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Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law

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Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law

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DEFINING THE ROLE OF LAW GUARDIAN IN NEW YORK STATE BY STATUTE, STANDARDS AND CASE LAW

*Diane Somberg**

I. Introduction

This paper will focus on the role of the law guardian in proceedings related to children in New York State. In New York, law guardians are frequently expected to act in such a way that the role is actually a hybrid or combination of several traditional roles. This often is a cause of confusion both for the law guardian himself, the other attorneys involved in the proceeding, and even the judge. At times, this hybrid role creates a situation in which the law guardian finds himself with a conflict inherent in the statutory definition of the role itself. This paper looks at New York statutes, case law and standards that have been developed in an attempt to synthesize the information so as to provide some guidance for law guardians. It does not propose to encompass the law guardian role in other states where statutes may well be different, nor does it propose to be a final standard. As case law is still defining the law guardian's role, this limits itself to where the role of law guardian stands in New York State as of this time.

Confusion is generated by the fact that New York attempts to combine several traditional roles into one entitled 'law guardian.' These traditional roles are: guardian ad litem, the attorney as advocate, and, the attorney as investigator for the court.

A Guardian ad litem has been defined as "a court appointed special guardian to represent an infant ward or unborn person in specific litigation."¹ A guardian ad litem has the responsibility of determining and representing the best interests of

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¹ BLACK'S LAW DICTIONARY 706 (6th ed. 1990).

the child.² It is not necessary that a guardian ad litem be an attorney.³ In comparison, an attorney acting as an advocate for the child is required to act in accordance with the child/client's wishes.⁴ The advocate role requires that the attorney argue vigorously for the client's wishes even if the attorney feels the choice is not the best decision.⁵ Finally, the role of investigator requires that the attorney become, in effect, an agent of the court and act as an expert witness.⁶ The attorney/investigator is expected to gather relevant information about the child and the situation that is before the court.⁷ While an attorney in this role will investigate the facts and legal issues and then inform the court of his findings, the attorney assumes neutrality and will not advocate a specific outcome.⁸

In New York State, the Family Court Act ("FCA") states that minors involved in proceedings that originated in family court need to be represented by counsel.⁹ Some of these proceedings are child abuse or neglect cases, termination of parental rights applications, adoption applications, requests for abortion where parents have not given consent to their pregnant minor daughter, civil commitment proceedings, child custody disputes, juvenile delinquency hearings, persons in need of supervision proceedings ("PINS"), and for medical treatment issues.¹⁰ Representation can be by a privately hired lawyer or by

² *In re Jennifer G.*, 110 A.D.2d 801, 487 N.Y.S.2d 864 (2d Dep't. 1985); *In re Peter "VV"*, 169 A.D.2d 995, 565 N.Y.S.2d 271 (3d Dep't 1991); *In re Tina "PP"*, 188 A.D.2d 704, 591 N.Y.S.2d 84 (3d Dep't 1992).

³ Jo Ann Douglas, *Reviewing the Role of Law Guardian in Matrimonial Cases*, N.Y.L.J., May 30, 2001, at 1.

⁴ MODEL RULES OF PROFESSIONAL RESPONSIBILITY EC 7-1 (2000).

⁵ *Id.*; see also *Fagnoili v. Farber*, 105 A.D.2d 523, 481 N.Y.S.2d 784 (3d Dep't 1984); *In re Elianne M.*, 196 A.D.2d 439, 601 N.Y.S.2d 481 (1st Dep't 1993).

⁶ Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785 (1996).

⁷ *In re Apel*, 96 Misc. 2d 839, 409 N.Y.S.2d 928, 930 (Fam. Ct. 1978).

⁸ Angela D. Lurie, *Representing the Child-Client: Kids Are People Too*, 11 N. Y. L. SCH. J. HUM. RTS. 205, 210 (1993).

⁹ N.Y. FAM. CT. ACT § 241 (McKinney 2000).

¹⁰ Stuckey, *supra* note 6, at 1785.

an appointed law guardian. Although it is recognized that a private attorney is a zealous advocate for his client's wishes, what role is the law guardian to assume? "A law guardian is not a guardian ad litem, a forensics expert, a social worker or a finder of facts. A law guardian is an attorney for a child, but the law guardian's role may differ from the role of an attorney for an adult."¹¹ The law guardian in New York State has a dual or hybrid role. He is part advocate and part guardian ad litem with a statutory mandate to represent both the child's wishes and the child's best interests.¹² Additionally, the law guardian is expected to inform the court of any relevant information that will help the judge to make a decision in the best interest of the child.

II. Development of the Role of Law Guardian in New York

Children in the United States were originally considered property of their fathers and the law focused on the rights of the adults concerning their children.¹³ Children, as separate entities, were not recognized under the legal system until sometime in the twentieth century when the institution of the juvenile court came into being. The attitude of the juvenile court was paternalistic and informal, focusing on the best interest and welfare of the child.¹⁴ It was the case of *In re Gault*,¹⁵ that the United States Supreme Court first granted the right of counsel to children for juvenile delinquency proceedings.¹⁶ The Court, in addressing a writ of habeas corpus for a fifteen year old boy, held "neither the Fourteenth amendment nor the Bill of Rights is for adults

¹¹ Nancy Erickson, *The Role of the Law Guardian in a Custody Case Involving Domestic Violence*, 27 FORDHAM URB. L. J. 817, 818 (2000).

¹² N.Y. FAM. CT. ACT § 241.

¹³ Susan Hawkins, *Protecting the Rights and Interests of Competent Minors In Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2074, 2076 (1996).

¹⁴ Robert Sheperd, *I Know the Child Is My Client, but Who Am I?* 64 FORDHAM L. REV. 1917, 1919 (1996).

¹⁵ 387 U.S. 1 (1967).

¹⁶ *Id.* at 13.

alone.”¹⁷ In a case originating in New York, *Carey v. Population Services*,¹⁸ the United States Supreme Court struck down a New York statute prohibiting distribution of contraceptives to minors under the age of sixteen.¹⁹ The Court extended the fundamental rights of privacy and bodily integrity to children.²⁰

While the Supreme Court has not yet addressed the question of when a minor must be represented by counsel, a survey of cases relating to the rights of children may suggest how the Court would rule. In *Gault*, the Court suggested a need to give due process to juveniles and proposed that an adversarial approach in a juvenile delinquency proceeding may be necessary to convince the child that the court’s decision is fair and that rehabilitation is the appropriate disposition.²¹ In *Wisconsin v. Yoder*,²² Justice Douglas, in his dissent, stated that if an older child’s interests are in conflict with his parent’s interests, he should be allowed to argue his own point of view.²³

While the Court seems to lean toward representation for children in cases where the child’s interests conflict with his parents’ wishes, the Court also has indicated that it believes children need a protective *parens patrie* attitude within the justice system. In *Bellotti v. Baird*,²⁴ a case involving a statute requiring parental permission for a minor to receive an abortion, the Court invoked a paternalistic outlook and limited the child’s choice to either procuring a parent’s permission or getting a judicial determination that she is mature enough to make the decision to abort and that it is in her best interests.²⁵

¹⁷ *Id.*

¹⁸ 431 U.S. 678 (1977).

¹⁹ *Id.* at 678.

²⁰ *Id.* at 681.

²¹ 387 U.S. 1, 26 (1967).

²² 406 U.S. 205 (1972).

²³ *Id.* at 242 (Douglas, J., dissenting) It was the custom of the local Amish families to remove their 14 and 15 year old children from the school system so as to teach them the skills they would need to live as Amish despite a state statute requiring school attendance until age 16. *Id.*

²⁴ 443 U.S. 622 (1979).

²⁵ *Id.* at 635.

The Court reasoned that prior case law had established that while children are protected by constitutional guarantees, the state is allowed to “adjust the legal system to account for children’s vulnerability and their needs for concern, sympathy and paternal attention.”²⁶ Such cases suggest that the Supreme Court will hold that children are separate entities from their parents, but as minors they need the paternalistic protection of an adult to help them in court proceedings.

The right to counsel was not extended to other proceedings involving children until 1974 when congress passed the Child Abuse Protection and Treatment Act (“CAPTA”),²⁷ which provides federal aid to child protective service agencies only if the state legislature has enacted laws that ensure that a child involved with protective proceedings will be granted a guardian ad litem.²⁸ This encompassing statute meant that the issue of child representation did not have to be addressed by Congress in a piecemeal fashion, for each type of proceeding. Today, partly as a result of this legislation, child advocates consisting of volunteers, attorneys and guardian ad litem are appointed by courts to focus on the child’s needs and wishes and to see that pertinent information critical to making decisions about the child, reaches the judge.²⁹

The most common advocates in United States courts are attorneys and guardians ad litem.³⁰ Attorneys are charged with representing a client’s wishes as defined by the client.³¹ Guardians ad litem, on the other hand, have other important duties such as: acting as fact finders by reviewing records and interviewing significant people in the child’s life; discovering the

²⁶ *Id.*

²⁷ 42 U.S.C. § 5101 (2000).

²⁸ *Id.*

²⁹ Leonard Edwards, *Who Speaks for the Child*, 2 U. CHI. L. SCH. ROUNDTABLE 67, 69 (1995).

³⁰ *Id.* at 70.

