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Seen But Not Heard: Advocating for Children in New York State

Sarah L. Marx

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SEEN BUT NOT HEARD: ADVOCATING FOR CHILDREN IN NEW YORK STATE

*Sarah L. Marx**

On November 1, 2008, the New York State Bar Association House of Delegates approved a resolution affirming their commitment towards establishing a civil right to counsel in New York State. One of the issues identified is a child's right to representation not only in criminal, but also civil proceedings. Unlike other litigant groups, children have a statutorily established right to council in civil proceedings. However, as the white paper, adopted by the New State Bar Association, details, there are gaps in children's advocacy throughout New York State. While significant steps towards improvement have recently taken place, there is still a long road until a collective voice for children is heard as loudly as their adult counterparts. This Comment explores the current state of the law and advocacy models in order to analyze what has been done towards improving a child's right to counsel, as well as possible future steps. It is this author's hope that the voices of children one day resonate as loudly as other politically powerful groups in New York. The children are New York's future, and their lives need to be improved.

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* B.S. Policy Analysis and Management, Cornell University 2005; J.D. Candidate, 2009 Touro Law Center. Thanks to Professor Myra Berman, Professor Lewis Silverman, Tom Maligno, Andrew Scherer, Sardar Asadullah, and Isaac Samuels for their thoughts and guidance.

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**SEEN BUT NOT HEARD:
ADVOCATING FOR CHILDREN IN NEW YORK STATE**

INTRODUCTION

While children in New York have a right to an attorney in most court proceedings, it is apparent that there are significant gaps in their access to counsel. This Comment seeks to analyze and discuss the current state of the law through examining New York's statutory framework, court cases, and professional organizational standards. This Comment will then combine this statutory framework with the three prevailing models of child advocacy to devise strategies and solutions towards providing greater, more effective representation for New York's children most in need. In four parts, this Comment seeks to create a framework for discussion, create a picture of current child advocacy, rights and practices, and propose strategies and solutions from this point forward. Part I discusses the current state of the law through detailing the statutory, legal, and professional framework for representing children in New York. Part II discusses factors in representing children and how they interact to frame the discussion of the most effective advocacy in a given situation. Part III details the three prevailing child advocacy models and fleshes out their strengths and weaknesses and then explores how New York courts have applied these models in the past. Part IV details the current problems in child representation in New York, what has been done so far, and what can be done towards future improvements. It is this author's hope that this Comment will serve to gener-

ate discussion on improving child advocacy in New York.

I. THE CURRENT STATE OF THE LAW

A. Statutory Framework

As a general matter, Section 241 of the New York Family Court Act provides that “minors who are the subject of family court proceedings or appeals in proceedings originating in family court should be represented by counsel of their own choosing or by law guardians.”¹ Further, Judiciary Law Section 35(7) authorizes the appointment of a law guardian in all cases commenced in Supreme Court and Surrogate’s Court that could have been commenced in Family Court.²

Counsel is also provided for in specific proceedings. Articles 3 and 7 of the Family Court Act provide for a child’s right to counsel in delinquency and Persons in Need of Supervision (“PINS”) proceedings.³ Social Services Law Section 384-b and Article 6 of the Family Court Act provide children with counsel in a termination of parental rights proceeding.⁴ Counsel in permanency hearings are set

¹ N.Y. FAM. CT. ACT § 241 (McKinney 2008). “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.” *Id.* at §241. See also *Campolongo v. Campolongo*, 768 N.Y.S.2d 498, 500 (App. Div. 2d Dep’t 2003) (stating that it is a denial of a child’s due process rights to be interviewed without a law guardian to protect the child’s interests).

² N.Y. JUD. LAW § 35(7) (McKinney 2007).

³ *Rapoport v. Berman*, 373 N.Y.S.2d 652, 654 (App. Div. 2d Dep’t 1975) (holding that a child’s right to counsel as set forth in *In re Gault*, also extends to PINS and delinquency proceedings).

⁴ N.Y. SOC. SERV. LAW § 384-b (McKinney 2007); N.Y. FAM. CT. ACT Art. 6.

out in Article 10-A of the Family Court Act.⁵ Lastly, counsel in certain foster care review proceedings are provided for in Social Services Law Section 358-a.⁶ Removal of counsel is also reviewable upon direct appeal.⁷

Section 249 of the Family Court Act further states that judges are not required, but can at their discretion, appoint law guardians in custody, visitation, interstate custody, and adoption proceedings, and in some family offense and paternity proceedings.⁸ Additionally, Section 249-a of the Family Court Act creates a rebuttable presumption that “[a] minor who is a subject of a juvenile delinquency or a person in need of supervision proceeding . . . lack[s] the requisite knowledge and maturity to waive the appointment of a law guardian.”⁹ Lastly, Section 249-b of the Family Court Act sets forth that the chief administrator of the courts determines the court rules on “workload standards for attorneys for children, including maximum numbers of children who can be represented at any given time.”¹⁰

Each county in New York State also has a law guardian panel overseen by each of the four Appellate Division departments through a Law Guardian Director.¹¹ “In counties without an institutional law

⁵ See N.Y. FAM. CT. ACT §§ 1086-1090 (McKinney 2008).

⁶ N.Y. SOC. SERV. LAW §358-a (McKinney 2006).

⁷ See *Cassandra R. v. Flemma*, 703 N.Y.S.2d 792, 793 (App. Div. 4th Dep’t 2000).

⁸ N.Y. FAM. CT. ACT § 249 (McKinney 2008); see also JULIA VITULLO-MARTIN & BRIAN MAXEY, NEW YORK FAMILY COURT: COURT USER PERSPECTIVES 14 (2000), http://www.vera.org/publication_pdf/nyfamilycourt.pdf [hereinafter VITULLO-MARTIN & MAXEY].

⁹ N.Y. FAM. CT. ACT § 249-a (McKinney 2008).

¹⁰ N.Y. FAM. CT. ACT § 249-b (McKinney 2007).

¹¹ PRELIMINARY REPORT OF THE CHIEF ADMINISTRATIVE JUDGE PURSUANT TO CHAPTER 626 OF THE LAWS OF 2007 4 (Dec. 2007), available at <http://www.courts.state.ny.us/ip/gfs/LawGuardianDoc2007.pdf> [hereinafter PRELIMINARY

guardian provider, law guardians are assigned solely from county law guardian panels.”¹² Panel law guardians are attorneys in private practice whom the appellate divisions certify as eligible to accept law guardian assignments from judges. They are reimbursed by the state at seventy-five dollars per hour for both in-court and out-of-court time.¹³ The key difference between a law guardian assigned from the panel and an institutional provider is that institutional providers are able to regulate their caseloads by declining an assignment, while an institutional provider must accept all cases where there is no conflict of interest between representing the child and the parent(s).¹⁴

B. Children’s Rights Established by Caselaw

The landmark Supreme Court case *In re Gault*¹⁵ guarantees that a child has a constitutional right to counsel in juvenile delinquency proceedings under the Fourteenth Amendment, including notice of charges, as well as evidentiary protections such as confrontation, cross examination of witnesses, and the privilege against self-incrimination.¹⁶ Commentators have since interpreted *Gault* as “conclud[ing] that young children are empowered to set the objective of their criminal case to the same degree as an unimpaired adult.”¹⁷

Interestingly, the United States Supreme Court has never de-

REPORT].

¹² PRELIMINARY REPORT, *supra* note 11, at 4.

¹³ N.Y. JUD. LAW §35(3); *see also* PRELIMINARY REPORT, *supra* note 11, at 4.

¹⁴ PRELIMINARY REPORT, *supra* note 11, at 4.

¹⁵ 387 U.S. 1 (1967).

¹⁶ *Gault*, 387 U.S. at 41.

¹⁷ Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1423 (1996).

terminated “whether children in protective proceedings are constitutionally entitled to representation.”¹⁸ The Court has also never held that a “child in an abuse or neglect proceeding has a constitutional right to counsel, although most jurisdictions require independent representation for the child.”¹⁹

New York has since incorporated *Gault* into its civil jurisprudence.²⁰ *In re Jamie TT*²¹ established the constitutional right to counsel for children in civil matters and reiterated and refined the statutory right to counsel in civil proceedings in New York.²² Further, *Nicholson v. Scoppetta* clarified this right when it established the standard for removing a child from the home in New York.²³

Another important issue in child advocacy is the child’s ability to be present at court proceedings. New York does not currently have any legislation, nor has it recognized a constitutional right for children to be present at their court proceeding. However, the American Bar Association (“ABA”) has recognized a right to “meaningful participation in the proceeding,” which includes “the opportunity to be present at significant court hearings.”²⁴

¹⁸ Merrill Sobie, *The Child Client: Representing Children in Child Custody Protective Proceedings*, 22 TOURO L. REV. 745, 757-58 (2006).

¹⁹ Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1679 (1996).

