 1246 ("The better view is that children indeed need advocates in this complex and often-chaotic process"); Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act § 241 ("No one can disagree that determining where a child's interest lies is a subjective and dangerous task (although, of course, judges do so every day). . . . Nevertheless, adopting a 'neutral' posture about the need to dismiss a case leaves unprotected the child for whom court intervention may be harmful"); cf. *Matter of Ray A.M.*, 37 N.Y.2d 619, 624 (1975) (since child could not speak for herself in termination proceeding, her lawyer's "highly competent neutral submission is reassuring").

¹¹⁵ See *supra* note 19, *Standard A-4*.

¹¹⁶ See *K.C. Clark v. Alexander*, 953 P.2d 145, 153-154 (Wyoming 1998); *Marriage of Rolfe*, 699 P.2d 79, 87 (Montana 1985).

¹¹⁷ N.Y. Fam. Ct. Act § 241; *Matter of Derick Shea D.*, 22 A.D.3d 753, 754 (2d Dep't 2005) (orders terminating parental rights reversed, and matter remitted for new dispositional hearing, where law guardian expressed opinion that best interests of children, ages ten and fourteen, called for termination of parental rights, and set forth his reasoning, but failed to state that children had expressed desire to be returned to mother); see *supra* note 19, *Standard A-3* ("the attorney for the child must inform the court of the child's articulated wishes, unless the child has expressly instructed the attorney not to do so").

We will not in this article address the separate question of whether, and, if so, under what circumstances, a child has the right or should be permitted to appear in court during the proceedings. See *supra* note 19, *Standard D-5* does state that "[t]he attorney shall determine whether the child wishes to be, or in the case of a child who lacks capacity, whether the child should be present during courtroom proceedings. When the attorney determines that the child wishes to or should be present, the attorney shall make necessary applications to the court and otherwise attempt to enforce the child's right to be present." We also note that under Social Services Law §409-e(2), a family service plan "shall be prepared in consultation. . . with the child if the child is ten years of age or older, and, where appropriate, with the child's siblings. Such consultation shall be done in person, unless such a meeting is impracticable or would be harmful to the child." Also, the Federal Children and Families Services Improvement Act of 2006 [Public Law 109-288; S. 3525] has amended §475(5)(C) of the Social Security Act to make Title IV-E foster care eligibility contingent upon the existence of procedural safeguards that "assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court. . . consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child." This Federal legislation resulted in a State requirement that the court conduct "age-appropriate consultation with the child who is the subject of [a] permanency hearing. . . ." FCA §1089(d); see *Matter of Pedro M.*, 2008 WL 4379608 (Fam. Ct., Albany Co., 2008) (court establishes guidelines cont'd on next page

Taking No Position

Nowhere is it written that, when making decisions on behalf of a child, the lawyer *has to take a position*. It is inconceivable that a lawyer with a large caseload will not sometimes encounter legal issues, or “best interests” determinations, that are such close calls that the lawyer cannot in good conscience make a definitive pronouncement in court that may well sway the judge. For instance, when the statutory “*res ipsa loquitur*” presumption comes into play because the child has suffered serious injuries,¹¹⁸ but the respondent parents are among many adults who cared for the child during the period when the injuries were sustained and/or the parents have offered a plausible explanation for the injuries or credible denials of guilt, should a lawyer who is genuinely torn take a position just for the sake of it?

And what about the lawyer who is assigned at a removal hearing to represent an infant? Since it is clear that the lawyer will not be providing client-directed representation, the lawyer could seek to elicit as much relevant evidence as possible, and consider taking a preliminary position if she has a good faith basis for determining whether the requisite imminent risk exists. But with only the petition, and, perhaps, a child protective caseworker to guide her, the lawyer will sometimes find it appropriate to refrain from making such a judgment because of insufficient facts in a cold record.