³¹ MODEL RULES OF PROF’L CONDUCT, R. 1.2 (a) (1983) (“A lawyer shall abide by a client’s decisions concerning the objective and representation, subject to certain exceptions, and shall consult with the client as to the means by which they are to be presented . . .”).

child's best interests and wishes; investigating possible solutions; appearing at all proceedings and making written reports; providing testimony if needed; communicating and explaining the proceedings of the court to the child so he understands what is taking place; monitoring service plans and informing the court of progress; and advocating at proceedings for the child.³² Whether a law guardian performs all or some of these tasks depends on state statutes and practices in each jurisdiction. In New York, the position of "law guardian" represents a hybrid role, combining the duties of the attorney as advocate and as guardian ad litem.

The conflict that arises from this combination of duties involves a question of what is the attorney's role when the client/child's wishes do not coincide with what is in the best interests of the child? The attorney is charged with representing a child's wishes according to the Model Rules, while the guardian ad litem is assigned the role of protecting the child's best interests. The result is a great deal of confusion in New York State as to the proper role of a law guardian in juvenile proceedings.

In New York State, a law guardian must be an attorney.³³ As noted, by statute, she is charged with protecting a child's best interests and helping to express the child's wishes.³⁴ If the court, however, defines the law guardian role as purely an advocate for the child, then the court can, under New York Civil Practice Law and Rules, (hereinafter CPLR), article 12, sections 1201 and 1202,³⁵ appoint a guardian ad litem to act as investigator, mediator, problem solver, and can require her to act as a witness and prepare a report for the court.³⁶ In New York, a court is required to assign a law guardian for neglect and abuse proceedings, cases involving termination of parental rights, in juvenile delinquency and PINS proceedings if the child can not afford a lawyer, and in any other situation in which the court

³² Edwards, *supra* note 29, at 73.

³³ N.Y. FAM. CT. ACT § 242.

³⁴ *Id.*

³⁵ N.Y.C.P.L.R. §§ 1201, 1202 (McKinney 1992).

³⁶ Douglas, *supra* note 3, at 1.

deems it necessary. In short, almost all children involved in court proceedings in New York are represented by counsel.³⁷

Appointment of law guardians in New York State is governed by the FCA section 243.³⁸ There are three sources from which courts can appoint attorneys as law guardians: 1) pursuant to an agreement with a legal aid society; 2) from a panel of qualified attorneys appointed by the local jurisdiction; 3) by appointment of the Appellate Division, a private attorney can provide representation in the local family court.³⁹ A law guardian must be screened and interviewed by administrators of the law guardian program and is often required to take part in training sessions or classes. Requirements and training vary by department and law guardians are certified annually.⁴⁰ Payment is the responsibility of the state and is, for the most part, considered to be inadequate.⁴¹

III. The Role of a Law Guardian in Juvenile Delinquency and PINS Proceedings

Courts have dealt with juvenile delinquency problems since the Enlightenment in England when the state began to step in as *parens patriae* in situations where parents were unable or did not bother to control their children.⁴² American colonists

³⁷ MERRIL SOBIE, NEW YORK FAMILY COURT PRACTICE 781 (West Publishing Co. 1996).

³⁸ N.Y. FAM. CT. ACT § 243 (McKinney 2000) states in pertinent part: "a) The office of court and administration may enter into an agreement with a legal aid society . . . b) the appellate division . . . may . . . enter into an agreement with any qualified attorney or attorneys to serve the family court . . . c) the appellate division . . . may designate a panel of law guardians . . ."

³⁹ *Id.* §§ 243, 249.

⁴⁰ *Id.*

⁴¹ Sobie, *supra* note 37, at 785. At this time, New York State pays law guardians \$25 per hour for out of court work and \$40 per hour for time in court. There has been a proposal to raise that amount to \$40 for out of court time and \$75 for in court time. See *Decision of Justice*, N.Y.L.J., February 11, 2003, at 18.

⁴² Mary Kay Lanthier, *Children's Right to be Heard*, 2 NE. U. FORUM 1 (1997).

brought the *parens patriae* philosophy with them from England and by 1870, eighteen states institutionalized unruly children.⁴³

Pursuant to this philosophy, reformers advocated for a juvenile court system to deal with delinquent children because criminal courts were trying and imprisoning delinquent children with criminal adults. It was felt that these children would be better served by more rehabilitative services so as to give them the opportunity to re-enter society as productive citizens.⁴⁴ By 1917 most of the states had juvenile court systems.⁴⁵ These juvenile courts had jurisdiction over neglected, dependent and delinquent children.⁴⁶ Juveniles who were considered unruly children, were habitual runaways, or were truant, were placed along with children who had committed crimes of rape, murder, and burglary.⁴⁷

It was not until the 1960's that people began to criticize the practice of incarcerating juveniles who had committed violent criminal offenses along with minors involved in unruly but non-criminal activity.⁴⁸ New York, in the early 1960's, was one of the first states to establish non-criminal juvenile courts.⁴⁹ It was in the case of *In re Gault* that the United States Supreme Court first recognized that juvenile delinquent proceedings were punitive, and juveniles, like adults in criminal cases, had a right to procedural safeguards including a right to counsel.⁵⁰

Distinguishing juvenile delinquents from children in need of supervision, ("PINS" in New York), the former group was given the right of counsel, while PINS were not.⁵¹ Delinquents were considered to be criminals, deserving of punishment while PINS were considered status offenders and in need of treatment.⁵²

⁴³ *Id.* at 6.

⁴⁴ *Id.* at 9.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Lanthier, *supra* note 42, at 9.

⁴⁸ Lanthier, *supra* note 42, at 10.

⁴⁹ Lanthier, *supra* note 42, at 10.

⁵⁰ 387 U.S. at 13.

⁵¹ *Id.* at 18.

⁵² *Id.*

In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act⁵³ which called for PINS to be placed in treatment programs and residential group homes instead of incarceration in correctional facilities.⁵⁴ Alternatively, courts could order a PINS child returned to home subject to certain conditions, place the child on probation, or render custody of the child to a social service agency for placement in a group home or foster care.⁵⁵

In keeping with the principle of a right to counsel, New York State requires a law guardian to be appointed for any child in a juvenile delinquency proceeding who does not have his own counsel.⁵⁶ Counsel is constitutionally required because juvenile delinquency proceedings, like criminal trials, may result in commitment to a secure facility and the curtailing of a person's freedom.⁵⁷ In cases where loss of freedom is an issue, the Fourteenth Amendment Due Process Clause includes a right to be represented by counsel which was extended from adult criminal trials to juvenile delinquency proceedings under *Gault*.⁵⁸

In juvenile delinquency proceedings, a law guardian is often assigned before the initial appearance. If that is not the case, the New York State Bar Association (N.Y.S.B.A.) Standards recommend that the law guardian request an adjournment so as to interview the child and ascertain the facts.⁵⁹

In defense of a child, every possible defense should be considered, including a negligence petition against the child's parents.⁶⁰ Additionally, the N.Y.S.B.A. Standards state that the law guardian's responsibility is to argue for the least restrictive

⁵³ 42 U.S.C. § 5601 (2000).

⁵⁴ *Id.*

⁵⁵ N.Y. FAM. CT. ACT §§ 352, 353 (McKinney 2000).

⁵⁶ *Gault*, 387 U.S. at 18.

⁵⁷ *Id.* at 13.

⁵⁸ *Id.*

⁵⁹ New York Bar Association, *Law Guardian Representation Standards* (1988). Standards applicable to juvenile delinquency can be found on Pages 1-64 while those related to PINS are found at 65-123. Additionally, standards related to child protective proceedings may be found at 124-37.

⁶⁰ N.Y.S.B.A. Standards, *supra* note 59, at 17. (D-2). A child's behavior, such as running away and missing school, may be the reaction to a neglectful or abusive home life.

form of detention, if release is not a possibility.⁶¹ According to the N.Y.S.B.A. Standards, in a juvenile delinquency proceeding with a mature child, the attorney is bound to defend what the child determines is his own interests.⁶² The standards specifically state that the child's desires are to be ascertained, he is to be advised and should fully consent to the law guardian's actions, goals and strategy.⁶³ Additionally, the law guardian is to advise the child in writing of the right to appeal, determine if the child wishes to follow this course and, if so, should commence an appeal.⁶⁴

PINS proceedings usually begin with the filing of a petition by a parent, school, or truant officer. The petition alleges a child's truancy, incorrigible behavior or behavior beyond the control of a parent, and a need for court supervision and/or treatment. Every alleged PINS must have either a private attorney or a law guardian appointed by the court at the time the petition is filed.⁶⁵ The law guardian is expected to interview the child after the petition is filed and prior to his first appearance before the court. The law guardian will remain with the child as a representative throughout the proceeding.⁶⁶

According to the N.Y.S.B.A. Standards that relate to PINS proceedings, the procedures themselves are vague and differ from court to court.⁶⁷ The FCA Section 712, regulates PINS proceedings which consists of generalized phrases and discovery and evidentiary rules which are not as well defined as they are in delinquency proceedings.⁶⁸ FCA Section 241 gives a somewhat mixed message to law guardians.⁶⁹ The statute states, this section "establishes a system of law guardians for minors who often require the assistance of counsel to protect their

⁶¹ N.Y.S.B.A. Standards, *supra* note 59, at 17, (B-3).