²⁰ *Rapoport*, 373 N.Y.S.2d at 654 (holding that a child’s right to counsel as set forth in *In re Gault*, also extends to PINS and delinquency proceedings).

²¹ 599 N.Y.S.2d 892 (App. Div. 3d Dep’t 1993).

²² *Jamie TT*, 599 N.Y.S.2d at 894.

²³ 820 N.E.2d 840, 854 (N.Y. 2004).

²⁴ NYSBA COMM. ON CHILDREN AND THE LAW: STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CHILD PROTECTIVE, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS 16 (2007), <http://www.courts.state.ny.us/ad3/lg/June2007CoverandStandards.pdf>. [hereinafter NYSBA STANDARDS].

Currently in New York, the Chief Administrator of the Courts has stated that law guardians may not represent more than 150 children at a time.²⁵ The burden is also on the legal services providers to adhere to these limits.²⁶ However, Chief Administrative Judge Pfau stated that these limits could be adjusted after considering other factors, including: “the complexity of a law guardian’s cases, where the cases are in the adjudication process, the availability of support staff and whether a guardian is being asked to represent siblings of clients.”²⁷

These new court rules have been met with criticism.²⁸ Section 7.2 of the Rules of the Chief Judge has an internal inconsistency when it provides that “where the attorney overrides the child’s wishes, the attorney must nonetheless inform the court of the child’s expressed preference ‘if the child wants the attorney to do so.’”²⁹ There is a conflict here between the best interests and child attorney representational models.³⁰ The attorney is forced to take on two “incompatible legal positions: stating the youth’s wishes to the Court while simultaneously undermining those wishes by stating the attorney’s own position on the case”³¹ if she feels her client is incapable

²⁵ Joel Stashenko, *Law Guardian Cases are Capped at 150*, 239 N.Y.L.J. 1 (2008).

²⁶ Stashenko, *supra* note 25.

²⁷ Stashenko, *supra* note 25.

²⁸ Timothy M. Tippins, *The Ambiguous Role of Law Guardians*, 239 N.Y.L.J. 3 (2008). “While the new court rule at least suggests that advocacy for the child’s wishes ought to be the default position of the child’s attorney, its allowance of an attorney override remains enormously problematic.” *Id.*

²⁹ Tippins, *supra* note 28 (quoting N.Y. R. CHIEF J. §7.2(d)(3)).

³⁰ See *infra* text accompanying notes 77-87 (discussing the best interests model); see *infra* text accompanying notes 102-109 (discussing the attorney for the child model.)

³¹ Theresa Hughes, *A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children’s Advocates*, 40 COLUM. J. L & SOC. PROBS. 551, 577 (2007).

of making a reasoned decision. Notably, the new rules have characterized law guardians as an “attorney for the child,” which was previously not a common practice.³² Thus, while there is a movement in New York to provide children with better quality representation in legal proceedings, New York courts have been slow to adopt this new framework of child advocacy.

C. Professional Standards for Representing Children

Commentators have characterized “[t]he philosophy of the legal profession or, more accurately, of the organized bar and academy, [as] . . . opposite that of legislators, both state and federal.”³³ The New York State Bar Association and American Bar Association professional responsibility codes “support the right of the client to determine the objectives of a proceeding when the client is capable of making a considered judgment. However, the codes are silent about what standards should be used to judge the client’s decision-making abilities, and the standards used in practice have varied widely.”³⁴ This section compares and contrasts the standards espoused by the New York State and American Bar Associations for representing children in order to assess the differences and similarities of the two standards and how they impact child advocacy in New York.

1. *The New York State Bar Association*

The New York State Bar Association (“NYSBA”) standards

³² Stashenko, *supra* note 25.

³³ Sobie, *supra* note 18, at 798.

³⁴ Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L. Q. 287, 304-05 (1983).

state that no matter how the child's attorney is characterized, the 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."³⁵ To determine the best course of action for the child, the attorney 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,"³⁶ including "multiple interviews with youth clients, visiting the home, developing a rapport with youth clients, and conferring [with the client] as often as the client demands."³⁷

The lawyer's duty to the child encompasses explaining to the child, "in a developmentally appropriate manner, all information that will help the child to understand the proceedings, make decisions, and otherwise provide the lawyer with meaningful input and guidance."³⁸ Since children are more easily manipulated than adults, the "lawyer should ensure that the child's decisions reflect his/her actual position. The lawyer [also] has a duty not to overbear the will of the child."³⁹

An attorney cannot substitute her own judgment and advocate for a position contrary to the child's stated preference except where: 1) the child's preference would "expose the child to imminent danger of grave physical harm and . . . this danger could not be avoided by

³⁵ NYSBA STANDARDS, *supra* note 24, at 2.

³⁶ *Id.*

³⁷ Hughes, *supra* note 31, at 575.

³⁸ NYSBA STANDARDS, *supra* note 24, at 2.

³⁹ *Id.*

removing one or more individuals from the home, or by the provision of court-ordered services and/or supervision;” or 2) the child is incompetent “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.”⁴⁰ However, whenever the attorney is substituting her own judgment for that of the child’s preference, “the attorney must inform the court that this is the basis upon which the attorney will be advocating the legal interests of the child.”⁴¹

Lastly, attorneys for children in New York are subject to the ethical rules governing all lawyers. This includes, but is not limited to: “ex parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation.”⁴²

2. *The American Bar Association*

Commentators have characterized the American Bar Association (“ABA”) standards as requiring that attorneys “owe the same duties to a youth as they do an adult. They also direct that lawyers should meet with the clients, stay in touch post-hearings, counsel youth, elicit the youth’s preferences, advise the client, follow the youth’s direction throughout the course of the litigation, and so

⁴⁰ *Id.* at 3.

⁴¹ *Id.* at 4.

⁴² N.Y. R. CHIEF J. §7.2(b); Tippins, *supra* note 28. See also NYSBA STANDARDS, *supra* note 24, at 5. (“The attorney-client privilege attaches to communications between the child and his or her attorney, including advice given by the attorney. Statements made by the child to a social worker, an investigator, a paralegal, or another person employed by the attorney also are protected by the privilege.”).

forth.”⁴³ The ABA Standards also emphasize the lawyer’s independence from the court and those involved in the litigation, and that the lawyer should at all times be unprejudiced and uncompromised.⁴⁴

Unlike the NYSBA’s standards, the ABA distinguishes between children’s attorneys and best interests attorneys. A child’s attorney focuses on the child’s wishes, and resembles a traditional lawyer-client relationship,⁴⁵ while a best interests attorney substitutes the lawyer’s opinion for the child’s wishes.⁴⁶ Similarly, however, lawyers “appointed as a Child’s Attorney or Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations.”⁴⁷

The ABA standards state that child’s attorneys are “bound by their states’ ethics rules in all matters, . . . [and] [a] Child’s Attorney appointed to represent two or more children should remain alert to the possibility of a conflict that could require the lawyer to decline representation or withdraw from representing all of the children.”⁴⁸ The child’s attorney should also follow his client’s decisions regarding the objectives of the representation where the client is competent to do so. The child’s attorney should also “pursue the child’s expressed objectives, unless the child requests otherwise, and follow the

⁴³ Hughes, *supra* note 31 at 574-75.

⁴⁴ AM. BAR ASS’N SECTION OF FAMILY LAW: STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES 3 (2003), www.abanet.org/family/reports/standards_childcustody.pdf. [hereinafter ABA STANDARDS]. (“The lawyer has the right and the responsibility to exercise independent professional judgment in carrying out the duties assigned by the court, and to participate in the case as fully and freely as a lawyer for a party.”).

⁴⁵ See *infra*, text accompanying notes 102-09.

⁴⁶ See *infra*, text accompanying notes 77-87.

⁴⁷ ABA STANDARDS, *supra* note 44, at 3.

⁴⁸ *Id.* at 9.

child's direction, throughout the case.”⁴⁹

Best interests attorneys are also required to follow state ethics rules “in all matters except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of their appointed tasks.”⁵⁰ “A child's communications with the Best Interests Attorney are subject to the state ethics rules on lawyer-client confidentiality, except that the lawyer may also use the child's confidences for the purposes of the representation without disclosing them.”⁵¹

II. FACTORS IN REPRESENTATION

Several factors drive the analysis and interpretation of a particular standard an attorney is to follow in representing a child client. This Part addresses and analyzes how the age of the child, a child's race and class, as well as the type of proceeding at issue shape the discussion of what is expected of the attorney's advocacy.

A. Age of the Child

The age of a child is an important factor in representation. There is no bright line rule on how courts should treat children at a given age as they have different cognitive abilities and thus vary in their decision making capacity.⁵² “The crucial difference between most impaired adults, such as the elderly and young children, is that

⁴⁹ *Id.* 11.

⁵⁰ *Id.* at 15.