Of course, the lawyer for an older child, for whom the lawyer is likely to provide client-directed representation, ordinarily should not take a position before speaking to the client or obtaining, through other means, clear-cut information regarding the child’s position.¹¹⁹

The “Grave Physical Harm” (or “Seriously Injurious”) Exception

Section 7.2 of the Rules of the Chief Judge states that the child’s attorney “would be justified in advocating a position that is contrary to the child’s wishes” when “following the child’s wishes is likely to result in a substantial risk of imminent, serious harm to the child...” *N.Y.S.B.A. Standard A-3* states that the child’s attorney may “substitute judgment and advocate in a manner that is contrary to a child’s articulated preferences” when “[t]he attorney has concluded that the court’s adoption of the child’s expressed preference would expose the child to

that presume child age seven or over should be produced in court and that child under seven should not, and provide that if attorney for child under age seven wishes to have child appear in court, attorney need only communicate that to court and agency with good faith basis for request).

¹¹⁸ See N.Y. Fam. Ct. Act § 1046(a)(ii).

¹¹⁹ *Utah State Bar Opinion 04-01A*, 2004 WL 2803335 (lawyer cannot represent individual unless the two have communicated and established attorney-client relationship); *Dunkley v. Shoemate*, 515 S.E.2d 442, 445 (N.C., 1999) (person may not appear as attorney without grant of authority by person for whom attorney is appearing); cf. *In re Joshua K.*, 272 A.D.2d 160, 161 (1st Dep’t 2000) (no error where court conducted TPR inquest in absence of counsel for respondent after original attorney was disqualified; even if new counsel had been appointed, there was no showing that respondent would have cooperated or been available for consultation).

imminent danger of grave physical harm and that this danger could not be avoided by removing one or more individuals from the home, or by the provision of court-ordered services and /or supervision.”¹²⁰ A similar, “seriously injurious” exception has been adopted by the American Bar Association and the National Association of Counsel for Children.¹²¹

Further support for this exception may be found in *City Bar Ethics Opinion 1997-2*,¹²² where it was held that a lawyer may disclose confidential information concerning abuse or maltreatment in “extreme” and “rare” cases in which “the lawyer honestly concludes, after full consideration,” that disclosure is necessary to prevent the client from being killed or maimed” by another person or from killing or maiming himself or another. Similarly, in *State Bar Ethics Opinion 486*,¹²³ it was held that a lawyer may disclose a client’s expressed intention to commit suicide.

¹²⁰ See also *supra* note 19, *Commentary to Standard A-3* (“use of the language, ‘imminent danger of grave physical harm’ . . . is intended to include sexual abuse and to recognize the extraordinary circumstances that should be present before overriding a child’s expressed position”); *supra* note 19, *Commentary to Standard A-4* (“Substituted judgment should only be used if the attorney has objective factual evidence to support the conclusion that a failure to substitute judgment would expose the child to imminent danger of grave physical harm”).

¹²¹ See *supra* note 21, *Standard B-4(3)*; *supra* note 24, *Standard B-4(4)*. While the exception in § 7.2 of the Rules of the Chief Judge arguably includes serious *emotional* harm, the Rule merely permits lawyers to make decisions on behalf of children in certain cases, but does not require them to do so. Thus, children’s lawyers in New York remain free to adhere to the stricter standards. See also *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. at 609 (client-directed representation not mandated when “the child’s expressed preferences would be seriously injurious”; seriously injurious “does not mean merely contrary to the lawyer’s opinion of what would be in child’s interests”); Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y.L.J., Oct. 6, 1992, at 1 (law guardian may refuse to argue for result that would place child in “imminent danger,” which “connote[s] a grave immediate danger”); Haralambie, *Response to the Working Group on Determining the Best Interest of the Child*, 64 FORDHAM L. REV. at 2017 (for some children, “a certain degree of physical maltreatment or neglect may be far outweighed by the importance of other benefits of life with the family: affiliation, continuity of environment, proximity to friends, activities, and school, availability of pets, and other needs that the family meets”). Section 7.2 of the Rules of the Chief Judge states that the child’s attorney “would be justified in advocating a position that is contrary to the child’s wishes” when “following the child’s wishes is likely to result in a substantial risk of imminent, serious harm to the child. . . .” While the harm contemplated in Rule 7.2 appears to be of a lesser degree than that contemplated in the other standards, the Rule merely permits lawyers to make decisions on behalf of children more often; it does not require them to do so. Thus, children’s lawyers in New York remain free to adhere to the stricter standards.

