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Nancy S. Erickson

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J.D. Brooklyn Law School; LL.M., Yale Law School. The author was a professor of law for many years and has written several books and many articles on family law, including child support, custody, marital property, domestic violence, and adoption. She is currently a solo practitioner concentrating in matrimonial and family law and is employed as a Senior Trial Attorney by Legal Services for New York, Brooklyn Branch. The views expressed in this article are solely the views of the author and do not necessarily reflect the positions or policies of Legal Service for New York.

THE ROLE OF THE LAW GUARDIAN IN A CUSTODY CASE INVOLVING DOMESTIC VIOLENCE

*Nancy S. Erickson**

INTRODUCTION

A law guardian for a child has an extremely difficult job, one that arguably requires a higher degree of diligence than that of an attorney representing a competent adult. Yet, under New York law, the role of the law guardian for a child involved in a custody case is not clearly defined.

When domestic violence is involved, the law guardian's role becomes crucial. As Judge Marjory Fields stated in 1994:

> A law guardian may help provide protection for the child by countering the tendency of battered women when they testify to minimize the violence committed against them. The law guardian can present the child's wishes to the court. Finally, the law guardian will have greater credibility with the court when presenting evidence of the impact of the violence on the child, and the child's fears of the violent father.[1]

The role of the law guardian for the child in a custody case involving domestic violence has been expanded as a result of the enactment of chapter 85 of the 1996 Laws of New York ("Chapter 85"),[2] which requires that judges in child custody cases consider domestic violence when determining the best interests of the child.

This article will outline the statutes, cases and rules governing law guardians in New York and will discuss how Chapter 85 affects the law guardian's role.

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* J.D. Brooklyn Law School; LL.M., Yale Law School. The author was a professor of law for many years and has written several books and many articles on family law, including child support, custody, marital property, domestic violence and adoption. She is currently a solo practitioner concentrating in matrimonial and family law and is employed as a Senior Trial Attorney by Legal Services for New York, Brooklyn Branch. The views expressed in this article are solely the views of the author and do not necessarily reflect the positions or policies of Legal Services for New York.

1. Marjory D. Fields, *The Impact of Spouse Abuse on Children and its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J.L. & PUB. POL'Y 221, 247-48 (1994).

2. 1996 N.Y. Laws ch. 85, § 2.

I. NEW YORK STATUTES, CASES AND RULES GOVERNING LAW GUARDIANS

A. Definition of "Law Guardian"

Section 241 of the Family Court Act ("FCA") declares that "minors who are the subject of family court proceedings . . . should be represented by counsel of their own choosing or by law guardians."[3] Some children who appear before the family court have "counsel of their own choosing" either because their parents or others pay for the lawyer or because the attorney volunteers.[4] This is not usually the case, however, and courts often must appoint a law guardian for the child pursuant to the provisions of the FCA.

It is clear what a law guardian is not: a law guardian is not a guardian ad litem,[5] a forensics expert, a social worker or a finder of fact. A law guardian is an attorney for a child, but the law guardian's *role* may be different from the role of an attorney for an adult.

Many attorneys, parents and even judges do not understand the role of a law guardian. There is a longer history of law guardians in the family court than in the supreme court, so it is not surprising that supreme court judges and practitioners more often misunderstand the role of a law guardian. It has even been remarked by more than one matrimonial attorney that some supreme court judges view the law guardian's role as akin to that of an assistant to the judge. Although the law guardian can, of course, be of assistance to the judge (as can forensics experts and social workers), this is an inaccurate view of the law guardian's role.

Recognizing the difficulty of defining the law guardian's role, Justice Lewis R. Friedman stated in 1994 that "[t]oday law guardians are essential to the functioning of the family court and serve vital roles in all types of cases in that court and in supreme court

3. N.Y. FAM. CT. ACT §241 (McKinney 1999).

4. *Id.* § 249 Practice Commentaries at 246 (McKinney 1999).

5. A guardian ad litem ("for the case") is a person, often but not necessarily a lawyer, appointed by the court to represent the interests of an infant or an incompetent person. For a good explanation of the differences between guardians ad litem and law guardians, see N.Y. ST. B. ASS'N COMM. ON PROFESSIONAL ETHICS, Ethics Opinion 656 (1993). In a particular case, it could be necessary for a child to have both a guardian ad litem and a law guardian. For example, when a child needs to be the plaintiff (petitioner) in a case and there is no parent capable of bringing the case on the child's behalf, a guardian ad litem — perhaps a grandparent, aunt, uncle or other relative or friend — may be needed to act in that role; additionally, a law guardian may be necessary to act as the child's attorney.

matrimonial and custody cases. Yet, there is, and has been, no clear definition of the role of a law guardian."[6]

Judge Friedman reviewed the history of the use of "law guardians" to represent children in various types of proceedings, pointing out that, "There is consensus in the legal community that there is an essential duality of the law guardian's role — defense attorney [advocate for the child's position] and guardian [to act in the best interests of the child]."[7]

He noted that although the legislature amended the FCA in 1970, the statutory definition of the role of the law guardian is still not particularly helpful.[8] Section 241 of the FCA merely states that the law guardian is needed as "counsel to help protect [children's] interests and to help them express their wishes to the court."[9]

This statutory definition does not assist the law guardian to determine which of his/her roles should prevail — the role of advocate or the role of guardian. In other words, the law guardian needs to know whether he or she should argue for the result the child wishes or the result the law guardian believes would be in the child's best interests.

In his Practice Commentaries on section 241 of the FCA, Douglas J. Besharov states: "The convoluted wording of this section reflects: (1) the underlying ambivalence of its drafters about the role of Law Guardians, and (2) the problems inherent in establishing guidelines for the representation of young people of varying degrees of maturity."[10]

As a practical matter, when a child is very young, the law guardian cannot determine the child's wishes. Conversely, the law guardian would have a difficult time arguing against the result an older teenager would want. However, most children are "in-between" — they can articulate their wishes to a certain extent, but the law guardian may agree or disagree as to whether the child's desired outcome would be in the child's best interests.

To solve such problems of ambiguity, a more useful definition of the role of the law guardian is needed than the definition in section 241 of the FCA, and attempts are being made to develop such a definition. There is now a Statewide Law Guardian Advisory Committee ("LGAC"), chaired by Justice Edward O. Spain of the

6. Marquez v. Presbyterian Hosp., 608 N.Y.S.2d 1012, 1014 (Sup. Ct. 1994).
7. *Id.* at 1015.
8. *See id.*
9. N.Y. FAM. CT. ACT § 241.
10. *Id.* Practice Commentaries at 218.

Appellate Division, Third Department, which was established in 1996 by the Office of Court Administration and meets periodically to deal with issues relating to law guardians. The work of the LGAC should lead to greater uniformity throughout the state with regard to law guardians. In fact, the LGAC has already made one recommendation for legislation that deals with payment of fees for law guardians.[11]

The LGAC has developed the following working definition of the role of the law guardian:

> The law guardian is the attorney for the child. In juvenile delinquency and persons in need of supervision proceedings, it is the responsibility of the law guardian to vigorously defend the child. In other types of proceedings, *it is the responsibility of the law guardian to diligently advocate the child's position in the litigation.* In ascertaining that position, the law guardian must consult with and advise the child to the extent and in a manner consistent with the child's capacities. If the child is capable of knowing, voluntary and considered judgment, the law guardian should be directed by the wishes of the child, even if the law guardian believes that what the child wants is not in the child's best interests. *However, when the law guardian is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment or that following the child's wishes is likely to result in a risk of physical or emotional harm to the child, the law guardian would be justified in taking a position that is contrary to the child's wishes.* In these circumstances, the law guardian should report the child's articulated wishes to the court if the child wants the law guardian to do so, notwithstanding the law guardian's position.[12]

This definition of the law guardian's role expresses the inherent duality of the child's desires versus the child's best interests, but adds an additional factor that would weigh against advocating for what the child articulates as her/his desires: the likelihood that harm would result.

