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Introduction

In 1979, then-Chief Judge Breital wrote a short opinion for New York's Court of Appeals in a contested custody dispute that has left an unintended (and almost unrecognizable) legacy. In *Braiman v. Braiman*,[1] the court struggled to render a final judgment in an extremely heated case in which the trial court ruled for the father, the appellate court reversed and awarded joint custody to both parents, and the Court of Appeals found itself in the uncomfortable position of not knowing what to do because the record was "plagued . . . with hopelessly conflicting testimony on vital facts and issues."[2] Accordingly, it remanded the case to the trial court with instructions to conduct a new hearing. In addition, and as an aside, Chief Judge Breital offered a suggestion to the trial court: it could, he wrote, if it chose to, appoint "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."[3] Thus, a wrinkle was let loose in the practice of contested custody and visitation cases that is quickly transforming the field.

Although the New York legislature originally recognized the value of providing children with lawyers (with the chosen

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1. 378 N.E.2d 1019 (N.Y. 1978).

2. *Id.* at 1019.

3. *Id.* at 1022. The two children were seven-and-a-half and six years old. *Id.* at 1019.

title of "law guardians") in 1962, it focused on proceedings in which children were formal parties, and usually charged with misconduct which they were obliged to defend.[4] By 1970, New York courts were routinely appointing lawyers for children in juvenile delinquency and Persons In Need of Supervision proceedings, as well as in child protective proceedings in which local agencies charged parents with abuse or neglect and subjected children to foster care placement and termination of parental rights.[5]

That is largely where things stood through the mid-1980s. Back then, the idea of appointing a child with an attorney in a contested custody or visitation case was avant-garde in New York and almost never done. One might promptly add, there are excellent reasons for distinguishing between the kinds of cases in which New York courts saw fit to appoint lawyers for children through this period and custody cases in which New York courts eschewed the use of counsel for children, but we are getting ahead of ourselves. Suffice it to say, through this time, contested custody cases in New York were almost always litigated without the appointment of an attorney for the child.

Fast forward to the early 2000s and the picture has dramatically changed.[6] Although New York continues to maintain the distinction between the first set of cases in which children have the statutory right to court-appointed counsel and custody cases where appointment is left to the discretion of the trial court,[7] there is an ever growing call to appoint lawyers for children in all contested custody cases.[8] Despite this trend, New

4. *See* N.Y. FAM. CT. ACT, 1962 N.Y. Laws, ch. 686 (current version at N.Y. FAM. CT. ACT § 241 (McKinney 2006)); *see also* Jane M. Spinak, *The Role of Strategic Management Planning in Improving the Representation of Clients: A Child Advocacy Example*, 34 FAM. L.Q. 497, 498 (2000).

5. *See* Douglas J. Besharov, Practice Commentary, N.Y. FAM CT. ACT §§ 241, 249 (McKinney 1998).

6. *See* Merril Sobie, Supplemental Practice Commentary, N.Y. FAM CT. ACT § 249 (McKinney 2003).

7. N.Y. FAM. CT. ACT § 249 (McKinney 2006).

8. *See, e.g.*, Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 255–56, 276–77 (1991); Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 108–09 (2003); Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53, 53 (1992); Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MA-

York has not adequately addressed basic questions about why courts should provide children with lawyers in custody cases and the proper role these lawyers should undertake. Although two national efforts have sought to clarify these antecedent questions,[9] New York has lagged and has never undertaken a sustained, serious look at them.

In 2006, the most important Commission ever assembled to study the matrimonial process in New York issued an extensive report examining both the substance and process of New York's divorce system and proposing widespread change.[10] The *Report of the Matrimonial Commission to the Chief Judge of the State of New York* (hereinafter "the Commission" or "the Commission's Report") resulted from multiple meetings over more than one year of a diverse and highly experienced group of experts which convened public hearings providing a very broad opportunity for obtaining information.[11] The subjects the Commission studied included the use of lawyers for children.[12] Regrettably, the Commission's Report does not include a sustained consideration of the most basic questions about using lawyers for children in custody cases. Instead of independent analysis and vigorous discussion of the most pressing questions concerning the use of lawyers for children, the Commission only gives conclusions. One of its important conclusions is in the form of a preference: that most of the time courts appoint lawyers for children in contested custody cases.[13] I will only address the

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TRIM. LAW. 57, 92–93 (1995); Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 687–88 (1987); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1578–86 (1996).

9. *American Academy of Matrimonial Lawyers, Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW. 1 (1995) [hereinafter *AAML Standards*]; AMERICAN BAR ASSOCIATION, SECTION OF FAMILY LAW STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES (2003), http://www.abanet.org/family/reports/standards_childcustody.pdf [hereinafter ABA STANDARDS].

10. MATRIMONIAL COMMISSION OF THE STATE OF NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (Feb. 2006), http://www.nycourts.gov/reports/matrimonialcommissionreport.pdf.; reprinted here as Appendix A. [hereinafter MATRIMONIAL COMMISSION REPORT].

11. *See id.* at i–ii.

12. *See id.* at 39–45.

13. *See id.* at 41. The Commission's prose occasionally makes it unclear whose voice is speaking. The Commission's Report states:

Commission's Report on the single issue of lawyers for children, and I express no view on the many other subjects in the Commission's Report. Part I sets forth the Commission's recommendations concerning lawyers for children. Part II reveals the multitude of questions and issues that the Commission ignored. It also suggests that the Commission's Report deliberately emphasizes the ordinariness of the role and purpose of children's lawyers, thereby obfuscating the complexities raised by using lawyers in these proceedings. Part III discusses the bases upon which New York courts are to decide custody cases in order to show that they expect children's best interests, not children's preferences, to dominate the court's inquiry. Part IV describes what judges want and expect from children's lawyers in custody proceedings, demonstrating that courts routinely expect these lawyers to advise them on children's best interests. Following this, Part V suggests that the Commission did not intend to change either how courts are supposed to decide cases or what children's lawyers are supposed to do when appointed to represent children. This part reveals the true extent to which the Commission liberates children's lawyers to advocate what they perceive to be in their clients' best interests as well as the dangers associated with encouraging lawyers to perform this role.

I. The Commission's Recommendations

Perhaps the most startling quality of the Commission's work is its brevity. Altogether, it devoted only six pages to the

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> The appointment of an attorney for the child, and his or her active participation in the proceedings, ensures independent representation for the children. Pursuant to Family Court Act § 249, the appointment of an attorney for the child in a custody dispute is within the sound discretion of the court. Nonetheless, there is a preference for the appointment of an attorney for the child in such disputes. Indeed, the failure to make such an appointment in certain custody proceedings has been deemed to be an improvident exercise of a court's discretion.

Id. (citing Vecchiarelli v. Vecchiarelli, 656 N.Y.S.2d 337, 338–39 (App. Div. 1997); McWhirter v. McWhirter, 514 N.Y.S.2d 301 (App. Div. 1987)). Does the Commission mean that current law states a preference for children's lawyers or that the Commission prefers them? Current law is certainly unclear. The fact that courts have held the failure to appoint a law guardian to be reversible error in some cases is no proof that courts are expected to appoint them most of the time. It remains the case today that most custody matters are contested without children's lawyers. Whether that will remain so in the future remains to be seen.

subject of representing children.[14] The means by which it was able to say so little is that it incorporated by reference other efforts produced in New York. The Commission chose the expedient (if problematic) device of endorsing and recommending "the adoption by administrative rule of the Statewide Law Guardian Advisory Committee's working definition of the role of the attorney for the child."[15] It also recommended the adoption of the recently revised New York State Bar Association's Law Guardian Representation Standards by administrative rule.[16] Here is the Statewide Advisory Committee's definition in its entirety:

> The law guardian is the attorney for the child. In juvenile delinquency proceedings, it is the responsibility of the law guardian to vigorously represent 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 possible and in a manner consistent with the child's capacities. If the child is capable of a 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 interest. However, when the law guardian is convinced either that the child lacks the capacity for making a 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.[17]

Unfortunately, this definition is plainly inadequate. First, note the odd use of adjectives as the starting point for clarifying a lawyer's role. We are told that in delinquency proceedings the child's lawyer is to "*vigorously* represent the child." But, surely this is premature. We need to take *some* stock of what the role

14. *See* MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 39–45.

15. *Id.* at 39.

16. *Id.* at 42–43.

17. *Id.* at 39–40 (quoting Appellate Division, Second, Third and Fourth Departments, Law Guardian Program Administrative Handbook (2004), http://nycourts.gov/ad4/lg/lg_2004handbook.pdf (internal quotation marks omitted)).

is before focusing on the degree of vigor with which we should perform it. Astonishingly the drafters of this statement have nothing more to say about lawyers in delinquency proceedings. Instead, they immediately turn to the role of lawyers for children in all other types of cases.[18] Here we are treated to our first difference in roles. Whereas attorneys for children in delinquency proceedings are obliged to "vigorously represent" their clients, in other types of proceedings, they are to "diligently advocate the child's position in the litigation."[19] Perhaps some readily grasp these distinctions, but they will prove to be inscrutable to many. Let us try to make some sense of them.

The important distinction between the two roles plainly is not the difference between "vigorously" and "diligently." It must be the difference between "representing the child" and "advocating the child's position." On its face, this would seem to mean that when lawyers are representing children in all proceedings not involving delinquency, they are straightforwardly to seek the position chosen by the child. In contrast, in delinquency proceedings, it would seem the children's lawyers are supposed to do something else ("represent the child"). But appearances can be misleading.

The drafters of this definition say nothing at all about how a lawyer representing a delinquent is to determine what position to advocate. From this, we may reasonably infer there are no tasks unique to representing children which their lawyers need to take. In other words, all children's lawyers in delinquency cases need to do is ask their clients what they want. In this way, to "represent the child" means to advocate for the objectives set by the child. When discussing lawyers in all other

18. The Matrimonial Commission Report definition inexplicably separates juvenile delinquency and Persons in Need of Supervision (PINS) cases. This distinction has no support in the literature or case law. To the contrary, when New York first enacted the counsel-appointing statute, it categorized delinquents and PINS together in the same Article 7 of the New York Family Court Act and provided children with the same kind of counsel in each proceeding. Today, the Family Court Act discusses delinquents separately in Article 3 while PINS remain in Article 7. No one else in New York distinguishes between delinquents and PINS. The "other proceedings," in all events, include neglect and abuse and foster care related proceedings including termination of parental rights (Articles 6 and 10), as well as child custody and visitation cases (Article 6). *See* N.Y. FAM. CT. ACT (McKinney 2006).

19. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 39.

proceedings, the definition explains how lawyers are supposed to ascertain the position to "diligently advocate." These additional steps ultimately authorize children's lawyers to advocate for a position "contrary to the child's wishes." Thus, in this peculiar Alice-in-Wonderland scenario, "advocating for the child's position" does *not* mean advocating for what the child wants; it means, instead, advocating for a result chosen by the lawyer.[20] Thus, the directive to "diligently advocate their clients' position" is at best inadequate and at worst deceptive. Yet, the Commission simply adopts the law guardian definition without addressing these matters.

A second reason for the shortness of the Commission's law guardian recommendations is, as we shall see in the next section, that the Commission ignored most of the important questions which need to be addressed when considering the use of children's lawyers in custody cases. The law guardian section begins promisingly enough by mentioning a number of questions the Commission considered. In particular, it observed that:

> Questions have been raised about the proper role of attorneys for the child in custody proceedings, when they should be appointed, their qualifications, and protocols for representation. Other issues of concern are how attorneys for the child should be compensated, and mechanisms for monitoring their performance.[21]

Instead of clarifying what these questions and issues of concern were, the Commission only assured us that it gave them "extensive review and much deliberation"[22] and advised that "this issue requires further research, discussion, and consideration."[23]

The Commission took a strong position against regarding children's lawyers as fiduciaries.[24] It said no more about this topic and one is left to understand that the Commission simply

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20. "'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'" LEWIS CARROLL, THROUGH THE LOOKING GLASS & WHAT ALICE FOUND THERE 269 (Martin Gardner ed., Random House 1990) (1960).

21. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 39.

22. *Id.*

23. *Id.*

24. *Id.*

meant that the special oversight responsibilities attendant with court appointments of fiduciaries need not apply to the appointment of children's lawyers.[25] Though judges are to decide when to appoint children's lawyers, the Commission "unequivocally states that it is essential that such appointments be fair and unbiased."[26]

The Commission recommended expanded training of judges, court personnel, and lawyers seeking court appointments as attorneys for children because many of these key actors need, in the Commission's view, "a better understanding of the role of the attorney who represents the child."[27] Without further explanation, the Commission found "gender bias" on the part of appointed attorneys for the child,[28] and called for greater training for children's lawyers with a specific recommendation that it include "addressing one's own biases."[29]

It also found the "recurring problem" of courts' improper "expectations regarding the role of the attorney for the child," stressing that "[t]he court should not ask an attorney for the child for a recommendation or personal opinion."[30] "Essential" judicial training should include instructing judges about child development issues and advising them not to "make improper requests for recommendations by the attorney for the child," or to "unduly rely on or delegate any judicial responsibilities to any attorney involved in the litigation, including the attorney for the child."[31] The Commission also clarified that courts "shall not engage in *ex parte* communications," with anyone including the child's lawyer.[32] Nor should courts "request that the attorney for the child select the forensic expert" or "request reports prepared by the attorney for the child."[33]

Finally, the Commission commented on the practice of payment for children's lawyers and found the system statewide to

25. *Id.*
26. *Id.* at 41.
27. *Id.*
28. *Id.* at 43.
29. *Id.*
30. *Id.*
31. *Id.* at 44.
32. *Id.*
33. *Id.*

be inconsistent.[34] To achieve statewide uniformity on this, it recommended that the Office of Court Administration "seek to amend the Domestic Relations Law, the Family Court Act and the Judiciary Law, to expressly empower courts with the discretion to direct parents with sufficient means to pay the fee of the attorney for the child."[35] It also recommended that courts set forth in their appointment order "the allocation of fees, the source of payment, the attorney's hourly rate, the frequency and reporting process of billing, the means for enforcement of payment, and any other relevant factors that will eliminate conflict in connection with the appointment of an attorney for the child."[36]

Undoubtedly, one of the weaknesses in the Commission's work is that it was the product of professionals closely associated with New York courts. This not only meant the wholesale endorsement of prior works produced by the Appellate Division Law Guardian Program and the New York State Bar Association, but, in addition, only one who works within that system could write seriously "commend[ing] the work of the OCA, the Appellate Divisions and others in educating and training judges, court personnel and those seeking appointments as attorneys for children."[37] In fact, New York practice regarding law guardians has a very troubled history, characterized by an almost complete lack of clarity. The leading commentator on New York practice in the area, Professor Merril Sobie, puts it this way: "The age old question is what the law guardian should do when faced with such conflict—advocate wishes, pursue interests, or conform closely to the statute's precise words by trying to accomplish the ludicrous, simultaneously advocating conflicting wishes and interest."[38]

One wonders exactly what the Commission was praising so highly given its findings that even though law guardians have been used in thousands of matrimonial cases in New York, "par-

34. *Id.*

35. *Id.*

36. *Id.* at 45.

37. *Id.* at 41.

38. Merril Sobie, Supplemental Practice Commentary, N.Y. FAM. CT. ACT § 241 (McKinney 2003).

ties often lack a full understanding of the duties and obligations of the attorney for the child."[39]

II. What the Commission Omitted from its Work

Lawyers for children present special concerns not ordinarily present when one is considering lawyers for other clients. We need to consider carefully even the most basic issues. When one is discussing whether to require a lawyer for an adult, in contrast, we know all of the fundamental parameters. Thus, when deciding whether adults should be able to obtain routine appointment of counsel, we already know what we mean. Lawyers, as agents for their principals, take their instruction from their clients.[40] Adult clients have the authority, in the words of the Model Code of Professional Responsibility, to "make decisions" that "are binding on [their] lawyer[s]."[41]

Everything is different when we are considering giving lawyers to children. Even the most basic understanding of the purpose and role of the assignment is absent. For this reason, a series of vital questions need to be addressed. Most prominent among these are the reasons for the appointment, the purposes hoped to be served by it, and the anticipated role of counsel (which will follow logically from these two prior considerations). It is a fundamental failure of logical ordering to begin, as the Commission does, with the conclusion that courts should assign counsel for children in legal proceedings. This conclusion may be correct, but, at the very least, we are unable to know until we have carefully examined the reasons and purposes for the appointment. Regrettably, the Commission eschewed these antecedent questions.

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39. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 41–42.

40. Both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility are unambiguous in setting forth the role of counsel when representing a competent client. Rule 1.2(a) of the Model Rules requires that lawyers for competent adults "abide by a client's decisions concerning the objectives of representation." MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002).

41. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1983) (provides that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer").

Considerable scholarly attention has focused on these vital questions over the past decade.[42] In addition, two important national organizations developed Standards for the appointment and conduct of lawyers for children in custody proceedings. The American Academy of Matrimonial Lawyers (in 1995)[43] and the American Bar Association (in 2003),[44] developed extensive Standards for the practicing Bar regarding custody cases.[45] The Commission's recommendations deviate substantially from these works. By itself, this may not be troubling. Each jurisdiction should be free to decide what constitutes best practices in this area. The troubling aspect of the Commission's work, however, is that it does not engage with these prior works. One can only know what the Commission recommends; the Commission's Report entirely omits its reasoning, and, particularly, its reasons for rejecting the work of others.

Perhaps the first thing to stand out when comparing the Commission's Report with the work of the American Academy of Matrimonial Lawyers is that the Commission's Report expresses a "preference" for appointing lawyers for children.[46] AAML Standard 1.1 explicitly rejects the general call for lawyers to routinely represent children in matrimonial cases.[47] In the AAML's view, representatives for children, whether counsel or guardians ad litem, may be appropriate in particular cases. Other than in those cases, however, appointing representatives

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42. *See generally Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1281 (1996). In December 1995, Fordham University Law School hosted a national conference on representing children. More than seventy lawyers, judges, legal scholars, and representatives of other professions participated in the conference, which resulted in the publication of a special issue discussing ethical issues in the legal representation of children. *See* Bruce A. Green & Bernardine Dohrn, *Foreword: Children & the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1283 (1996).

43. *AAML Standards*, *supra* note 9. I should point out, for purposes of fair disclosure, that I served as the Reporter for these Standards.

44. ABA STANDARDS, *supra* note 9.

45. In 2006, the National Conference of Commissioners on Uniform State Laws promulgated uniform standards for the appointment of lawyers for children in custody proceedings. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT (2006), http://www.abanet.org/legalservices/probono/nccusl_act_rep_children.pdf. Since these standards were published after the Commission's Report, they will not be considered here.

46. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 41.

47. *See AAML Standards*, *supra* note 9, at 1.

for children does not necessarily better serve them and may adversely affect the other parties to the action. In the absence of a particular reason for assigning representation for a child, the representative frequently will merely duplicate the efforts of counsel already appearing in the case.[48]

In contrast, the Commission's Report expresses "a preference for the appointment of an attorney for the child in such disputes,"[49] even encouraging judges to appoint more than one child's lawyer "when conflicts exist in representing more than one child in the family."[50] Although it leaves the decision to appoint an attorney for a child to the court's discretion in each case, it does not go far enough to clarify when the court should exercise its discretion.[51]

Though there may be good justifications for appointing counsel for children in custody proceedings, including protecting the child from harm associated with acrimonious litigation, interpreting and clarifying issues for the child, ensuring the child an opportunity to be heard, and helping the court reach the best outcome for the child,[52] there are also reasons to have reservations about using children's lawyers. Some worry that placing children at the center of their parents' dispute by stressing the importance of their preference to the outcome the court will reach is bad for them and that child custody law was developed to protect children from being made to feel responsi-

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48. *AAML Standards*, *supra* note 9, Standard 1.1 cmt., at 2.

49. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 41. It leaves the decision to appoint an attorney for a child to the court's discretion in each case. *Id.*

50. *Id.* at 44.

51. The Commission instructs judges to consider such factors as "whether or not the parties are represented by counsel, the degree of acrimony between the parties, the presence of issues or allegations of domestic violence and/or substance abuse, requests for relocation, allegations of child abuse or neglect, a parent's unfitness, and the age and maturity of the child." *Id.* at 41.

52. *See, e.g.*, Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585, 1600–01 (1995); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1427–28 (1996); Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. LAW. 35, 40–41 (1995); Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIMONIAL LAW. 57, 64 (1995).

ble for choosing where to live.[53] Others worry from the opposite direction. Instead of a concern about over-empowering children, they worry that assigning children with lawyers means that lawyers ultimately get to choose which position to advocate.[54]

The principal danger children's lawyers bring is that they will conclude what is best for their clients based on invisible factors that have more to tell us about the values and beliefs of the lawyers than about what is good for the children.[55] The AAML in particular recognized the dangers associated with freeing lawyers to advocate for the result they deem best. The AAML chose the simple and elegant device of prohibiting all children's lawyers, including those labeled as "guardians ad litem," from advocating for a result that is not derived from what their clients instructed. The AAML distinguishes between two types of clients for children's lawyers. When the client is "unimpaired,"[56] the lawyers are obliged to let the client set the objectives for the case. When the client is "impaired,"[57] chil-

53. Some scholars have recognized the difficulties posed by making the child's preference in a custody-related case a focus of attention. *See, e.g.*, Martin Guggenheim, *Counseling Counsel for Children,* 97 MICH. L. REV. 1488, 1492 n.8 (1999) (reviewing JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (1997)); Kim J. Landsman & Martha L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1165 (1978).

54. *See, e.g.*, Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. LAW. 35, 45–49 (1995); Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 327 n.129 (1998); Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 100–07, 123–24 (1984).

55. *See, e.g.*, Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. LAW. 35, 51 (1995); Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 318–19 n.79 (1998).

56. *AAML Standards*, *supra* note 9, Standard 2.4, at 16.

57. *AAML Standards, supra* note 9, Standard 2.7, at 19. The Standards, promulgated in 1995, were based on the then-current language from Rule 1.14 of the MODEL CODE OF PROF'L RESPONSIBILITY (2001) which discussed the duties of counsel when representing a client whose "ability to make adequately considered decisions in connection with the representation is impaired." The Rule was amended in 2002, eliminating the word "impaired," and describing the duties of counsel when representing a client whose "capacity to make adequately considered

dren's lawyers are not constrained to advocate for what their client wants. But they may never advocate for a result against what their client wants, even if they choose not to advocate for the client's preference.[58]

The ABA Standards build off of the AAML's but ultimately take a materially different tack. Like the AAML, the ABA Standards ordinarily require that the lawyer be guided by the client's choice of objectives. Children's lawyers are ordinarily required by the ABA Standards to advocate for the result sought by clients who, in the lawyer's judgment, are capable of making adequately considered decisions. The Commission instructs lawyers to ascertain whether, in their opinion, the child's views are the product of a "knowing, voluntary and considered" judgment.[59] As we shall see, this proves to be an invitation for children's lawyers in New York to infuse their own beliefs into their representation to a degree these national standards do not tolerate.

Unlike the AAML, however, and in accordance with the Commission, the ABA Standards authorize children's lawyers in certain circumstances to advocate for the best interests of the child. In order not to confuse these two radically different roles, however, the ABA Standards divided the roles into two parts. In the first, a "Child's Attorney" is a lawyer who "represents the child as a client"[60] bound by the client's preferences. These lawyers serve their clients as agents for them.[61] Whenever a child's lawyer is expected to advocate for the child's best interests, that

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decisions in connection with a representation is diminished." MODEL CODE OF PROF'L RESPONSIBILITY R. 1.14 (2006).