¹²² 1997 WL 1724482. See also A.B.A. *Model Rules of Prof’l Conduct, Rule 1.14* (“When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian,” and, when taking such protective action, “the lawyer is impliedly authorized . . . to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests”).

¹²³ 1978 WL 14149.

Moreover, in some cases the lawyer will be unable to advocate for the child's desires because the argument would be frivolous.¹²⁴

Before invoking the "grave physical injury" exception, the child's lawyer should first consider whether there is a safety plan that would adequately address the danger, and begin by advocating for imposition of such a plan.¹²⁵ And, when employing the exception, the lawyer "should advocate a remedy which is as close as possible to the child's wishes as possible, but does not result in imminent danger" of serious harm.¹²⁶

The Lawyer's Role in Presenting Evidence

Ordinarily, a lawyer attempts to present evidence that advances the client's position, and to prevent the introduction of evidence that undercuts the client's position. However, in *Matter of Scott L. v. Bruce N.*,¹²⁷ a custody proceeding, the court opined that a child's lawyer, rather than "suppress or withhold information which could be relevant to the court's determination of the child's best interests, when such evidence runs contrary to the result the child desires," should uncover and offer evidence of abuse or neglect, and other evidence that has been withheld by the other parties. "Zealous advocacy should never be permitted to interfere with this crucial function." The court noted that "[t]here is nothing in the statutes nor in case law. . . which says that a Law Guardian in a custody proceeding should advocate for the child's wishes at the expense of his over-all interests or at the expense of a full presentation of the facts."¹²⁸ Since the court had already held that the child's lawyer in a custody proceeding does *not* act in the traditional advocate's role and is not compelled to advocate for what the child wants, the court's imposition of a superseding duty to present relevant evidence was not surprising.¹²⁹

In contrast, when a lawyer is providing client-directed representation in a child protective proceeding, in which the child's liberty interests are more compelling than in a custody

¹²⁴ See *supra* note 21, *Standard B-4(3)* (lawyer may not advocate position that is prohibited by law or without any factual foundation); Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y.L.J., Oct. 6, 1992, at 1 ("Further, advocating the child's wishes when a court has found imminent danger may be deemed to be a frivolous position as defined in the Rules of Professional Responsibility, and attorneys are admonished to refrain from advocating a frivolous position"); cf. *Matter of Peter "VV"*, 169 A.D.2d 995, 997 (3d Dep't 1991) (PINS respondent not denied effective assistance of counsel where law guardian acknowledged need for placement despite respondent's contrary desire, but "[t]here simply was no evidence in the record that would have supported a less restrictive alternative disposition").

¹²⁵ See *supra* note 19, *Standard A-3*.

¹²⁶ Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y.L.J., Oct. 6, 1992, at 1.

¹²⁷ 134 Misc.2d 240.

¹²⁸ 134 Misc.2d at 245-246.

¹²⁹ See also Guggenheim, *Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* at 1432-1433 (in custody cases, lawyer should "uncover relevant facts that place the judge in the best position to decide the case and to protect the child from harm that may result from the litigation itself").

proceeding, there is no sound justification for this approach if the lawyer's decision to advocate for the result the child desires is to have any meaning.

