The Role of the Attorney for the Child

The rules of the Chief Judge define the role of the attorney for the child [1] and establish that the child is the “subject” of a custody proceeding rather than an interested party. The attorney for the child, formerly known as the law guardian, is defined as someone appointed pursuant to Family Court Act §249, or by the supreme court or a surrogate's court in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred to it.[2]

The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on ex parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation.[3]

The attorney for the child may not submit to the court information which he obtains on his own, and in effect makes him a witness against one of the parties. [4]

It is improper for the Court to ask the attorney for the child, on the record, to discuss the position of the child regarding how well the current custody arrangement is working. The questioning of the attorney for the child by the court is “something that should not be repeated." The court should not consider the hearsay opinion of a child in determining the legal sufficiency of a pleading in the first place. Such colloquy made the attorney for the child an unsworn witness.[5]

It is not proper for the court to ask the attorney for the child to submit a report to the court, [6] or for the attorney for the child to make a recommendation[7] to the court.

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[1] Rule 7.2 of the Rules of the Chief Judge (22 NYCRR 7.2)

[2] 22 NYCRR 7.2 (a)

[3] 22 NYCRR 7.2 (b)

[4] In Cervera v Bressler, 50 A.D.3d 837, 855 N.Y.S.2d 658 (2d Dept. 2008) the Appellate Division held that the court improvidently exercised its discretion in denying the father's motion to remove the attorney for the child who submitted affirmations in support of his order to show cause which included facts which were not part of the record, but which constituted hearsay gleaned from the mother. It held that this behavior on the part of the attorney for the child, as well as his repeated ad hominum attacks on the father's character, was both unprofessional and improper, as it amounted to the attorney for the child acting as a witness against the father, in violation of the Rules of the Chief Judge. (22 NYCRR 7.2[b]).

[5] In Naomi C v Russell A., 48 A.D.3d 203, 850 N.Y.S.2d 415 (1st Dept. 2008) the Appellate Division pointed out that with the parties present, the court asked the Law Guardian, on the record, to discuss the position of the 10-year-old child regarding how well the current custody arrangement was working. Although the family court was warranted in dismissing the petition on its face, the questioning of the Law Guardian by the court was “something that should not be repeated". Although the court was correct to disallow the "cross-examination" of the Law Guardian by petitioner's counsel, the court should not consider the hearsay opinion of a child in determining the legal sufficiency of a pleading in the first place. Such colloquy made the Law Guardian an unsworn witness. It emphasized that the attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to becoming a witness in the litigation.

[6] In Usack v Usack, 17 A.D.3d 736, 793 N.Y.S.2d 223 (3d Dept. 2004) the Appellate Division specifically emphasized that it is not proper for a Law Guardian to make a "report" to a court. There the Law Guardian submitted, at Supreme Court's direction, a report containing her own unsworn observations regarding the parties, recounting personal interactions or opinions about them, all of which, it noted, could have been explored and elicited by calling witnesses and upon cross-examination of the parties and other witnesses. It noted that it had held in an earlier case that a law guardian is the attorney for the children and not an investigative arm of the court. “While law guardians, as advocates, may make their positions known to the court orally or in writing (by way of, among other methods, briefs or summations), presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate practices. Consequently, courts should not direct law guardians to make such reports.”

[7] In Matter of Graham v Graham, 24 A.D.3d 1051, 806 N.Y.S.2d 755 (3d Dept. 2005) a custody case, the Appellate

In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.[8]

In other types of proceedings, such as custody proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position. In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances. If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. [9] The attorney should explain fully the options available to the child and may recommend to the child a course of action that in the attorney's view would best promote the child's interests. Since the attorney for the child is subject to the ethical requirements applicable to all lawyers he may not advocate his contrary opinion to the court unless he "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child". The rules provide that in such case he would be justified in advocating a position that is contrary to the child's wishes. However, in these circumstances, he must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position. [10]