⁶² N.Y.S.B.A. Standards, *supra* note 59, at 17, (B-3).

⁶³ N.Y.S.B.A. Standards, *supra* note 59, at 51, (F-7).

⁶⁴ N.Y.S.B.A. Standards, *supra* note 59, at 63, (H-3).

⁶⁵ N.Y. FAM. CT. ACT §§ 249, 741.

⁶⁶ Sobie, *supra* note 37, at 698.

⁶⁷ N.Y.S.B.A. Standards *supra* note 59, at 67.

⁶⁸ *Id.*

⁶⁹ N.Y. FAM. CT. ACT § 241.

interest and to help them express their wishes to the court.”⁷⁰ In the commentary to FCA Section 241, the law guardian’s role is defined as one that “sought to marry the dual concerns of due process and the child’s best interest.”⁷¹ Complicating matters is FCA Section 735 which mandates diversion and adjustment services.⁷² The language of this statute recognizes that a child’s liberty may be at stake and the fact that *Gault* does not extend procedural protection of counsel to children involved in PINS.⁷³ Disposition of PINS proceedings can include a return to home with conditions, probation, placement in a foster home or group home, and even incarceration if the child violates a court order. It has been argued that there exists a liberty interest in PINS proceedings as well as in a juvenile delinquency proceedings and, as such, the child should have a right to counsel.⁷⁴ Others argue that PINS proceedings are essentially a *parens patriae* proceeding and the need for independent counsel is not necessary.⁷⁵ In New York State, PINS are appointed a law guardian if they can not provide their own counsel. The question is what role does the law guardian play in this situation?

The N.Y.S.B.A. Standards state that while the law guardian’s responsibilities are not always discernable in a PINS proceeding, there are several principles that apply, one being the counsel’s role to defend vigorously.⁷⁶ Standard C-9 states “the law guardian’s position, goals and strategies should be agreed to by the child.”⁷⁷ The commentary for this standard recommends that the law guardian should carefully explain the procedure, alternatives and ramifications to the child.⁷⁸ If he disagrees with a major decision, the law guardian can either try to persuade the child to the law guardian’s position, seek an alternative, or

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² N.Y. FAM. CT. ACT § 735.

⁷³ Lanthier, *supra* note 42, at 1.

⁷⁴ Lanthier, *supra* note 42, at 14.

⁷⁵ Lanthier, *supra* note 42, at 19.

⁷⁶ N.Y.S.B.A. Standards, *supra* note 59, at 67.

⁷⁷ N.Y.S.B.A. Standards, *supra* note 59, at 98.

⁷⁸ N.Y.S.B.A. Standards, *supra* note 59, at 98.

proceed with the child's wishes despite the law guardian's misgivings.⁷⁹ Additionally, the standards stress that a court can only accept an admission if the child acknowledges the facts, is made aware of any rights he may be waiving and understands the ramifications.⁸⁰ It is the responsibility of the law guardian to explain this to the child and assess his understanding of the admission. The judge will also question the child as to his understanding. The standards go on to instruct the law guardian to advocate the least possible restrictive alternative.⁸¹

Case law as to the role of law guardian in delinquency and PINS procedures, suggest that the proper role is as a traditional advocate. The appellate court in the PINS case of *In re Peter "VV,"*⁸² held that the law guardians, when representing older children, should advocate for the child's wishes as well as the child's best interests.⁸³ In this case, the court held that the law guardian had strongly advocated for the respondent's wishes, but that the law guardian's refusal to advocate for an alternative disposition did not, in fact, deny the respondent effective counsel since the evidence did not support the alternative the child wanted.⁸⁴

A Third Department decision in a PINS case found that it was appropriate for a law guardian to acknowledge a difference in the child's wishes and the law guardian's belief that placement with the City Department of Social Services was the better choice.⁸⁵ However, in another Third Department decision of a PINS proceeding, the court found that the law guardian had not advocated for her client's right to an alternative placement and stated "the law guardian should advocate for the needs and wishes of the child he or she represents if the child is of sufficient

⁷⁹ N.Y.S.B.A. Standards, *supra* note 59, at 98.

⁸⁰ N.Y.S.B.A. Standards, *supra* note 59, at 101.

⁸¹ N.Y.S.B.A. Standards, *supra* note 59, at 115.

⁸² *Matter of Peter VV*, 169 A.D.2d 995, 565 N.Y.S.2d 271 (3d Dep't 1991).

⁸³ *Id.* at 997, 565 N.Y.S.2d at 273.

⁸⁴ *Id.*

⁸⁵ *In re Tina "PP"*, 188 A.D.2d 705, 591 N.Y.S.2d 84, 85 (3d Dep't 1992).

maturity to make reasonable decisions about how the case will be handled.”⁸⁶

For PINS proceedings, the statutes and case law imply that an attorney placed in the position of law guardian should play a role of part advocate and part guardian ad litem.⁸⁷ This causes a conflict for the law guardian, in a PINS proceeding as it does for other juvenile proceedings when the child’s wishes and the child’s best interests, as the law guardian interprets them, are not the same. Some critics claim that in a PINS proceeding there are two distinct interests, therefore, there should be legal counsel to advocate the child’s best interests and wishes, and an independent guardian ad litem to investigate and report the child’s best interests.⁸⁸ The practice manual given to law guardians in New York City concludes that ethically, children should have a right to have their wishes presented to the court and that older children should have more input in decisions made on their behalf. A law guardian can take into account the child’s maturity, knowledge and good sense and if the law guardian thinks the child’s wishes are unwise, the law guardian should act as an advisor and attempt to change the child’s mind.⁸⁹ Douglas J. Besharov’s Practice Commentary in McKinney’s Consolidated Laws of New York, states “an adolescent alleged to be a juvenile delinquent or a PINS will presumably be able to make the fundamental case handling decisions.”⁹⁰

The Model Code insists that attorneys are obligated to zealously advocate for their clients.⁹¹ However, canon 7-12 states that an attorney may be compelled to make decisions for the client if he has a mental or physical disability that would prohibit the client from making a “considered judgment.” A “disability” includes minority, however, a law guardian is directed to give weight to a child’s opinion depending on age and

⁸⁶ *In re Sandra “XX”*, 169 A.D.2d 992, 994, 565 N.Y.S.2d 269, 271 (3d Dep’t 1991).

⁸⁷ Lurie, *supra* note 8, at 210.

⁸⁸ Lanthier, *supra* note 42, at 25.

⁸⁹ Lurie, *supra* note 8, at 232.

⁹⁰ N.Y. FAM. CT. ACT § 241 cmt.

⁹¹ MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980).

ability.⁹² Ability refers to the child's being able "to make knowledgeable, voluntary and considered judgment and to work effectively with the attorney."⁹³ The law guardian is to consider age, maturity, developmental ability, emotional stability, ability to articulate wishes and any external factors such as a parent's mental illness, substance abuse or domestic violence.⁹⁴ The Standards state that in cases of juvenile delinquency an action can not be brought against a child under the age of seven and almost all respondents are over twelve.⁹⁵ A child over twelve is probably almost always mature enough to understand and join in the process of making decisions as to his case. Therefore, in a juvenile delinquency proceeding, the law guardian should take the traditional role of advocate of the client's wishes. However, in PINS cases, the children, while of an age old enough to understand and make their wishes known, are quite often troubled children and may be unwilling to communicate or cooperate.⁹⁶ The New York State statutes, standards and case law do not prohibit the law guardian from taking a stance based on the child's best interests. Where a conflict arises, it seems to be that the court expects the law guardian to acknowledge the child's wishes, but state his own belief as to the appropriate disposition.⁹⁷

For the most part in delinquency and PINS procedures, a liberty interest is at stake and the child should be treated as any client with legal counsel - a law guardian should defend his wishes vigorously as an advocate.⁹⁸ It is only if the client is immature or incapable of making a considered judgment that the

⁹² *Id.* at EC 7-28.

⁹³ Joel Brandes, *Adopting Law Guardian Standards*, N.Y.L.J., Nov. 27, 2001, at 3.

⁹⁴ *Id.*

⁹⁵ N.Y.S.B.A. Standards, *supra* note 59, at 2.

⁹⁶ N.Y.S.B.A. Standards, *supra* note 59, at 65.

⁹⁷ See *Tina "PP"*, 188 A.D.2d at 504, 591 N.Y.S.2d at 84; *Peter "VV"*, 169 A.D.2d at 995, 565 N.Y.S.2d at 271; *Sandra "XX"*, 169 A.D.2d at 992, 565 N.Y.S.2d at 264.