⁵¹ *Id.*

⁵² See Ramsey, *supra* note 34, at 310. “The threshold question in developing an age-based presumption is whether children of a certain age would lack the skills needed to make a simple decision.” *Id.*

those adults have lived a full life, during which their personalities, values, and preferences became knowable. Young children, in contrast, have not yet reached the point in life when their values have been revealed.”⁵³

Research supports the rebuttable presumption that children over seven have the capacity to employ the reasoning necessary to make a considered decision.⁵⁴ This research further shows that developing a “graduated scale of capacity in relation to age [is] not . . . feasible as some children under seven have the ability to make . . . difficult decisions.”⁵⁵

A child’s ability to communicate his preferences and understand the advice his lawyer gives him is also key to “mak[ing] and/or express[ing] a decision. However, the child’s understanding of word meaning [is] . . . different from [an] adult’s and the child may be reluctant to admit a lack of comprehension.”⁵⁶

Children under fifteen also have “a significantly poorer understanding of their role in the legal proceedings than older youth and adults.”⁵⁷ Research shows that children “have lower cognitive capacities, particularly in stressful situations, than adults.”⁵⁸ This is be-

⁵³ Guggenheim, *Paradigm*, *supra* note 17, at 1400.

⁵⁴ Ramsey, *supra*, note 34, at 311. “Adults presumptively have the reasoning capacity to make important decisions for themselves: young children do not.” See Guggenheim, *Paradigm*, *supra* note 17, at 1407.

⁵⁵ Ramsey, *supra* note 34, at 316. “In no jurisdiction is the preference of a child under fourteen-years-old more than one factor among many which the judge is to take into account when determining the child’s best interests.” Guggenheim, *Paradigm*, *supra* note 17, at 1425.

⁵⁶ Ramsey, *supra* note 34, at 318. “The mere ability to express a preference . . . is not an adequate test of capacity. Rather, the child must have the intellectual and emotional capability of making a decision that is reasonably accurate.” Federle, *supra* note 19, at 1681.

⁵⁷ Hughes, *supra* note 31, at 565.

⁵⁸ *Id.* “Cognitive and psycho-social deficits are most obvious in children below the age of

cause when an adolescent is deciding whether or not to communicate with his attorney, he will “weigh the costs and benefits differently than an adult because he or she has a limited future orientation and a tendency to focus on immediate gains.”⁵⁹ Representing a child is thus shaped by the age of the child client. Some children are able to participate more proactively in the representation and some need the attorney to step in and offer her considered judgment that is in the child’s best interest, but there is no bright line rule on what age children are capable of making decisions in their legal representation.

B. Race and Class

Race and class are two factors that go hand-in-hand in an analyzing an attorney’s role in representing a child client. If nothing else, an attorney’s sensitivity to the cultural and social differences in minority groups helps the attorney better communicate and effectively find solutions for their child clients.⁶⁰ Attorneys and their clients may differ in race and class. If the attorney is sensitive to these populations, the attorney will be in a better position to understand the unique needs of a particular group and tailor their advocacy more effectively.

ten.” Peter Margulies, *Lawyering for Children: Confidentiality Meets Context*, 81 ST. JOHN’S L. REV. 601, 627 (2007).

⁵⁹ Hughes, *supra* note 31, at 565. “Most children, including adolescents, experience particularly large deficits in their understanding of how consequences play out over time. In younger children, this deficit dovetails with a lack of understanding of self and role. For adolescents, this deficit may be exacerbated by a tendency to embrace risky behavior.” Margulies, *supra* note 58, at 626.

⁶⁰ “Lawyers may not understand the culture or means of expression of a child from a different socio-economic or ethnic background. . . . Lawyers who react adversely . . . without ascertaining the extent of permanent harm to the child contribute to biases within the family law system.” Margulies, *supra* note 58, at 621-22.

Studies have shown that most civilian users of the Family Court system are African-American or Hispanic, while seven percent are white, and one percent is Asian.⁶¹ Further, “blacks and other minority groups are usually overrepresented in protection proceedings.”⁶² In contrast, most professional users of the Family Court system are white and African American, while Hispanics and Asians comprise less than ten percent of professionals.⁶³

Mandatory reporting requirements also highlight the race and socio-economic disparities in the child welfare system.⁶⁴ A social worker may not understand, how in some cultures, it is common for a grandparent to care for the child while the parent works. The social worker then sees the parent as unfit because she is working while the child is supervised by an extended family member.⁶⁵ Attorneys need to have a cultural awareness and sensitivity to their client’s unique needs and backgrounds, which comes from effective communication with the client and her family and or caretakers.

⁶¹ VITULLO-MARTIN & MAXEY, *supra* note 8, at 5.

⁶² Ramsey, *supra* note 34, at 296. “The sad fact remains that in both Chicago and New York City, statistically speaking the only families forced to endure the indignity of the child welfare system are brown and black families.” Martin Guggenheim, *How Children’s Lawyers Serve State Interests*, 6 NEV. L.J. 805, 828 (2006).

⁶³ VITULLO-MARTIN & MAXEY, *supra* note 8, at 5.

⁶⁴ Margulies, *supra* note 58, at 638 (“Since poor families do not have the resources to buy the help they need, the[ir] choice[s] are largely made by the department of social services. These families are not in a position to explore all options and to pursue the course which is best suited to their needs.”).

Ramsey, *supra* note 34, at 295.

⁶⁵ Margulies, *supra* note 58, at 622.

C. Type of Proceeding

1. *Custody and Visitation Proceedings*

The “ideal standard for determining a child’s custodial arrangement[] is one that both yields predictable and easily adjudicated results and also consistently serves the child’s best interests.”⁶⁶ Children in custody and visitation proceedings also “have a right to be placed with the caregiver who will best serve their interests [T]hey [also] have a right to have a judge determine their best interests.”⁶⁷

It is also important to note that a child’s preference in a custody proceeding—where the child is able to express an opinion—it is important for attorneys to convey this to judges and courts, and legislatures do not favor a child controlling the outcome in a custody case.⁶⁸ A child’s preference should be among the factors a judge takes into account in making a custody determination, not the determining factor.⁶⁹ This goes hand-in-hand with a child’s age and capacity to make decisions. If a court determines a child to be capable of decision making, then the attorney for the child should focus more on this in her advocacy. Otherwise, the best advocacy for the child who is not old enough to make decisions is to take the child’s preferences into account when arguing a custody position to the court.

⁶⁶ Tippins, *supra* note 28.

⁶⁷ Guggenheim, *Paradigm*, *supra* note 17, at 1426.

⁶⁸ *Id.* at 1424-25.

⁶⁹ *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1263 (N.Y. 1982).

2. *Child Protective Proceedings*

As discussed earlier, a child's wishes should be respected when the child is old enough to make a decision. This is true in protective proceedings as well as in custody proceedings.⁷⁰ However, unlike with child custody, given the serious nature of protection proceedings, courts tend to use the best interests standard more often in abuse, neglect, or dependency proceedings, as well as termination of parental rights proceedings.⁷¹

Representing children in protection proceedings also serves the dual purpose of minimizing harm and providing advocacy for the child.⁷² A child's rights in a child protective proceeding can also be defined in one of two ways: first, "children have a right to live with their parents unless a court finds the parents unfit"; or second, "children have the right to be free from harm, not merely to have a judge decide whether they are endangered."⁷³

This analysis goes along with the age of the child. Children who are of a certain age and maturity level are able to play a more active role in the best disposition of these types of proceedings. The attorney needs to be sensitive to safety and time sensitive issues inherent in these types of proceedings in advocating for the child. If the child's wishes would put the child in immediate danger, then the attorney must go against the child's wishes and ask the court to place

⁷⁰ Ramsey, *supra* note 34, at 320.

⁷¹ 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, 1514 (1996).

⁷² Ramsey, *supra* note 34, at 291.

⁷³ Guggenheim, *Paradigm*, *supra* note 17, at 1429-30.

the child in a safer environment.⁷⁴

III. THE DIFFERENT ADVOCACY MODELS

The factors in representation previously discussed are one side of the child advocacy coin. It is also important to note that attorneys serving as law guardians are very different than attorneys for children. One focuses more on the child's best interest, while the other looks more at the child's preferences. The following Part analyzes the three prevailing child advocacy models, explores their respective strengths and weaknesses, and concludes with a discussion of how New York courts have applied these models. Throughout the following discussion, it is important to keep in mind how the different advocacy models support or discredit the arguments that "the lawyer who represents the child's wishes is [also] more likely to effectuate the goals of representation than is the lawyer who represents the child's best interests,"⁷⁵ and if parents and their counsel should not represent the child's best interests, as their interests often conflict.⁷⁶

A. The Best Interests of the Child Model

The ABA defines a best interests attorney as "[a] lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or

⁷⁴ See *In re Amkia P.*, 684 N.Y.S.2d 761, 763 (N.Y. Fam. Ct. 1999) (finding that attorney's override of child's wishes to remain with her mother was proper where it was not clear if the child's mother could adequately meet the child's healthcare needs).