58. *See AAML Standards*, *supra* note 9, Standard 2.7, at 19. ("When a child client, by virtue of his or her impairment, is unable to set the goals of representation, the child's lawyer shall not advocate a position with regard to the outcome of the proceeding or issues contested during the litigation."). *See also AAML Standards*, *supra* note 9, Standard 3.2, at 29.

59. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 40 (quoting Appellate Division, Second, Third and Fourth Departments, Law Guardian Program Administrative Handbook (2004), http://nycourts.gov/ad4/lg/lg_2004handbook.pdf (internal quotation marks omitted)).

60. ABA STANDARDS, *supra* note 9, II. B. cmt., at 2.

61. The child's attorney "should abide by the client's decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer, and does so." ABA STANDARDS, *supra* note 9, IV. C., at 11. The Commentary makes plain that "the child is entitled to determine the overall objectives to be pursued." ABA STANDARDS, *supra* note 9, IV. C. cmt., at 11.

lawyer is to be known as a "Best Interests Attorney."[62] Recognizing the huge difference between them, the ABA Standards prohibit the lawyer from being a combination of the two.[63] Going even further to ensure no ambiguity, the ABA Standards insist that at every hearing either the judge or the lawyer clarify which kind of lawyer is appearing.[64]

In contrast, the Commission did not even acknowledge the possibility that children's lawyers might advocate for their clients' best interests, much less discuss the dangers of authorizing lawyers to play this role. Although the Commission endorses a definition of "law guardian" that allows lawyers to advocate for a position opposite from the child's wishes, it repeatedly emphasizes that children's lawyers should advocate the children's wishes, thereby almost pretending children's lawyers have no other significant role to perform.

In place of an examination of the dangers associated with advocating for children's best interests, the Commission chose rhetoric emphasizing a child empowerment theme. One gets the strong impression that the Commission wants (or wants readers to believe it wants) children's lawyers whenever possible to be "ordinary" lawyers striving to achieve the objectives set by their clients. This impression is obtained from the very beginning: "children's lawyers are *lawyers*" we are emphatically told by the State Bar Standards relied upon by the Commission. The Commission's First Principle, is that "the law guardian is the attorney for the child."[65] To make this even more emphatic, the Commission eschews the term "law guardian," choosing instead simply to refer to all court-appointed lawyers in these cases as the "attorney for the child."[66] This is remarkable since

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62. ABA STANDARDS, *supra* note 9, II. B. 2, at 2; *see also* Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 105, 119–22 (describing the roles of child's attorneys and best interests attorneys as set forth in the ABA Standards).

63. ABA STANDARDS, *supra* note 9, II. B. cmt., III. B. cmt., at 2, 3.

64. ABA STANDARDS, *supra* note 9, III. G. cmt., at 7.

65. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 39 (quoting Appellate Division, Second, Third and Fourth Departments, Law Guardian Program Administrative Handbook (2004), http://nycourts.gov/ad4/lg/lg_2004handbook.pdf (internal quotation marks omitted)).

66. *Id.* at 39 (quoting Appellate Division, Second, Third and Fourth Departments, Law Guardian Program Administrative Handbook (2004), http://nycourts.gov/ad4/lg/lg_2004handbook.pdf (internal quotation marks omitted)). Since the

the controlling statute,[67] and caselaw,[68] exclusively speak in terms of "law guardians." By preferring "attorney for the child," the Commission seeks to avoid the ambiguity inherent in being a "guardian," reinforcing the sense that the Commission prefers children's lawyers to be guided by what their clients instruct.[69]

This impression is strengthened by an early emphasis on children's rights. In the very first paragraph in the children's lawyer section, the Commission writes, "the attorney for the child, as the children's independent advocate, generally must take a position based upon the children's wishes and convey that position to the court."[70] This is designed to leave us with the understanding that the attorney for the child in custody proceedings ("generally") has the straightforward duty to empower children. The final point of emphasis made by the Commission is its warning to judges against seeking recommendations from children's lawyers, insisting that "court[s] should not ask an attorney for the child for a recommendation or personal opinion . . . [because] the attorney for the child is not an arm of the court or a fiduciary and . . . he or she must advocate on that child's behalf as is required of any other attorney in a civil proceeding."[71]

It is as if the Commission denied the pertinence of any concern associated with empowering children's lawyers to advocate a child's best interests by denying that children's lawyers in

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Commission has chosen to eschew the term "law guardian," I shall do the same throughout this article. I do this to be fair to the Commission's work, even though I fear some readers will be confused because the controlling statutes and case law all continue to use the term.

67. N.Y. FAM. CT. ACT § 241 (McKinney 2006).

68. *See, e.g.*, *infra* note 113.

69. The Commission recommends amending all relevant statutes, court rules, and regulations to replace the term "law guardian" with the term "attorney for the child" to change "perceptions held about . . . the role of attorneys who represent the children." MATRIMONIAL COMMISSION REPORT, *supra* note 10, at iv. This recommendation further highlights the Commission's insistence on changing language without exploring the reasons for and implications of such change.

70. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 39.

71. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 43. The Commission rescinds this admonition almost immediately by insisting only that judges "not make *improper* requests for recommendations by the attorney for the child." *Id.* at 44 (emphasis added). Moreover, the Commission stresses that "[t]he attorney for the child is expected, however, to take a position in the litigation—in accordance with the considerations outlined earlier—and to use every appropriate means to advance that position." *Id.* at 43–44.

New York have very much discretion to choose the result they wish. But this is plainly incorrect. Indeed, there simply is no way around just how the New York Standards endorsed by the Commission empower children's lawyers, not children.[72]

The real question which the Commission should have addressed is whether, all things considered, more is gained or lost by encouraging lawyers to assess for themselves what best serves the child. Perhaps the question is closer than I take it to be. From my perspective as a practicing lawyer for more than 35 years, the dangers associated with freeing lawyers in this way are far greater than what anyone has to gain by their use. I readily accept that I may be wrong. But nothing the Commission has said would allow me to recognize the errors of my ways because the Commission appears to be oblivious to even the possibility that children's lawyers may contaminate the fair administration of justice.

Although the Report emphasizes the ordinariness expected from children's lawyers, I wish to demonstrate that the traditional role of a child's lawyer in New York is anything but ordinary. Despite the Commission's effort to obfuscate the point, I hope to show that children's lawyers are expected to recommend to the court the outcome they believe will serve their clients best interests and that the Commission has not advocated any significant change from this role and purpose of children's lawyers. This is so for three reasons. First, adjusting the process by which courts decide custody disputes by making it more likely that they will decide custody disputes in accordance with what children want would be starkly at odds with the purpose of custody dispute resolution. Second, and related to this, New York courts would not tolerate setting loose a cadre of children's lawyers whose principal function was to strive single-mindedly to achieve the result desired by the child. Third, and perhaps most tellingly, as we have already seen, the State Bar Standards defining the tasks to be performed by children's lawyers, which were endorsed by the Commission as authoritative, provide otherwise.

72. *See infra* notes 131–35 and accompanying text.

III. The Proper Weight Due a Child's Preferences According to New York Law

New York law is unambiguous in requiring that courts determine custody matters "solely" based on "what is for the best interest of the child, and what will best promote its welfare and happiness."[73] The New York Court of Appeals has made clear there are no rigid rules or absolutes governing custody determinations.[74] Rather, courts have developed a list of factors to consider in ascertaining which outcome will most likely serve the child's best interests.[75] The child's preference is merely one of the many factors that courts should consider. Other factors include, in no particular order: (1) the relative fitness of each party; (2) the emotional bond between the child and each party; (3) the length of time the child has lived in a stable environment; (4) each party's ability to provide for the child's emotional and intellectual development; (5) the financial status of each party; (6) the individual needs of the child; (7) the degree to which the custodial determination would interrupt the child's day-to-day life; (8) the willingness of each party to facilitate a relationship between the child and the other party; and (9) any other relevant factor, such as domestic violence or substance abuse.[76] Individual courts have revised this list from time to time.[77] No test exists for telling a court with any great precision

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73. N.Y. DOM. REL. LAW § 70 (McKinney 2006). *See also* N.Y. DOM. REL. LAW § 240 (McKinney 2006) ("In all cases there shall be no prima facie right to the custody of the child in either parent.").

74. Friederwitzer v. Friederwitzer, 432 N.E.2d 765, 767 (N.Y. 1982) ("The only absolute in the law governing custody of children is that there are no absolutes.").

75. *Id.* at 768 ("The standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered."); Nehra v. Uhlar, 372 N.E.2d 4, 7 (N.Y. 1977) ("Paramount in child custody cases, of course, is the ultimate best interest of the child.").

76. K.D. v. J.D., No. V-16584-03, 2004 WL 1753417, at *6 (N.Y. Fam. Ct. June 30, 2004). *See also* Ellen K. v. John K., 588 N.Y.S.2d 625, 626 (App. Div. 1992); Krebsbach v. Gallagher, 587 N.Y.S.2d 346, 347 (App. Div. 1992).

77. *See, e.g.*, Salvatore M. v. Tara C., No. V-11289-04/05 I, 2006 WL 8322539 (N.Y. Fam. Ct. March 2, 2006). The court held that:

> In determining the best interest of the child where a change of custody is sought, the court considers such factors as the original placement of the child, the length of that placement, relative fitness of parents, quality of home environment, parental guidance given to the child, parents' financial status, and parents' ability to provide for the child's emotional and intellectual development.

how to reach the ultimate conclusion of what outcome will most likely serve the best interests of the child. But New York law could not be clearer: the clarion substantive rule concerning the weight to give a child's views is that it is merely a factor to which a court should give as much weight as it deems appropriate.[78] The best interests test is an amalgam result based on the totality of the evidence.[79] Although appointing an attorney who strives to secure the outcome desired by the child furthers the goal of making the client's wishes known to the court, it may undermine securing an outcome that will best serve the "child's interests" as New York defines the phrase.

This is not to suggest that a child's expressed desires are irrelevant. Indeed, New York courts have become ever more insistent that trial courts ascertain the expressed wishes of the child before deciding a contested custody case, commonly through an *in camera* interview conducted by the judge.[80] One of the surest ways for a trial court to commit reversible error in a contested custody dispute is to fail to learn the expressed wishes of the child (though the means by which the court ascer-

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Id. at *8 (citations omitted); *see also* Suzanne T. v. Arthur L.T., 817 N.Y.S.2d 855, 857 (Fam. Ct. 2005).

78. *See, e.g.*, Eschbach v. Eschbach, 436 N.E.2d 1260, 1263 (N.Y. 1982) (holding that the child's desire is "but one factor to be considered; as with the other factors, the child's desires should not be considered determinative."); Moore v. Barrett, 786 N.Y.S.2d 825, 827 (App. Div. 2004) (holding that in determining the child's best interest, "numerous factors, which could include a child's preference, must be reviewed and weighed."); Cornell v. Cornell, 778 N.Y.S.2d 193, 195 (App. Div. 2004) ("Although the advanced age of the child tends to render greater weight to his or her reasoned wishes, the child's preference is but one factor in the best interests analysis.").

79. *See, e.g.*, *Eschbach*, 436 N.E.2d at 1264 (stating that in a custody case, the trial court is required to "review the totality of the circumstances" in determining child's "best interests"); *Friederwitzer*, 432 N.E.2d 765, 769 (holding that the court has the discretion to change custody "when the totality of circumstances . . . warrants its doing so in the best interests of the child").