The attorney for the child should not have a particular position or decision in mind at the outset of the case before the gathering of evidence. It is only appropriate for an attorney for a child to form an opinion as to what would be in the child's best interest, after such inquiry.[11]

Division strenuously voiced its opinion that it was improper for Family Court to direct the child's attorney, the Law Guardian, to file a "report". Although the Law Guardian was careful to characterize his written submission at the end of the proof as his "summation" and appropriately relied solely on record evidence in support of his position. Family Court, however, not only referred to the "summation" as a "report" but, in lieu of making independent findings, adopted--in its own decision--the Law Guardian's submission in its entirety. The Law Guardian also made "recommendations" in his submission; evidence that he, as well as Family Court, may have misunderstood his role. It stated: "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."

[8] 22 NYCRR 7.2 (c)

[9] In Matter of Delaney v. Galeano, 50 A.D.3d 1035, 857 N.Y.S.2d 58 (2d Dept. 2008) the attorney for the child appealed from an order of the Family Court, which, after a hearing, denied his motion to hold the respondent mother in contempt. Upon receipt of a letter from the 14-year-old child to the effect that he did not want the appeal to proceed, the Appellate Division issued an order to show cause directing the parties or their attorneys to show cause why an order should not be made dismissing the appeal as withdrawn. The motion was granted and the appeal was dismissed as withdrawn. The Appellate Division held that where "the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child. Here, the child on numerous occasions had expressed concern that his attorney was not representing his wishes. Additionally, he requested that the appeal be withdrawn. In response to the order to show cause, the attorney for the child failed to demonstrate any basis upon which the child's preference may properly be disregarded.

[10] 22 NYCRR 7.2 (d).

[11] In Matter of Brown v Simon, 123 A.D.3d 1120, 1 N.Y.S.3d 238 (2d Dept., 2014), the Appellate Division held that "[an attorney for the child] should not have a particular position or decision in mind at the outset of the case before the gathering of evidence" (Matter of Carballeira v. Shumway, 273 A.D.2d 753, 756). It is only appropriate for an attorney for a child to form an opinion as to what would be in the child's best interest, after such inquiry. Here, it was inappropriate for the attorney for the child to have advocated for a temporary change in custody without having conducted a complete

The Appellate Division has held that children do not have full party status in custody cases and they do not have the same legal status as their parents. [12]

Where the court in a custody case appoints an attorney for the children, he or she has the right to be heard with respect to a proposed settlement and to object to the settlement, but not the right to preclude the court from approving the settlement in the event that the court determines that the terms of the settlement are in the children's best interests. 2[13]

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investigation. The attorney for the child acknowledged that his application was based solely on his discussion with the father and the child's day care provider, which was located near the father's residence, and that he did not speak to the mother or the child's other day care provider closer to the mother's residence." It remitted the matter to the Family Court for a de novo hearing and directed the Family Court to appoint a new attorney for the child.

[12] Matter of Matter of McDermott v Bale, 94 A.D.3d 1542, 943 N.Y.S.2d 708 (4 Dept., 2012)

In Matter of Kessler v Fancher, 112 A.D.3d 1323, 978 N.Y.S.2d 501 (4 Dept, 2013) the mother did not take an appeal from the order in appeal No. 2, which dismissed her petition seeking modification of a custody order. The Appellate Division held that the children, while dissatisfied with the order, could not force the mother to litigate a petition that she had since abandoned. As it wrote in Matter of McDermott v. Bale, 94 A.D.3d 1542, 1543–1544, 943 N.Y.S.2d 708 "children in custody cases should [not] be given full-party status such that their consent is necessary to effectuate a settlement ... There is a significant difference between allowing children to express their wishes to the court and allowing their wishes" to chart the course of litigation). It affirmed the order.