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11. S. 7397, 221st Reg. Sess. (N.Y. 1998) (dealing with payment of law guardian fees by parents). The low fees paid to law guardians is a barrier to recruitment of a sufficient number of well-trained attorneys to represent children.

12. LAW GUARDIAN PROGRAM ADMINISTRATIVE HANDBOOK 2-3 (emphasis added). To contact the LGAC, write to Associate Justice Edward O. Spain, Appellate Division, Third Department, 61 State Street, Troy, New York 12180.

B. The Law Guardian's Role In Private Custody Cases Pursuant to Statutes and Court Rules

There is a dearth of statutory and regulatory authority relating to law guardians. The courts have found it necessary to fill in the legislative and regulatory blanks by a great deal of judicial interpretation. This judicial interpretation will undoubtedly be accelerated by the declaration of Chief Justice Judith Kaye that a law guardian should be appointed in any case involving the custody of a child.[13]

1. *In Divorce Cases*

The Domestic Relations Law does not deal with law guardians; the statutes relating to law guardians are in the FCA instead, and most are applicable in divorce and other matrimonial actions.[14]

The Matrimonial Rules, however, do specifically refer to law guardians in paragraph (f) of Section 202.16 of the Uniform Rules for Trial Courts. Paragraph (f) deals with Preliminary Conferences: "At the close of the conference . . . [t]he court may appoint a law guardian for the infant children, or may direct the parties to file with the court, within 30 days of the conference, a list of suitable law guardians for selection by the court."[15] This implies that early appointment of a law guardian in a divorce case is valuable.

2. *In Family Court Cases*

Non-marital children,[16] of course, are not affected by the Matrimonial Rules. Their parents usually go to family court to determine custody and visitation disputes.[17]

Married parents can also seek judicial intervention in the family court and tend to do so in many situations. For example, when emergency relief is needed, the family court can grant such relief on the same day when application for relief is made. Additionally, because family court has no filing fees and tends to be more "user friendly" to litigants without attorneys, married parents sometimes go to family court when private counsel is unaffordable.

13. *See* Getman v. Getman, N.Y. L.J., Jan. 16, 1997, at 36 (Sup. Ct. Jan. 16, 1997).

14. *See, e.g.*, Borkowski v. Borkowski, 396 N.Y.S.2d 962 (Sup. Ct. 1977).

15. *McKinney's 1999 New York Rules of Court* § 202.16(f)(3).

16. Non-marital children are those of parents who are not married. For further discussion, see *infra* note 18.

17. *But see* Allen v. Farrow, N.Y. L.J., June 8, 1993, at 1, 22 (App. Div. June 8, 1993). Woody Allen and Mia Farrow were never married, but Allen was the father of one of Farrow's children and adopted another child of Farrow. The custody battle over their children was brought in supreme court.

Once paternity is established, the FCA makes no distinction between marital and non-marital children with regard to custody and visitation. This may mislead law guardians and others to believe that the general practices regarding marital children should be routinely and uncritically applied to non-marital children when to do so may not be in the best interests of those children.[18]

The Matrimonial Rules are not applicable in family court even when the parents are married, so there is no requirement of a Preliminary Conference in family court (although many family court judges do treat the first court appearance as a preliminary conference). There is also no statute or regulation directing exactly at what point in the course of a family court proceeding a law guardian should be appointed. If early appointment is valuable for marital children, it should be equally — if not more — valuable for non-marital children.

Certain provisions concerning law guardians are contained in Part 1 of Article 2 of the FCA. Section 241 of the FCA sets forth the legislative findings and purpose;[19] section 242 defines "law guardian" as "an attorney admitted to practice law in the state of New York and designated under this part to represent minors pursuant to [FCA section 249]."[20] Sections 243 and 244 describe the process by which the Office of Court Administration or an Appellate Division may designate a legal aid society, an individual attorney or a panel of attorneys to act as law guardians and the duration of such designation.[21] Sections 245 and 248 deal with compensation of law guardians and state appropriations therefor.[22]

Section 249 specifies when appointment of a law guardian is mandatory and when it is discretionary. Law guardians must be appointed in all child protective, juvenile delinquency and person in need of supervision proceedings, among others.

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18. For example, the non-marital child may not even know his or her father — he might be a total stranger. Then it cannot be assumed that unsupervised visitation will not be traumatic to the child. There are other concerns as well. *See, e.g.*, Nancy S. Erickson, *Custody of Non-Marital Children*, 14 WOMEN'S ADVOC. 1, 6-7, 11 (May 1993). With regard to domestic violence, the mother may have done the right thing — she may have acted quickly to terminate the relationship with the father when he abused her. Consequently, she may never have lived with him or may have lived with him only briefly, so she may not have enough evidence of abuse to convince the court that he might be dangerous to the child.

19. *See* N.Y. FAM. CT. ACT § 241 (McKinney 1999).

20. *Id.* § 242.

21. *See id.* §§ 243-244.

22. *See id.* §§ 245, 248.

In cases where appointment is not mandatory, including custody cases between parents, Section 249 indicates that "the court may appoint a law guardian to represent the child, when, in the opinion of the . . . judge, such representation will serve the purposes of this act, if independent legal counsel is not available to the child."[23]

C. The State Bar Association's Law Guardian Representation Standards

The appointment of law guardians to represent children in court proceedings was statutorily authorized in 1962. By the 1980's, the New York State Bar Association (the "NYSBA") concluded that "standards . . . are needed to guide and assist law guardians in fulfilling their essential obligations."[24] In 1988, the NYSBA adopted and published law guardian standards for delinquency, PINS and child protective cases. In 1994, standards for private custody or visitation disputes were promulgated ("Standards" or "NYSBA Standards").[25]

These Standards have not been enacted into law or officially adopted by any Appellate Division as part of its rules; however, three out of the four Departments use the Standards informally and provide them to lawyers who take their law guardian training programs. The Fourth Department developed its own "Guidelines" prior to the NYSBA Standards.[26] There are some significant differences between the Fourth Department Guidelines and the NYSBA Standards, perhaps necessitating a careful review of these documents by an appropriate body and development of uniform statewide standards for law guardians.

The NYSBA Standards should be studied by any attorney who accepts assignment as a child's law guardian and by any attorney who takes part in a court proceeding in which a law guardian has been assigned. Like the Code of Professional Responsibility,[27] the Standards contain short "standards," and also more lengthy "com-

23. *Id.* § 249.

24. N.Y. ST. B. ASS'N, LAW GUARDIAN REPRESENTATION STANDARDS, 2 CUSTODY CASES 1 (1994) [hereinafter LAW GUARDIAN STANDARDS].

25. *See id.*

26. The Fourth Department used many of the same sources as the drafters of the Law Guardian Standards, and that Department uses its own standards in its law guardian training. Its standards are entitled: "Guidelines for Law Guardians in the Fourth Department" (Jan. 1987) (for Abuse and Neglect, Foster Care, Termination of Parental Rights, PINS, and J.D.s), "Guidelines for Counsel for the Child in Custody and Visitation Proceedings" (Apr. 21, 1992) and "Appeals Guidelines for Law Guardians" (Nov. 9, 1993).

27. *See* N.Y. CODE OF PROFESSIONAL RESPONSIBILITY (1994).

mentary."[28] The thrust of the Standards seems to encourage law guardians to focus on the fact that their role is the role of an attorney, no matter what the judge, the parties or any agency or other person believes that law guardian's role is or should be.