⁷⁵ Ramsey, *supra* note 34, at 302.

⁷⁶ *Id.* at 293.

objectives.”⁷⁷ The ABA goes on to state that

in advocating the child’s best interests, an attorney should keep in mind that [a]ny assessment of, or argument on, the child’s best interests should be based on objective criteria as set forth in the law related to the purposes of the proceedings, . . . should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement, . . . [and] [a]t hearings on custody or parenting time, . . . should present the child’s expressed desires (if any) to the court, except for those that the child expressly does not want presented.⁷⁸

1. *Best Interests Model Explained*

The best interests standard is a procedural mechanism to allow lawyers to make arguments about how judges decide a child’s case.⁷⁹ One commentator has even characterized this model as emphasizing lawyer autonomy: “the attorney is professionally independent of and, perhaps, even paternalistic towards the client, as well as morally accountable for her actions.”⁸⁰

There are three reasons why a child lawyer needs to understand the best interests of her client:

(1) the ultimate legal standard governing the client’s case will often require a determination by a fact finder of best interests; (2) all conversations with other professionals in the case, whether in preparing litigation

⁷⁷ ABA STANDARDS, *supra* note 44, at 2.

⁷⁸ *Id.* at 17-18.

⁷⁹ Guggenheim, *Paradigm*, *supra* note 17, at 1426.

⁸⁰ Federle, *supra* note 19, at 1657-58.

or seeking settlement, will be framed by their concern for [the] client's best interests; and (3) the logistics of representing children require lawyers to make choices based on their clients' best interests on a daily basis.⁸¹

Lawyers are encouraged to advocate for the child's best interest, as "responsible lawyering . . . requires [them] to confront [their] assessment of a client's best interests, to ensure that bias and personal values have not assumed too important a role in the representation."⁸²

The best interests model requires the lawyer to first determine what she "believes to be in the child's best interests and then zealously advocate for a disposition consistent with her views. . . . Alternatively, the lawyer may assume a nonadversarial role and act as an independent investigator" to provide the court with relevant information to ascertain the child's best interest.⁸³ "The lawyer may [then] argue for a result contrary to her client's express wishes if, in her best judgment, the child's stated preference is not a reasonable or intelligent choice."⁸⁴ The lawyer in this instance must believe that "the child's position would lead to an outcome prejudicial to her best interests".⁸⁵

There are also conflicting views on what constitutes "best interests." Some commentators would "replace a focus on best interests with a focus on permanent 'least detrimental' alternatives for the

⁸¹ Peters, *supra* note 71, at 1513.

⁸² *Id.*

⁸³ Federle, *supra* note 19, at 1682-83.

⁸⁴ *Id.* at 1688.

⁸⁵ Margulies, *supra* note 58, at 607.

child,”⁸⁶ while others posit “a permanent caregiver may be less important than the family network surrounding the child.”⁸⁷

2. *Virtues of the Best Interests Model*

Advocates of the best interests model characterize it as more flexible, allowing for lawyers to advocate for the best result for the individual client. One legal recommendation does not work the same way for each child.⁸⁸

Lawyers should consider the best interests standard because they will often have to determine the goals and objectives of the representation with very little input from the child.⁸⁹ “The child’s lawyer must [also be able to] understand and speak the language of best interests to communicate usefully with other professionals.”⁹⁰ A child will often have a “therapist, state social worker, teacher, counselor, and other professionals . . . charged with protecting their client’s ‘best interests.’ ”⁹¹ “Often, a lawyer well-versed in the best interests terminology and theory may forge a settlement out of court with those crucial nonlegal professionals on issues both central and ancillary to the case.”⁹²

Lawyers should represent a child’s best interests because of

⁸⁶ Peters, *supra* note 71, at 1517.

⁸⁷ *Id.*

⁸⁸ Guggenheim, *Paradigm*, *supra* note 17, at 1431. “[L]awyers for children [are free] to advocate results they believe are best for their clients ensur[ing] the randomness and chaos that a rational legal system would avoid whenever possible.” *Id.*

⁸⁹ Peters, *supra* note 71, at 1513.

⁹⁰ *Id.* at 1516.

⁹¹ *Id.*

⁹² *Id.*

the serious risks to the child and lack of child advocacy.⁹³ “The lawyer representing the child’s best interests [in poorer families] can [also] point out the faults in the way both parents and the state are providing for the child.”⁹⁴

3. *Flaws of the Best Interests Model*

Critics of the best interests model have focused on its inherent subjectivity and how the determination is irrelevant for much of the proceeding.⁹⁵ Attorneys are not experts in child welfare, and thus one attorney’s advocacy for the same child is different than another attorney’s advocacy for that child in the same situation.⁹⁶ The attorney is substituting her own judgment over the child’s, and each attorney’s judgment is different. Further, the judge takes the child’s best interests into account in proceedings, such as termination of parental rights, only once there is a finding of abuse or neglect.⁹⁷ Critics note in their arguments how “lawyers representing the child’s best interests do not present a challenge, but rather serve to reinforce the status quo.”⁹⁸

In contrast, the lawyer who tries to provide the client with information, to present his or her own recommendations as but one alternative, to listen to the client, and to assess the client’s capabilities against a presumption of competence is required to be more in-

⁹³ Ramsey, *supra* note 34, at 295.

⁹⁴ *Id.*

⁹⁵ Sobie, *supra* note 18, at 806, 807. “The Solomonic determination of “best interests” frequently bedevils the judges who must ultimately determine the issue, with or without the independent determination of counsel for the child.” *Id.* at 792.

⁹⁶ Sobie, *supra* note 18, at 806-07.

⁹⁷ *Id.* at 807.

⁹⁸ Ramsey, *supra* note 34, at 302.

volved with the client and more aware of the issues from the client's perspective.⁹⁹

The most notable critics, Goldstein, Freud, and Solnit, for example, advocate replacing the "best interests" approach with the "least detrimental alternative"¹⁰⁰ as the most effective way to meet a child's needs when deciding placement. They argue that this model better takes into account a child's psychological, biological, physical, and social needs.¹⁰¹

B. The Attorney for the Child

The ABA defines a child's attorney as: "A Lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client."¹⁰²

1. Attorney for the Child Model Explained

The client autonomy model is "client-centered and client-empowering; the attorney is partisan, loyal, zealous, subordinate and

⁹⁹ *Id.*

¹⁰⁰ Peters, *supra* note 71, at 1538. The least detrimental alternative is defined as:

[T]hat specific placement and procedure for placement which maximizes, in accordance with the child's sense of time and on the basis of short term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.

GOLDSTEIN, ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* VOL. 1 53 (The Free Press 1979).

¹⁰¹ GOLDSTEIN, ET AL., *supra* note 100, at 63-64.

¹⁰² ABA STANDARDS, *supra* note 44, at 2.

morally nonaccountable for the client's autonomous choices."¹⁰³ This model "presupposes a degree of competency"¹⁰⁴ as "[t]he traditional representation model cannot be applied to the very young."¹⁰⁵ This demonstrates how age also frames the analysis as to which advocacy model is best for a particular child client.

The attorney for the child's role has been expressed as per Model Rule 1.14, encompassing three practical defaults: 1) the relationship default; 2) the competency default; and 3) the advocacy default.¹⁰⁶ The relationship default states that the "lawyer must meet and get to know his client."¹⁰⁷ The competency default states that the "lawyer should initially presume some level of competency for his client on each issue in the representation in which a client's point of view would ordinarily be sought."¹⁰⁸ The advocacy default states that the "lawyer should initially attempt to advocate for the position expressed by his client. The lawyer may deviate from these defaults only when independent evidence and psychiatric evaluations demonstrate that the default position is erroneous, and that deviation from the default position would clearly benefit the child."¹⁰⁹

2. *Virtues of the Attorney for the Child Model*

Proponents have proactively addressed criticisms of the attorney for the child model by arguing that 1) there is a minimal risk in

¹⁰³ Federle, *supra* note 19, at 1657.

¹⁰⁴ *Id.* at 1661.

¹⁰⁵ Sobie, *supra* note 18, at 816.

¹⁰⁶ Peters, *supra* note 71, at 1508.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

erroneously concluding that a child is capable of making a decision;¹¹⁰ 2) the focus is shifted to the child, lessening class and racial bias;¹¹¹ and 3) decisions tend to be more accurate.¹¹²

Advocates of the attorney for the child model also stress that lawyers, not the trier of fact, should decide the child's best interests if children are not allowed to set the goals of their cases.¹¹³

Further, even young children can have their desires heard by a judge where the attorney assumes a child-oriented approach. This is achieved by the clear demarcation of the guardian ad litem's authority for the particular matter at hand.¹¹⁴ Additionally, where a child's lawyer aggressively pursues the result advocated by the child in a custody proceeding, the child's preference has a greater influence on the ultimate outcome.¹¹⁵

3. *Flaws of the Attorney for the Child Model*

While it has many positive features, the reality is that courts in New York are reluctant to adopt the attorney for the child model. "While there has been a greater acceptance of the law guardian's independent advocacy role . . . these same courts continue to use best interests language to define the law guardian's role, even though the

¹¹⁰ Ramsey, *supra* note 34, at 320.