⁹⁸ Lurie, *supra* note 8, at 236.

law guardian must advocate for the child's best interests while informing the court of the child's wishes.⁹⁹

IV. The Role of a Law Guardian in Abuse and Neglect Proceedings

A caveat to PINS proceedings is that at times, a neglect petition may be substituted for a PINS petition.¹⁰⁰ This comes about in situations where a runaway child absconds because of parental abuse, or perhaps a child is truant from school because of lack of parental supervision.¹⁰¹ There also exists the possibility that a parent may bring a PINS petition so as to mask his own neglect or abuse of the child.¹⁰²

In child abuse and neglect cases, the state brings an action against the parents on behalf of the child. The state is claiming that parental care of the child has fallen below the acceptable level society expects and it is necessary to intervene so as to protect the child.¹⁰³ A petition is filed and a hearing ensues. The case will either be closed for lack of evidence, services will be given to the family to help them improve the situation, or a child may be placed out of the home if it is shown that the parents have indeed abused or neglected their child. If a child is removed, a permanent plan is instituted to try to unite child and parent.¹⁰⁴

Should this be deemed impossible, parental rights may be terminated and the child made available for adoption or permanent foster care. Impossibility occurs if after eighteen months have elapsed from the time the child was removed, a parent has made no improvement in the circumstances that would allow the child to be returned.¹⁰⁵ Examples would be situations in which a drug dependent parent has made no effort to become

⁹⁹ Lurie, *supra* note 8, at 238.

¹⁰⁰ N.Y.S.B.A. Standards, *supra* note 59, at 89.

¹⁰¹ N.Y.S.B.A. Standards, *supra* note 59, at 89.

¹⁰² N.Y.S.B.A. Standards, *supra* note 59, at 89.

¹⁰³ Edwards, *supra* note 29, at 81.

¹⁰⁴ Edwards, *supra* note 29, at 81.

¹⁰⁵ N.Y. SOC. SERV. LAW § 384 (McKinney 2000).

rehabilitated or an abusive parent has not attended counseling sessions.¹⁰⁶

In 1974, when Congress enacted CAPTA, it did not define the role of a guardian ad litem nor give any guidance with respect to duties or responsibilities.¹⁰⁷ In response, New York State enacted Article Ten of the Family Court Act to address child dependency cases where all children involved in family court proceedings are afforded a law guardian.¹⁰⁸ The Third Department, in the case of *Matter of Jamie "TT"*,¹⁰⁹ held that minor children have a right to counsel in child protective proceedings under Article Ten,¹¹⁰ as well as under the state and federal constitutions.¹¹¹ As to the role of law guardians, the New York statute states:

Counsel is often indispensable to a potential violation of due process of law and may be helpful in providing record determination 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 protect their interests and help them explain their wishes to the court.¹¹²

In the negligence case of *In re Elaine M.*,¹¹³ a New York appellate court overturned a family court decision which denied the child's application for a substitution of counsel.¹¹⁴ The court acknowledged the child's right to change her own counsel in a neglect proceeding. The child had experienced a fear that the

¹⁰⁶ *Id.*

¹⁰⁷ 42 U.S.C. § 5106.

¹⁰⁸ N.Y. FAM. CT. ACT § 1016, which provides in part: "the court shall appoint a law guardian to represent a child who has been allegedly abused or neglected . . ."

¹⁰⁹ 191 A.D.2d 132, 135, 599 N.Y.S.2d 892, 893 (1993).

¹¹⁰ N.Y. FAM. CT. ACT § 241.

¹¹¹ *In re Gault*, 387 U.S. 1.

¹¹² N.Y. FAM. CT. ACT § 241.

¹¹³ *In re Elianne M.*, 196 A.D.2d 439, 601 N.Y.S.2d 481 (1st Dep't. 1993).

¹¹⁴ *Id.*

court appointed law guardian would not present her wishes to the court because she felt that the law guardian had been influenced by her adoptive mother.¹¹⁵ Here, the court suggested that the proper role of a law guardian was to advocate for the child's wishes.¹¹⁶ However, in the case of *In re Apel*,¹¹⁷ a New York Family Court suggested the proper role of a law guardian in an abuse proceeding should be to remain neutral. The Commissioner of Social Services requested the law guardian be removed because he felt that the law guardian had a bias for keeping children in foster care.¹¹⁸ While the court denied the motion, it reminded the law guardian that he had an obligation to help the court arrive at a proper disposition and, as such, should remain neutral and provide information to the court as related to the child's best interests.¹¹⁹ The court went on to say, however, that the law guardian had a right to advocate his opinion which he had formed over the past five years while representing these particular children.¹²⁰ Similarly, the Second Department overturned a family court's removal of a law guardian for an infant in a neglect proceeding.¹²¹ The law guardian, in this case, had advocated moving the child after two years in his foster home, to the home of a maternal aunt. The trial court granted the foster parents' request to remove the law guardian.¹²² The appellate court, in overturning the decision, stated that in a child protective proceeding, a law guardian's role "not only includes serving as counsel and advocate for the child, but also encompasses aiding the court in arriving at an appropriate disposition" and, as such, a law guardian is expected to advocate for a disposition that in his judgment would protect the child's best interests.¹²³ Case law in New York favors the right of the

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *In re Apel*, 96 Misc.2d at 840, 409 N.Y.S.2d at 929 (Fam. Ct. 1978).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 841, 409 N.Y.S.2d at 931.

¹²⁰ *Id.*

¹²¹ *In re Dewey S.*, 175 A.D.2d 920, 573 N.Y.S.2d 769 (2d Dep't. 1991).

¹²² *Id.*

¹²³ *Id.* at 921.

law guardian to promote what he believes to be the best interests of the child.

The N.Y.S.B.A. Standards state that “child protective proceedings (abuse and neglect) pose perhaps the most troublesome issues to a law guardian. The consequences to the child are great.”¹²⁴ Part of the problem in representing children involved in protective proceedings is that often they are very young and not able to let their wishes be known.¹²⁵ Depending on the child’s age, maturity and capacity, the law guardian is given considerable latitude.¹²⁶ In protective proceedings, the law guardian’s role becomes partly investigative as he must verify the facts, interview the child in an attempt to ascertain his wishes, investigate the charges and then, using the information gained, develop an opinion as to the child’s wishes and best interests which may not be mirror images of each other.¹²⁷ Additionally, at the trial stage, a child may be asked to testify and it becomes the law guardian’s job to protect the child from trauma.¹²⁸ The law guardian is expected to take an active role in a trial as to presenting all information he may have gathered. At the dispositional stage, the law guardian must advocate the position that represents a child’s wishes while protecting his interests and well being.¹²⁹

Herein lies the heart of the conflict. What is the law guardian obligated to advocate when a child’s wishes do not match what is in his best interests? The N.Y.S.B.A. Standards state that where a conflict arises, it should be resolved by working with the child. While the conflict may not be completely resolved, the law guardian must advocate the child’s wishes within the confines of protecting his well being.¹³⁰ In New York State, law guardians are urged to become familiar with the legislative and judicial initiatives, particularly the Child Welfare

¹²⁴ N.Y.S.B.A. Standards, *supra* note 59, at 125.

¹²⁵ N.Y.S.B.A. Standards, *supra* note 59, at 125.

¹²⁶ N.Y.S.B.A. Standards, *supra* note 59, at 126.

¹²⁷ N.Y.S.B.A. Standards, *supra* note 59, at 126.

¹²⁸ N.Y.S.B.A. Standards, *supra* note 59, at 127.

¹²⁹ N.Y.S.B.A. Standards, *supra* note 59, at 127.

¹³⁰ N.Y.S.B.A. Standards, *supra* note 59, at 127.

Reform Act¹³¹ which establishes and codifies children's rights including a right to preventive services.¹³² Case law in New York State also seems to suggest the NYSBA method of resolving interests/wishes conflicts.¹³³

Fordham University Law School hosted a national conference related to children and the law with the goal of coming to a consensus on the role of lawyers appointed for children. The participants concluded that the American Bar Association Standards, the Model Rules and the Model Code did not provide adequate guidance.¹³⁴ The Conference produced a list of recommendations to guide lawyers appointed to represent children.¹³⁵ The Fordham Conference on "Ethical Issues in the Legal Representation of Children Recommendations" sought to limit the discretion of the lawyer in advocating a position on behalf of a child.¹³⁶ The conference concluded that a law guardian's primary role is that of a lawyer and, as such, he must act under the ethical mandates of the Rules of Professional Responsibility and advocate for the child's wishes as far as the child can articulate.¹³⁷ If the child is unable to express his wishes, then the lawyer may advocate for the child's best interests, but only to the extent that the child is impaired.¹³⁸ Best interest should be determined from the child's perspective and within the context of the child's circumstances and the ramifications of any position taken.¹³⁹

¹³¹ N.Y. SOC. SERV. LAW §§ 358 (a)-(h).

¹³² N.Y.S.B.A. Standards, *supra* note 59, at 128.

¹³³ *Dewey*, 175 A.D.2d at 920, 573 N.Y.S.2d at 769.

¹³⁴ Jessica Eames, *Seen But Not Heard: Advocating For the Legal Representation Of A Child's Expressed Wishes In Protection Proceedings*, 48 EMORY L. J. 1431 (1999).

¹³⁵ *Proceedings Of The Conference On Ethical Issues In The Legal Representation Of Children: Recommendations Of The Conference*, 64 FORDHAM L. REV. 1301 (1996).

¹³⁶ Ann Haralambie, *Responses To The Conference: Response To The Working Group On Determining The Best Interest Of The Child*, 64 FORDHAM L. REV. 2013, 2018 (1996).

¹³⁷ *Id.* at 2016.

¹³⁸ *Id.*

¹³⁹ *Id.* at 2017.