For example, Standard B-6 states: "The law guardian should not submit any pre-trial report to the Court, but may submit legal papers and argue orally based on the evidence."[29] The Commentary to Standard B-6 states, in part:

> In some cases, a law guardian has been requested by the Court to submit a separate pre-trial report and recommendations, or the attorney has elected to submit such a report. . . . *The preparation and submission of such a report is inconsistent with the purpose and role of an attorney.* The law guardian is not a social worker or a probation investigator. . . . Further, a law guardian who submits a report and recommendation opens the possibility that he will or should be called as a witness [which is] incompatible with legal representation.[30]

D. Caselaw Interpreting the Role of the Law Guardian

Since 1962, interpretation of the role of the law guardian has been developing in case law. Most case law deals with compensation of law guardians[31] and various aspects of the law guardian's role as an attorney in proceedings, such as the law guardian's participation in the case and the application of attorney-client privilege.

Another issue addressed in court opinions is the weight to be given to the recommendations of both the law guardian and the forensic evaluator. In two highly publicized (and highly criticized) cases, *Rentschler*[32] and *Renee B.*,[33] the First Department chastised the trial courts for failing to follow the recommendations of the court-ordered forensic evaluator.[34]

However, the court may not abdicate to either the law guardian or the forensic expert the court's own responsibility for deciding the case. The court may and should decide a case contrary to the

28. *See* LAW GUARDIAN STANDARDS, *supra* note 24.

29. *Id.* at Standard B-6, commentary.

30. *Id.*

31. The role of the law guardian has also been analyzed in various legal publications. *See, e.g.*, Joel Brandes, *Compensation of Law Guardians*, N.Y. L.J., July 28, 1998, at 3 (analyzing the role of the law guardian).

32. Rentscheler v. Rentschler, 611 N.Y.S.2d 523 (App. Div. 1994).

33. *In re* Renee B., 611 N.Y.S.2d 831 (App. Div. 1994).

34. *See supra* notes 32-33.

positions expressed by a law guardian or forensic expert if the evidence convinces the court that the law guardian's position is not the position best supported by the evidence.[35]

E. Who Can Be a Law Guardian?

Theoretically, any attorney could assume the role of a law guardian in a custody case. However, as a practical matter, because many parents can barely afford to pay their own attorneys' fees, much less the fees for attorneys for their children, many children need to be assigned counsel. As discussed above, when a law guardian is assigned under such circumstances, the law guardian is paid by the State, pursuant to section 245 of the FCA.[36]

It is unclear whether courts have the authority to direct a parent to pay the fees of a law guardian. However, since the adoption of the matrimonial rules, many more supreme court judges have been appointing law guardians in custody cases than in the past. Quite often, judges direct one or both of the parties to pay the law guardian's fees. The law guardian in such cases usually bills her/his time by the hour, and the court directs the parents to share the fees on some pro rata basis set by the court; e.g., sixty percent by the mother and forty percent by the father, fifty/fifty or some other split.

Some experts take the position that since neither the matrimonial rules nor the Domestic Relations Law provides for the payment of the law guardian's fees, "legislation is needed to authorize such awards."[37] Nevertheless, judges continue to make such orders.

F. Training of Law Guardians

Aiding in the administrative issues inherent in the appointment process, each judicial department has a law guardian program.[38]

35. *See* Chait v. Chait, 638 N.Y.S.2d 426 (App. Div. 1995).

36. *See* N.Y. FAM. CT. ACT § 245 (McKinney 1999).

37. Brandes, *supra* note 31, at 3. *See also supra* note 11 for a bill that would accomplish that result.

38. The directors of the four programs are as follows:
Katherine Law, Esq., Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010 (212-779-7880); Harriet Weinberger, Esq., Appellate Division, Second Department, 45 Monroe Pl, Brooklyn, New York 11201 (718-875-1300 x202); John E. Carter, Jr., Appellate Division, Third Department, P.O. Box 7288, Capitol Station, Albany, New York 12224 (518-486-4567); and Tracy M. Hamilton, Appellate Division, Fourth Department, 50 East Avenue, Suite 403, Rochester, New York 14604 (716-530-3170).

Because there are very few statutes and rules governing law guardians, the director of each law guardian program has a great deal of leeway in setting up the program and administering it, within the broad guidelines of the provisions of the FCA and the applicable rules.

Law guardian training is usually done on a Departmental basis. In the more populous departments, the counties often have their own training as well. The lengths of the training programs and their contents vary significantly among departments, with the Third Department having at this time the most extensive and structured program.

Domestic violence issues are usually not covered in the basic training materials, but that subject is often handled by means of special seminars and meetings for law guardians. For example, in October 1998 the Nassau County Law Guardian Advisory Committee and the Appellate Division, Second Judicial Department, sponsored a seminar on Domestic Violence for members of the Nassau County Law Guardian Panel. Speakers addressed such topics as relevant legislation (including Chapter 85 of the Laws of 1996), the traumatic psychological impact of domestic violence on children, interviewing techniques for law guardians, the dynamics of domestic violence and coercive control, battered women's shelters and their services for children, and other community resources.

Special seminars, however, may not be sufficient. Uniform domestic violence training is necessary in all departments. Careful review of the training materials for law guardians to assure coverage of domestic violence is called for so that law guardians understand the history, interpretation and impact of Chapter 85 and the problem of domestic violence more generally.

II. CHAPTER 85 OF THE LAWS OF 1996 AND ITS EFFECT ON THE ROLE OF THE LAW GUARDIAN

A. Chapter 85: Language, History and Purpose

New York State recently joined the overwhelming majority of states that recognize the need to protect children against spouse/partner abusers.[39] Legislation ensuring that judges in child custody and visitation cases consider domestic violence when determining

39. "[A]t least 38 states and the District of Columbia have laws making domestic violence a relevant factor in custody decisions by the courts." Legislative Memorandum in Support of Chapter 85 [hereinafter "MIS"]. Since that time, several other states have also required courts to consider domestic violence in custody determinations.

the best interests of a child was sponsored by Representative Helene Weinstein and Senator Stephen Saland and was enacted into law as Chapter 85.[40]

1. *The Language of Chapter 85*

Chapter 85 amends section 240(2) of the Domestic Relations Law by adding the following language:

> Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, and such allegations are proven by a preponderance of the evidence, *the court must consider the effect of such domestic violence upon the best interests of the child*, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section.[41]

Chapter 85 also amends the FCA to make this same language applicable in family court custody and visitation proceedings.

2. *History and Purpose of Chapter 85*

Laws enacted in many other states similar to Chapter 85 create a presumption against custody to the batterer and require the batterer to prove he is not a danger before unsupervised visitation may be ordered. Congress, the American Bar Association and the National Council of Juvenile and Family Court Judges have all recommended this type of law.[42]

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40. *See* 1996 N.Y. Laws ch. 85.

41. *Id.* (emphasis added). It should be noted that the allegations of domestic violence need to be proven only by a preponderance of the evidence. Therefore, it is not necessary to bring a criminal charge against the abuser, and the standard used by the family court or supreme court is simply the ordinary civil standard. This matter may seem too rudimentary to require discussion; however, some judges seem to be looking for a higher standard of proof — such as clear and convincing proof or even that beyond a reasonable doubt — before they will make a finding of domestic violence. It is not necessary for the victim to meet such a high standard, and a court cannot properly require her to do so. It should also be noted that the perpetrators of domestic violence can be female and the victims can be male. However, since the National Institute of Justice reports that 95% of victims are female and 95% of perpetrators are male, we will use "she" to refer to the victim and "he" to refer to the perpetrator.

42. *See* H.R. Cong. Res. 172, 101st Cong. (1990); ABA, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN (1994); NATIONAL COUNCIL OF JUV. & FAM. CT. JUDGES, FAMILY VIOLENCE: A MODEL STATE CODE §§ 401-406 (1994).

Although Chapter 85 is weaker than those laws, it will provide valuable guidance to judges in child custody cases, cautioning them that custody to a spouse abuser is rarely in the best interests of the child, and that limitations on visitation may be necessary to protect both the child and the abused parent.