80. *See, e.g.*, Lincoln v. Lincoln, 247 N.E.2d 659, 661 (N.Y. 1969) ("[W]e are convinced that the interests of the child will be best served by granting to the trial court in a custody proceeding discretion to interview the child in the absence of its parents or their counsel."); Koppenhoefer v. Koppenhoefer, 558 N.Y.S.2d 596, 599 (App. Div. 1990) ("The preferred practice in a custody/visitation case in order to determine best interests, is to have an in camera interview with child on the record in the presence of the Law Guardian."); Reed v. Reed, 734 N.Y.S.2d 806, 809 (Fam. Ct. 2001) ("It has been well established in this jurisdiction that the appropriate method to conduct an interview with a child in a custody matter is an in camera interview.").

tains this information are more flexible than always conducting an interview).[81] But it is crucial to appreciate that the error committed is not a failure involving the child's rights. It is a failure of input. The court's error is the failure to secure potentially relevant data. The entire point of the substantive standard for deciding a custody dispute in New York is that the child's expressed preference is datum courts must consider in reaching their ultimate conclusion regarding the child's interests.[82] But it is no more consistent with New York law for a court to decide the case based solely on the child's expressed wishes[83] than it would be for a court to refuse to consider them.

Not only are courts free to decide custody cases opposite from what the children have stated they want, but appellate courts comfortably affirm such results, rejecting the claim that the court failed to take into account wishes of children.[84] Thus, in *Roberts v. Roberts*,[85] a fourteen-year-old girl and twelve-year-old boy claimed that the trial court erred by ignoring their wishes. The appellate court disagreed, emphasizing the distinction between factoring into the ultimate decision the children's

81. *See, e.g.*, *Koppenhoefer*, 558 N.Y.S.2d at 599 (reversing trial court where fourteen- and twelve-year-old children had no opportunity to communicate their preferences to the court in custody and visitation case); Feldman v. Feldman, 396 N.Y.S.2d 879, 881 (App. Div. 1977) (reversing trial court where court failed to consult sixteen-year-old before determining custody and visitation rights). *See also* Spain v. Spain, 515 N.Y.S.2d 134, 136 (App. Div. 1987) ("In view of the paucity of information in this record and the failure of the court to interview the child, there is little on which to base a judgment with regard to the best interest of the child.").

82. *See, e.g.*, *Eschbach*, 436 N.E.2d at 1263 ("While not determinative, the child's expressed preference is some indication of what is in the child's best interests."). The sole concern of the court in a custody dispute is which resolution will best serve the best interests of the subject children by promoting the children's welfare, happiness, and optimum development. *See id.* at 1262–63; *Friederwitzer*, 432 N.E.2d at 767–68; Nehra v. Uhlar, 372 N.E.2d 4, 5 (N.Y. 1977); Teuschler v. Teuschler, 660 N.Y.S.2d 744, 746 (App. Div. 1997) (citing Dintruff v. McGreevy, 316 N.E.2d 716 (N.Y. 1974) ("Although a child's preference may be indicative of what is in the child's best interests, it is not determinative.")).

83. The case law is replete with holdings ordering a custodial arrangement at odds with the stated preferences of the children, even when the children are teenagers. *See, e.g.*, Smoczkiewicz v Smoczkiewicz, 770 N.Y.S.2d 101 (App. Div. 2003) (affirming court order denying change in custody despite thirteen-year-old's preference); Johnston v. Bridenbecker, 752 N.Y.S.2d 496, 496–97 (App. Div. 2002) (reversing lower court's custody order to reach result contrary to children's desires); Jordan v. Jordan, 732 N.Y.S.2d 478, 479 (App. Div. 2001).

84. *See* Roberts v. Roberts, 505 N.Y.S.2d 215, 216 (App. Div. 1986).

85. *Id.*

wishes and relying on them as the basis for the result. The children's wishes—even of fourteen- and twelve-year-olds—are heard "not to bind the courts, but to guide them in determining what is in the best interests of the children."[86]

It is true that courts are supposed to give more weight to older children's wishes than to those of younger children.[87] Case law commonly repeats the notion that older and mature children's expressed wishes are entitled to "great weight."[88] But it is equally true that courts are expected to exercise their inde-

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86. *Id.* at 216.

87. *Eschbach*, 436 N.E.2d at 1263–64 ("While not determinative, the child's expressed preference is some indication of what is in the child's best interests. Of course, in weighing this factor, the court must consider the age and maturity of the child and the potential for influence having been exerted on the child.").

88. *See, e.g.*, O'Connor v. Dyer, 795 N.Y.S.2d 686, 687 (App. Div. 2005) (quoting Koppenhoefer v. Koppenhoefer, 558 N.Y.S.2d 596, 599 (App. Div. 1990)) (internal quotation marks omitted). There is no magic age of maturity. One court has characterized fourteen as "the age of preference." Suzanne T. v. Arthur L.T., 817 N.Y.S.2d 855, 857 (Fam. Ct. 2005). However, there are many examples of courts deciding cases contrary to what children fourteen and even older want. *See, e.g.*, Gonzalez v. Gonzalez, 791 N.Y.S.2d 562 (App. Div. 2005) (reversing trial court order despite fifteen-year-old's desire to live with father); Moore v. Barrett, 786 N.Y.S.2d 825, 827 (App. Div. 2004) (deciding contrary to sixteen-year-old's desire since "such preference, even from a child of this age, will not be determinative"); McTighe v. Pearl, 778 N.Y.S.2d 588, 590 (App. Div. 2004) (affirming custody order at odds with fourteen-year-old's desire); Juliano v. Pollack, 681 N.Y.S.2d 159, 160 (App. Div. 1998) (upholding denial of custody modification for fourteen-year-old even though "all parties were aware of his contentions and his desire" for modification); McCrocklin v. McCrocklin, 430 N.Y.S.2d 320, 321 (App. Div. 1980) ("While we observe that the wishes of a child of Colleen's age [15] and presumed maturity must be considered, they are not necessarily dispositive of the custody issue."). *See also* Cornell v. Cornell, 778 N.Y.S.2d 193 (App. Div. 2004) (holding "erroneous" family court's view that fifteen-year-old's "wishes should be dispositive"). Courts routinely hold that children as old as ten, eleven, and even twelve years "generally [are] not of sufficient maturity to weigh intelligently the factors essential to making a wise choice as to custody." Fox v. Fox, 582 N.Y.S.2d 863, 864 (App. Div. 1992). *See, e.g.*, Robert T.F. v. Rosemary F., 538 N.Y.S.2d 605, 607 (App. Div. 1989) (noting that eleven-year-old's wishes are not determinative and court "must not lose sight of the child's age and vulnerability to be influenced by the noncustodial parent"); Ferguson v. Ressico, 510 N.Y.S.2d 275, 277 (App. Div. 1986) (affirming trial court's order despite contrary desire of eleven-year-old child); Roberts v. Roberts, 505 N.Y.S.2d 215 (App. Div. 1986); Feltman v. Feltman, 471 N.Y.S.2d 619, 620 (App. Div. 1984) (citing Martin v. Martin, 427 N.Y.S.2d 1002 (App. Div. 1980) ("The child's preference to live with her mother is not determinative in this case because a child of 11 is not mature enough to weigh intelligently the factors necessary to make a wise choice as to her custody.").

pendent judgment in reaching the ultimate decision.[89] When, if ever, children's desires tip the balance for a court is always to be decided by the judge. A rule that children's views are entitled to precisely as much (or little) weight as the judge deems appropriate should not be confused with empowering children.[90]

There are several reasons why the expressed wishes of a child are not binding on the court. One is that a substantive rule that the child's stated preferences are controlling would mean that the focus of the case would shift from the overall facts to a single criterion: what the child will tell the judge.[91] This, in turn, would mean that the parents would have an incentive to place a terrible burden on the child, fixing the child at the very center of the controversy in contravention of everything psychologists tell us is good for children.[92] The Court of

89. *See, e.g., Jordan*, 732 N.Y.S.2d at 479 (holding that in the absence of a showing that "visitation would result in significant emotional harm to the children," it was error for Family Court to have awarded visitation based upon the adolescent children's desires).

90. Even when courts are inclined to uphold an order granting or denying visitation or custody which happens to comport with the child's preferences, it is common for the appellate courts in New York to stress that "the stated desires of the children with respect to visitation are not determinative." Jabri v. Jabri, 598 N.Y.S.2d 535, 537 (App. Div. 1993). In *Jabri*, the court ended up affirming the trial court's order, but, in doing so, saw fit to remind everyone that, even though the order conditioned visitation upon the children's willingness to participate, it "decline[d] to disturb the visitation order at this time, considering the fact that the youngest of the children is now 16 years old, and in view of the psychiatric testimony which indicates that compulsory visitation would not be in their best interests." *Id.*

91. *See, e.g.*, Dintruff v. McGreevy, 316 N.E.2d 716, 716 (N.Y. 1974) ("While a child's view should be considered to ascertain his attitude and to lead to relevant facts, it should not be determinative. If it were, then all a court would be required to decide is whether his preference of parent is voluntary and untainted and then follow the child's wish."); Metz v. Morley, 289 N.Y.S.2d 364, 368 (App. Div. 1968) ("We may not abdicate the function of this court to determine what is in the best interest of the child and permit the youngster to be the sole judge of her own welfare."); Hahn v. Falce, 289 N.Y.S.2d 100, 109 (Fam. Ct. 1968) ("[I]n the case of a 10-year-old child whose preference for one parent or the other can be so easily influenced by discipline or the lack of it, or by the denial or gratification of childish desires the wishes of the child are not . . . controlling, and will not deter the court from making a contrary determination if in the court's judgment, the best interests of the child require it. Any other policy would be practically to abandon the jurisdiction of the court and make the child the sole judge of his own best interests and welfare.").

92. *See supra* note 53 and accompanying text. *See also* Miosky v. Miosky, 2006 WL 3025811, at *4 (N.Y. App. Div. Oct. 26, 2006) (reversing trial court order where "Family Court should not have relegated visitation to the younger daugh-

Appeals has recognized that this could result in "distortive manipulation by a bitter, or perhaps even well-meaning, parent."[93]

But New York rejects a rule that the child's wishes are controlling for even more basic reasons. Rarely, anywhere in the law, are a child's desires binding on adults.[94] To the contrary, all of the really important decisions about children are vested in adults responsible for their upbringing to make for them. Parents possess the authority to raise children as they see fit, to give as much weight to children's preferences as the parents deem appropriate, but ultimately to make decisions for children without being constrained by the children's desires.[95]

The law of divorce does not change this fundamental relationship between children and the law. Judges responsible for deciding contested custody disputes step into the shoes of parents when deciding these cases. They are charged with the duty of advancing the children's interests. But custody cases are not about empowering children. Wise judges, like wise parents, would not want to make decisions on behalf of children without knowing what the children think. But the children's thoughts merely are helpful to the adult decision-maker. As the Court of Appeals has said, among the reasons courts are not bound by children's expressed wishes in deciding custody cases is that

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ter's wishes, as she was clearly caught in the crossfire and under undue influence" from parent); Bergson v. Bergson, 414 N.Y.S.2d 593, 594 (App. Div. 1979) (modifying a joint custody order that had allowed 15-year-old to choose between his parents because "[t]o lodge such discretion in the child would make him the focal point of family discord and subject him to undue pressure").

93. Nehra v. Uhlar, 372 N.E.2d 4, 7 (N.Y. 1977).

94. The outstanding exception involves pregnant minors. *See* Bellotti v. Baird, 443 U.S. 622, 643 (1979) (concluding that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained" without parental consent); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (holding unconstitutional a state law provision requiring a parent's consent for an unmarried minor seeking an abortion, noting that the "State may not impose a blanket provision . . . requiring the consent of a parent or person in *loco parentis* as a condition for abortion of an unmarried minor"). But, as I have suggested elsewhere, even this exception tells us less about children's rights than about the complicated story of fights between adults over an important public health choice. *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 224-44 (2005); Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589 (2002).