According to Jean Peters, author of *Representing Children in Child Protective Proceedings*, it is imperative that a lawyer representing a child understand the wishes and “best interests” of a child within the context of the child’s world.¹⁴⁰ A lawyer needs to get to know a child and her situation by speaking to the child and listening to her, explaining the lawyer’s role and talking to other people important in the child’s life.¹⁴¹ It is important for “lawyers to individualize every representation in a way that allows the maximum possible participation of the client so that the representation reflects the uniqueness of each client.”¹⁴² Peters states two instances in which a lawyer is to advocate the child’s best interests over the child’s wishes: when the lawyer’s role is described by statutes as representing the child’s best interests; and, if the child is not able to formulate her wishes.¹⁴³ Otherwise, the lawyer is to argue as the child wishes.¹⁴⁴

While the ABA standards and the Model Code support the concept that a law guardian in New York State should adopt a child’s wishes, the New York statute, case law, and some authorities in the field hold that best interests of the child is the proper advocacy role.¹⁴⁵ Case law in New York adds support to the theory that law guardians are obligated to put the child’s best interests first in their efforts to advocate. In the case of *In re Jennifer G.*,¹⁴⁶ a law guardian who argued for the return of her two young clients to an abusive mother was removed from the case and a new law guardian appointed because the court held that the law guardian did not act in a way which was conducive to the best interests of the child.¹⁴⁷

Responding to a survey as to the proper role of a law guardian in protective proceedings, lawyers in New York City

¹⁴⁰ JEAN PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS, 118 (1997).

¹⁴¹ *Id.* at 50.

¹⁴² *Id.* at 54.

¹⁴³ *Id.* at 130.

¹⁴⁴ *Id.* at 54.

¹⁴⁵ See *supra* text accompanying notes 103-23.

¹⁴⁶ 110 A.D.2d 801, 487 N.Y.S.2d 864 (2d Dep’t 1985).

¹⁴⁷ *Id.* at 866.

strongly believed a child's wishes was the proper stance to be advocated, while upstate New York and Long Island lawyers advanced that a law guardian should present both the wishes of the child and the best interests of the child.¹⁴⁸ Peters believes this second method is most appropriate and states that "regardless of whatever is determined to be in the child's best interests, a lawyer must express the child's wishes to the decision maker."¹⁴⁹ She claims a law guardian can do both by determining the child's best interests with the "child in context" as the focus versus the "lawyer in context."¹⁵⁰ Often by making the effort to explain the situation and the proceedings in a way that the child understands, the lawyer and child client can come to an understanding of what the lawyer's position should be.

A second conflict of interest problem can arise in abuse and neglect proceedings when the law guardian represents siblings.¹⁵¹ The lawyer must consider whether he can adequately represent more than one child in the family.¹⁵² Representation of one child may be inconsistent with representing another sibling.¹⁵³ Such a conflict arises when one sibling may desire a different outcome than a brother or sister, or if there is an issue between the siblings themselves.¹⁵⁴ One sibling may be abusing another, or one sibling may not believe another's claim of parental abuse and might be angry with the claimant.¹⁵⁵ The lawyer may not be able to protect one sibling's interests without adversely affecting the other's position.¹⁵⁶ The Model Code prohibits the lawyer from representing more than one client if their interests are different.¹⁵⁷ The N.Y.S.B.A. Standards

¹⁴⁸ PETERS, *supra* note 140, at 1404.

¹⁴⁹ PETERS, *supra* note 140, at 57.

¹⁵⁰ PETERS, *supra* note 140, at 57.

¹⁵¹ PETERS, *supra* note 140, at 807.

¹⁵² PETERS, *supra* note 140, at 807.

¹⁵³ PETERS, *supra* note 140, at 805.

¹⁵⁴ PETERS, *supra* note 140, at 805.

¹⁵⁵ PETERS, *supra* note 140, at 38.

¹⁵⁶ PETERS, *supra* note 140, at 38.

¹⁵⁷ MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105.

recommend that a lawyer in such a position withdraw from representing any of the siblings.¹⁵⁸

In the case of *In re H. Children*,¹⁵⁹ the Family Court held that if an attorney is representing more than one child and a conflict of interest arises between the siblings, the attorney may be obligated to withdraw from representing both children.¹⁶⁰ In this case, the two minors had a different view as to the alleged sexual abuse by the father toward one of the children.¹⁶¹ The court held that in such a situation, the guardian may have received confidential information from each child and that this in itself is a conflict of interest for a law guardian.¹⁶² Such information may create a dilemma, in that a law guardian might be tempted to use confidential information from one child to benefit the other.¹⁶³ This situation portrays a conflict of loyalty to a client that a law guardian might encounter when representing more than one sibling.

The conflicts of loyalty and confidentiality are part of the attorney-client privilege.¹⁶⁴ Ordinarily, unless a client consents, the lawyer can not reveal a confidence.¹⁶⁵ The only exceptions to that privilege are if a client is planning to commit a crime and the information is needed to prevent it (sometimes an issue in Juvenile Delinquency or PINS case); and, when an attorney is required to disclose the information by law or court order.¹⁶⁶ This is particularly relevant in abuse and neglect cases because if a child discloses to a lawyer that he is being abused or neglected, the lawyer may be obligated to report the information.¹⁶⁷ Law guardians must be able to pursue the best interests of the child

¹⁵⁸ N.Y.S.B.A. Standards, *supra* note 59, at 15 (B-2).

¹⁵⁹ 160 Misc. 2d 298 (Fam. Ct. 1994).

¹⁶⁰ *Id.* at 299.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ PETERS, *supra* note 140, at 621.

¹⁶⁵ PETERS, *supra* note 140, at 621.

¹⁶⁶ MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (c)(2).

¹⁶⁷ N.Y. FAM. CT. ACT § 1075.

and that may involve divulging information said in confidence.¹⁶⁸ Law guardians should not be hindered while trying to advocate for the child, by a child having the power to forbid disclosure.¹⁶⁹ While the child should be told of the possibility that his confidence may have to be revealed, the ultimate decision to disclose the information should be the law guardian's.¹⁷⁰ Additionally, law guardians can be compelled by the court to disclose the information.¹⁷¹ Public policy demands that in abuse and neglect proceedings, the court needs the full development of the facts so as to make a decision in the best interest of the child.¹⁷² Law guardians have a duty to protect children from abuse and neglect.¹⁷³ The problem of disclosure may be able to be resolved between the child and law guardian and the child may be persuaded to reveal the information or give a waiver.¹⁷⁴ If not, however, the law guardian may have to disclose the information in this role as advocate for the best interests of the child.¹⁷⁵

The final conflict for the law guardian in abuse and neglect cases is the one posed by the purpose of the law itself. The goal of the law is to protect the child and preserve the family.¹⁷⁶ These goals may be inconsistent, but the law guardian should keep both in mind.¹⁷⁷

¹⁶⁸ Stuckey, *supra* note 6, at 1801.

¹⁶⁹ Stuckey, *supra* note 6, at 1801.

¹⁷⁰ Stuckey, *supra* note 6, at 1801.

¹⁷¹ Stuckey, *supra* note 6, at 1803.

¹⁷² Stuckey, *supra* note 6, at 1803.

¹⁷³ Stuckey, *supra* note 6, at 1809.

¹⁷⁴ ANN HARALAMBIE, *THE CHILD'S ATTORNEY* 36 (1993).

¹⁷⁵ Stuckey, *supra* note 6, at 1801.

¹⁷⁶ Edwards, *supra* note 29, at 81 (referring to the Adoption and Child Welfare Act of 1980, 42 U.S.C. §§ 420-673 (2000)).

¹⁷⁷ Edwards, *supra* note 29, at 81.

V. The Role of a Law Guardian in Custody and Visitation Rights Proceedings

While the legislature has authorized law guardian appointments for custody cases in both Family Court and the Supreme Court of New York,¹⁷⁸ it is discretionary for the judge to appoint one.¹⁷⁹ However, failure to appoint a law guardian may constitute abuse of discretion.¹⁸⁰ Law guardians for custody cases are appointed pursuant to Section 249(a) of the Family Court Act, or Section 1201 of the Civil Practice Rules and Law and Section 202.16(f) of the Uniform Rules of Trial Court for cases appearing in the state Supreme Court.¹⁸¹ The law guardian role in custody cases is governed by the various related statutes in the Family Court Act. “The statute and case law prescribe increased law guardian participation.”¹⁸²

The N.Y.S.B.A. has published a second volume of “Law Guardian Representation Standards,” specifically formulated for custody cases.¹⁸³ While the standards have not been enacted into law, three appellate departments use them and provide them to attorneys who take the law guardian training program.¹⁸⁴ The standards state that the law guardian, in custody cases, is considered to be neutral as to the parents’ adversarial procedures and should argue for the child’s best interests.¹⁸⁵ The law guardian in custody cases has traditionally acted as an agent of the court and filled a void in custody disputes.¹⁸⁶ As one commentary has noted:

¹⁷⁸ N.Y. FAM. CT. ACT § 249.

¹⁷⁹ 2 N.Y.S.B.A. Standards, Custody Cases 1 (1992).

¹⁸⁰ *Id.*

¹⁸¹ Erickson, *supra* note 11, at 821.

¹⁸² Erickson, *supra* note 11, at 821.

