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## A Law Guardian by the Same Name: A Response to Professor Guggenheim's Matrimonial Commission Critique

Merril Sobie

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# **A Law Guardian by the Same Name: A Response to Professor Guggenheim's Matrimonial Commission Critique**

**Merril Sobie\***

## **Introduction**

A symposium “response” customarily presents a contrasting position to the primary article. However, perhaps to the chagrin of the sponsors, the reader and, alas, to me, I agree with Professor Guggenheim. I too, experienced disappointment upon reviewing the Matrimonial Commission Report’s law guardian section, and concur with his conclusion that the Commission “missed an important opportunity.”<sup>1</sup> Of course we disagree on plenty—the role of the law guardian, for example—but our disagreements are largely de hors the Report. Unfortunately, the Commission has failed to address the critical issues (if they had, their report would have precipitated the intended responsive format). I nevertheless believe that several Commission recommendations merit support, and that their recommendations should be viewed as a minor step on the long journey towards the effective representation of children. As far as the more substantive issues, well, that is what Professor Guggenheim’s article and this author’s response are all about.

I commence this article with a discussion of the statutory provisions governing the appointment and responsibilities of attorneys who represent children in New York. Part II briefly outlines the chronological implementation from initial enactment through the Matrimonial Commission Report, a period spanning forty-five years. Parts III and IV explore the specific nature of child custody representation and the relationship between the attorney and the child client during the course of a

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\* Professor of Law, Pace University School of Law. Prof. Sobie was formerly the Executive Officer of the New York City Family Court.

1. Martin Guggenheim, *A Law Guardian by Any Other Name: A Critique of the Report of the Matrimonial Commission*, 27 PACE L. REV. 785 (2007) [hereinafter Guggenheim, *Critique*].

frequently lengthy proceeding. Last, the Commission's conclusions and recommendations are critiqued in Parts V and VI.

### I. The Source

Let's jump even further back from Professor Guggenheim's opening statement summarizing Judge Breitel's 1978 *Braiman v. Braiman* opinion,<sup>2</sup> to the birth of children's representation. Enacting the 1962 Family Court Act, the New York Legislature established, for the first time anywhere in the United States, the right of a child to be represented by counsel. The 1962 provisions remain effective today. After forty-five years it may prove helpful to quote the operative sheet music, viewing the critical provisions as though they were enacted yesterday, unencumbered by the intervening decades of ideology, politics, and case law development.

This act declares that minors who are the subject of family court proceedings . . . should be represented by counsel of their own choosing or by law guardians . . . . This declaration is based on a finding that counsel is often indispensable . . . .<sup>3</sup>

As used in this act, 'law guardian' refers to an attorney admitted to practice law in the state of New York . . . .<sup>4</sup>

The costs of law guardians . . . shall be payable by the state of New York within the amounts appropriated therefore.<sup>5</sup>

Supervision by administrative board. The administrative board of the judicial conference [now the Office of Court Administration] may prescribe standards for the exercise of the powers granted to the appellate divisions under this part and may require such reports as it deems desirable.<sup>6</sup>

This part establishes a system of law guardians for minors who often require the assistance of counsel to protect their interests and to help them express their wishes to the court.<sup>7</sup>

Reading the pristine statutory language, I believe the following conclusions are unassailable:

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2. *Braiman v. Braiman*, 378 N.E.2d 1019 (N.Y. 1978).

3. NY FAM. CT. ACT § 241 (McKinney 1962).

4. *Id.* § 242.

5. *Id.* § 248.

6. *Id.* § 246.

7. *Id.* § 241.

1. Children have the right to choose counsel (just as their elders may). In fact, a law guardian appointment is the statutory default option—a child may choose counsel or, if not, she has the right to be represented by a law guardian.

2. A law guardian is an “attorney” or is “counsel” to the child (the two words are used interchangeably throughout the applicable sections of law)—nothing more and nothing less. The Matrimonial Commission’s recommendation that the title be changed from “law guardian” to “attorney for the child” represents no substantive modification at all.<sup>8</sup>

3. A law guardian (or attorney for the child) is paid by the state of New York “within the amounts appropriated therefore,” and from nowhere else. An attorney who is not assigned in accord with the Act, to be paid via the authorized state fiscal mechanism, cannot be a law guardian. Thus, the so-called “private pay” law guardian represents a misapplication of the relevant statutes; the title itself is an oxymoronic phrase (more about the “private pay” law guardian later).