95. *See, e.g.*, MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 38 (2005).

children's views "do not always reflect the long-term best interest of the children."[96]

IV. What Judges in New York Expect from Children's Lawyers

As we have already seen, the progenitor of appointing lawyers for children in custody cases was *Braiman v. Braiman*.[97] *Braiman* could not be confused with any kind of call for lawyers in order to empower children. Rather, Chief Judge Breital viewed the court-appointed guardian as a lawyer "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."[98]

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96. *Nehra*, 372 N.E.2d at 7. *See also* Lincoln v. Lincoln, 247 N.E.2d 659, 661 (N.Y. 1969) ("A child whose home is or has been torn apart is subjected to emotional stresses that may produce completely distorted images of its parents and its situation. Also its feelings may be transient indeed, and the reasons for its preferences may indicate that no weight should be given the child's choice."). Sometimes, trial courts forget that their role is to decide independently what result best serves the children's interests (or, perhaps, simply stress too much that their decision is based on the "strong desires" of the children). When this occurs, courts are especially likely to reverse trial court orders, if only to remind all of the supremacy of the judges' power to decide the case. *See, e.g.*, Fox v. Fox, 582 N.Y.S.2d 863, 864 (App. Div. 1992) (holding that it was "improper" to change custody of child "because of the 'strong desires' of the 10-year-old daughter to live with her mother." Court requires a showing that the child "is possessed of exceptional judgment or maturity to decide her custodial fate."). Courts are particularly likely to reverse trial court orders based on the child's preferences when the court acted "without the benefit of an investigative report and without the testimony of teachers, counselors, psychologists or other experts." *Id.* (citing Mead v. Mead, 532 N.Y.S.2d 449 (App. Div. 1988)). *See also* Calder v. Woolverton, 375 N.Y.S.2d 150 (App. Div. 1975), *aff'd*, 355 N.E.2d 306 (N.Y. 1976); Barry v. Glynn, 297 N.Y.S.2d 786 (Fam. Ct. 1969)). In other words, children's preferences come to matter if, but not unless, they are supported by expert testimony or other more objective data. *See* Barry v. Glynn, 297 N.Y.S.2d 786, 790 (Fam. Ct. 1969) ("[I]n choosing between two good homes each of which seems to make [the child] thrive, but one of which she strongly prefers, this particular child's welfare at age 11 requires, as our expert witness maintains, deferring to her unwavering wishes."); Sciartelli v. Sciartelli, 528 N.Y.S.2d 443, 444 (App. Div. 1988) (affirming order in accordance with adolescents' preferences where "the Law Guardian and a court-appointed clinical psychologist recommended" the same outcome as the children).

97. 378 N.E.2d 1019 (N.Y. 1979).

98. *Id.* at 1022. The two children were seven-and-a-half and six-years-old. *Id.* at 1019.

Braiman had three characteristics deeply at odds with empowering children. First, it did not even envision this person being the children's *lawyer*; a guardian ad litem was all that it desired. In addition, it assigned the guardian with two tasks: Explore the truth for the court and, "perhaps even" make a recommendation to the trial judge of how to decide the case. Taken together, this means that, at least when the Court of Appeals first expressed a view on the subject, it regarded the court-appointed professional as an aide of the court, not as an attorney for the child. Nor did the Court of Appeals regard the child as anyone's client. The notion that children's lawyers are more appropriately viewed as court aides than children's lawyers has deep resonance in the case law.

Trial and appellate judges recognize that getting at the true facts in many cases can be difficult. Understandably, courts want any help they can get. For many judges deciding complex custody cases, this neutral child's lawyer is just what they are looking for to help them determine the best interests of the child. Anyone familiar with cases involving children who fails to understand this is missing the real point. Consider how common it is for appellate courts to emphasize that the child's lawyer recommended the result reached by the appellate court. The Court of Appeals presents a prominent example. Thus, in *In re Ray A.M.*,[99] the Court of Appeals upheld an order terminating parental rights. In doing so, it added gratuitously, "It is significant too that the Law Guardian for the child . . . has submitted a useful and thoughtful brief and argument, urging" this outcome.[100] "Since the child obviously cannot speak for herself," the court observed, "this highly competent neutral submission is reassuring."[101] Does anyone seriously believe the court would have been impressed by the legal position advocated by the child's lawyer if it understood that the position was merely the product of the child's wishes? No one should expect children's lawyers suddenly to cease advocating the children's best interests given what judges expect from them. If lawyers for children started to fight unswervingly to achieve the outcome preferred by the child, courts would stop paying careful atten-

99. 339 N.E.2d 135 (N.Y. 1975).
100. *Id.* at 138.
101. *Id.*

tion to what the children's lawyers were saying. Even more, courts would be reluctant to bother appointing children's lawyers in the first place.

A very large part of the value of children's lawyers, whether to the Court of Appeals or to trial judges, is the "reassuring" quality that the result the law guardian *chose* to advocate comports with the result the court chose to reach. Thus, the Court of Appeals, in *In re Nathaniel T.*,[102] again revealed the comfort law guardians bring by observing that "both Law Guardians, court-appointed attorneys whose role was to protect and represent the interests of the children, have filed recommendations and briefs urging that these children have been permanently neglected and that parental rights should be terminated."[103] The same note is commonly sounded in the appellate divisions. Courts like children's lawyers because they tend to offer "relevant and important insights."[104]

Even a casual reading of courts' descriptions of the child's lawyer's role reveals how deeply courts perceive the lawyer as the court's aide. "[A]n important function in furtherance of the law guardian's role in a child custody proceeding," a trial court wrote in 2002, "is to uncover and offer evidence which adults might choose to withhold from the court."[105] This is powerfully

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102. 492 N.E.2d 775 (N.Y. 1986).

103. *Id.* at 777.

104. Church v. Church, 656 N.Y.S.2d 416, 417 (App. Div. 1997) (quoting Moon v. Moon, 502 N.Y.S.2d 110, 112 (App. Div. 1986)) (internal quotation marks omitted). *See also* Grathwol v. Grathwol, 727 N.Y.S.2d 825, 829 (App. Div. 2001) ("We also note that the Law Guardian's recommendation, although not binding on this Court, fully supports the determination made by Family Court that it will be in the child's best interest to be with petitioner."); *In re* Anthony M., 705 N.Y.S.2d 715, 717 (App. Div. 2000) ("Notably, the Law Guardian appointed to represent the child . . . has advocated strongly in support" of what the court holds); Rolls v. Rolls, 663 N.Y.S.2d 345, 347 (App. Div. 1997) (citing Betancourt v. Boughton, 611 N.Y.S.2d 941 (App. Div. 1994)) ("We also note that, although by no means determinative, Supreme Court's determination that the children should remain living with defendant was in accord with the Law Guardian's recommendation.").

105. Bradt v. White, 740 N.Y.S.2d 777, 780 (Sup. Ct. 2002). *See also* B.A. v. L.A., 761 N.Y.S.2d 805, 812 (Fam. Ct. 2003) (citing Koppenhoefer v. Kppenhoefer, 558 N.Y.S.2d 596 (App. Div. 1997); Vecchiarelli v. Vecchiarelli, 656 N.Y.S.2d 337 (App. Div. 1997)) ("Appellate courts have long recognized the dual role of the law guardian as both the champion of the best interests of their clients and as advocates for their express preferences, if any. This includes being an investigator seeking truth on controverted issues and as recommenders of alternatives for the court's considerations.").

reiterated in *Carballeira v. Shumway*, a Third Department decision in 2000, which is heavily cited in the case law.[106]

In *Carballeira*, the losing parent in a contested custody dispute appealed the final order objecting that the child's lawyer advocated for a result contrary to the expressed wishes of his eleven-year-old client. The father conceded that the lawyer "would be justified in substituting his or her own judgment of what is in the best interest of a very young child."[107] His claim was that when "the represented child is old enough to articulate his or her wishes, the Law Guardian is required to advocate for the result desired by the child and prohibited from interjecting an independent view of what would best meet the child's needs."[108] The Third Department rejected this "categorical position"[109] explaining that "[t]he Law Guardian, has the statutorily directed responsibility to represent the child's wishes as well as to advocate the child's best interest."[110] Because the child's preference is only "some indication of what is in the child's best interests,"[111] "a Law Guardian may properly attempt to persuade the court to adopt a position which, in the Law Guardian's independent judgment, would best promote the child's interest, even if that position is contrary to the wishes of the child."[112] *Carballeira* concluded that the child's lawyer fulfilled the assignment fully even though he argued for the result oppo-

106. 710 N.Y.S.2d 149, 152–53 (App. Div. 2000). *See also* Goodfriend v. Devletsah-Goodfriend, 813 N.Y.S.2d 824, 826 (App. Div. 2006); Vickery v. Vickery, 812 N.Y.S.2d 180, 181–82 (App. Div. 2006); Whitley v. Leonard, 772 N.Y.S.2d 620 (App. Div. 2004); Blangiardo v. Blangiardo, 767 N.Y.S.2d 788, 788 (App. Div. 2003); James MM. v. June OO., 740 N.Y.S.2d 730, 732 (App. Div. 2002).

107. *Carballeira*, 710 N.Y.S.2d at 151–52.

108. *Id.* at 152.

109. *Id.*

110. *Id.*

111. *Id.* (quoting Eschbach v. Eschbach, 436 N.E.2d 1260, 1263 (N.Y. 1982)) (internal quotation marks omitted).

112. *Id.* (quoting *In re* Amikia P., 684 N.Y.S.2d 761, 763 (Fam. Ct. 1999)) (internal quotation marks omitted). Far from paving new ground, *Carballeira* merely restated the long-established understanding by New York courts of the role and purpose of children's lawyers in custody cases. In 1994, the court in *Marquez v. Presbyterian Hospital*, noted that a "consensus in the legal community that there is an essential duality of the law guardian's role—defense attorney and guardian." Marquez v. Presbyterian Hospital, 608 N.Y.S.2d 1012, 1015 (Sup. Ct. 1994).

site from what his "certainly intelligent but somewhat less mature than average" eleven-year-old client wanted.[113]

Appellate courts in New York expect children's lawyers to decide for themselves whether to advocate for an outcome opposed by the children regardless of the children's age. Since it was decided in 1990, *Koppenhoefer v. Koppenhoefer*[114] has become the most frequently cited case for providing a definition of a child's lawyer's role. In *Koppenheofer*, a 16-year-old boy and his 14-year-old sister were the subjects of a particularly embattled visitation dispute since their parents divorced thirteen years earlier. When the children were 14 and 12, the trial court modified the visitation order in favor of the mother, but failed to interview the children or use a law guardian. The Second Department reversed because "[t]he children were not heard from directly, or through a Law Guardian."[115] On remand, the trial court was directed to conduct further hearings in order to learn the children's preferences.[116] Moreover, the court wrote, the "appointment of a law guardian . . . [would have been] appropriate and helpful to the court."[117] The Second Department assigned a very broad set of tasks for the children's lawyer, leaving to the lawyer which to choose. Children's lawyers, says the court, "may act as champion of the child's best interest, as advocate for the child's preferences, as investigator seeking the

113. *Carballiera*, 710 N.Y.S.2d 149. Especially fascinating is the relationship between the merits of the case—what the court ultimately believed was in the child's best interests—and the court's willingness to condone the child's lawyer's refusal to advocate for a result which he did not personally believe would advance the child's best interests. The appellate court expressed the concern that the child was unable to "articulate objective reasons for his preference other than his dislike of discipline at respondent's home and the lack of rules and discipline at petitioner's home." *Id.* at 152–53. Once the court was comfortable agreeing with the trial court's decision, which did not come out in favor of what the child wanted, the court was primed to conclude that it was also reasonable for the child's lawyer to conclude that what the child wanted would not serve his best interests and, therefore, the lawyer was permitted to advocate for a result that he believed would advance the child's best interests. *Id.*

114. 558 N.Y.S.2d 596 (App. Div. 1990).

115. *Id.* at 598.

116. *Id.* at 599 ("[I]n order that more than lip service be accorded the vague and amorphous concept of best interests, the court must inquire into the emotional, intellectual, physical, and social needs of the children, as well as the children's preferences if the children are capable of verbalizing them.").