A limited obligation to bring evidence of abuse or neglect to light is imposed upon the child's lawyer by FCA §1075, which states that when, upon receipt of a post-dispositional report from a child protective agency, the law guardian determines that "there is reasonable cause to suspect that the child is at risk of further abuse or neglect or that there has been a substantive violation of a court order," the law guardian "shall apply to the court for appropriate relief pursuant to [FCA §1061]." While one expert has opined that "[s]ince there is no mention of the child's wishes or desires, the Law Guardian seems to have been transformed into an auxiliary child protective worker,"¹³⁰ that is not the case. First of all, an application for relief cannot be based on information protected by the attorney-client privilege. In addition, because the relief sought by the child's lawyer must be "appropriate," and §1061 requires "good cause" for any application to stay execution of, set aside, modify or vacate a dispositional order, the lawyer cannot apply for relief unless the facts warrant a new dispositional order. Finally, from a client-directed lawyer's perspective, relief is not "appropriate" when the child does not want it. While New York appellate courts have recognized that the lawyer has an obligation to ensure that the evidence supporting the client's position is fully presented, they have never suggested that the lawyer should present evidence that would *undermine* the client's position. On the contrary, in *Matter of Colleen CC.*,¹³¹ the court found a violation of the right to effective assistance of counsel where a lawyer, while thoroughly questioning a fourteen-year-old client, "made a point of breaking down [the child's] direct testimony, raising the possibility that he had been "coached" by his mother during a recess and effectively impeaching him by exploring prior inconsistent statements, all for the obvious purpose of discrediting his allegations of abuse."¹³²

When the lawyer is not providing client-directed representation, and plans to take a position at the hearing that is consistent with a properly formulated view of the child's legal interests, it does not seem prudent for the lawyer to challenge the introduction of relevant evidence or eschew opportunities to examine witnesses in an effort to ascertain more facts. It may "seem[] unwise, as well as naive, to expect a Law Guardian to withhold judgment--if he or she has performed a full investigation prior to the hearing."¹³³ However, the lawyer cannot be dead certain of her position until after a full hearing.¹³⁴

¹³⁰ Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act § 241.

¹³¹ 232 A.D.2d 787 (3d Dep't 1996).

¹³² 232 A.D.2d at 788.

¹³³ Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act § 241; *see also Cervera v. Bressler*, 50 A.D.3d 837 (2d Dep't 2008) (child's attorney, upon appropriate inquiry, may form opinion about merits of case); *Carbeillera v. Shumway*, *supra*, 273 A.D.2d 753 (although law guardian should not have stated that he was "biased," he only "intended to communicate that after being exposed to the evidence, he had formed a professional opinion concerning the proper disposition of custody and thus had a preference for respondent"); *Matter of TM*, 19 Misc.3d 1113(A) (Fam. Ct., Kings Co., 2008) (although child's attorney should not have position in mind at outset of case, it is appropriate for attorney to form opinion later and attempt to persuade court to adopt that position; child's attorney "cannot be required to satisfy standards of performance laid down for her by other counsel in the case, whose motives are dictated by the obligation to represent another party, with his or her own interests, which may not cont'd on next page

On the other hand, courts have made it clear that the “a law guardian is the attorney for the children,” and not “an investigative arm of the court. While law guardians, as advocates, may make their positions known to the court orally or in writing (by way of, among other methods, briefs or summations), presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate practices (citations omitted). Consequently, courts should not direct law guardians to make such reports.”¹³⁵

Whatever role the child’s lawyer is playing, the lawyer should prepare trial strategy in close coordination with counsel for any party whose litigation goals are aligned with the child’s. “The child’s position may overlap with the positions of one or both parents, third-party caretakers, or a child protection agency. Nevertheless, the child’s attorney should be prepared to participate fully in every hearing and not merely defer to the other parties. Any identity of position should be based on the merits of the position . . . and not a mere endorsement of another party’s position.”¹³⁶

Conclusion

No model of representation is perfect, and so debater’s points can be scored against each one. But the perfect should not become the enemy of the good. We are compelled to choose this

coincide with the interests of the child”).

¹³⁴ See *Matter of Williams v. Williams*, 35 A.D.3d 1098, 1100 (3d Dep’t 2006) (law guardian improperly acquiesced in truncated custody hearing and formulated position in absence of complete record); *Matter of Apel*, 96 Misc.2d 839, 842 (Fam. Ct., Ulster County, 1978) (“For the law guardian to undertake such an assessment, make a judgment on the basis of that assessment as to which of his client’s interests should receive paramount consideration, and then tailor his trial strategy accordingly, is a self-servicing exercise in which the lawyer judges the ultimate issues in the case and then sets out to implement his own judgment”); Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act § 241 (“Therefore, even when Law Guardians are not sure that their young clients are of sufficient maturity to make a reasoned decision about the course of the proceeding, they should . . . seek the fullest presentation of the facts concerning the allegations of the petition and the family’s present situation”).