4. Responsibility for the law guardian system is statutorily entrusted to the Office of Court Administration (“OCA”) (the statute, dating from 1962 refers to OCA’s predecessor organization).<sup>9</sup> OCA is statutorily empowered to enter into agreements with legal aid societies to provide law guardians in a county,<sup>10</sup> and several statutory agreements have been implemented over the past several decades. Empowered with the plenary authority to contract for representation, OCA effectively determines the form of children’s representation throughout the state. Although in the absence of an OCA agreement the Appellate Divisions are delegated significant powers relating to the delivery of law guardian services within a specific county,<sup>11</sup> even that authority is subject to such “standards for the exercise of the powers” as OCA’s Administrative Board may prescribe (as well as the possibility that OCA will override the Appellate Divisions

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8. MATRIMONIAL COMMISSION, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006), available at <http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf> [hereinafter MATRIMONIAL COMMISSION REPORT], reprinted here as Appendix A. That said, the recommendation would publicly clarify the attorney’s role and, for that reason, merits implementation.

9. N.Y. FAM. CT. ACT § 243 (McKinney 1962).

10. N.Y. FAM. CT. ACT § 243(a) (McKinney 1999).

11. See *id.* § 243.

by contracting directly with legal service providers). To further bolster OCA's oversight, the Act subjects Appellate Division contracts for law guardian services to regulations promulgated by the Administrative Board,<sup>12</sup> and specifically requires that the Administrative Board approve the designation of Appellate Division law guardian panels for each county.<sup>13</sup> In short, the Act envisions a unified, integrated, statewide system for affording children representation with specific authority delegated to the Appellate Divisions, subject to statewide standards, approvals, and oversight. The structural system, as mandated, has never been realized.

5. A law guardian is statutorily obligated to act as "counsel to protect their [the children's] interests"<sup>14</sup> and to "help them express their wishes to the court."<sup>15</sup> That prescription is not unique to children's law. Attorneys, whether retained or assigned, do likewise when defending clients, in actions ranging from contracts to criminal law. The first prong, protecting the child's interests, represents a straight codification of Canon EC 6-4 of the Rules of Professional Responsibility, stipulating that, "[h]aving undertaken representation, a lawyer should use proper care to safeguard the interests of his client."<sup>16</sup> The second prong, representing the child's wishes, is similarly mainstream to the attorney-client relationship. Lawyers must respect their client's wishes, regardless of age.

6. Crucially, the applicable statutes do not stipulate, imply or even hint that the child's attorney should advocate the child's "best interests" (a far different concept than protecting a client's legal interests). Although Section 241 has been mis-cited countless times for the proposition that the law guardian must represent the child's "best interests,"<sup>17</sup> in reality the "best interests" rule has no statutory basis at all. The unintended development of "best interests" lawyering will be discussed

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12. *Id.* § 243(b).

13. *Id.* § 243(c).

14. *Id.* § 241.

15. *Id.*

16. MODEL CODE OF PROF'L RESPONSIBILITY, EC 6-4 (1983). Safeguarding interests is synonymous with protecting interests.

17. *See, e.g., Albanese v. Lee*, 707 N.Y.S.2d 171 (App. Div. 2000); *Carballeira v. Shumway*, 710 N.Y.S.2d 149 (App. Div. 2000).

later.<sup>18</sup> Suffice to say, at this point, that the Act itself requires an uncompromised attorney-client relationship between the law guardian/counsel and the child client.

Enactment of the law guardian statutes constituted a radical child's rights manifesto in 1962, five years prior to the landmark *Gault* case,<sup>19</sup> and prior to the appearance of counsel (except on rare occasion) for any child in any court. The revolutionary legislative decision to afford state paid representation to children is underscored by the observation in the 1967 United States Supreme Court's *Gault* decision that approximately two-thirds of the states did not even permit retained counsel (much less assigned counsel) to represent children who faced possible incarceration.<sup>20</sup> Forty-five years later, the operative statutes have not surrendered their radical luster—perhaps for no reason other than the failure to fully implement almost every mandated provision.