117. *Id.*

truth on controverted issues, or may serve to recommend alternatives for the court's consideration."[118]

Caselaw imposes almost no limitations on the discretion accorded to the child's lawyers, beyond that they may not silence the child. Even this limitation is less a rule about children's lawyers than about the duty of courts to *learn* what the child's wishes are so that the judge will give them appropriate weight. But children's lawyers are free to argue that what the child wants would not serve the child well and to recommend any outcome that seems to the child's lawyer best for the child.

Beyond this, the only thing New York courts insist upon the child's lawyer doing is *something*. When children's lawyers fail to take an active role, appellate courts are quick to reverse.[119] But so long as they are active, they are free to make of their appointment what they will, within the boundless choices of advocating for the child's wishes, neutrally uncovering the "truth" whether these additional facts would advance or undermine the child's wishes, or actively opposing the outcome desired by the child and recommending what the child does not want.

Courts want the child's representative, whatever the label, "to bring a mature judgment to the situation and to provide or arrange for the provision of the manifold services required by a child who is the subject of a custody proceeding."[120] Even when courts have acknowledged that children's lawyers can properly assert "a position wholly divergent from that ultimately articulated by the trial court or an appellate court," they have emphasized that the position the lawyers advocate should not be "dictate[d]" by their clients.[121]

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118. *Id.* at 599-600.

119. *See, e.g.*, Grisanti v. Grisanti, 772 N.Y.S.2d 700, 703 (App. Div. 2004) (citing the "failure of the Law Guardian to take an active role in the proceedings" as a reason for remitting for a new fact-finding hearing). *See also* Williams v. Tillman, 734 N.Y.S.2d 727, 728 (App. Div. 2001) (citing *In re* Colleen CC., 648 N.Y.S.2d 754, 756 (App. Div. 1996) (praising the Law Guardians' "active role in the proceedings" as "a far cry from 'passive representation' which would cause us to disturb Family Court's determination")); Pratt v. Wood, 620 N.Y.S.2d 551 (App. Div. 1994).

120. Scott L. v. Bruce N., 509 N.Y.S.2d 971, 975 (Fam. Ct. 1986).

121. *Id.* at 973.

Because of this, the most misleading aspect of the Commission's work is its warning that "court[s] should not ask an attorney for the child for a recommendation or personal opinion . . . [because] the attorney for the child is not an arm of the court or a fiduciary and . . . he or she must advocate on that child's behalf as is required of any other attorney in a civil proceeding or action."[122] Once again, the Commission seeks to obfuscate the true nature of the child's lawyer's role. The authority relied upon for prohibiting courts seeking the personal opinion of the child's lawyer is *Graham v. Graham*,[123] a 2005 decision from the Third Department which, depending on how one reads its dictum, can be construed to have changed the terms of the child's attorney's proper role. Because *Graham* might be read as radically reshaping New York's understanding of the role of a child's lawyer, it deserves careful attention.

Graham affirmed a trial court's order changing the custodial arrangement involving a 10-year-old girl. The appellate court was "unable to conclude that Family Court's determination lacks evidentiary support. The difficulty in making a choice between the conflicting positions argued in this case is reflected by the great reluctance with which the Law Guardian advocated for a change in custody."[124] Though it affirmed, the Third Department criticized the conduct of both the Family Court judge and the law guardian, observing that it was "improper for Family Court to direct the child's attorney, the law guardian, to file a 'report' in this case."[125] After the trial, the Law Guardian submitted what he called his "summation" in writing which relied only on evidence in the record, and recommended changing custody. The appellate court was disturbed, however, that the trial court "not only referred to the 'summation' as a 'report'" but adopted "the Law Guardian's submission in its entirety."[126]

Graham would be easy to understand if that is all there were to it. Thus far, it appears that all the appellate court was

122. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 43.

123. 806 N.Y.S.2d 755 (App. Div. 2005).

124. *Id.* at 757.

125. *Id.* (citing Weiglhofer v. Weiglhofer, 766 N.Y.S.2d 727, 729 (App. Div. 2003)).

126. *Id.*

troubled by was that the trial court may have deferred to the law guardian's views instead of, as is plainly the court's duty, deciding the matter independently, giving only as much weight to what the law guardian had to say as the court thought appropriate. But *Graham* confusingly seems to go further and also criticized the child's lawyer for making "recommendations" in his submission, worrying that perhaps the lawyer, along with the trial court, "may have misunderstood his role."[127] The court expressed the concern that:

> The use by a court of the 'recommendation of the Law Guardian' has too long been tolerated in Family Court and matrimonial proceedings. When a court asks the child's attorney to make 'a recommendation,' it improperly elevates the Law Guardian's position to something more important to the court than the positions of the attorneys for each of the parents. Attorneys representing parents do not advocate on behalf of their clients by making 'reports' and 'recommendations.' The Law Guardian should take a position on behalf of the child at the completion of a proceeding whether orally, on the record, or in writing and that position must be supported by evidence in the record.[128]

Taken literally, this would be an astonishing repudiation of an unwavering line of cases endorsing the role of law guardians as making recommendations based on the evidence. This is particularly so in light of precedents decided by the same court which are not even cited. Thus, in a 1999 decision, the same court wrote that "[o]ne of the functions of a Law Guardian is to assist the court in determining an appropriate disposition. An obvious incident of the Law Guardian's role as advocate for the child is the right to advance the disposition perceived to be most consonant with the well-being of the child."[129]

Though *Graham* literally prohibits law guardians from making recommendations, the court modifies this injunction by directing that law guardians "take a position on behalf of the child at the completion of a proceeding."[130] Thus, *Graham* simply wishes to do away with the term "recommendation" when

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127. *Id.* at 758.

128. *Id.* (citation omitted).

129. Forsyth v. White, 698 N.Y.S.2d 743, 745 (App. Div. 1999) (citing *In re* Dewey S., 573 N.Y.S.2d 769, 770 (App. Div. 1991)).

130. *Graham*, 806 N.Y.S.2d at 758.

characterizing the law guardian's advocacy, preferring "position" instead. This is, of course, a distinction without a difference. After all was said and done, the appellate court in *Graham* affirmed the trial court's order, emphasizing that the outcome was based upon the appellate court's independent search of the record, and expressly treating the law guardian's recommendations "more properly as the position of the attorney representing the child."[131]

It is unlikely that *Graham's* preference for the word "position" over "recommendation" will ultimately prevail in the case law.[132] Over the past 30 years, nearly 200 cases expressly refer-

131. *Id. Graham*'s reasoning that law guardians should be prohibited from making recommendations because "[a]ttorneys representing parents do not advocate on behalf of their clients by making . . . 'recommendations,'" and also cannot withstand analysis. *Id.* The reason attorneys representing parents may not do this is because attorneys representing parents are obliged by the First Principle of an attorney's duty toward an unimpaired client, which is to allow the client to set the objectives of the case and direct the actions of his or her lawyer, at least to the extent of what the lawyer is permitted to seek as the ultimate outcome. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.2 (2006); N.Y. CODE OF PROF'L RESPONSIBILITY, 22 N.Y.C.R.R. § 12000.32(a)(1). We begin, in other words, with such dissimilarly situated arrangements when lawyers are representing children who are not setting the objective of the outcome and when lawyers are representing adults who are, that it simply will not do for courts to note that adult's lawyers could not do what a child's lawyer just did. If what the child's lawyer did is unacceptable, it must be for reasons independent of whether adults' lawyers could do the same thing.

132. The principal case cited by *Graham* in support of its condemnation of law guardians issuing reports is not remotely pertinent to what the law guardian in *Graham* did. In *Weiglhofer v. Weiglhofer*, 766 N.Y.S.2d 727 (App. Div. 2003), the trial court entered an order without conducting or hearing any evidence in the case. In lieu of a hearing, the trial court ordered and relied on a "report" from the law guardian. The Third Department condemned this practice, emphasizing that the law guardian is "not an investigative arm of the court." *Weiglhofer*, 766 N.Y.S.2d at 729. But, instead of condemning the practice of law guardians making recommendations as a general proposition, *Weiglhofer* endorsed the practice of "law guardians, as advocates, [ ] mak[ing] their positions known to the court orally or in writing (by way of, among other methods, briefs or summations)." *Id. Weiglhofer* stands for the unremarkable rule that "presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate practices." *Id.* (citing Rueckert v. Reilly, 723 N.Y.S.2d 232, 233 (App. Div. 2001)). In *Rueckert v. Reilly*, the court rejected a parent's contention that the law guardian acted improperly by providing the court with unsworn reports. The Second Department agreed that the attorney for the child, "could no more be required to report to a judge than the attorney for any party in a case." *Rueckert*, 723 N.Y.S.2d at 233. But, the law guardian's choice to advocate for the position of the child "in the presence of counsel for the parties . . . did not

ence a "law guardian's recommendation" in the published opinion issued by the court.[133] Indeed, except for *Graham*, every court that has commented on the subject has endorsed the role of the law guardian as making recommendations to the court. The oft cited *Vecchiarelli v. Vecchiarelli*,[134] prominently cited by the Commission, reversed a trial court order entered without the use of a law guardian emphasizing that the child's lawyer "would have been able to recommend alternatives for the court's consideration and to advocate for the children in these proceedings."[135]

As we have already seen, one of the most important functions courts expect children's attorneys to perform is to recommend a course of action for the court. The classic definition of the role of the child's lawyer, as expressed in a 1994 decision, is that they are treated "as parties which have the right, or duty, to express their own views on the case."[136] Additionally, the court emphasized, this second role ("guardian") is so different from the first ("defense attorney") that an entire different body of law applies to it.[137] It is analogous to the role of a guardian ad litem who is charged with the duty "to make an objective evaluation of the circumstances and to take such action as will advance what he perceives to be the best interest of the ward; the wishes of the ward will be relevant but not determinative."[138]

As we have also seen, courts, including the Court of Appeals, routinely reference the child's lawyer's recommendation

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constitute a report." *Id.* (citing Carballeira v. Shumway, 710 N.Y.S.2d 149 (App. Div. 2000)).

133. Westlaw search for New York cases using the phrase "'law guardian' /2 recommendation" turned up 198 cases as of August 15, 2006.

134. 656 N.Y.S.2d 337 (App. Div. 1997).

135. *Id.* at 338 (citing Koppenhoefer v. Koppenhoefer, 558 N.Y.S.2d 596, 599–600 (App. Div. 1990)).

136. Marquez v. Presbyterian Hospital, 608 N.Y.S.2d 1012, 1016 (Sup. Ct. 1994).

137. *Id.* at 1015–16.

138. *Id.* (quoting *In re* Aho, 347 N.E.2d 647, 650–51 (N.Y. 1976)) (internal quotation marks omitted). *See also* Bluntt v. O'Connor, 737 N.Y.S.2d 471, 479 (App. Div. 2002) (noting that law guardians are "appointed to use [their] skill and judgment to aid the court in deciding what visitation was in the child's best interests").

as an additional justification for the result it reached.[139] All four Appellate Divisions, including the Third, regularly do so.[140] Thus, the First Department, upholding an award of custody, wrote, "[t]he record, which consists of the testimony of both parents, the Law Guardian's recommendation and [a] report . . . is adequate to support the court's determination of custody."[141] The Second Department has noted "[f]urthermore, the custody determination was consistent with the Law Guardian's recommendation."[142] Indeed, the Second Department has even reversed a Family Court order because, among other things, the Family Court improperly disregarded the recommendation of the law guardian whom the appellate court described as an "impartial observer[ ]."[143] The Third Department recently wrote, "[b]ased upon the totality of the circumstances set forth in this record, including evidence relating to the stability provided by respondent for the child, the fact that he has thrived under her care and the Law Guardian's recommendation, we find that the court properly determined that sole custody to respondent was in the child's best interests."[144] And the Fourth Department saw fit to rely on the law guardian's recommendation in 2005 to justify its affirmance, stating, "[W]e further agree with the Law

139. *See, e.g.*, *In re* Nathaniel T., 492 N.E.2d 775, 777 (N.Y. 1986) ("[B]oth Law Guardians, court-appointed attorneys whose role was to protect and represent the interests of the children, have filed recommendations and briefs urging" the result reached by the Court); *In re* Ray A.M., 339 N.E.2d 135, 138 (N.Y. 1975) ("It is significant too that the Law Guardian for the child . . . has submitted a useful and thoughtful brief and argument, urging" this outcome).