Some judges may still look at spouse abuse in a very dangerous manner, expressing this simplistic view: "He hit her, but he never hit the kids, so the domestic violence should have nothing to do with the custody case." Judges, attorneys (including law guardians), and even forensic evaluators may fail to recognize the many forms that domestic violence can take, apart from any physical assaults on the body of the victim.

B. The Effects of Domestic Violence

Domestic violence is a "pattern of coercive control," which "comprises a pattern of assaultive and controlling behaviors, including physical, sexual, psychological, financial and/or emotional attacks on a member of an intimate relationship by her partner."[43] Thus, domestic violence may and sometimes does exist without any actual physical assaults. This is especially the case in recent years, when the general population has become more educated on the issue of domestic violence, so that abusers are aware that to avoid incarceration they must be careful not to actually hit their victims, especially in places where bruises will be obvious.

Those who would define domestic violence as limited to physical assault (or threats thereof) might conclude that if the perpetrator of domestic violence never hit the children, his violence toward his partner/victim should be ignored in a custody case. Decades of study and experience, however, strongly indicate that such ignorance is wrong. New York case law prior to Chapter 85 already indicated that domestic violence — especially when it is witnessed by the child — should be considered a significant factor in custody and visitation proceedings.[44] Even then some judges held that

43. Lois Schwaeber, *Domestic Violence: The Special Challenge in Custody and Visitation Dispute Resolution*, 10 DIVORCE LITIG. 141, 141 (Aug. 1998), *reprinted in* the materials used in the Second Department's Law Guardian Continuing Legal Education Program on October 22, 1998, in Nassau County.

44. *See* Sheridan v. Sheridan, 611 N.Y.S.2d 688 (App. Div. 1994) (justifying relocation); Keating v. Keating, 538 N.Y.S.2d 286, 291(App. Div. 1989) (denying visitation); Anonymous G. v. Anonymous G., 517 N.Y.S.2d 985, 988 (App. Div. 1987) (requiring supervised visitation); Molier v. Molier, 386 N.Y.S.2d 226 (App. Div. 1976) (denying visitation).

spousal abuse demonstrated that the abuser is "not a fit parent to whom the welfare of a child should be entrusted."[45]

1. *Harm to Children Who Witness Abuse or Reside in a Violent Home*

The legislative Memorandum in Support ("MIS") of the bill that became Chapter 85 of the Laws of 1996 points out:

> Children who have witnessed their fathers beating their mothers have suffered from delayed development and sleep disturbances and feelings of fear, helplessness, depression, guilt and anxiety. Studies indicate that these children suffer somatic symptoms as well, with a higher incidence of colds, sore throats, hospitalizations and bedwetting than children from non-violent homes.[46]

Chapter 85 was intended to expand existing New York precedent "by acknowledging that children may also be harmed even when they do not actually witness the violence."[47] The MIS indicates that the legislature based this conclusion on studies of how domestic violence affects children. "A child does not have to directly witness the attacks on a parent to suffer emotional trauma. Studies have indicated that children raised in a violent home have reactions of shock, fear and guilt. Such children also have impaired self-esteem and developmental and socialization difficulties."[48]

2. *Risk of Child Being Abused by the Abuser*

The legislature also recognized that children may be at increased risk of being abused themselves if custody is given to a parent who abused the other parent.[49] Studies show that "a high correlation has been found between spouse abuse and child abuse."[50]

Even if there is no evidence that the spouse abuser has abused his children in the past, it is likely he will do so in the future, for at least two reasons. First, research has shown that once the victim-spouse is no longer available to the abuser, he often transfers his

45. Farkas v. Farkas, N.Y. L.J., July 13, 1992, at 31 (Sup. Ct. July 13, 1992).

46. MIS, *supra* note 39, at 3 (citations omitted).

47. *Id.* at 2.

48. *Id.* at 2-3 (citing DEL MARTIN, BATTERED WIVES chs. 6-7 (1976); Westra & Martin, *Children of Battered Women*, 10 MATERNAL-CHILD NURSING J. 41, 49 (1981)).

49. *See, e.g., id.* at 3 (emphasizing the spouse abuse-child abuse correlation).

50. *Id.* (citing Rosenbaum & O'Leary, *Children: The Unintended Victims of Marital Violence*, 51 AM. J. ORTHOPSYCHIATRY 692 (1986); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984)).

abuse to the children.[51] Contrary to popular myth, abuse does not automatically end when the victim leaves the abuser. In fact, abuse often increases when the victim tries to escape from her abuser.[52] Spousal abuse is not a matter of a partner suddenly getting angry and swinging; rather, an abusive partner is abusive because he wants to maintain *control* over the victim or victims. The abuser may use physical force and threats of physical force, but often also uses mental and emotional abuse or threats to attain the same goal.

If the victim leaves, the abuser experiences a loss of control that often triggers an attempt to regain control; most often, this leads to increased abuse.[53] If the victim is protected from abuse, the perpetrator may transfer the abuse to the children, perhaps because they are identified with the victim.[54]

A spouse abuser who never abused the children during the spousal abuse may abuse the children thereafter. The risk of abuse is greater for older children than for younger children.[55] Thus, if the children are placed in the custody of the spouse abuser, every year that they get older increases the risk that they will be abused by him.

Courts must also be careful to protect children of spouse abusers even if the abuser does not get custody. The children may be endangered if the abuser has unsupervised visitation with the children.[56]

3. *Risk of Intergenerational Violence*

Society at large is endangered if a battering parent is permitted to raise children. According to the MIS, "children who are raised in violent homes learn to use physical violence as an outlet for an-

51. *See, e.g.*, DEL MARTIN, BATTERED WIVES 76-77 (rev. ed. 1981) (mentioning that an abuser may "strike out" at others in response to victim's attempt to leave).

52. *See id.* at 76-79.

53. *See, e.g.*, Daniel Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOC. WORK 51, 52 (Jan. 1994), *reprinted in* the materials used in the Second Department's Law Guardian Continuing Legal Education Program on October 22, 1998, in Nassau County.

54. *See id.*

55. *See* MIS, *supra* note 39 (citing Hershey, Domestic Violence: Children Reared in Explosive Homes 9 (1982) (unpublished manuscript, on file with author)); *see also* Fields, *supra* note 1, at 222. According to one study, among children of battered women, 17.6% are abused in the under 3 year old age group; 37.5% were abused in the 3-5 year old group and 41.5% of children 6-11 were abused. *See* MIS, *supra* note 39, at 3.

56. *See* Saunders, *supra* note 53, at 155-58.

ger and are more likely to use violence to resolve conflicts."[57] One New York supreme court case emphasized that "a man who engages in the physical and emotional subjugation of a woman is a *dangerous role model* from whom children must be shielded."[58]

4. *Manipulation of the Legal System*

Abusers are usually conniving and manipulative. They can and will use any means available to them — including the legal system — in order to keep their victims in their power. Spouse abusers are also likely to be highly persuasive and even charming,[59] as evidenced by the initial control they maintained over their spouse-victims. They will try to misuse the legal system with this charisma in an attempt to convince the judge, the law guardian, the forensics evaluator and all other court actors to look favorably upon them.

Spouse abusers are often even more effective at controlling their children than their spouses, because of the age and dependency of the children. Many children identify with the abuser and claim a preference to live with him, even though this would not be in their best interests. The children may identify with the abuser in the hope that doing so will best protect their mother, themselves or other siblings. Other times their identification stems from their internalization of the abuser's negative put-downs of their mother.[60] In almost all of these situations, a custody award to the abuser will only further harm the child and increase the likelihood of intergenerational transmission of domestic violence.

Thus, abusers present serious difficulties to the legal system, which presumes that all persons are "innocent until proven guilty" and assumes that all litigants stand on the same footing. To mix metaphors, it is important to remember that the playing field is not

57. MIS, *supra* note 39, at 3 (citation omitted). Batterers themselves are likely to come from violent homes. *See id.* (citing Hilberman & Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460, 1337 (1978)). Furthermore, male children of violent parents are ten times more likely to beat their wives. *See id.* (citing STRAUS ET AL., BEHIND CLOSED DOORS (1980)).