## II. Implementation

At least in New York City, the initial implementation of the law guardian system tracked the applicable statutes closely. Law guardian services were provided by the then newly established Juvenile Rights Division of the Legal Aid Society (JRD), as organized and directed by Charles Schinitzky, a legendary figure who had led the fight for children's representation. Professor Guggenheim, who joined JRD in its first decade, has written eloquently of the founding philosophy. Noting that JRD rejected the "guardian ad litem" model, he has characterized the then prevailing JRD law guardian role as follows: "[W]e were defense lawyers fighting what we conceived to be the state's efforts to interfere with the freedom of our clients to live the life they chose."<sup>21</sup> Those were heady days, with JRD bat-

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18. See *infra* Part IV A.

19. *In re Gault*, 387 U.S. 1 (1967).

20. *Id.* at 37-38 (stating that, "[i]n at least one-third of the States, statutes now provide for the right of representation by retained counsel in juvenile delinquency proceedings, notice of the right [to representation], or assignment of counsel, or a combination of these").

21. Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805, 808 (2006) [hereinafter Guggenheim, *State Interest*].

tlings for children's rights in Family Court, on appeal, and through class action litigation.

To be sure, the trial bench, unaccustomed to counsel and, as a group, fervently in favor of a "best interests" or "guardian ad litem" approach, was not amused. I recall vividly several stormy administrative meetings in the late 1960's with the Family Court bench on one side and Charles Schinitzky on the opposite side, literally and figuratively.<sup>22</sup> The traditional attorney-client model, as envisioned by the Act, nevertheless largely prevailed, protected by JRD's fierce independence, the relative insulation of statewide funding (as opposed to local funding), and the support of senior judicial administrative officials.

But New York City constitutes only one part of a vast state. Outside the city, the introduction of attorneys for children changed little. Except for a few large counties, the "panel" system,<sup>23</sup> an arrangement which permits local judges to appoint law guardians from an "approved" list (not necessarily in rotation) was and still is employed. Consequently, the local judge assigns whomever he wishes, effectively controlling the role of the child's counsel.<sup>24</sup> Going one step further, in the early days judges frequently dispensed with lawyers altogether by encouraging or dictating waiver of counsel. Widespread anecdotal evidence of judicially imposed waivers on children ("you don't think you need a lawyer, do you?") led to the 1978 enactment of Section 249(a) of the Family Court Act, effectively precluding waiver, at least in juvenile delinquency cases, where counsel is constitutionally required (and in person in need of supervision proceedings). Contributing to local judicial control was the lack of supervision, oversight, or regulation. At the state level, the Judicial Conference (the predecessor of OCA) was absolutely silent, and at the regional level, the Appellate Divisions were equally quiet. Both august agencies failed to act, in derogation of their statutory responsibilities.

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22. In 1967, I was appointed to the position of Assistant to the Director of Administration of the Courts of the First Department. In that capacity, I attended multiple meetings convened to discuss the judges' objections and concerns.

23. See N.Y. FAM. CT. ACT § 243(c) (McKinney 1999).

24. Individual judicial assignments are precluded in New York City, where JRD controls the recruitment and assignment of law guardians. For a discussion of the perils of judicial control, see *infra* Part V.

By the commencement of the second "law guardian generation" even JRD had modified its initial strong attorney-client model. Professor Guggenheim attributes the shift largely to the proliferation of child welfare cases (as opposed to delinquency cases).<sup>25</sup> Yes, the traditional attorney-client relationship is more difficult to maintain in child welfare cases, where the client is very young,<sup>26</sup> but the caseload migration to child welfare was only one factor in the progression from client advocacy to a "best interests" approach. Other factors were the failure to implement the system, as prescribed by statute, throughout most of the state, (New York City is not as isolated as it occasionally believes) the changing leadership at JRD, and most notably, the growing paramountcy of "best interests" appellate case law.<sup>27</sup>

In 1982, exactly twenty years after the establishment of the system, the New York State Bar Association, reacting to widespread criticism concerning the abilities and the efficacy of law guardians, sponsored a comprehensive study. Not surprisingly, the study found extraordinary inadequacies. Outside New York City, the majority of assigned law guardians never even met their clients, discovery was non-existent, the number of appeals initiated by law guardians was virtually nil, and only twenty-one percent of law guardians provided even "acceptable representation."<sup>28</sup> The perceived role of the law guardian was found to be almost irrelevant; representation by a "phantom" attorney, one who never meets his client, is meaningless, regardless of how counsel's role is defined.