140. *See, e.g.*, Grathwol v. Grathwol, 727 N.Y.S.2d 825, 829 (App. Div. 2001) ("We also note that the Law Guardian's recommendation, although not binding on this Court, fully supports the determination made by Family Court that it will be in the child's best interest to be with petitioner."); *In re* Anthony M., 705 N.Y.S.2d 715, 717 (App. Div. 2000) ("Notably, the Law Guardian appointed to represent the child . . . has advocated strongly in support" of what court holds"); Rolls v. Rolls, 663 N.Y.S.2d 345, 347 (App. Div. 1997) (citing Betancourt v. Boughton, 611 N.Y.S.2d 941, 944 n.4 (App. Div. 1994)) ("We also note that, although by no means determinative, Supreme Court's determination that the children should remain living with defendant was in accord with the Law Guardian's recommendation."); Church v. Church, 656 N.Y.S.2d 416, 417 (App. Div. 1997) (quoting Moon v. Moon, 502 N.Y.S.2d 110, 112 (App. Div. 1986)) (noting that law guardians offer "relevant and important insights").

141. Major v. Gamble-Major, 653 N.Y.S.2d 848 (App. Div. 1997).

142. Grossman v. Grossman, 772 N.Y.S.2d 559, 560 (App. Div. 2004).

143. Krebsbach v. Gallagher, 587 N.Y.S.2d 346, 350 (App. Div. 1992).

144. Scala v. Parker, 757 N.Y.S.2d 622, 625 (App. Div. 2003).

Guardian's recommendation" with regards to placement and visitation.[145]

In light of all this, it quickly becomes evident that the Commission did not intend that children's lawyers would suddenly steer their efforts toward advocating for what children want when that would mean other than advocating for what is in the children's best interests. We can safely assume that there would be no reason for the Commission to recommend any changes in matrimonial practice unless there were features of current practice it found wanting. Thus, had the Commission called for courts to more commonly appoint children's lawyers to advocate forcefully for the outcome desired by their clients, it would have done so because it had concluded that courts were giving insufficient weight to children's positions.[146] This might be for either of two reasons. It might be that the Commission was concerned that judges were inadequately made aware of the child's position or that the Commission thought that judges were giving insufficient weight to the child's position in too many cases. These are very different problems.

Of these possibilities, we can comfortably reject that the Commission meant to improve an imperfect process by which courts were failing to ascertain the child's position. For one thing, the instrument chosen to fix this perceived error is too blunt. There are countless simpler and less expensive ways to ensure that children reveal their position to a judge than to require counsel for children as the presumptive fix.[147] Beyond this, it is even less likely that the Commission would insist that the lawyer "diligently advocate" the child's position if the cure it was striving for was merely to repair the procedural failing of ensuring that the child's position be heard.

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145. McAuley v. Martin, 807 N.Y.S.2d 255, 256 (App. Div. 2005).

146. If the Commission concluded that courts are currently deciding in accordance with the children's desires in the vast number of contested cases, it simply would not make sense for the Commission to prefer as a matter of course for courts to appoint children's lawyers in order to achieve a result that would be reached in any event. Moreover, anyone who is familiar with litigation appreciates the truism that a case is more likely to be resolved in accordance with a skilled lawyer's effective advocacy than it would be without it.

147. Particularly given the broad problem in American society of denying so many civil litigants court-assigned counsel even in cases of enormous importance to them, it would be odd for the Commission to insist on lawyers for children in the absence of a showing that they are likely to be needed in most instances.

We can also comfortably reject the second possibility. It should be readily apparent just how odd it would be if the Commission actually meant to give more weight to children's preferences than current law does.[148] A call for a greater use of children's lawyers is tinkering with procedure. But if the hidden goal of these procedural changes were to impact substantive law, the more direct route would have been to recommend such changes in the law. It is plain that the Commission knew how to make substantive recommendations when it believed them appropriate. Its call for a change in the legal basis for granting divorces, bringing New York into line with virtually the rest of the country by permitting no-fault divorce, is an important example of such a recommendation.[149] So, too, the Commission called upon the Office of Court Administration to seek amendments to the law concerning the payment of children's lawyers.[150] But it made no recommendation to modify section 70 of the Domestic Relations Law by making a child's expressed wishes a more prominent factor in deciding cases than under current law. Since neither of these reasons is plausible, it is highly unlikely that the Commission would conclude there is a pressing need for children's lawyers to advocate diligently what children want.

V. The Commission Empowers Children's Lawyers Not Children

Ultimately, it is plain that the Commission did not really mean to limit the circumstances under which children's lawyers are free to advocate the best interests of their clients because it adopted the New York State Bar Association's Law Guardian

148. One could easily imagine children's advocates trying to empower children more by insisting that courts rely more heavily on the child's wishes when deciding custody disputes. One possible rule might call for courts to presume that the child's wishes should be the determinative factor but allow courts to decide the case in a contrary manner by articulating the specific reasons for doing so. In this imagined world, courts would consider children's views significantly more prominently than they do now. And in this world, one could easily understand the parallel effort to ensure that attorneys represent children in these proceedings. But this imagined world bears no relation to the laws of New York. New York is not a jurisdiction that insists that children's wishes control the outcome of contested custody disputes. *See supra* notes 75–82 and accompanying text.

149. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 18–19.

150. *Id.* at 44.

Representation Standards as the authoritative guide for the role of lawyers for children in custody cases.[151] The State Bar Standards *require* that the child's attorney "develop a position and strategy . . . concerning every relevant aspect of the proceedings."[152] The Commentary makes clear that developing such a position and strategy constitutes the very heart of the role ("the paramount law guardian responsibility," in its words).[153] The Commentary stresses that "[w]hen the child is too young to articulate his or her wishes or provide assistance to counsel, the law guardian must of course determine the child's interests independently."[154] Even when children are old enough to articulate wishes, however, the Commentary does no more than hope that "[i]n most cases it is [ ] possible to articulate a position with which both the law guardian and the child agree."[155]

Though the Commission may have obfuscated this issue, it is inarguable that children's lawyers will continue to perform their expected role of making recommendations to courts. The Commission expects children's lawyers to choose for themselves what to advocate while calling their advocacy "the child's position." Sometimes the lawyer's choice corresponds with what the child actually wants. But there need be no correlation whatsoever between them. Often the child is too young even to express a view or to express it with sufficient gravity to be taken very seriously by the lawyer.

The Commission authorizes a child's attorney to disregard the client's wishes when he or she is "convinced . . . that the child lacks the capacity for making a knowing, voluntary, and considered judgment."[156] But this limitation only applies when

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151. *Id.* at 42–43.

152. NEW YORK STATE BAR ASS'N, COMMITTEE ON CHILDREN AND THE LAW, LAW GUARDIAN REPRESENTATION STANDARDS VOLUME II: CUSTODY CASES 6 (2005), *available at* http://www.nysba.org/Content/ContentGroups/Children_and_the_Law/2005NYSBAchildcustodystandardsMay132005_finaldraft.pdf [hereinafter NYSBA STANDARDS].

153. *Id.* at 22.

154. *Id.*

155. *Id.* at 24.

156. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 40 (quoting Appellate Division, Second, Third and Fourth Departments, Law Guardian Program Administrative Handbook (2004), http://nycourts.gov/ad4/lg/lg-2004handbook.pdf (internal quotation marks omitted)).

children are capable of expressing their wishes. Even if we assume that most lawyers would comfortably allow their older clients to set the objectives in their case, the great majority of cases involves children under the age of ten.[157] Moreover, even the limitation on when children's lawyers are permitted to advocate for a result opposite from what their clients want is written in language which obfuscates the full measure of discretion it accords. On the one hand, it suggests that unless the lawyer is "convinced" of something, he or she should follow the child's stated preferences. On the other hand, this is a modification of a principle originally created by the Supreme Court designed to have an effect opposite from how it is used here. Courts must first conclude that an individual's decision has been made "competently and intelligently," before they may permit someone to waive constitutionally protected rights.[158] The Commission uses this very high standard (adding "considered" for good measure) to make it easier to conclude that a child's preferences are not binding on his or her lawyer. Even more, although children's lawyers are supposed to be "convinced" before not being bound by a child's preferences, they need only conclude that the child lacks something an adult would possess to believe that the child's views are not truly "knowing, voluntary and considered." For many adults, whenever they sincerely believe that a child wants something that is not good for them, they are convinced that the child's views lack an important measure of what, for these purposes, can be construed as "considered judgment."

Second, children's lawyers are also empowered to disregard their client's stated preferences when the lawyer believes "that following the child's wishes is likely to result in a risk of physical or emotional harm to the child."[159] It is entirely up to the

157. Because courts tend to give more weight to the preferences of children over fourteen, there are relatively few custody cases filed involving children fourteen or older. As a consequence, virtually all highly contested cases involve children who are between infancy and fourteen. Since there is little reason to assume that children are distributed unevenly across the scope of contested custody cases, we may comfortably assume that there are as many two-years-olds who are the subject of custody cases as there are twelve-years-olds. By this reasoning, the overwhelming percentage of children in contested custody cases are under the age of fourteen and the great majority are under the age of ten.

158. Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

159. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 40 (quoting Appellate Division, Second, Third and Fourth Departments, Law Guardian Program Ad-

child's lawyer what position to choose and the child's lawyer complies faithfully with the Commission's recommendations even when he or she advocates for a result opposed by the child. The child's lawyer has the ultimate power to make all of these choices whether or not the children are very young.

This is not to say that children's lawyers seek results most of the time to which their clients are opposed. There often is symmetry between what the child's lawyer advocates and what the client wants. But rare is the child's lawyer who simply asks: "What does my client want?" Children's lawyers, like courts, actually are using the child's views as a factor in the arithmetic of determining what is in the child's best interests. When children's lawyers conclude that what is best for their client is what their client wants, no one ever detects any divergence from the duty to advocate for what the client wants. Since that is what the child's lawyer is doing, it matters not at all to the practitioner how the lawyer reached that choice. But it really does make a considerable difference.

Children's lawyers in practice seek to help the court reach the best outcome for the child, not to reach the outcome the child most wants. Although there are many cases in which these two results overlap, it is important to appreciate that when courts decide cases in accordance with what the children want, it is not *because* of what the children want. Rather, it is because the judge believes the result is best for the child.

It is true that these recommendations will be bounded by certain important principles advanced by the Commission's Report. In particular, the Commission's emphasis that "[t]he law guardian is the attorney for the child"[160] will help eradicate the occasional practice of children's lawyers engaging in *ex-parte* communications with courts. Instead, children's lawyers will be expected to choose a position to advocate, and strategically seek to influence the outcome of the case at pre-trial conferences, during negotiations, when arguing motions, and when making closing arguments.[161] The State Bar Standards approved by the

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ministrative Handbook (2004), http://nycourts.gov/ad4/lg/lg-2004handbook.pdf (internal quotation marks omitted)).

160. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 39. .

161. NYSBA STANDARDS, *supra* note 152, Standard B-7 cmt., at 27. "The law guardian, as an attorney, may also prepare and submit a post-trial memorandum

Commission not only expect children's lawyers to deliver a summation, and prepare closing memoranda of law when appropriate,[162] they regard summation as "essential" because it is "the best opportunity to articulate the [child's lawyer's] position."[163]

Ironically, what many consider to be the principal dangers in using children's lawyers in these proceedings was extolled as a virtue by the New York State Bar Association in 1999 when it adopted the Law Guardian Representation Standards. The State Bar stressed that, "[t]he law guardian is often perceived as being 'neutral' in otherwise adversarial proceedings. . . . [and this] appearance of neutrality often gives the law guardian great influence."[164] It certainly does. Everyone familiar with how law guardians are perceived by the litigants in contested custody disputes appreciates just how powerful they are. Although it is possible to win a case when the child's lawyer opposes the result a party seeks, all recognize the uphill fight the party has in overcoming the advantage the opposing party has gained from enjoying the law guardian's support.