¹¹¹ *Id.* The lawyer is "less likely to make a judgment based on racial, socio-economic, or cultural stereotypes" if he uses the traditional lawyer-client approach, having a conversation with the child to determine "the child's knowledge of the context surrounding the case." Margulies, *supra* note 58, at 608.

¹¹² Ramsey, *supra* note 34, at 320.

¹¹³ Guggenheim, *Paradigm*, *supra* note 17, at 1424.

¹¹⁴ Sobie, *supra* note 18, at 818.

¹¹⁵ Guggenheim, *Paradigm*, *supra* note 17, at 1425.

word ‘best’ never appears in [Family Court Act] FCA §241.”¹¹⁶

C. The Hybrid Model

The two traditional models of child advocacy have obvious strengths and weaknesses. Over time, legal scholars have attempted to sift through the murkiness of the two models to create a clearer and more effective model incorporating both the best interests and attorney for the child models. This is because a lawyer’s role varies across a wide range of legal matters that a particular child may encounter. As one commentator has noted, “[W]hen determining the role of counsel for children it is essential to engage in a careful study of the legal rights and powers children enjoy in a particular subject matter implicated by the proceeding.”¹¹⁷

1. Hybrid Model Explained

The hybrid model is based on the premise that “the role of counsel ultimately depend[s] upon the particular substantive rights of the client.”¹¹⁸ As one commentator has stated, “[o]ne does not have to engage in a wooden ‘best interests’ vs. ‘child’s wishes’ analysis to determine whether the attorney should press for needed services.”¹¹⁹ The goal is to achieve the child’s maximum involvement without the

¹¹⁶ Jane Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit?: Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate*, 41 FAM. L. Q. 393, 409 (2007).

¹¹⁷ Guggenheim, *Paradigm*, *supra* note 17, at 1420. “The role of counsel for young children necessarily will vary across a variety of legal matters.” *Id.* at 1420-21.

¹¹⁸ *Id.* at 1420.

¹¹⁹ Sobie, *supra* note 18, at 787.

attorney overly managing the child's case.¹²⁰

The attorney needs to follow the client's objectives and needs the client's agreement, or at least her acquiescence, in making the major decisions. . . . The approach respects, but does not depend entirely on the client's desires. The relationship is collaborative. The attorney advises his client of the law and his evaluation of the facts. . . . An equivalent equation should be applied when representing the child, unless the child is of insufficient age or is otherwise too impaired to permit even an approximation of the ordinary attorney-client relationship.¹²¹

2. *Virtues of the Hybrid Model*

The advantage to this model is obvious. It combines the best aspects of the two traditional models and adds a layer of flexibility to account for the type of proceeding involved. "A perceptive broad approach, one which engages the child to the maximum extent possible, will in the long run be rewarding to the child and to the attorney."¹²²

3. *Flaws of the Hybrid Model*

The arguments against the hybrid model are rooted in the tension between the attorney's responsibility to adequately represent the child, while they are influenced at the same time by the state's desire to provide every child with a lawyer, arguably regardless of the qual-

¹²⁰ *Id.* at 815.

¹²¹ *Id.* at 810.

¹²² *Id.* at 822.

ity of representation.¹²³ The lawyer for the child in these situations wants to be the hero by siding with the state.¹²⁴ However, “state officials are not actually interested in children being represented. Their primary goal is to be able to proclaim that each child has a lawyer.”¹²⁵ Politicians win elections by attaining tangible results for their constituents, not by how good the lawyers are. There needs to be a balance between representing as many children as possible and representing them efficiently and effectively to achieve the best result. By not having a consistent mechanism and goal of representation, as it will vary under this model on a case-by-case basis, it is hard to predict what type of advocacy will yield the best results, thus making this model difficult to implement in a successful manner.

D. How New York Courts Have Applied the Three Models

This next section looks at how New York courts have applied the three different advocacy models to cases involving children in order to paint a clearer picture of the state of child advocacy in New York. The analysis first looks at how New York courts have defined the role of the child’s attorney, and then discusses where the court will allow the attorney’s preference to influence its decision over the

¹²³ “The irony in the theoretical arguments over whether children’s lawyers should advocate for what their client wants or for what is in their best interests is that were children’s lawyers ever to truly become powerful voices for what their clients want, they would become deeply opposed to state intervention.” Guggenheim, *State Interests*, *supra* note 62, at 833.

¹²⁴ “Lawyers for children are far more likely to feel as if they win most of the time by siding with the agency.” *Id.* at 830 (“The children’s bar exists to ensure that all children who need state protection receive it. And sometimes the children’s lawyer gets to be the protecting hero.”).

¹²⁵ *Id.* at 833.

child's preference, instances where it is appropriate and inappropriate for siblings to have the same or separate representation, and then concludes with looking at how the child's representation should not be influenced by or be the same as their parents' representation in a legal proceeding involving a child.

1. *The Purpose and Role of the Law Guardian*

New York case law sets forth a hybrid interpretation of the law guardian's role. The New York Court of Appeals has defined the law guardian's role as follows: "First and foremost, the Law Guardian is the attorney for the child and must take an active role in the proceedings."¹²⁶ The law guardian's assignment is two-fold: they are to conduct the fact-finding for their client and they are also present at the dispositional phase to relay to the court "what the child does seem to want; and what in her considered judgment, based on all the facts, would be best for the child."¹²⁷ Further, where a law guardian acts within the scope of her employment and advocates for the best interests of the child, she enjoys a quasi-judicial immunity.¹²⁸ This does not mean that law guardians do not owe the same duty of competency to child clients as to their adult clients. For example, in a case where the child's law guardian did not cross-examine the child's father at the custody hearing before recommending custody to the father, the

¹²⁶ *Caballeira v. Shumway*, 710 N.Y.S.2d 149, 152 (App. Div. 3d Dep't 2000). *See also* *Rueckert v. Rielly*, 723 N.Y.S.2d 232, 233 (App. Div. 2d Dep't 2001) (holding that the law guardian is the attorney for the child).

¹²⁷ *Stein v. Stein*, 496 N.Y.S.2d 902, 906 (N.Y. Fam. Ct. 1985).

¹²⁸ *Bluntt v. O'Connor*, 737 N.Y.S.2d 471, 478 (App. Div. 4th Dep't 2002).

law guardian was not appointed on remand.¹²⁹

Since a law guardian has a dual role of advocating for the child's best interest and her express preferences, a lawyer cannot be appointed as a child's guardian where her adversary is a member and president of her employer, the Legal Aid Society.¹³⁰ The law guardian is also always a lawyer and must follow the Code of Professional Responsibility and not allow her opinion to improperly override her client's wishes. And although there may at times be disagreements, "[t]he Law Guardian need not at her peril second-guess the parents or the judge. Her opinions are no less valuable to the court for being different; varying points of view enlarge the court's perspective and are helpful in formulating its decision."¹³¹

Since the law guardian is the child's attorney, they have an attorney-client relationship and their conversations fall within the attorney-client privilege.¹³² The law guardian is also the attorney for the child and "not an investigative arm of the court." Therefore, a court should not rely on a report made by a law guardian to the court in lieu of conducting a hearing in a proceeding on issues such as child custody.¹³³

Law guardians also employ other professionals to carry out the necessary work to support and facilitate effective advocacy. These experts are agents of the law guardian and also owe a duty to the child client. For example, a social worker, employed by a law

¹²⁹ *Williams v. Williams*, 827 N.Y.S.2d 328, 331 (App. Div. 3rd Dep't 2006).

¹³⁰ *B.A. v. L.A.*, 761 N.Y.S.2d 805, 811, 812 (N.Y. Fam. Ct. 2003).

¹³¹ *Stein*, 496 N.Y.S.2d at 906-07.

¹³² *Bentley v. Bentley*, 448 N.Y.S.2d 559, 560 (App. Div. 3d Dep't 1982).