58. Farkas v. Farkas, N.Y. L.J., July 13, 1992, at 31 (Sup. Ct. July 13, 1992) (emphasis added).

59. *See* WALKER, *supra* note 50; David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, BOSTON B.J., July/Aug. 1989, at 23; Joan Zorza, *The Gender Bias Committee's Domestic Violence Study: Important Recommendations and First Steps*, BOSTON B.J., July/Aug. 1989, at 13. *See also* Saunders, *supra* note 53, at 53.

60. *See, e.g.*, Schimler v. Schimler, 611 N.Y.S.2d 559, 560 (App. Div. 1994) (implying that father's constant denigration of mother in presence of the son created an unhealthy emotional environment).

level where there has been domestic violence — the abuser is and has been the winner for a long time and the victim has been abused and intimidated.

The abuser is likely to be confident, assertive, calm and "in control." He puts on a good appearance in court. Conversely, the victim is likely to be frightened, shaken, nervous, uncertain and often depressed.[61] Knowing that the abuser has successfully managed to manipulate others to maintain control, the victim realistically fears the abuser can also manipulate the legal system; consequently, the victim may appear paranoid when she is merely fearful that the abuser will again be successful in the manipulation of those around him. Judges, law guardians, attorneys, forensics evaluators and all other actors in the legal and social services system must be aware of this problem in order to stop the cycle of manipulation.

C. The Effects of Chapter 85 on the Law Guardian's Role in Custody Cases

In all custody cases, whether or not domestic violence is involved, one of the functions of the law guardian, as the child's attorney, is to investigate the facts of the case in order to determine what custody/visitation order would be in the best interests of the child.[62] Even prior to the enactment of Chapter 85, some judges wisely urged law guardians to take a very active role in custody cases involving domestic violence. Chapter 85 emphasizes this message in order to prevent an abuser from manipulating the court into granting him custody when it would not be in the child's best interests.

Many factors need to be taken into consideration in determining the best interests of a child. The Uniform Marriage and Divorce Act ("UMDA"),[63] upon which many states' laws are modeled, contains a list of factors that includes domestic violence as one of six

61. *See, e.g.*, Saunders, *supra* note 53, at 53-54.

62. In *Braiman v. Braiman*, 407 N.Y.S.2d 449 (1978), which is well-known for its holding that joint custody is inappropriate where parents are "antagonistic and embattled," there apparently was no law guardian for the three children. *Id.* at 449. The Court of Appeals, reversing and remanding for a new hearing, suggested that the trial court "may wish to consider appointing a qualified *guardian ad litem* for the children, who would be charged with the responsibility of close investigation and exploration of the truth on the issues and perhaps even of recommending by way of report alternative resolutions for the court to consider." *Id.* at 452 (citations omitted) (emphasis added). The Court did not indicate why a guardian ad litem rather than a law guardian was being suggested. *See id.*

63. UNIF. MARRIAGE AND DIVORCE ACT §§ 101-506 (amended 1973).

factors to be considered.[64] The New York State Legislature has never before specified factors, but has left the task of deciding what is in the best interest of the child to the courts.[65]

In 1996, the legislature specified that there is one factor the courts *must* consider — domestic violence.[66] If domestic violence is proven by a preponderance of the evidence, then the court *must* consider the effects of such domestic violence upon the best interests of the child.[67]

The legislative history of Chapter 85 indicates that domestic violence should be a "weighty" factor in the determination of child custody and visitation.[68] The legislature did not specify exactly how much weight is to be placed on domestic violence as a factor in comparison with other factors. However, it is safe to say that the legislature considered domestic violence a very important factor, since it is the *only* factor specifically listed in the statute.

Chapter 85 has a profound impact on the role of the law guardian. However, the degree of impact can only be calculated when the duties of a law guardian are delineated. The most detailed description of the role and duties of the law guardian in New York State is found in Volume II of the NYSBA Standards.[69] Although the Standards are not "law," they are relied upon to a great degree by each of the appellate division law guardian programs. The remainder of this article will review the duties of the law guardians as set forth in the Standards and will analyze the impact Chapter 85 may have on these duties.

The Standards are divided into four parts, dealing with the four stages of a custody case: Preliminary Stages, Pre-Trial, Trial and Post-Trial. This article will address the standards law guardians are expected to comply with at each stage.

1. *Preliminary Stages*

Part A of the Standards is devoted to the Preliminary Stages of the litigation and contains nine standards. Standard A-1 states,

64. One of the factors listed in the UMDA is "the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person, but witnessed by the child." *Id.*

65. *See, e.g.*, Eschbach v. Eschbach, 451 N.Y.S.2d 658, 660 (1982).

66. *See* 1996 N.Y. Laws ch. 85, § 2.

67. *See id.*

68. *See* MIS, *supra* note 39, at 1.

69. *See* LAW GUARDIAN STANDARDS, *supra* note 24.

"The law guardian should obtain and examine every available relevant document."[70]

In every case, according to the Commentary to A-1, the law guardian should obtain and examine all relevant court documents, including documents in "any prior cases involving the family."[71] Thus, in a custody case where domestic violence is alleged, the law guardian should obtain and examine all court documents in any prior (or concurrent) family offense, divorce or paternity case, for example.

What if the only proceeding between the parties is a family offense proceeding — should a law guardian be appointed for the children? It is not yet routine for a law guardian to be appointed in a family offense proceeding. However, it should be routine, except in cases where a recent custody order to the victim already exists. If there is no custody order, or if the abuser has obtained custody, it is likely that a custody case will soon be commenced and perhaps a law guardian will be needed. The intent underlying Chapter 85, as evidenced by the legislative history, leads to the conclusion that a law guardian should be appointed for any family offense case where the family contains minor children, regardless of whether custody or visitation is an issue at that time.

Therefore, if there are concurrent family offense and custody proceedings, and a law guardian has been appointed to the latter, that law guardian should also be appointed for the family offense proceeding. If the court failed to take such action and the law guardian decided that he or she should attend or participate in any hearings in the family offense proceeding, the court should permit and encourage such involvement. Although it could be argued that the law guardian could simply await the outcome of the proceedings, or get the transcripts of the hearings, where the credibility of witnesses is concerned, there is no substitute for attending the hearings. Additionally, the law guardian's active participation could bring out facts that otherwise might not be uncovered.

Once the law guardian obtains the relevant documents, they must be carefully analyzed. Although some of the documents may be misleading, the law guardian should attempt to determine the true facts. An obvious example is a typical divorce judgment, which often indicates that the divorce was granted on a relatively

70. *Id.* at 5.
71. *Id.*

innocuous ground, such as constructive abandonment.[72] This might lead the law guardian to assume that the divorce complaint, and counterclaims, if any, are superfluous. However, as many practicing attorneys know, domestic violence victims of severe abuse will often agree to grounds so as not to anger the abuser any further. Thus, the law guardian should look at the victim's original divorce complaint, which may often contain allegations of cruelty. These allegations are often the true facts in the case.

Standard A-2 states, "[t]he law guardian should interview and observe the child to ascertain the detailed facts relevant to custody, the child's wishes, the need for independent evaluations and the need for or appropriateness of interim judicial relief."[73]

The Commentary to Standard A-2 states, in part, as follows:

> An initial client interview is of course crucial. The child's perceptions and factual descriptions concerning the role, relationship and specific activities of each parent . . . are critical to formulating a law guardian position and structuring a litigation strategy . . . . Of equal importance may be the child's knowledge and perceptions concerning intra-family relationships, *such as conflicts between his or her parents*[.][74]

The Commentary goes on to state that the "responsibility [of the law guardian] is to *secure and verify every salient fact.*"[75] In truth, this standard simply compels the law guardian to perform for his/her client the same investigation that he or she would do for an adult client. Ideally, the attorneys for the parties should bring out all the facts, which would reduce the burden on the law guardian. However, perfection cannot be expected, particularly if one litigant is poor, traumatized by spousal abuse and fearful.