[13] Matter of Matter of McDermott v Bale, 94 A.D.3d 1542, 943 N.Y.S.2d 708 (4 Dept., 2012); In Matter of Kessler v Fancher, 978 N.Y.S.2d 501, 502, 2013 N.Y. Slip Op. 08701, 2013 WL 6823128, (4 Dept, 2013); Lawrence v. Lawrence, 151 A.D.3d 1879, 54 N.Y.S.3d 358 (4th Dep't 2017)

In Matter of Velez v Alvarez,129 A.D.3d 1096, 12 N.Y.S.3d 267 (2 Dept.,2015), the attorney for the children appealed from an order which modified a prior order of custody and visitation to the extent of awarding the parties joint physical custody of the children and final decision-making authority to the mother. The order appealed from was entered upon the consent of the mother and the father, and embodied the terms of an agreement reached by them in settlement of the custody proceedings. The attorney for the children contended that the Family Court approved the agreement without having sufficient information to enable it to render an informed determination as to whether the terms of the agreement were in the best interests of the subject children. The Appellate Division held that the attorney for the children could appeal from the order because the order was not entered on the consent of the attorney for the children. Rather, it was entered over the objection of the attorney for the children. The Court stated that as a general rule, it is error as a matter of law to make an order respecting custody based upon controverted allegations without the benefit of a full hearing. Since the court has an obligation to make an objective and independent evaluation of the circumstances, a custody determination should be made only after a full and fair hearing at which the record is fully developed. It found that under the circumstances of this case, which it did not mention, the Family Court did not possess sufficient information to enable it to render an informed and provident determination as to the best interests of the subject children. It remitted the matter to the Family Court for an evidentiary hearing on the issues of physical custody and visitation, including in camera interviews of the children and a new determination thereafter of the petitions. It held that the hearing and determination should be preceded by forensic evaluations of the parties and the children.

In In re Trosset, 32 Misc. 3d 198, 925 N.Y.S.2d 328 (Fam. Ct. 2011), Family Court held that child had standing to file a petition to modify a custody order. The Attorney for the Child filed a petition to modify an order of the Family Court. Respondent mother filed a motion to dismiss the petition alleging that the Attorney for the Child lacked standing to file a petition concerning custody on behalf of the child. The Family Court denied the motion. It found that respondent's position was not an unreasonable one given that children are

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In ▸Lawrence v. Lawrence, 151 A.D.3d 1879, 54 N.Y.S.3d 358 (4th Dep't 2017) (Mem) the Appellate Division dismissed the appeal, taken by the Attorney for the Child representing the parties' oldest child, from an order dismissing the mother's petition seeking modification of a custody order. Inasmuch as the mother had not taken an appeal from that order, the child, while dissatisfied with the order, cannot force the mother to litigate a petition that she has since abandoned. It held that a child in a custody matter does not have **"**full-party status**"** (▸McDermott v. Bale, 94 A.D.3d 1542, 1543, 943 N.Y.S.2d 708 (4th Dep't 2012)), and it dec

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not specifically granted standing in any of the statutes which confer standing to parties in custody and visitation matters. In contrast, FCA **§**522 authorizes a child to commence a paternity proceeding. By extension, the conferral of standing upon the child permits the Attorney for the Child to file a paternity petition on the child's behalf. (See, Elacqua on Behalf of Tiffany DD v. James EE, 203 A.D.2d 688, 610 N.Y.S.2d 354 (3d Dep't 1994); see also, FCA §§241, 249). The Family Court noted that the absence of specific authority regarding custody and visitation was problematic for petitioner. It stated that in the absence of a statute granting a child standing to sue, standing depends upon whether the party has alleged facts showing a disadvantage to themselves as individuals. (Citing, Baker v. Carr, 369 U.S. 186, 206, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). In this matter, the Attorney for the Child made allegations which related directly to the child's desire to live with his father. The Court concluded that the child had a stake in this outcome sufficient to confer standing upon him to file a petition, and by extension, for the Attorney for the Child to file on his behalf