¹⁸³ 2 N.Y.S.B.A. Standards, *supra* note 179, at 3.

¹⁸⁴ Erickson, *supra* note 11 at 823. (stating that different appellate divisions require different training programs for law guardians and most have developed their own standards).

¹⁸⁵ 2 N.Y.S.B.A. Standards, *supra* note 179, at 3.

¹⁸⁶ Stuckey, *supra* note 6, at 1788.

Absent the assistance of a guardian ad litem, the trial court, charged with rendering a decision in the best interests of the child, has no practical, effective means to assure itself that all the requisite information bearing on the question will be brought before it untainted by the parochial interests of the parents. . . . The guardian ad litem essentially functions as the court's investigative agent, charged with the same ultimate standard that must ultimately govern the court's decision – the best interests of the child.¹⁸⁷

Not only should the law guardian be concerned with custody and visitation, but she should be aware of and advocate for the child's material needs and any protection issues that may exist.¹⁸⁸ New York legislation requires that judges in child custody and visitation cases must consider domestic violence within the family and how it relates to a child's best interests when deciding issues of custody.¹⁸⁹ Often great weight is given to the law guardian's position; as the only neutral participant besides the judge, the law guardian is frequently the attorney who negotiates a practical resolution.¹⁹⁰ When negotiating with parents for custody of a child, the law guardian may be in the best position to act as a catalyst for cooperation in order to procure an agreement based on the best interests of the child.¹⁹¹ If no agreement is reached, the law guardian must present all relevant information and should include evidence of the child's development and needs, parental – child relationships and each parent's ability to provide for the child physically, emotionally and socially so that the court has a complete picture of the available choices.¹⁹² One important goal in custody cases is to try

¹⁸⁷ Stuckey, *supra* note 6, at 1789.

¹⁸⁸ 2 N.Y.S.B.A. Standards, *supra* note 179, at 4.

¹⁸⁹ N.Y. DOM. REL. LAW § 240 (2).

¹⁹⁰ 2 N.Y.S.B.A. Standards, *supra* note 179, at 27.

¹⁹¹ HARALAMBIE, *supra* note 176, at 155.

¹⁹² HARALAMBIE, *supra* note 176, at 155.

to keep both parents involved in the child's life.¹⁹³ This is most easily accomplished when parents can communicate with each other in a civil manner.¹⁹⁴ The law guardian should monitor custody and visitation plans particularly during the first year so that, if necessary, modifications based on the child's best interests can be accomplished.¹⁹⁵

An additional role of the law guardian in this type of proceeding is to protect the child when that child testifies.¹⁹⁶ The law guardian needs to prepare and protect the child for an often traumatic experience.¹⁹⁷ It is the law guardian's job to make sure that the youngster's wishes are ascertained by testimony or an in-camera interview.¹⁹⁸ One final role of the law guardian in a custody case is to protect the child/client from multiple rounds of child expert evaluations when one experienced evaluator would be sufficient.¹⁹⁹

At a recent Family Court and Matrimonial Law Committee program for the Nassau County Bar Association, the committee stated that a law guardian was to advocate the child's best interests for young children and at about age nine, the child's wishes should be advanced.²⁰⁰ It was strongly suggested that the law guardian know the complete circumstances of the child and the case.²⁰¹ The law guardian is responsible for rendering an independent opinion and acting as an integral participant in the litigation.²⁰² Since the law guardian is seen as the only one with access to all sides of the issue, the judge relies on her to gather

¹⁹³ HARALAMBIE, *supra* note 176, at 156.

¹⁹⁴ HARALAMBIE, *supra* note 176, at 156.

¹⁹⁵ HARALAMBIE, *supra* note 176, at 156.

¹⁹⁶ 2 N.Y.S.B.A. Standards, *supra* note 179, at 32.

¹⁹⁷ 2 N.Y.S.B.A. Standards, *supra* note 179, at 32.

¹⁹⁸ 2 N.Y.S.B.A. Standards, *supra* note 179, at 32.

¹⁹⁹ Erickson, *supra* note 11, at 839.

²⁰⁰ Honorable Cornell Fosky, Address at the Nassau County Bar Association Meeting, *Role of Law Guardians – View From the Family Court Bench* (March 6, 2002).

²⁰¹ *Id.*

²⁰² *Id.*

the information and report it to the court.²⁰³ The judge often bases a decision on the law guardian's information and opinion. Therefore, it is essential that when advocating a position, the law guardian explain the basis and reasons for her recommendation.²⁰⁴

Case law in the area of custody disputes holds that there are no strict rules as to which parent is entitled to custody.²⁰⁵ The standard is the best interest of the child.²⁰⁶ In fact, the Second Department has held that a law guardian is required to advocate according to this standard.²⁰⁷ That court has described the role of a law guardian in custody disputes as a "champion of a child's best interests, an advocate for the child's wishes, an investigator seeking the truth, and a recommender of alternatives for the court's discretion."²⁰⁸

Concerns about the role of a law guardian in custody cases include issues of best interests versus child's wishes, issues of confidentiality, and conflicts that might result from representing siblings in custody cases. Where there is a conflict of best interests versus child's wishes in a custody case, both the Standards and case law agree that the law guardian is obligated to advocate for the child's best interests. The N.Y.S.B.A. Standards add that while a law guardian has a responsibility to work with a child in establishing a position and should express the child's wishes to the court, she has a duty to protect the child's best interests.²⁰⁹ The standards are also quick to point out that often, in custody disputes, the child becomes a pawn.²¹⁰ The Standards go on to suggest that a law guardian evaluate whether a

²⁰³ Honorable Elaine Stack, Address at the Nassau County Bar Association Meeting, *Role of Law Guardians - A View From the Supreme Court Bench* (March 6, 2002).

²⁰⁴ *Id.*

²⁰⁵ *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 596, 447 N.Y.S.2d 873 (1982).

²⁰⁶ *Matter of Nehrav Uhlar*, 43 N.Y.2d 242, 372 N.E.2d 4, 401 N.Y.S.2d 168. (1977).

²⁰⁷ *In re Jennifer G.*, 110 A.D.2d 801, 487 N.Y.S.2d 864. (2d Dep't 1985).

²⁰⁸ *Koppenhoeler v. Koppenhoeler*, 159 A.D.2d 113 (2d Dep't 1990).

²⁰⁹ 2 N.Y.S.B.A. Standards, *supra* note 179, at 13.

²¹⁰ 2 N.Y.S.B.A. Standards, *supra* note 179, at 17.

child has been coached by either parent as to the child's wishes or perception of facts.²¹¹ The role of law guardian in such complicated cases, is to support the child, represent his interests, inform the court of his wishes, and protect the child in all proceedings and decisions.²¹²

In a custody case involving an eleven year old child, the court held that a law guardian has a responsibility to represent a child's wishes and his best interest, but when the desired result of the child and the child's best interest differ, it is appropriate for a law guardian to make an investigation, and if in his independent judgment the child's best interests lie elsewhere, he has the right to argue his belief.²¹³ The child's preference in a New York custody proceeding is only one factor that the court must weigh and how much weight is given that preference depends on the age and maturity of the child.²¹⁴ The law guardian is required to acknowledge the child's wishes to the court but may hold an independent opinion as to the child's best interests and can properly attempt to advocate his opinion.²¹⁵

The conflicts that arise in representing more than one sibling are similar to those discussed in the abuse and neglect section.²¹⁶ The NYSBA Standards admonish a law guardian to be sensitive to the possibility of conflicts with siblings, to carefully evaluate this possibility and, if necessary, to request that the court appoint another law guardian for each of the children.²¹⁷ Such conflicts will more likely arise where one child wishes to live with one parent and the other child prefers another arrangement, or where one child's perception of the facts – possibly abuse, is very different than the view of a sibling.²¹⁸

²¹¹ 2 N.Y.S.B.A. Standards, *supra* note 179, at 10.

²¹² 2 N.Y.S.B.A. Standards, *supra* note 179, at 2.

²¹³ *Carballeia v. Shumway*, 273 A.D.2d 753, 754, 710 N.Y.S.2d 149, 150 (3d Dep't 2000).

²¹⁴ *Id.* at 756.

²¹⁵ *Id.*

²¹⁶ See *supra* text accompanying notes 132-36.

²¹⁷ 2 N.Y.S.B.A. Standards, *supra* note 179, at 4.

²¹⁸ HARALAMBIE, *supra* note 176, at 37.

Confidentiality and loyalty to the client are another conflict the law guardian may have in a custody dispute. Public policy favors full development of the facts in a court's search for the truth.²¹⁹ However, in *Carballeira*,²²⁰ the Third Department held that disclosure of a confidence was proper only because the law guardian had the child's permission.²²¹ Law guardians have an attorney/client relationship with the children they represent and generally cannot reveal a confidence under the Code of Professional Responsibility.²²² In the *Carballeira* case, the parents had joint custody of their disabled child. The father later sought and gained sole custody, contrary to the wishes of the child.²²³ The law guardian, while advocating his opinion as to the child's best interests, also communicated the child's wishes to the court.²²⁴ In arguing for a contrary result, the law guardian disclosed the child's confidence of an attempted suicide.²²⁵ The court held that there was no impropriety because the child had consented to the disclosure.²²⁶ The petitioning parent had argued that a law guardian is obligated to advocate the child's stated wishes if the child is old enough to express them, however, the court disagreed.²²⁷

VI. The Role of a Law Guardian in Termination of Parental Rights And Adoption Proceedings

Termination of parental rights is often the end chapter of a long legal history for a family.²²⁸ Termination is usually the result of abandonment, parental mental illness or retardation,

²¹⁹ HARALAMBIE, *supra* note 176, at 37.