Standard A-3 states:

> The child should be advised, in terms the child can understand, of the nature of the proceedings, the child's rights, the role and responsibilities of the law guardian, the attorney-client privilege, the court process, the possible consequences of the legal action, and how the child may contact the law guardian at any time during the course of the proceedings.[76]

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72. *See generally* N.Y. DOM. REL. LAW § 170(7) (McKinney 1999) (defining constructive abandonment).

73. *See* LAW GUARDIAN STANDARDS, *supra* note 24, at 6.

74. *Id.* (citation omitted) (emphasis added).

75. *Id.* at 8 (emphasis added).

76. *Id.* at 10.

The Commentary to Standard A-3 summarizes this canon by stating that: "The initial interview should not be a one-way street."[77] While the law guardian must obtain information from the child, the child must also obtain information from the law guardian. The Commentary recognizes that this may be a difficult task.[78] It also stresses that the law guardian should attempt to help the child understand that the law guardian is available to the child by phone, mail or in person throughout the proceedings, which may last a long time.[79]

Standard A-4 states, "The parents' or other party's attorneys should be advised of the role and responsibilities of the law guardian, including the law guardian's legal standing in the proceedings, and the law guardian's responsibilities to participate fully to protect the child's interests and to express the child's wishes."[80] This is an extremely important standard. Often attorneys do not understand that the law guardian, as the child's attorney, must be served with all documents and has a right, as the Commentary to Standard A-4 indicates, to "participate in conferences, to introduce evidence, call witnesses, cross-examine other parties' witnesses and to advocate" the position s/he deems appropriate for the particular child.[81] Some attorneys view the law guardian as having a lesser role as a mere neutral observer. Others view the law guardian as assuming the role of a forensic examiner, therapist or social worker for the child, or a referee to hear and report to the judge. The Commentary indicates that the attorneys in a case must realize that the law guardian is "an attorney representing a party in interest."[82]

Attorneys sometimes find the law guardian's role difficult to understand, especially in private custody cases, where they may assume that the best interests of the child will emerge and become apparent to the court from the advocacy of the two parents' attorneys, and that the court will rule for one parent (sole custody with visitation to the other) or for both (some kind of joint custody). They tend to forget that the court could become convinced that neither parent is fit and recommend that charges be filed against them by child protective services.

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77. *Id.*
78. *See id.*
79. *See id.*
80. *Id.* at 11.
81. *Id.*
82. *Id.*

Similarly, the child could have wishes and needs that the parents fail to express or for which they fail to advocate. For example, as a result of being abused, a battered mother may be so depressed and frightened that she gives in to the abuser's demands for overnight visitations with the child, although the child may be expressing to the law guardian a fear of or lack of readiness for such overnight visits.

This is not to say that the child will always express his/her concerns to the law guardian. It is quite common in domestic violence cases, for example, that the child or children are so traumatized by the abuser or so much under his control that they do not feel safe speaking with anyone about their true feelings. Sometimes threats are made by the abuser that he will hurt or even kill the child, the mother or someone else who is dear to the child if the child reveals the truth to anyone. Thus, it often takes a good deal of patience, careful listening and analysis of all the available data in order for the law guardian to determine what position should be taken in order to protect the child's interests when the child may not be expressing his or her true wishes to anyone.

Standard A-5 states, "The child's present home and any proposed home should be visited by the law guardian."[83] This standard is often ignored, especially in localities where a home visit might be inconvenient for the law guardian. Sometimes the law guardian relies on home visits by child protective services, probation or some other individual or agency worker. This reliance is unwise. The Commentary to Standard A-5 denominates the law guardian's home visit as an "important element in determining the child's interests and formulating a law guardian position,"[84] because

> [t]he physical characteristics of the home may be ascertained and the child may be observed in his or her usual environment. Frequently, the parenting roles of the litigants may be clarified by carefully observing the home and by discussing with the child and with the parent the different aspects of the household.[85]

In a case involving domestic violence, the layout of the abuser's household may reveal the abuser's self-absorption and failure to relate to the child with respect and caring. For example, the abuser may arrange his household space in such a way that the child has very little space of his own — a bed in someone else's room, a part

83. *Id.* at 13.
84. *Id.*
85. *Id.*

of a closet in another room, and no space in which to do his homework or be involved in his own interests or activities. Other aspects of the household may indicate the abuser's typical need for control, such as restricting others' access to the telephone, to portions of the house and even sometimes to the refrigerator.

Standard A-6 states, "The law guardian should interview the parties and any other relevant person, including any one with relevant knowledge of the child or the parties, as well as any potential factual or expert witnesses."[86] The Commentary lists many persons who should be interviewed, in addition to the parents themselves: collateral relatives, school officials, child care personnel, mental health professionals and other potential witnesses.[87] The Commentary advises, "[i]nterviews may be of special importance in light of the limited discovery techniques customarily employed in custody cases."[88]

In cases involving domestic violence, it is often surprising how many persons who might be expected to side with the abuser do not do so when contacted by a person who is concerned about the child. The abuser's parents, for example, sometimes are quite protective of their grandchildren even when to do so requires them to turn their backs on their own son. Siblings of the abuser who wish to distance themselves from him may acknowledge the violence he has demonstrated toward his wife and toward others.

On the other hand, those who wish to protect the abuser from being found out may appear truthful at first. They may simply deny the existence of any abuse or indeed of any household disputes at all. Under questioning, however, they may reveal their lack of candor in various ways, even if they continue to deny the abuse.

Standard A-7 states, "The law guardian should apply for appropriate court orders to protect the child or obtain temporary relief, determine visitation, and limit repeated or unnecessary interviews or evaluations."[89]

Standard A-8 states, "The law guardian should participate whenever any party requests an interim court order which may affect the child."[90] These standards underscore the guardian's role as a "full

86. *Id.* at 14.
87. *Id.* at 15.
88. *Id.* at 14.
89. *Id.* at Standard A-7.
90. *Id.* at Standard A-8.

participant in the proceedings, assigned to represent the child's interests,"[91] An example provided in the Commentary is that

> [w]here child abuse is alleged in the course of a custody action, the law guardian should move quickly for independent evaluations and may need to apply to stay the custody action while the child protective service investigates abuse or neglect allegations. When appropriate, the law guardian should also determine the need for and immediately seek a protective order limiting visitation or contact between child and the alleged abuser.[92]

A law guardian should be especially attuned to the possibility, in a case where one parent has abused the other, that the children may fear the abuser or that when the abusive parent can no longer abuse his spouse, he may transfer his abuse to the child.[93]

Standard A-9 states, "When appropriate, independent court ordered evaluations or studies should be requested."[94] This Standard speaks for itself. According to the Commentary, independent evaluations could include "psychiatric, psychological, educational, medical, and social work evaluation. . . ."[95] Forensic evaluations in custody cases are quite often ordered by the court *sua sponte.* If the court does not do so, it might be appropriate for the law guardian to request evaluations.

Where domestic violence is an issue, it would be important for the law guardian to request that the evaluator have training and experience in the area of domestic violence. This would be to the benefit of both parents, because an evaluator with training and experience in domestic violence will be more capable of determining whether *or not* abuse took place, if so, what impact it had and will have in the future on the child, and what plans for parental contact with the child would be in the child's best interests.

If the issue of domestic violence were ignored by the forensic evaluator, the evaluation would have little usefulness to the law guardian or to the court, and a second evaluation might be necessary. This would not be good for the child. As the Commentary to Standard A-8 states: "While evaluation may be necessary, the child should not be subjected to continuing rounds of visits with different experts. . . ." Thus, care should be taken to appoint a knowledgeable evaluator in the first instance.