¹³⁵ *Weiglhofer v. Weiglhofer*, 1 A.D.3d 786, 789, n.* (3d Dep’t 2003); see also *Cervera v. Bressler*, 50 A.D.3d 837, 840-841 (2d Dept. 2008) (child’s attorney disqualified where he disclosed facts which were not part of record and constituted hearsay gleaned from mother, and made repeated ad hominum attacks on father’s character, which effectively made attorney witness against father); *Naomi C. v. Russell A.*, 48 A.D.3d 203 (1st Dept. 2008) (court improperly asked law guardian to discuss position of ten-year-old child regarding how well custody arrangement was working, but acted properly in disallowing “cross-examination” of law guardian by petitioner’s counsel; court should not consider hearsay opinion of child in determining legal sufficiency of pleading, and such colloquy makes law guardian an unsworn witness, “a position in which no attorney should be placed”); *Graham v. Graham*, 24 A.D.3d 1051, 1054 (3d Dep’t 2005), *lv denied*, 6 N.Y.3d 711 (“We have not given the Law Guardian’s summation greater weight than the arguments and positions of the attorneys for the parents and have treated the ‘recommendations’ of the Law Guardian more properly as the position of the attorney representing the child”).

¹³⁶ See *supra* note 21, *Commentary to Standard D-4*. See also Christine Gottlieb, *Children’s Attorneys’ Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263, 1275 (2006) (“Children’s lawyers should proactively pursue any position of parents that would serve children’s interests”).

model because it is the best one.¹³⁷ Minimizing use of the guardian *ad litem* model reduces the number of instances in which representation becomes skewed by the preferences, and idiosyncratic biases and personal philosophies of individual lawyers. The age parameters we have set also make sense. Allowing lawyers to focus on maturity in determining when to provide client-directed representation leads to arbitrary determinations as to who is and is not “mature”-- many older teenagers and adult clients would fail that test -- and permits a lawyer to discount the child’s position whenever the lawyer thinks it reflects a lack of sound judgment. When the focus is on the child’s baseline capacity to communicate a position and the reasons for it, rather than on the child’s ability to make well-reasoned judgments, there will be more consistency in child advocacy. As long as the child’s lawyer also concentrates on protecting the child in the home or institution in which the child is residing, the safety and best interests of the child will be promoted.

The model we have adopted does not remove entirely the risk of bias or arbitrariness, but the only solution would be to adopt a model requiring the lawyer to merely assist the court in gathering evidence, without taking positions and making arguments. That would relegate the lawyer to duty as an adjunct to the court, and turn the lawyer into something other than *the child’s* lawyer.

Given the lawyer’s counseling function, her authority to develop a litigation strategy, her discretion to invoke the “seriously injurious” exception to client-directed advocacy, and the ethical proscription against frivolous arguments, cases in which the child’s lawyer is advocating for a result that would place a child at risk of substantial harm should not occur. More importantly, the law guardian’s representation should never undermine, and usually will enhance, the judge’s ability to ascertain the facts and make well-informed decisions. When the choice is between a lawyer who merely assists the judge in arriving at a decision the judge is fully qualified to make on her own, and a lawyer who provides the judge with a window into the child’s unique perspective, the choice is a simple one. These are proceedings that can change the course of the child’s life, and thus the child must be heard.

¹³⁷ In *A Child’s Right to Counsel: First Star’s National Report Card on Legal Representation for Children*, New York received an overall grade of “A” for its system of representation in abuse/neglect proceedings because, “[u]nder New York’s statute, a lawyer must represent the child’s wishes and interests.” *Id.* at 78.