Several of the recommendations in the 1984 Report were implemented, including a recommendation that the Bar Association promulgate standards for the representation of children. In fact, it is those standards which the Matrimonial Commission endorses,<sup>29</sup> and Professor Guggenheim criticizes. Other recommendations were never implemented, notably restructuring of the law guardian system through the establishment of a

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25. Guggenheim, *State Interests*, *supra* note 21, at 809-14.

26. Almost all juvenile delinquency clients are above the age of thirteen, whereas the majority of child welfare clients are below the age of eleven.

27. *See infra* Part IV A.

28. *See generally* JANE KNITZER & MERRIL SOBIE, *LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN*, NEW YORK STATE BAR ASSOCIATION (1984).

29. *See* MATRIMONIAL COMMISSION REPORT, *supra* note 8, at 42.



statewide law guardian office. One positive consequence of the Report was that the Appellate Divisions began to take their responsibilities seriously. Law guardian offices were established in each department and, in due course, those regional offices introduced training programs, screening mechanisms, and auxiliary services. On the other hand, the overarching responsibilities of OCA remain unfulfilled to this day. OCA has simply failed to implement their part of the 1962 bargain.

Systemically, the system is better than in 1982, thanks in large part to the law guardian directors' offices. Most children receive at least minimally adequate representation, as measured by communications between counsel and client and the prevalence of attorney advocacy (however formulated). In New York City, JRD has recently moved toward a more aggressive client advocacy model. The function of the law guardian remains murky and the structure of contractual assignments, as well as the panel system, need reformation.<sup>30</sup> But children are generally better served than heretofore, although the level of representation remains well below ideal.

### III. The Law Guardian and Child Custody Proceedings

The original Act, circa 1962, limited law guardian appointments to juvenile delinquency, child neglect, and person in need of supervision cases.<sup>31</sup> An early amendment, however, authorized law guardian representation "in any other proceeding in which the [Family] court has jurisdiction . . . ."<sup>32</sup> The revision enabled a Family Court judge to assign a law guardian to represent the child in a custody proceeding (the Supreme Court, which maintains concurrent custody jurisdiction, was excluded from the law guardian system until 1990). Initially, the discretionary assignment of counsel in a custody dispute was used only sparingly, usually when child protective issues arose or the dispute was even more contentious than the normally emotional intra-parent litigation.

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30. See *infra* Part VI.

31. N.Y. FAM. CT. ACT § 249 (McKinney 1962). This was true even in those cases in which appointment was mandated only at the request of the child, a parent, or the court *sua sponte*, as though a young child could or would request counsel.

32. N.Y. FAM. CT. ACT § 6 (McKinney 1970).

This brings my story, at last, to Professor Guggenheim's opening statement<sup>33</sup> and *Braiman v. Braiman*.<sup>34</sup> In *Braiman*, the New York Supreme Court, after hearing contradictory and highly inflammatory testimony, rendered a glib Solomonic decision: the embattled parents would share custody.<sup>35</sup> The Court of Appeals reversed, establishing the rule that joint or shared custody could not be ordered by a court over the objections of embattled confrontational parents.<sup>36</sup> Grasping for a way to cut through the hopelessly conflicting testimony, Judge Breitel suggested that, on remand, the trial court consider the appointment of a guardian ad litem to investigate the truth and perhaps guide the court with a dispassionate presentation and recommendation.<sup>37</sup> The Court of Appeals did not and could not, propose the appointment of a law guardian, or any other attorney for the children. *Braiman* was a Supreme Court case and, in 1979, the Supreme Court lacked any such power. Further, Judge Breitel knew full well the distinction between a law guardian and a guardian ad litem; he was simply reaching for the only possibly authorized figure who might help the children.<sup>38</sup>

Judge Breitel's suggestion never caught on, and in a custody case the appointment of a guardian ad litem for the child remains a rare event. Nor did the decision spawn the age of child representation. Appointing an attorney for the child enmeshed in a custody dispute evolved instead from the growing realization that a child needs legal representation.<sup>39</sup> In the past

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33. Guggenheim, *Critique*, *supra* note 1, at 785.

34. See *Braiman v. Braiman*, 402 N.Y.S.2d 643 (App. Div. 1977), *rev'd* 378 N.E.2d 1019 (1978).

35. *Id.* at 649.

36. *Id.* at 648.

37. *Id.* at 649.