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91. *Id.* at 16.
92. *Id.* at 17.
93. *See supra* notes 47-57 and accompanying text.
94. *See* LAW GUARDIAN STANDARDS, *supra* note 24, at Standard A-9.
95. *Id.* at 18.

An additional caveat is that the mental health of the victim may be damaged by the abuse, as discussed above. Therefore, the forensic evaluator and the attorneys should recognize this and should focus on her parenting abilities prior to the abuse and her potential for achieving a high level of parenting capacity after she is protected from the abusive partner.

2. *Pre-Trial*

Part B of the Standards deals with the pre-trial stage. The Standards emphasize the fact that the law guardian's role is to be the child's attorney, and that thorough preparation is as essential for the law guardian as for each of the attorneys for the two parents.

Standard B-1 states, "All available potential evidence should be obtained and analyzed, including discovery documents, financial statements, expert evaluations and witness statements."[96] This Standard is contrary to the way many law guardians now operate in terms of breadth of preparation. Many law guardians consider grounds for divorce and financial issues to be outside of their area of interest. However, both of these are relevant to the best interests of the child.

On grounds, the Commentary states:

> If, for example, custody is one aspect of a divorce action based on alleged cruelty, the allegations and documents to support a fault divorce may well be relevant to the issue of parental fitness and best interests of the child (and false allegations may be as significant as valid charges).[97]

This Commentary is obviously very significant for cases involving domestic violence: it is likely that a batterer will be unfit for custody or at least less fit than the victimized parent. As discussed above, many states' laws contain a presumption that custody not be awarded to a parent with a history of domestic violence, and both the American Bar Association and the Congress have recommended this type of law.[98]

Although New York's law contains no such presumption, it does require the court to consider the effects of domestic violence on the best interests of the child. Thus, where domestic violence has been demonstrated by a preponderance of the evidence and the court

96. *Id.* at 16.

97. *Id.* at 19.

98. *See supra* note 42 and accompanying text.

nonetheless determines that custody should go to the abuser, the court would have to explain why.

Financial matters are also relevant to the custody issue. The Commentary states:

> The required detailed financial statements, including the net worth statements, are *crucial to determine the material needs of the child* and may be *important in determining a parent's motivation and sincerity.*[99]

The Commentary's emphasis on motivation and sincerity is particularly important in domestic violence cases. Batterers' need for control often leads them to lie about, hide or obfuscate their true financial situations. One motive that often leads an abuser to try to gain custody of the children is to punish the victim of his abuse for leaving him, and he may view both depriving her of custody (and visitation, if possible) and depriving her of money (child support) as punishment that he wishes to mete out to her for her perceived sins against him.

Standard B-2 states, "The law guardian should develop a position and strategy in conjunction with the child concerning every relevant aspect of the proceedings."[100]

This Standard may be a surprise to many attorneys — even those who have been law guardians. Some law guardians view their role essentially as observers who will listen to both sides, will try to work out a compromise and then if settlement is not possible, will come to a conclusion as to the child's best interests at the end of the trial, at the same time as the judge.

This Standard makes it clear that the law guardian is an active participant, stating, "[T]he formulation of a comprehensive position and plan may be the *paramount law guardian responsibility*, for it represents the key to effective advocacy necessary to protect the youngster's interests."[101]

The Commentary cautions that the law guardian's position should not be set in stone at an early stage but "should be developed through an ongoing and extended attorney-client dialogue."[102] Nor should the child ever "feel compelled to choose between parents."[103] The child should be advised that neither the child nor the law guardian will make the ultimate decisions —

99. *See* LAW GUARDIAN STANDARDS, *supra* note 24, at 19 (emphasis added).
100. *Id.* at Standard B-2.
101. *Id.* at 21 (emphasis added).
102. *Id.* at 22.
103. *Id.*

those decisions are for the judge, after considering all of the evidence, including the child's wishes.[104]

Again the Commentary indicates that *all* aspects of the litigation relevant to the child (including financial) should be included in the law guardian's plan. Especially relevant to battered spouses is the Commentary's mention of possible needs for protective orders or "curtailed" visitation (e.g., supervised transfer of the child or supervised visitation).

Standard B-3 states that "[t]he law guardian should participate fully in pre-trial conferences and negotiations and should endeavor to resolve the case without the need for a trial."[105] This Standard emphasizes the law guardian's active role and need to establish a plan. Although some law guardians adopt an inactive role by simply waiting for the parties to reach a settlement and then rubber-stamping an approval, this Standard clarifies that the law guardian's position as the child's attorney requires the law guardian to reject a settlement which would be deleterious to the child "*even if both parties to the custody dispute agree.*"[106] This recognizes that the parents may be so caught up in their own issues (or, in the case of a battered woman, so intimidated) that their settlement may be inappropriate for the child.

The commentaries also stress the weight that the law guardian's proposals may carry with the judge, a weight that should be justified by the work put into the case by the law guardian, not simply by the law guardian's status and position.[107] For example, Standard B-4 states, "The law guardian should discuss the case periodically with the child."[108] Additionally, Standard B-5 provides that, "[t]he law guardian should prepare thoroughly for trial."[109]

These Standards carefully delineate the distinction between preparing a pre-trial report and advocating a position for the client:

> A law guardian may of course advocate a position and discuss the relevant available evidence and facts at pre-trial conferences and negotiations . . . in making closing arguments, or in arguing a motion. . . . The law guardian, as an attorney, may also prepare and submit a post-trial memorandum summarizing and discussing the evidence in the record, making legal arguments, and advocating a disposition. . . . A post-trial memorandum, unlike a

104. *See id.* at 23.
105. *Id.* at Standard B-3.
106. *Id.* at 25 (emphasis added).
107. *See, e.g., id.* (noting that "great weight" may be accorded).
108. *Id.* at Standard B-4.
109. *Id.* at Standard B-5.

> pre-trial report, is based on testimony and other evidence found in the record.[110]

Standards B-6 and B-7 further clarify the role of the law guardian. Standard B-6 states that "[t]he law guardian should not submit any pre-trial report to the Court, but may submit legal papers and argue orally based on the evidence."[111] Standard B-6 is an appropriate interpretation of the law guardian's role but is a major deviation from common practice in some counties, where a law guardian is expected to submit a pre-trial report to the court. Standard B-7, which states that "[t]he law guardian should not engage in any ex parte communication with the Court," also emphasizes the law guardian's role as an attorney.[112]

3. *The Trial*

Part C of the Standards deals with the trial aspect of the custody case. The Standards in Part C simply emphasize that the law guardian is an attorney, like any other attorney, with responsibilities toward his/her client.[113] The only difference is that the law guardian is the attorney for a person under the legal disability of infancy. Standard C-1 is geared toward that difference.

According to Standard C-1, "[w]hen necessary, the law guardian should move for protective orders at the commencement of the trial."[114] Examples of such protective orders include a motion to protect the child from having to testify in open court and a motion to bar certain evidence of questionable relevance or validity that might be highly emotional.[115]

The Commentaries also mention that "a party may be pressuring the child to take a position or to testify in a specific way; such harassment may be prohibited by a protective order."[116] This type of pressure and harassment by abusers is quite common in cases of domestic violence. It is unclear how a protective order could remedy this, especially where the abuser has temporary custody or sub-

110. *Id.* at 29 (citations omitted).
111. *Id.* at Standard B-6.
112. *Id.* at Standard B-7.
113. *See id.* at 30. Standards C-2 and C-3 will not be discussed herein. Standard C-2 states: "If appropriate, the law guardian should present a law guardian case, including independent evidence and witnesses." *Id.* at Standard C-2. Standard C-3 provides: "The law guardian should be familiar with the relevant records, reports and evidence, insure that necessary witnesses testify and relevant material is subpoenaed and introduced into evidence, and cross-examine witnesses." *Id.* at Standard C-3.
114. *Id.* at Standard C-1.
115. *See id.* at 30-31.
116. *Id.* at 31.

stantial access to the child. As is the case with spouse abuse, pressure and harassment by an abuser takes place mostly in the "privacy" (secrecy) of the home. The abuser takes great care to keep his conduct from being viewed by people who could testify against him and to isolate the child as much a possible from anyone to whom the child could — intentionally or inadvertently — reveal what occurs in the "privacy" of the home. Thus, the insistence of the Standards that the law guardian develop and maintain an ongoing, trusting relationship with the child, rather than speaking with the child once or twice, is extremely important.