¹³³ *Weiglhofer v. Weiglhofer*, 766 N.Y.S.2d 727, 729 n.1 (App. Div. 3d Dep't 2003).

guardian in a Family Court proceeding to determine the best interests of the child, is a “representative” under New York law for purposes of determining confidentiality and privilege. Thus material prepared by a social worker in anticipation of litigation or trial is confidential and privileged.¹³⁴ The “confidentiality and sensitivity of Family Court custodial litigation clearly call for stricter limitations.”¹³⁵

Lastly, “[s]ocial experiments should not be conducted at the cost of the well being of the children.”¹³⁶ Where a law guardian is willing to take the risk of advocating that children be given back to a mother on the recommendations of two social workers without a completed health study and investigation report, a new law guardian should be appointed.¹³⁷

2. *The Child’s Preference Versus the Law Guardian’s Preference*

Perhaps the biggest challenge law guardians face in representing children is when to advocate for the child’s preferences and when to override the child’s preference in favor of the law guardian’s judgment of what is in the child’s best interest. If the attorney is advocating against the child’s wishes, the attorney must still inform the court of such preferences. For example, if the law guardian fails to express the desires of ten and fourteen year-old children to be returned to their mother before advocating that terminating the mother’s parental rights was in their best interests, the matter must be

¹³⁴ *In re McN.*, 584 N.Y.S.2d 17, 18 (App. Div. 1st Dep’t 1992).

¹³⁵ *McN.*, 584 N.Y.S.2d at 17, 18.

¹³⁶ *In re Jennifer G.*, 487 N.Y.S.2d 864, 866 (App. Div. 2d Dep’t 1985).

¹³⁷ *Jennifer G.*, 487 N.Y.S.2d 864, 865-66.

remitted for a new dispositional hearing.¹³⁸

Courts are also sympathetic to the best interests of the child where the law guardian seeks the ability to review confidential court records in foster care and adoption proceedings.¹³⁹ In custody proceedings, the court also considers the child's preference, but it is not the determinative factor.¹⁴⁰ For example, the determination of whether a six-year-old child with the ability to articulate a custody preference should be able to take the witness stand at trial to testify as to cruel and inhuman treatment and custody preference is inappropriately compared to a child's right to confrontation in juvenile court proceedings as enunciated in *Gault*.¹⁴¹

The best interests of the child also trump the child's wishes where the child is too young to fully appreciate the risks of the court granting her preferences. A law guardian advocating contrary to a ten-year-old's preference to be with her mother when it is not clear whether the mother can adequately provide for the child's medical care is providing effective counsel.¹⁴²

Further, where the law guardian believes his client is "less mature than average and easily manipulated by adults," and the child does not articulate objective reasons for his custody preference, the law guardian does not act improperly in advocating for a position against his client's wishes.¹⁴³ Similarly, a law guardian does not act

¹³⁸ *In re Derick Shea D.*, 804 N.Y.S.2d 389, 390 (App. Div. 2d Dep't 2005).

¹³⁹ *In re Kimberly H.*, 556 N.Y.S.2d 220, 221, 222, 223 (N.Y. Fam. Ct. 1990).

¹⁴⁰ *Reed v. Reed*, 734 N.Y.S.2d 806, 809 (Sup. Ct. New York County 2001) (citing *Eschbach v. Eschbach*, 436 N.E.2d 1260 (N.Y. 1982)).

¹⁴¹ *Reed*, 734 N.Y.S.2d at 811.

¹⁴² *Amkia P.*, 684 N.Y.S.2d at 763.

¹⁴³ *Caballeira*, 710 N.Y.S.2d at 152-53.

improperly by prosecuting a neglect petition against a child's wishes where the law guardian believes it is in the child's best interest to not let the children live with the mother who had an abusive boyfriend.¹⁴⁴

3. *Representation of Siblings and Conflicts of Interest*

"The 'best interests' of the children is the threshold consideration in a custody proceeding."¹⁴⁵ Where six siblings have conflicting interests in a sibling visitation proceeding, the best interests of the child are served by having separate law guardian representation.¹⁴⁶ It is thus permissible to have separate law guardians where the children are "of reasonably sound judgment and able to advocat[e] positions adverse to each other . . . [and they were] sheltered from the circumstances or environment in which the allegations of abuse allegedly occurred."¹⁴⁷

It is also permissible to have a separate law guardian where the oldest child is ready to live on her own, and would be burdened by a proceeding that does not directly impact her anymore.¹⁴⁸ Courts have also allowed separate law guardians for a child who has three other siblings in making a custody determination where it is in the child's best interests as a result of her psychological state.¹⁴⁹ However, it is permissible for a law guardian to represent more than one child in the same household, even though not blood related, where

¹⁴⁴ James MM v. June OO, 740 N.Y.S.2d 730, 732, 733 (App. Div. 3d Dep't 2002).

¹⁴⁵ *Bentley*, 448 N.Y.S.2d at 560.

¹⁴⁶ *In re Brooke D.*, 598 N.Y.S.2d 633, 634 (App. Div. 4th Dep't 1993).

¹⁴⁷ *In re Jennifer M.*, 561 N.Y.S.2d 347, 349 (N.Y. Fam. Ct. 1990).

¹⁴⁸ *Jennifer M.*, 561 N.Y.S.2d at 349.

¹⁴⁹ Gary D.B. v. Elizabeth C.B., 722 N.Y.S.2d 323, 326 (App. Div. 4th Dep't 2001).

there was a similar set of circumstances: both children lived in the same household with the alleged sexually-abusive parent.¹⁵⁰

Further, where four siblings begin to express different interests as to which parent to live with, the court should grant the law guardian's motion to withdraw representing all of the children as it creates a conflict of interest.¹⁵¹ Similarly, there is also a conflict of interest warranting separate law guardian appointment where the law guardian adopts the position that the three siblings remain with the mother at the outset of the proceedings without making a further inquiry where one of the children subsequently expresses a preference to live with the father.¹⁵²

4. *Attorney for the Child or Attorney for the Parent*

New York courts have held that "[c]hildren are entitled to independent representation in Family Court proceedings because their interests are at stake and because neither the parents, the parents' counsel, nor the court can properly represent the children's interest."¹⁵³ "Parents may not . . . retain counsel for their children or become involved in the representation of their children because of the appearance or possibilities of a conflict of interest or the likelihood that such interference will prevent the children's representation from being truly independent."¹⁵⁴ In sum, a private attorney cannot take

¹⁵⁰ *Jennifer M.*, 561 N.Y.S.2d at 349.

¹⁵¹ *Gary D.B.*, 722 N.Y.S.2d at 326.

¹⁵² *Corigliano v. Corigliano*, 746 N.Y.S.2d 313, 315 (App. Div. 2d Dep't 2002).

¹⁵³ *Fargnoli v. Faber*, 481 N.Y.S.2d 784, 786 (App. Div. 3d Dep't 1984).

¹⁵⁴ *Fargnoli*, 481 N.Y.S.2d at 786.

the place of the court appointed law guardian if there is evidence indicating that the attorney was retained by the parent for the child.¹⁵⁵

There is also no bias where a law guardian has not met the child's parent before the trial and formulated his opinion only in the course of a hearing.¹⁵⁶ A law guardian is also not impermissibly biased against a mother where the law guardian's position was a result of evolution over time as a result of proof of the mother's abuse of the child client.¹⁵⁷

The child's law guardian should not be removed where the Juvenile Rights Division of Legal Aid represented the child in an abuse and neglect proceeding and then termination of parental rights proceeding, and then the Criminal Defense Division of the Legal Aid Society simultaneously represented the mother in a criminal matter, especially since the attorneys "did not exchange any information during or after the period of simultaneous representation."¹⁵⁸

Further, where a bright and mature fifteen-year-old believes that her legal representative is biased towards her father, a law guardian should be appointed to adequately express the wishes of the child and her siblings in court.¹⁵⁹ There is, however, a conflict of interest between the children and the law guardian where there is the possibility that the legal services organization was the mother's attorney for a period of time.¹⁶⁰ However, there is no conflict of interest where the

¹⁵⁵ *La Bier v. La Bier*, 738 N.Y.S.2d 132, 135 (App. Div. 3d Dep't 2002).

¹⁵⁶ *Carballeira*, 710 N.Y.S.2d at 153.

¹⁵⁷ *In re Nicole VV*, 746 N.Y.S.2d 53, 60 (App. Div. 3d Dep't 2002).

¹⁵⁸ *In re T'Challa D.*, 770 N.Y.S.2d 649, 650 (App. Div. 2d Dep't 2004).

¹⁵⁹ *Albanese v. Lee*, 707 N.Y.S.2d 171, 172 (App. Div. 1st Dep't 2000).

¹⁶⁰ *Fargnoli*, 481 N.Y.S.2d at 786.

law guardian has had no prior contact with the opposing party that “would have given her access to confidential or secret information concerning [the opposing party] that she would now be in a position to use on behalf of her client to [the moving party’s] disadvantage.”¹⁶¹

Additionally, where a minor child does not trust her law guardian to advocate her wishes, since she feels the law guardian was influenced by her adoptive mother, and as a result communication breaks down, the child should be able to ask the court to substitute new counsel of her own choosing.¹⁶² This shows how potential conflicts of interest can arise where the parent or another family member retains the attorney for the child. In such cases, New York courts have ruled that the child’s interests are best protected when represented by neutral and independent counsel, usually appointed by the court.¹⁶³

IV. STRATEGIES AND SOLUTIONS FOR MOVING FORWARD

It is imperative to note that there are still huge gaps in access to and effectiveness of children’s representation in New York. Children are largely a politically powerless group and thus it is incredibly difficult for them to enforce their rights. By analyzing the gaps in access to representation and why these problems exist, it becomes possible to discuss solutions and recommendations for the future.