38. The suggestion specifically meant a guardian ad litem appointment pursuant to section 1202 of the N.Y. C.P.L.R. (McKinney 1978). Guardian ad litem appointments are authorized in any case, ranging from personal injury to child custody, when a person of any age lacks the capacity to retain and direct counsel. A guardian ad litem does not enter into an attorney-client relationship, cannot file motions, examine or cross-examine witnesses, or otherwise act as an attorney (despite the confusion precipitated when an attorney for the child is paradoxically asked to perform a "guardian ad litem" role). By definition, the positions of guardian ad litem and law guardian conflict.

39. See, e.g., Linda D. Elrod, *Counsel for the Children in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53 (1992).

twenty-five years a national consensus has emerged. Ergo, many states have enacted legislation permitting the court to assign counsel to represent the child.<sup>40</sup> Continuing the national trend, the Uniform Marriage and Divorce Act stipulates that, “[t]he court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody, and visitation.”<sup>41</sup> As noted, New York, which pioneered in providing legal representation to children, extended the law guardian provisions to Family Court custody cases in 1970. In 1990, the Legislature further extended the provision to the Supreme Court,<sup>42</sup> assuring the availability of counsel regardless of the forum. Even more recently, New York appellate case law has practically turned the discretionary appointive power into a mandatory rule, at least when custody is contested, by finding the absence of a law guardian to be “an abuse of discretion.”<sup>43</sup> Professor Guggenheim’s assessment is correct, although the *Braiman* connection is questionable. From meager sources, representation in custody cases has mushroomed to the commonplace.

Of course, the “Johnny come lately” proceeding, child custody, inherited the problems described earlier in this article. The deed had already occurred. Representation had turned from client advocacy to an uneasy amalgam of client wishes and “best interests” advocacy, from Brooklyn to Buffalo.

#### IV. The Law Guardian and the Child Client

##### A. *Confusion in the Courtroom*

As noted, the law guardian’s legislated function is that of attorney for the child. The intended relationship is that of attorney-client, with the attorney protecting the client’s interests and adhering to the client’s wishes. Unfortunately, the case law has pulled in a different direction by asserting that the law

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40. California, for example, statutorily provided for counsel commencing in 1994. See CAL. FAM. CODE § 3150 (West 2004). Wisconsin is the only state which statutorily mandates the assignment of counsel to represent a child in a contested custody case. WIS. STAT. ANN. § 767.045(1) (West 2006).

41. UNIFORM MARRIAGE AND DIVORCE ACT § 310, 9A pt. 2 U.L.A. 13 (1973).

42. N.Y. JUD. LAW § 35(7) (McKinney 1990).

43. See, e.g., *Albanese v. Lee*, 707 N.Y.S.2d 171 (App. Div. 2000); *Davis v. Davis*, 711 N.Y.S.2d 663 (App. Div. 2000).

guardian should argue the child's "best interests" as perceived by counsel. Given the statutory framework, the courts have been constrained to at least acknowledge the Code provisions, which grant the child the right to choose counsel and to have counsel "help" articulate his wishes to the court. The upshot has been rank confusion.

Take the leading case of *Carballeira v. Shumway*,<sup>44</sup> discussed by Professor Guggenheim in his article.<sup>45</sup> In *Carballeira* the court prescribed the law guardian role in a custody case as follows:

[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. Because the result desired by the child and the result that is in the child's best interest may diverge, Law Guardians sometimes face a conflict in such advocacy.<sup>46</sup>

*Carballeira's* paramount problem is that the law guardian's "conflict" or dichotomy is a pure judicial invention. As noted earlier, the operative statute, Section 241 of the Family Court Act, does not stipulate, mention or imply a "best interests" approach. Nor, I might add, does one need legal counsel just to parrot one's wishes (although that aspect, unlike "best interests," maintains a statutory basis). Rather, an individual, regardless of age, needs legal counsel to express and implement wishes in the context of a legal proceeding. The landlord who wishes to toss out a tenant does not retain an attorney to tell the court that simple fact; he engages counsel to draft, file, argue and otherwise pursue an eviction proceeding. That is how a lawyer deals with a client's "wishes;" he uses the tools of his profession to achieve the client's goals. And that is just how a child's lawyer should deal with the child's wishes. Having erected the Potemkin "best interests" village, the *Shumway* court concluded that the attorney was correct in advocating the "best interests" of his mature eleven-year-old child client, despite her contrary wishes.<sup>47</sup> So much for following explicit statutory language.