²²⁰ *Carballeira*, 273 A.D.2d at 754, 710 N.Y.S.2d at 150.

²²¹ *Id.* at 757, 710 N.Y.S.2d at 153.

²²² MODEL CODE OF PROF'L RESPONSIBILITY, DR4-101 (c) (1).

²²³ *Carballeira*, 273 A.D.2d at 757, 710 N.Y.S.2d at 153.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ N.Y.S.B.A. Standards, *supra* note 59 at 165.

permanent neglect, or child abuse.²²⁹ The New York Court of Appeals in the case of *In re Orlando F.*, extended the right of representation to children involved in a termination of parental rights proceeding.²³⁰ The lower court had allowed the law guardian to withdraw from the case and did not appoint a replacement.²³¹ On appeal, it was held that the lower court had abused its discretion because a law guardian was required to represent the interests of the minor child.²³²

The law guardian's role, according to the FCA, is to protect the child's interests and help him express his wishes to the court.²³³ Likewise, according to the NYSBA standards, the law guardian has concomitant responsibilities in a termination proceeding and must protect the child's rights and interests while seeing that the child's wishes are considered.²³⁴ The law guardian is charged with taking an active role developing and advocating a disposition that is designed to protect, support and nurture the child.²³⁵

The most likely conflict of the law guardian at this point in a case is the divergent views of the child's wishes and the child's best interests. While a child may wish to return to an inappropriate home situation, his best interests may better be served by termination of parental rights and adoption into a more stable and supportive environment.²³⁶ The standards recommend that to the greatest extent possible, the conflict should be resolved by talking to the child.²³⁷ Where this is not possible, the child's best interests take precedent.²³⁸

²²⁹ SOC. SERV. LAW § 384 (b).

²³⁰ 40 N.Y.2d 103, 112, 351 N.E.2d 711, 717, 386 N.Y.S.2d 64, 68 (1st Dep't 1976).

²³¹ *Id.*

²³² *Id.*

²³³ N.Y.S. FAM. CT. ACT § 241.

²³⁴ N.Y.S.B.A. Standards, *supra* note 59, at 166.

²³⁵ N.Y.S.B.A. Standards, *supra* note 59, at 169.

²³⁶ N.Y.S.B.A. Standards, *supra* note 59, at 168.

²³⁷ N.Y.S.B.A. Standards, *supra* note 59, at 168.

²³⁸ N.Y.S.B.A. Standards, *supra* note 59, at 168.

Under the Adoption Assistance And Child Welfare Act Of 1980, (AACW), state agencies can receive federal funding only by making reasonable efforts to reunify a child with his family.²³⁹ Eventually, though, a final decision and permanency planning is necessary.²⁴⁰ The AACW states a preference for the termination of parental rights and adoption for a child who cannot return home because it offers a more permanent placement than the options of guardianship or long term foster care.²⁴¹ A child may not be able to return home because he may have been found to have been abandoned, permanently neglected, or abused. In New York State, the determinative time frame is eighteen months after a child's placement in foster care.²⁴² Because children need permanency and they are particularly time sensitive, it is the law guardian's role to advocate the child's need for a timely permanent disposition.²⁴³ In some cases this means returning the child to the home, and in others it means terminating the parents' rights and freeing a child for adoption, while in still others, permanent guardianship with parental visitation is appropriate.²⁴⁴ Whatever plan has been chosen as being in the best interests of the child, the law guardian is to zealously advocate for it.²⁴⁵ In adoption situations, New York State requires that children over age fourteen must give their consent to being adopted.²⁴⁶ Even if a child is not of an age where his consent is required, the law guardian has a duty to determine if the child wants to be adopted.²⁴⁷ A judge can waive the requirement of a child's consent, but there exists the possibility that the child will sabotage the adoption so judges are reticent to do so.²⁴⁸ Permanent foster care or a different adoptive home are other possibilities. If

²³⁹ 42 U.S.C. § 420-673.

²⁴⁰ HARALAMBIE, *supra* note 176, at 194.

²⁴¹ 42 U.S.C. § 420-673.

²⁴² N.Y. SOC. SERV. LAW § 384 (b).

²⁴³ HARALAMBIE, *supra* note 176, at 194.

²⁴⁴ HARALAMBIE, *supra* note 176, at 194.

²⁴⁵ HARALAMBIE, *supra* note 176, at 194.

²⁴⁶ N.Y. DOM. REL. LAW § 111.1 (McKinney 2000).

²⁴⁷ HARALAMBIE, *supra* note 176, at 197.

²⁴⁸ HARALAMBIE, *supra* note 176, at 197.

parental rights are terminated, a law guardian should ensure that a permanent home is procured and legal proceedings conclude as quickly as possible.²⁴⁹

VII. Children in the Criminal Court and the Role of a Law Guardian

There are two instances when children may require the services of a law guardian in criminal court – when they are a witness to a crime and must testify, and when they are victims of a crime. A law guardian may be appointed to accompany the child to protect his interests and to insulate the child from trauma.²⁵⁰ It is particularly hard for the child to face a person who inflicted maltreatment.²⁵¹ Several roles have been identified for law guardians in criminal court: counseling and translating court proceedings to the child; protecting the child from trauma caused by the court experience; coordination of agencies and courts when they need access to the child; acting as a voice for the child in letting the court and prosecutor know the child's needs and wishes (ie. testifying by videotape or closed circuit television); and as an advocate for the legal rights of the child.²⁵²

Appointment of a law guardian in criminal court is justified because he helps prepare the child for testifying, explains the meaning of the proceedings and supports the child through the ordeal.²⁵³ Often, a case could not be prosecuted without the child's testimony and the law guardian can help to make that testimony more effective as well as protect the child from harassment.²⁵⁴ Additionally, law guardians can help a judge fashion a sentence that will punish a perpetrator while protecting a child who may be emotionally attached to the offender. The

²⁴⁹ Edwards, *supra* note 29, at 85.

²⁵⁰ Edwards, *supra* note 29, at 86.

²⁵¹ Edwards, *supra* note 29, at 81.

²⁵² HARALAMBIE, *supra* note 176, at 291.

²⁵³ HARALAMBIE, *supra* note 176, at 291.

²⁵⁴ HARALAMBIE, *supra* note 176, at 291.

child risks being psychologically damaged as a result of testifying against a person to whom he may be emotionally attached.²⁵⁵

VIII. Ethics, Malpractice and Law Guardians

Statutes, case law, standards developed by the NYSBA, and the Code of Professional Responsibility all govern the representation of children in family court proceedings and, indeed, in any proceeding in which a law guardian is assigned to represent a child. The United States Supreme Court case of *In re Gault*, established that a child in a juvenile delinquency proceeding is entitled to counsel.²⁵⁶ The right to counsel was extended for protective proceedings in New York State by the case of *Jamie TT*.²⁵⁷ In *Jamie TT*, the appellate court held that a minor had the right to effective counsel for a protection proceeding under both the state and federal constitutions, as well as the FCA, Article Ten.²⁵⁸ The representation of a minor is to be meaningful.²⁵⁹ That meant, according to the court in the case of *Jamie TT*, that the physical presence of a state appointed lawyer in the courtroom is not enough.²⁶⁰ The court went on to hold that effective representation must include taking time to prepare a presentation of the relevant law and the pertinent facts as well as the use of basic advocacy skills to protect the child's interests.²⁶¹ Furthermore, it has been held to be mandatory that a law guardian fully participate in trials by offering evidence, and questioning witnesses.²⁶²

In New York, law guardians are also assigned to foster care proceedings and termination of parental rights cases. The FCA requires that law guardians protect a minor's interest and

²⁵⁵ HARALAMBIE, *supra* note 176, at 291.

²⁵⁶ *Gault*, 387 U.S. 1.

²⁵⁷ 191 A.D.2d 132, 599 N.Y.S.2d 842 (3d Dep't 1993).

²⁵⁸ *Id.* at 135.

²⁵⁹ Sobie, *supra* note 37, at 785.

²⁶⁰ *Jamie TT*, 191 A.D.2d at 136, 599 N.Y.S.2d at 846.

²⁶¹ *Id.* at 137.