Even more, the New York State Bar Association seeks to maximize the children's lawyer's influence in the outcome by celebrating his or her disproportionate power in the case:

> Helpful to the law guardian is the fact that he or she is the only neutral participant other than the judge, and the person who is legally bound to represent the child's interests. A law guardian proposal may accordingly be viewed by a party as less threatening and less adversarial. The other attorneys know that in most cases the court looks to the law guardian for suggestions for a resolution. Great weight may therefore be given to the law guardian's

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summarizing and discussing the evidence in the record, making legal arguments, and advocating a disposition. A post-trial memorandum, unlike a pre-trial report, is based on testimony and other evidence found in the record." *Id.* (citation omitted).

162. *Id.* Standard C-4, at 28.

163. *Id.* Standard C-4 cmt., at 29. Moreover, the Standards direct law guardians to use the summation and any post-trial memoranda they might submit to outline "the law guardian's *conclusions and recommendations*." *Id.* (emphasis added). Even more, law guardians are to be actively involved not only in custody and visitation inquiries, but in the financial features of the case. *Id.* Standard B-2 cmt., at 22.

164. NEW YORK STATE BAR ASS'N, COMMITTEE ON CHILDREN AND THE LAW, LAW GUARDIAN REPRESENTATION STANDARDS VOLUME II: CUSTODY CASES 6 (1999), http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/NYSBA_Reports/Guide_to_Representing_Children/Guide_to_Representing_Children.htm.

position, a fact which is often helpful in negotiating a pre-trial resolution.[165]

All of this makes the Commission's Report troubling. Its stress that children's lawyers are "lawyers" above all else masks the central truth that the role the Commission expects children's lawyer's to play is virtually unrecognizable in the ordinary attorney-client relationship. Its suggestion that authorizing best interests lawyers to advocate for the position they have chosen is akin to what "is required of any other attorney in a civil proceeding or action,"[166] could not be more misleading. After taking away the essential meaning of an attorney's duty to help clients live the lives they choose, it is nonsense to suggest that everything else remains the same.

The contrast with what ordinary lawyers must do and what the Commission authorizes children's lawyers to do could not be more in tension. Children's lawyers enjoy a measure of independence and freedom unparalleled in the law except when lawyers are representing incompetents. This is why we generally prefer to acknowledge the different roles by emphasizing the one as a guardian-ward relationship and the other as an attorney-client relationship. It is just as deceiving to call a guardian just another lawyer as it is to call a ward just another client. As Jane Spinak recently wrote about a related phenomenon, "[s]omehow the drafters believe that by giving a new name to someone who looks an awful lot like a GAL or hybrid advocate but who has to be a practicing lawyer and use the best practices of a child's lawyer, they will resolve the ambiguities of those traditional roles."[167]

What's really interesting about all of this is just how much children know the difference between having a real lawyer and the kind of lawyer New York courts give them instead. As a result of a celebrated case I handled in the early 1990s, one of my specialities has included representing children in custody cases who dislike their court-appointed law guardian. In 1992, a 12-year-old boy contacted me to complain about his court-ap-

165. *Id.* at Standard B-3 cmt.

166. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 43.

167. Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 NEV. L.J. 1385, 1389 (2006).

pointed law guardian. The child told me that, although he thought his lawyer would be someone fighting for what he wanted, he came to regard his lawyer as his enemy because the law guardian consistently sought things the child did not want. The child asked me to represent him. I filed a motion to be substituted as counsel for the court-appointed law guardian. The presiding judge, Judge William Rigler, made a Solomonic decision, replacing the law guardian but appointing a new law guardian instead of me in order to avoid any appearance of bias on my part after one of the parents expressed a concern that I had been influenced by the other parent.[168] The case received a fair amount of publicity, being reported in *The New York Times* as a case in which a child was able to fire his lawyer.[169]

Ever since, children have contacted me periodically complaining about their law guardian. Their complaints are strikingly similar. They all told me that they wanted a lawyer who would fight for them. After I explained to them that the law guardian is not obliged to seek the outcome the child wants, the children made clear that, if they could not have a lawyer who would seek what they want, they would much prefer not having a lawyer at all. My meetings with these children have persuaded me that they appreciate what many lawyers in the field do not: that the core meaning of a lawyer in American culture is dramatically at odds with the role and purpose of a law guardian. Children, at least those I have met, dislike hypocrisy most of all. They can comfortably accept not being permitted an attorney. But they deeply resent being assigned someone who calls herself an attorney and then behaves inconsistently with the core meaning of what attorneys are.

It is important to agree that when someone chooses to seek an outcome that I have specifically repudiated and made clear I do not wish, it is not a misuse of language to regard that person as my enemy. And that is the very context in which a number of children have contacted me over my career. These children

168. *See* P. v. P., 208 N.Y. L.J. 29 (Nov. 10, 1992).

169. Arnold H. Lubasch, *Boy in Divorce Suit Wins Right to Choose His Lawyer*, N.Y. TIMES, Nov. 10, 1992, at B6; Arnold H. Lubasch, *11-Year-Old in Custody Battle Wants to Trade in His Lawyer*, N.Y. TIMES, Oct. 29, 1992, at B3.

always felt they suffered the worst of both worlds.[170] They could far more easily have tolerated not being represented than they could suffer the indignity of being formally represented by their enemy. For the most part, courts have been tone deaf to this problem.

After my success in 1992, I tried, on several other occasions, to have a court remove the assigned law guardian on the same basis as the first case: that the children had lost all confidence in their law guardians because they refused to try to obtain the results desired by the children. None of the other attempts were successful. Two examples of my failures are instructive because they reveal, yet again, the degree to which judges regard law guardians as court aides, not as children's lawyers.

In the winter of 1995, I was contacted by the aunt of two children who were the subject of a particularly ugly divorce and custody dispute. The aunt asked me to meet with her nephews, aged eleven and nine, to hear their complaint. I did so. The boys reported to me that Justice Lewis Friedman of Manhattan Supreme Court assigned a law guardian to them and they were desperate to fire the law guardian whom they came to regard as an enemy. They explained to me that the law guardian consistently took positions antithetical to what they wanted and that they would not agree to continue even to answer the law guardian's inquiries because whatever they told him he used as he saw fit. I brought a motion by Order to Show Cause seeking to relieve the court-appointed law guardian and to appoint someone else or to permit the boys to retain Mr. Wiener and me to represent them.[171] The transcript of the argument on our motion is highly instructive.

According to the transcript, I told Judge Friedman that "I know of no case in which, after a child-client has told the Court that he does not trust his lawyer sufficiently to confide in him, that the Court has permitted the relationship to continue.

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170. *Cf.* Kent v. United States, 383 U.S. 541, 556 (1966) ("[T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.").

171. Eliott Wiener, a highly respected member of the matrimonial bar, was co-counsel with me.

Wholly apart from the question of the role of counsel for [the child] is the question of . . . the current relationship being contaminated beyond repair."[172] Justice Friedman replied: "Every time you use the word, counsel, I note you are not using the term 'law guardian' which is consistent with everybody's problem with the legislative division of the role." When I responded that I was talking about the law guardian-client relationship, Judge Friedman announced: "The only client the law guardian had, I thought, was me." He went on to clarify that:

> The relationship with the client or clients may be equivalent, but the terms of who the overall client of the law guardian is, I thought that was the Court. I thought that's pretty clear. The law guardian serves at the Court's pleasure and not at the pleasure of the clients. I think that much is fairly clear also.[173]

An almost identical motion in the Supreme Court Erie County around the same time brought an almost identical reaction from the court. In the Buffalo case, the children who asked me to have the judge replace the court-appointed law guardian hated the fact that they were obliged to be represented in name by someone who was devoted to achieving a result the children opposed. I tried with all my eloquence to persuade the Special Term Judge to relieve the law guardian. When I complained that the children were dissatisfied with the court-appointed law guardian, the judge politely but firmly told me that was of no consequence to her. She wanted a law guardian to help her decide the case. She was very pleased with the law guardian's performance. The children's feelings on the subject simply were irrelevant.

Conclusion

The Commission may have been uncomfortable acknowledging the degree to which children's lawyers not only are permitted, but *expected*, to advocate for what they perceive to be their client's best interests. Regardless of the emphasis the Commission chose to place on the purpose and role of children's

172. Transcript of Court Proceeding at 1357, Anonymous v. Anonymous, Index No. 312208/94 (N.Y. Sup. Ct. N.Y. Cty. January 29, 1996) (on file with the author).

173. *Id.* at 1358.

lawyers, the truth is that these lawyers will not, and are not expected to, diligently advocate for the result desired by their clients simply because that is what their clients want.

By pretending that children's lawyers do not possess extraordinary powers commonly denied ordinary lawyers, the Commission failed to say enough about how children's lawyers should constrain their authority to decide for themselves what objectives to fight for. Other than warning them against acting on their own biases,[174] the Commission simply leaves children's lawyers free to make all of the important decisions with which they are charged. They are free to decide whether or when to be bound by what their client instructs. And they are equally free to advocate for whatever position they choose after deciding not to be bound by what their client instructs.[175]

It is inadequate for the Commission only to recommend that training of children's lawyers be expanded to include "addressing one's own biases."[176] Though the Commission warned children's lawyers to "avoid actions or positions based on preconceived notions about sexual, racial or class roles or stereotypes, and seek to protect the child's interests without trying to impose the attorney's own value system or sociological theories on the child or family,"[177] this is considerably easier said than done. We each possess pre-conceived notions about the good life which we are incapable of recognizing, let alone ignoring, when assessing such inherently subjective inquiries as what will best serve a child. The problem is not with alerting lawyers to be concerned about this and to encourage them to be introspective; the problem is being satisfied that warning lawyers is sufficient.

The surest solution to constraining the misuse of discretion to choose for a child does not lie in additional training, it lies in restricting the power to exercise the discretion in the first

174. MATRIMONIAL COMMISSION REPORT, *supra* note 10, at 43.

175. Few adults find it easy to resist the conclusion that when a child seeks a result the adult regards as inimical to the child's best interests, the child is not making a considered judgment. This becomes an even easier conclusion to reach when children's lawyers are expressly told not to advance their client's wishes if they are "likely to result in a risk of physical or emotional harm to the child." *Id.* at 40.

176. *Id.* at 43.

177. NYSBA STANDARDS, *supra* note 152, at 3.

place.[178] And here, most of all, the Commission published an incomplete Report by failing to discuss the alternative strategies employed in several national efforts to reduce the circumstances in which lawyers' personal beliefs would ever even have the chance to determine their advocacy. Perhaps the Commission, like the Third Department in *Graham v. Graham*,[179] believes that children's lawyers are meaningfully constrained in their options because the "position" they choose "must be supported by evidence in the record."[180] But this modest restriction quickly proves to be no restriction at all. Any time a lawyer argues for a result that is unsupported by the record, the lawyer's argument is in trouble. Insisting only that the lawyer argue for things that arguably are supported by something someone in the case already said actually permits lawyers the equivalent of carte blanche authority to argue for anything the lawyer thinks is appropriate.

This article has demonstrated that lawyers for children in custody cases in New York are expected to inform courts of what their clients say they want the court to do, but are relatively free to advocate for the result the lawyers believe will best serve their clients. That has been the role of children's lawyers since they were first called upon to participate in custody cases and it remains the role after the Commission completed its work. For those who doubt the wisdom of lawyers performing this role, we hoped the Commission would provide either a repudiation of the use of children's lawyers for this purpose or a sustained defense of the practice. By doing neither, the Commission missed an important opportunity to make a lasting contribution to this important area of practice.

178. *See* Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 310–13 (1998).

179. 806 N.Y.S.2d 755 (App. Div. 2005).

180. *Id.* at 758.