¹⁶¹ *Stein*, 496 N.Y.S.2d at 905.

¹⁶² *In re Elaine M.*, 601 N.Y.S.2d 481, 482 (App. Div. 1st Dep’t 1993).

¹⁶³ *In re B.M.*, 841 N.Y.S.2d 217 (N.Y. Fam. Ct. 2007).

A. Identifying the Gaps in Representation

The biggest problem that attorneys representing children face is not having enough time to adequately devote to a particular client's case.¹⁶⁴ Attorneys are also not sufficiently compensated by the State for their services. As a result, it either does not make economic sense to take on more assigned law guardian cases¹⁶⁵ or practitioners and legal services organizations are forced to take on extremely large caseloads in order to cover their overhead.¹⁶⁶ It is thus hard to make ends meet, especially if you are a sole-practitioner.¹⁶⁷

Caseload and court management practices also impact a law guardian's ability to represent child clients. There are often crowded court dockets, long courtroom waits, discontinuous trials, and long adjournment periods.¹⁶⁸ Further, assessing possible systemic solutions is complicated by a lack of consistent data at the provider level on how caseloads are distributed.¹⁶⁹ There is also "a high rate of turnover among case workers and staff responsible for children in out-of-home placements."¹⁷⁰ Legal service providers are often forced to spend a huge amount of their time catching up on the state of a client's case.

¹⁶⁴ See HOWARD DAVIDSON & ERIK S. PITCHAL, CASELOADS MUST BE CONTROLLED SO ALL CHILD CLIENTS CAN RECEIVE COMPETENT LAWYERING 8, 9, 12 (2006), available at <http://www.firststar.org/documents/CaseloadCrisisStudy.pdf>.

¹⁶⁵ See Tammy S. Korgie, *Court-Appointed Attorneys Face Legal and Financial Challenges*, 73 N.Y. ST. B.J. 5, 5 (2001) (noting how "a New York attorney with average overhead expenses who performs assigned counsel work actually loses \$9.75 for every out-of-court hour performed, and \$5.75 earned income for every in-court hour . . . before taxes.").

¹⁶⁶ See DAVIDSON & PITCHAL, *supra* note 164, at 10.

¹⁶⁷ See Korgie, *supra* note 165, at 6 (discussing how one lawyer's approximate overhead for a case was \$3,455.31, yielding \$2.39 per hour in pre-tax profits).

¹⁶⁸ PRELIMINARY REPORT, *supra* note 11, at 7.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

Lastly, law guardians are often forced to travel between court appearances and client meetings and do not have adequate means of communication, such as laptops, personal digital assistants, and cell phones. Law guardians are also often forced to meet with child clients during late afternoons, evenings, and weekends due to court, school, and work obligations.¹⁷¹

Underlying this issue is that many assigned counsel “cannot afford the basic tools of the trade: offices to meet with clients, traditional research materials, on-line research capability, paralegals, and secretaries or receptionists.”¹⁷² Like in any lawyer-client relationship, communication is an important aspect of maintaining effective representation. “[Y]outh believe their lawyers do not maintain sufficient contacts or communicate with them adequately. They want their lawyers to listen, keep in touch, visit, call (and return calls), and generally spend more time with them.”¹⁷³

The issues of workload and compensation are crucial to providing children with better representation as the shortage of assigned counsel often results in “repeated adjournments, significant delays of trials and other court proceedings, further resulting in substantial backlogs of pending cases.”¹⁷⁴ This inefficiency in the already crowded New York judiciary system exacerbates the issue. This is evidenced in how often “judges must cajole, urge, and even beg as-

¹⁷¹ *Id.* at 7-8.

¹⁷² *New York County Lawyer's Ass'n v. State*, 763 N.Y.S.2d 397, 408 (Sup. Ct. N.Y. County 2003).

¹⁷³ Hughes, *supra* note 31, at 558-59.

¹⁷⁴ *New York County Lawyer's Ass'n*, 763 N.Y.S.2d at 408.

signed counsel to take cases”¹⁷⁵ to meet their growing needs.

Litigants not having adequate representation in these civil matters results in the “failure to call experts, make motions or seek discovery, depriving the family court judge of basic information to assess whether termination is appropriate or whether other services are required, and results in a less comprehensive order.”¹⁷⁶ Further, these indigent civil litigants “place the court in the awkward position of serving as both advocate and arbiter.”¹⁷⁷

B. The Reasons Behind the Current Difficulties

There are several factors contributing to the inadequacy of child representation in New York. One reason is that “Family Court filings, especially in New York City, have jumped since 2005 due in part to the 2005 ‘permanency’ law that requires hearings every six months for children in foster care. Child neglect and abuse filings also have surged since the high profile death of 7-year-old Nixmary Brown. . . .”¹⁷⁸ Annual Family Court filings also approached 700,000 in 2007, along with two million court scheduled appearances.¹⁷⁹

Further, the Federal Adoption and Safe Families Act of 1997, as adopted in New York State,¹⁸⁰ calls for foster care, child abuse and neglect, juvenile delinquency, PINS proceedings, and termination of

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 404.

¹⁷⁷ *Id.*

¹⁷⁸ Stashenko, *supra* note 25. “Permanency hearings are labor intensive, requiring [law guardians] to engage in regular client status reviews and to ascertain whether ordered services have been delivered.” PRELIMINARY REPORT, *supra* note 11, at 7.

¹⁷⁹ *Id.* at 1.

¹⁸⁰ 1999 N.Y. Sess. Law ch. 7 (McKinney).

parental rights cases to be subject to “more frequent judicial reviews, more extensive monitoring and documentation of children’s progress toward permanence, and expedited filings of proceedings to terminate parental rights.”¹⁸¹ The 2000 amendments to the Family Court Act also increased its jurisdiction over supervising PINS cases from 16 to 18 years of age.¹⁸²

Child welfare cases in the United States have also grown considerably since the 1974 federal Child Abuse Protection and Treatment Act. States are now required to “create a child abuse reporting scheme, establish a hotline to which a large number of professionals were required to report all suspicions of child abuse, and create a new corps of professionals who were required to investigate claims of child abuse whenever they were made.”¹⁸³ In sum, the increased federal and state requirements on child attorneys have created a huge need for greater child advocacy in New York.

C. What Has Been Done to Solve These Issues

1. Increase Law Guardian Compensation

In response to the pressure to increase compensation for attorneys, including child attorneys, the Supreme Court, New York County in *New York County Lawyer’s Association v. State* found that 1) it is necessary for indigent litigants to have assigned counsel; 2) there are not enough of them; 3) the lack of assigned counsel results

¹⁸¹ PRELIMINARY REPORT, *supra* note 11, at 1.

¹⁸² *Id.*

¹⁸³ Guggenheim, *State Interests*, *supra* note 62, at 812.

in delayed proceedings and excessive caseloads, resulting in less meaningful representation and impairing the judicial system's ability to function; and 4) the current compensation scheme in terms of caps on per case compensation and the disparity between compensation for in-court versus out-of-court work is the cause.¹⁸⁴ The court concluded that there should be the same pay rate for out-of-court work as in court work.¹⁸⁵ Further, the cap on total per-case compensation needs to be removed.¹⁸⁶ What was also fueling this litigation was the fact that law guardians had not seen a pay increase in fifteen years.¹⁸⁷ After this case, the rate of compensation was increased and made the same for in-court and out-of-court time.¹⁸⁸

2. *Capping Law Guardians at 150 Cases and Expanding the Family Courts*

In addition to pay issues, law guardians are seeing an increase in their caseloads as a result of the new federal and state requirements. In framing this discussion, it is important to note the ABA standards state that caseload sizes should be controlled "so that lawyers do not have so many cases that they are unable to meet the[] [ABA] Standards."¹⁸⁹ In the event that lawyer caseloads exceed these

¹⁸⁴ 763 N.Y.S.2d 397, 400 (Sup. Ct. N.Y. County 2003).

¹⁸⁵ *N.Y. County Lawyer's Ass'n*, 763 N.Y.S.2d at 407 (stating that the "[t]he lower rate of pay for out-of-court time . . . operates as a substantial disincentive to perform many . . . tasks."). See also *id.* at 409, 418.

¹⁸⁶ *Id.* at 409.

¹⁸⁷ John Caher, *Standards Set for 18-B Excess Compensation: Administrative Judge May Review Orders*, 225 N.Y.L.J. 53 (2001).