²⁶² *Borkowski v. Borkowski*, 90 Misc. 2d 57, 396 N.Y.S.2d 962 (1977).

help express his wishes to the court.²⁶³ The courts have held that a child may request a change in his appointed law guardian where the child does not feel comfortable, does not communicate with his law guardian, or does not trust the law guardian to express his wishes to the court.²⁶⁴ Additionally, if a law guardian does not take an active role, he can be disciplined or replaced.²⁶⁵

As American society has become disenchanted with lawyers, malpractice litigation has increased.²⁶⁶ Ann Haralambie, in her book *The Child's Attorney*, has identified an overall trend of filing civil actions on behalf of children against those who are responsible for investigating cases and protecting children.²⁶⁷ It is claimed that some lawyers fail in their duty to provide zealous efforts to return the child to his home, or fail in their duty to free the child for adoption; or fail to adequately protect a child from adverse situations.²⁶⁸

In *Marquez v. Presbyterian Hospital*,²⁶⁹ a protection case that alleged sexual abuse, the child was removed from her home for eighteen months, then returned when the investigator found no evidence of abuse.²⁷⁰ The parents proceeded to sue the law guardian for malpractice.²⁷¹ The court held that the malpractice standard as applied to law guardians, requires proof that the law guardian did not act with good faith in exercising his discretion.²⁷² Good faith was defined as judgment reasonably exercised based on the facts known at the time.²⁷³ The court went on to say that when acting for a very young child, the law

²⁶³ N.Y. FAM. CT. ACT § 241.

²⁶⁴ *Elianne M.*, 196 A.D.2d at 439, 601 N.Y.S.2d at 481.

²⁶⁵ *Van Gorder v. Van Gorder*, 188 A.D.2d 1049, 591 N.Y.S.2d 915 (4th Dep't 1992).

²⁶⁶ David Katner, *Coming To Praise, Not To Bury, The New ABA Standards Of Practice For Lawyers Who Represent Children In Abuse And Neglect Cases*, 14 GEO. J. LEGAL ETHICS 103 (2000).

²⁶⁷ HARALAMBIE, *supra* note 176, at 43.

²⁶⁸ HARALAMBIE, *supra* note 176, at 43.

²⁶⁹ 159 Misc. 2d 617, 608 N.Y.S.2d 1012 (N.Y. Sup. Ct. 1994).

²⁷⁰ *Id.* at 619.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 625.

guardian is essentially a guardian ad litem and acts in the best interests of the child.²⁷⁴ The law guardian, therefore, needs to be protected from litigation that would undermine his good faith efforts.²⁷⁵ The court limited its holding to when the law guardian is acting as a guardian ad litem for a very young child as distinguished from lawyers acting in a role as advocate (ie; PINS and juvenile delinquency cases).²⁷⁶ However, in a recent case where a court in New York has addressed civil liability for a law guardian, it was suggested that the line between advocating for a child's best interests versus advocating for his wishes is not easily drawn and quasi-judicial protection may extend to any law guardian acting within the scope of his appointment.²⁷⁷

In 1988, the New York Bar Association conducted a study of law guardians and determined that forty-five percent of the overall representation was inadequate and fifty percent of the errors made by law guardians went unchallenged.²⁷⁸ Law guardian standards were then enacted to give law guardians more guidance.²⁷⁹ It has been suggested that law guardians are also monitored by judges and this provides some control over their discretion.²⁸⁰ Judges do not have to consent to a law guardian's recommendation.²⁸¹ Additionally, parents, social services, and children can request a change in law guardians and the decision of a judge on this matter is able to be appealed.²⁸² Finally, the Code of Professional Responsibility operates as a guide and control for law guardians.²⁸³ However, critics suggest that additional regulations are necessary to limit discretion of law guardians, improve representation of children, and to protect the

²⁷⁴ *Marquez*, 159 Misc. 2d at 625, 608 N.Y.S.2d at 1018.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Bluntt v. O'Connor*, 737 N.Y.S. 2d 471 (4th Dep't 2002).

²⁷⁸ *Shepherd*, *supra* note 14, at 1932.

²⁷⁹ N.Y.S.B.A. Standards, *supra* note 59.

²⁸⁰ *Bluntt*, 737 N.Y.S. 2d at 24.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

young clients being represented.²⁸⁴ They argue that there needs to be measuring standards to evaluate the work of law guardians and check that quality representation is granted to children who do not have the ability to comprehend what is happening to them.²⁸⁵

Exposure to liability for the malpractice of an attorney acting as a law guardian is most likely to occur in the areas of: making an adequate investigation; conferencing with the child; familiarity with the law, records and reports including possible options for services and placement; obtaining necessary disclosures for consideration by the court; maintaining contact with the client and family to arrange for any adoption subsidies that might be available; fully participating in court actions; proposing alternative claims a client may be entitled to; presenting the child's wishes; lack of permanency planning; and meeting a standard of reasonable care in general.²⁸⁶ However, New York case law suggests that law guardians are somewhat protected by a quasi-judicial immunity from suit in the course of performing their duties and advocating the best interests of the child.²⁸⁷ Because the law guardian is considered an agent of the court, he enjoys an immunity similar to that granted to judges and other agents of the court.²⁸⁸ One reason for this immunity for law guardians is that if the law guardian is subject to civil suits by unhappy parents, he may be chilled from exercising independent judgment and making recommendations based on that judgment.²⁸⁹ The court in *Bluntt*, quoted a Supreme Court of Wisconsin case holding that a law guardian "must be allowed to independently consider the facts of a case and advocate the best interests, free from the threat of harassment for retaliatory litigation. Fear of liability could warp the judgment of those who are appointed, toward the appeasement of disappointed parents or

²⁸⁴ *Id.*

²⁸⁵ Shepherd, *supra* note 14, at 1951.

²⁸⁶ HARALAMBIE, *supra* note 176, at 43.

²⁸⁷ HARALAMBIE, *supra* note 176, at 43.

²⁸⁸ HARALAMBIE, *supra* note 176, at 51.

²⁸⁹ HARALAMBIE, *supra* note 176, at 51.

children and away from protecting the best interests of the child:"²⁹⁰

On the other hand, in the custody case of *Matter of Terrance G.* the court explained the fears of the critics.²⁹¹

Cloaked in the statutory phrase 'best interests of the child' is the invitation to the exercise of awesome power....To treat that power cavalierly, to utilize it with presumption or with preference; to exult in its form but without substance; to rationalize pre judgment and garb it with platitudes; to insult without good cause; to judge where judgment is not called for; to particularize when comprehension of the whole is necessary; to fail to act when action is required is to corrupt that power and to be corrupted by it.²⁹²

A heightened ethical duty accompanies an attorney for the child because of the client's immaturity and inability to understand the procedures and repercussions that may be involved with the case.²⁹³ Attorneys should thoroughly investigate the case, evaluate any special needs of the child, get the help of experts in assessing the child and in general, thoroughly prepare.²⁹⁴ Finally, it is important that law guardians for children exercise professional judgment at every step of the case.²⁹⁵

IX. Conclusion

Representing children in New York State as a law guardian requires not only affirmative duties, but a responsibility

²⁹⁰ *Bluntt*, 737 N.Y.S. 2d at 23 (quoting *Paige K.B. v. Molepske*, 580 N.W.2d 289 (1998)). Minors were sexually abused after their father was given custody in a divorce case. In a suit against the guardian ad litem, the court held that the guardian was entitled to quasi-judicial immunity.) *Id.*

²⁹¹ *Matter of Terrance G.*, 731 N.Y.S.2d 832. (N.Y. Fam. Ct. 2002).

²⁹² *Id.* at 873.

²⁹³ HARALAMBIE, *supra* note 176, at 44.

²⁹⁴ HARALAMBIE, *supra* note 176, at 45.

²⁹⁵ HARALAMBIE, *supra* note 176, at 45.

to advocate a child's best interests and present the child's wishes to the court. That role changes somewhat with the type of proceeding.

In a juvenile delinquency or PINS proceeding, where a liberty interest is often at stake, a law guardian should vigorously defend the child in the same way as any attorney representing an adult defendant. The law guardian should represent the legal interests of the child and act as an advocate of the child's wishes. However, the advocacy must take place within the confines of the best interest standard. The child and attorney should be guided by each other with the child expressing to the law guardian what he wants admitted and advocated and the law guardian explaining and counseling the child as to the effects of those decisions. As the children in these types of proceedings are usually on the older side, they should be able to expect an attorney representing them to abide by their wishes. It is only in the most extreme situations in which a guardian and child can not agree on a course of action that the guardian should revert to a best interests of the child standard and argue her own position. In such a case, it should be made known to the court that there is a difference of opinion between the attorney and her client and the reasons she has chosen to advocate one position over another.

Contrastingly, in protective proceedings for abuse and neglect cases, the law guardian should reverse the emphasis and act first as a protector of the child's best interests, while expressing the child's alternative wishes to the court. It is in protective proceedings, and adoption and custody cases that the law guardian faces a true and sometimes overwhelming combination of roles – attorney and guardian ad litem. A law guardian in protective proceedings should be allowed to advocate a position different from the child's wishes because it is well recognized that a child may be torn between love of a parent and a desire for familiarity, versus a need for safety and stability. In such a situation, it is imperative that the law guardian stay focused on the best interests of the child.

Likewise, in adoption and custody cases, the child's wishes are only one part of the court's decision and a law guardian is expected to make an independent investigation and

recommendation based on the child's best interests. The age and maturity of a child go to the weight accorded a child's wishes as considered by the judge in his decision. The danger in both situations is that a law guardian may be making decisions and arguments based on inadequate information. It therefore becomes vital that an investigation be made of the facts and experts such as psychologists, social workers and physicians be consulted before a position is decided on by the law guardian. Additionally, the law guardian should seek out those who know the child best such as teachers, relatives and neighbors. The totality of the circumstances of the child must be considered to ensure that the sensitive balance between the best interests of the child and the wishes of the child are weighed.

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