Standard C-4 states that "[t]he law guardian should deliver a summation, and prepare any necessary memoranda of law."[117] Standard C-4 and the Commentaries to C-4, like many of the other Standards, may surprise attorneys who have not previously analyzed the Standards or dealt with law guardians who take an active role in their cases.

There is sometimes an assumption that the law guardian will simply provide a general articulation of the desired outcome of the custody/visitation portion of the case, leaving it to the attorneys for the parents to go into detail and to handle the other aspects of the case. Standard C-4 and its Commentaries make it clear that the law guardian is to be actively, fully involved in all aspects of the case:

> Summation presents perhaps the best opportunity to articulate the law guardian position, as buttressed by the evidence. Every relevant issue, including custody, visitation, parental decision making, conditions for custody, and child support should be detailed so the court is apprised of the exact plan developed by the law guardian (even if fully discussed at the pre-trial level). When appropriate, the law guardian should also offer to submit a post-trial memorandum outlining the evidence, the legal issues and the law guardian's conclusions and recommendations.[118]

Standard C-5 states that "[i]f the Court conducts an in-camera interview with the child, the law guardian should request that it be held in chambers with only the judge, the law guardian and a court reporter present and only after the law guardian has advised the child of the purpose of the interview."[119] This portion of the custody case differs so much from the usual conduct of a trial that the law guardian must be very careful to determine exactly how the

117. *Id.* at Standard C-4.
118. *Id.* at 31.
119. *Id.* at Standard C-5.

Court wishes the in-camera interview to be done and must be prepared to oppose any procedure he or she believes will be detrimental to the child. Similarly, if an in-camera interview is held, the law guardian should ensure that the child is fully prepared so that the interview can accomplish the goals it is meant to achieve.

The question that remains is what those goals are. According to the Commentary to Standard C-5, "[a] special law guardian responsibility is to protect the child against the usually intimidating and traumatic experience of testifying against his or her parent in their presence."[120] Yet the Commentary also notes that "[i]n exceptional cases, it may be appropriate or beneficial for the older child to testify in open court."[121] In cases where the child witnessed his or her mother being abused, was "caught in the crossfire," or suffered as the intended victim of parental abuse, the child may want no contact or only supervised contact with the abuser. In such circumstances, the law guardian may determine that testimony in open court is necessary to protect the child.

It is particularly important for children over the age of eighteen to testify in cases where the child wants no contact with the abuser. This could avoid tragedies like the Third Department case of *Perez v. Perez*,[122] in which the court held that the abusive father could stop paying child support for the eighteen-year old daughter who refused contact with the father. The child was deemed by the court to have no right to support just at the time when she needed it the most — for college. Thus, the custodial mother was left with the full obligation to put the child through college. The trial court had severely limited evidence of the domestic violence that had occurred during the marriage.

4. *Post-Trial*

Part D of the Standards deals with the post-trial stage. These Standards may seem particularly unusual to attorneys who view the law guardian's role as passive or see the child as a person who should be protected but not informed.

Standard D-1 states that, "[t]he law guardian should explain to the child, in terms the child can understand, the court's determination and its consequences, the rights and responsibilities of each of

120. *Id.*

121. *Id.*

122. 659 N.Y.S.2d 642 (App. Div. 1997). The court gave no reasons or authority for the proposition that the trial court did not abuse its discretion in limiting the introduction of evidence of domestic violence during the parties' marriage. *See id.* at 644.

the parties, including the child, the possible right to appeal, and the possibility of future modification."[123] The task of conveying this information to the child is commonly left to the parents, but Standard D-1 indicates it is the responsibility of the law guardian. While many adults underestimate the abilities of children and thus would view such attempts to convey information to the child as a waste of time or even harmful, this standard assumes that the child is capable of understanding these rules.

The Standards express confidence both in the law guardian and in the child. The Commentary to D-1 states, in part, that "[I]t is of particular importance that the child understand his or her continuing relationship with each parent . . . and each parent's continuing responsibilities to the child."[124] The Commentary further notes that "[i]t is also helpful to maintain communication with the child subsequent to the trial. Post-trial problems may thereby be ameliorated or appropriate legal action commenced."[125] The Commentary notes that the law concerning "the law guardian's ability to file post-disposition enforcement or modification motions is not clear," but that as an alternative, the law guardian could advise a parent to do so.[126]

According to Standard D-2, "[t]he law guardian should examine the court order to insure that it complies with the findings and disposition."[127] The Commentary notes that "[i]f necessary, the law guardian should submit a counter-proposed order or amendment."[128]

Standard D-3 states that "[i]f the law guardian believes that the court's determination is contrary to the child's interests, after considering the wishes of the child, a notice of appeal should be filed and measures undertaken to assure that the appeal is perfected expeditiously."[129] The Commentary clarifies that "[i]f necessary, temporary appellate relief should be requested, such as a stay of the order."[130] The Commentary also notes that while the law guardian has standing under section 1120 of the FCA to initiate, argue and appeal from an order of the family court, standing to initiate the appeal is less clear when the case arises out of the

123. *See* LAW GUARDIAN STANDARDS, *supra* note 24, at Standard D-1.
124. *Id.*
125. *Id.* at 34-35.
126. *Id.* at 35.
127. *Id.* at Standard D-2.
128. *Id.*
129. *Id.* at Standard D-3.
130. *Id.*

supreme court.[131] If a parent appeals the decision, whether from family court or supreme court, the law guardian should file a brief and participate at oral argument or request that the court appoint a new law guardian for the appeal.[132]

The law guardian's initiation of or participation in an appeal would be particularly important if the trial court granted custody or inordinately liberal visitation to an abuser and the law guardian believed that this would endanger the child. Additionally, many abused spouses have few resources, both monetary and emotional, to mount an appeal, and thus the law guardian's participation can be particularly helpful.

CONCLUSION

A law guardian in a custody case involving domestic violence must, at a minimum, investigate the case carefully and form his/her own conclusions. First, the law guardian must determine whether domestic violence took place. If the law guardian determines that domestic violence has taken place he/she must determine the effects of the domestic violence on the best interests of the child. The law guardian should include in the determination whether the child was hurt in the line of fire; witnessed the violence, although was not physically hurt; or did not witness the violence but was present in the violent home. Even if the child was born after the mother left the abusive situation and never had any contact with the abuser, the law guardian can infer from an abuser's past acts of violence toward the mother a future propensity of similar behavior toward the mother and/or the child. Third, the law guardian must determine what kind of visitation would best protect the victim and the child. Lastly, the law guardian must determine how to give the victim the necessary support to ameliorate the effects of domestic violence on the child.

The NYSBA Standards for custody cases, promulgated in 1994, are exceedingly helpful guidelines for law guardians in cases involving domestic violence, although modifications of these guidelines may be necessary and appropriate as experience develops under Chapter 85 of the Laws of 1996.

The law guardian programs in the Appellate Divisions are in the process of training their law guardians with regard to the new law and the phenomenon of domestic violence. They should be en-

131. *See id.*
132. *See id.* at 38.

couraged to continue and improve that training, as research on domestic violence continues to inform us all about the effects of domestic violence on children — effects that are much more serious and long-lasting than previously thought.