¹⁸⁸ *N.Y. County Lawyer's Ass'n*, 763 N.Y.S.2d at 418 (holding that assigned counsel are entitled to reimbursement at \$90 per hour, without distinguishing between in-court and out-of-court work); see also N.Y. JUD. LAW §35(3) (stating that compensation for assigned counsel is \$75 for in-court time and \$75 for out-of-court time).

¹⁸⁹ ABA STANDARDS, *supra* note 44, at 25.

standards, the courts can take one or more of the following steps:

(1) work with bar and children's advocacy groups to increase the availability of lawyers; (2) make formal arrangements for child representation with law firms or programs providing representation; (3) renegotiate existing court contracts for child representation; (4) alert agency administrators that their lawyers have excessive caseloads and order them to establish procedures or a plan to solve the problem; (5) alert state judicial, executive, and legislative branch leaders that excessive caseloads jeopardize the ability of lawyers to competently represent children; and (6) seek additional funding.¹⁹⁰

In early 2007, the New York Office of Court Administration conducted a judicial needs assessment and "concluded that caseloads vary widely but appeared to be highest in New York City and in other urban areas."¹⁹¹ In response to this study, the Chief Administrative Judge decided in early April 2008 to cap law guardian cases at 150.¹⁹²

In response to this study, the "OCA included an extra \$5 million in its budget for the 2008-09 fiscal year in anticipation of the need to add law guardians. . . . OCA officials estimate that between 25 and 30 new full-time law guardians will be needed due to the setting of caseload limits."¹⁹³ Interestingly, however, "[b]oth the U.S. Department of Health and Human Services and the National Association of Counsels to Children recommend that court-appointed guardi-

¹⁹⁰ *Id.* at 25-26.

¹⁹¹ Stashenko, *supra* note 25.

¹⁹² *Id.*

¹⁹³ *Id.*

ans have no more than 100 clients at one time.”¹⁹⁴ This new cap of 150 is still a giant step towards improving child advocacy in New York State.¹⁹⁵

This same study also showed a need for more Family Court judges. “There are 153 judges assigned to the Family Court statewide: 47 judges in New York City and 106 in the courts outside of New York City. Based upon a judicial needs assessment conducted in early 2007, OCA determined that there is an urgent need for a bare minimum of 39 additional Family Court Judges.”¹⁹⁶

D. Recommended Steps Towards Improvement

Commentators have stated “unless the component parts of a system see change as part of its own culture, the overall system will be unable to improve.”¹⁹⁷ This is very applicable in analyzing the law and theories as to what are the best solutions to improve child advocacy in New York. “Ultimately, progress in the area of child welfare depends on political will. Unfortunately, politicians suffer from a familiar collective action dynamic—the race to the bottom—which encourages policymaking that benefits their short-term political fortunes, while arguably benefiting society less in the long run.”¹⁹⁸

The “[l]aw should strive to achieve two goals in creating rules for child advocacy. The first is to ensure uniformity in behavior

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ PRELIMINARY REPORT, *supra* note 11, at 2.

¹⁹⁷ Jane M. Spinak, *The Role of Strategic Management Planning in Improving the Representation of Clients: A Child Advocacy Example*, 34 FAM. L. Q. 497, 528 (2000).

¹⁹⁸ Margulies, *supra* note 58, at 625.

The second goal is to maximize the probability of advancement of a child's legal rights."¹⁹⁹ Most importantly, throughout the child's representation, "[d]uring dialogue with the child, the lawyer should explore three issues: (1) the likelihood and gravity of future harm, (2) the child's understanding of the consequences of the decision, and (3) the availability of alternatives" to address the child's current legal situation.²⁰⁰ To achieve this, lawyers should "work with other professionals, such as psychologists and psychiatrists, to develop studies of children in actual or experimental legal settings for the purpose of obtaining better information about interviewing and counseling children about children's decision making generally."²⁰¹

From this discussion, it is clear that focusing on and investing in long term solutions such as job programs, education, daycare, and drug treatment is preferable to investing more in prisons or foster care.²⁰² It is like the old saying "if you give a man a fish, he will eat for a day, but if you teach a man to fish, he will eat for life." People have to be given the tools to help themselves and not just given short term compensation for their immediate survival needs. Some commentators have thus enunciated practical short-term considerations to facilitate meaningful attorney-client relationships with children, which include returning phonecalls within a day, calling the client unsolicited to ask if the client has questions and give case updates, provide the client with written status reports, visiting clients where

¹⁹⁹ Guggenheim, *Paradigm*, *supra* note 17, at 1414-15.

²⁰⁰ Margulies, *supra* note 58, at 630.

²⁰¹ Ramsey, *supra* note 34, at 325-26.

²⁰² Margulies, *supra* note 58, at 626.

they live, including if incarcerated, facilitating the client's active participation in the court process through attending court appearances, actively listening and engaging clients to make sure they are clear on their available options, responsiveness to the client's needs and requests, speaking with the adults in the child's life, including family members, counselors, and teachers, stressing truthfulness above all else.²⁰³ However, it is hard to do this without an adequate support staff, including secretaries, paralegals, and law student interns.²⁰⁴ They are a key component in carrying out these short term solutions.

Attorney assignments to courtrooms are also an area for improvement. Studies suggest that it is more efficient to have one law guardian assigned to a particular courtroom as opposed to rotating attorneys throughout intake sessions. This avoids scheduling conflicts and juggling hearings between courtrooms, as well as fosters working relationships between the law guardian, the prosecutor, the judge, and the court clerks.²⁰⁵

Mediation is another possible solution as it is an effective way to achieve the child's greater involvement in the adjudicatory process. "To a child, mediation is usually a much less awesome or frightening procedure than formal court appearances. . . . The growing use of mediation may also have a spill-over effect on the courtroom phase."²⁰⁶ Alternatively, if the child is not present in the courtroom,

²⁰³ Hughes, *supra* note 31, at 572. "[F]or young people, their own participation in the representation seems to be less important to them than perceptions of their lawyer's neutrality, trustworthiness, and respectfulness. . . . [B]eing 'nice,' going 'out of your way,' and applying the human element to the representation are highly valued qualities." *Id.* at 564.

²⁰⁴ DAVIDSON & PITCHAL, *supra* note 164, at 11.

²⁰⁵ PRELIMINARY REPORT, *supra* note 11, at 9.

²⁰⁶ Sobie, *supra* note 18, at 778.

“limited participation may be afforded through the use of in-camera testimony, which is when a child testifies or is interviewed confidentially in judicial chambers.”²⁰⁷

In developing these new law guardian standards to meet the long term and short term solutions, it is important that they be “flexible and avoid a rigid limit that may well prove unworkable or arbitrary as applied to a particular situation or set of law guardians.”²⁰⁸ This aspect of law guardian representation seems to support the reasoning behind the hybrid representational model. However, there may be situations where one of the other two traditional models is better suited to the needs of the situation, such as using the best interests model where the child is too young and immature to express a custody preference.

Lastly, the NYSBA report on a civil right to counsel recently argued that the right to counsel in custody, visitation, and adoption cases should be made mandatory.²⁰⁹ Additionally, attorneys, lawmakers, and legal educators gathered at Touro Law Center in March 2008 to discuss creating an action blueprint for creating a civil right to counsel in New York State. Participants engaged in break-out sessions to discuss several of the key issue areas facing access to justice in New York State. One of the break-out sessions, the Child Custody and Safety Break-Out session, was facilitated by New York University Law School Professor Martin Guggenheim, Jessica Marcus of the

²⁰⁷ *Id.* at 779.

²⁰⁸ PRELIMINARY REPORT, *supra* note 11, at 12.

²⁰⁹ Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State: A Report of The New York State Bar Association*, 25 TOURO L. REV. 31 (2009).

Brooklyn Family Defense Project, and Gerri Pomerantz, a private practitioner with twenty years experience as a public interest attorney. Three key solutions towards better facilitating advocacy for children in New York arose out of this discussion. One suggestion is to separate the decision makers from those who have to worry about cost.²¹⁰ A second suggestion is to create uniformity in legal representation and principles.²¹¹ Lastly, and perhaps the most important key to facilitating real change at the state legislative level, is to argue to the state about the money saved.²¹² Politicians and lawmakers tend to think in terms of the bottom line and are more likely to support changing an existing policy where it saves the state money. If there is going to be any real change, it needs to have the New York Legislature's support.

V. CONCLUSION

Through establishing an awareness of the strengths and weaknesses of theoretical models and actual child advocacy in New York courts and analyzing the current state of the law and advocacy in New York, lawyers and children's rights advocates can begin to establish a framework and discussion for improving a child's already established right to a lawyer in New York State. The discussion in the preceding pages will hopefully serve as a jumping off point towards improving the lives of children in New York and beyond.

²¹⁰ Transcript of Child Custody & Safety Break-out Session, *An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State* 53 (2008) [hereinafter *Break-out Transcript*].

²¹¹ Break-out Transcript, *supra* note 210, at 69.

²¹² Break-out Transcript, *supra* note 210, at 77.