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44. *Carballeira v. Shumway*, 710 N.Y.S.2d 149 (App. Div. 2000).

45. See Guggenheim, *Critique*, *supra* note 1, at 810-12.

46. *Id.* at 152. *Carballeira* has been cited widely. See, e.g., *James MM v. June OO*, 740 N.Y.S.2d 730, 732-33 (App. Div. 2002).

47. *Shumway*, 710 N.Y.S.2d at 152-53.

*Shumway* is not alone.<sup>48</sup> Given that the appellate courts devised conflicting “statutory” mandates, judges have unsurprisingly decided whichever way suited the case, or worse, have imposed the judge’s personal view. Contrast, for example, *Albanese v. Lee*,<sup>49</sup> where the court upheld the right of the child to choose counsel who would adequately express her wishes to the court (the assigned law guardian assumed a “neutral” position),<sup>50</sup> with *James MM v. June OO*, where the court concluded that the law guardian should advocate “best interests.”<sup>51</sup> After reading the case law a newly minted law guardian could not possibly know the path to follow. Professor Guggenheim is essentially correct in concluding that, “[c]ase law imposes almost no limitations on the discretion accorded to the child’s lawyers, beyond that they may not silence the child.”<sup>52</sup>

But there also exist major constraints beyond the case law muddle. Of these, the greatest limitation, by far, is the specific desires of the appointing trial judge (except in those counties which do not employ panels). Judicial wishes, but not children’s wishes, often prevail. Attorneys do not readily go against the appointive hand that feeds them, and will almost never directly challenge the trial court unless fully protected by case law. The conflicting case law thereby strengthens judicial authority at the expense of the child’s right to meaningful representation.<sup>53</sup>

Confusion is further exacerbated by the fact that the term “best interests” mirrors the applicable substantive law rule. In determining a custody case the court rules in favor of the plaintiff or the defendant by applying a “best interests of the child” standard.<sup>54</sup> Of course, the law guardian consequently argues that her position furthers the child’s best interests. Of course, so does every other attorney, including counsel for the respective parents. That’s the job of counsel—to convince the court

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48. See Guggenheim, *Critique*, *supra* note 1, at 810.

49. *Albanese*, 707 N.Y.S.2d at 172; see also *In re Derick Shea D.*, 804 N.Y.S.2d 389, 390 (App. Div. 2005) (holding that the lawyer should have advocated the child’s wishes).

50. *Albanese*, 707 N.Y.S.2d at 172.

51. *James MM*, 740 N.Y.S.2d at 732.

52. Guggenheim, *Critique*, *supra* note 1, at 813.

53. Other potential limitations on the child’s lawyer’s discretion include: the code of professional responsibility, bar promulgated standards, and the attorney’s training and background.

54. See *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765 (N.Y. 1982).

that his client's position is consistent with the substantive standard, and to simultaneously convince the court that the adversary's position is inimical to the substantive standard. Ergo, when the same matrimonial case progresses from child custody to the equitable division of marital property, each parent's attorney will eloquently argue that the standard is satisfied by awarding his client the lion's share of the property. What is "equitable" to attorney "A" is clearly inequitable to attorney "B." Each is acting in a professionally ethical manner by shaping her client's position to fit the applicable legal rule. In other words, asking a child's attorney to argue "best interests" is as nonsensical as asking a plaintiff's personal injury lawyer to argue that the defendant was negligent. As Jean Koh Peters has cogently articulated:

[A]ny child advocate must become adept at translating her proposals to the court into the language of 'best interests.' Just as a tort attorney must translate a client's story into the legal language of fault and negligence, children's attorneys must often translate their clients' desires and goals into the framework of 'best interests.' Like any attorney who respects the client's right to make her own informed decision, the attorney may be in the odd position of advocating a result which, personally, the lawyer believes is not in the child's best interests. Thus, a lawyer should be prepared to make an argument that a client's desire is in her best interests as long as the lawyer can do so in good faith. The lawyer should press herself to make those arguments even when they conflict with her personal assessment of the client's 'best interests.'<sup>55</sup>

The critical issue boils down to the attorney's formulation of his "best interests" position (since that is the substantive rule). The facile, albeit generally acceptable, approach is for the child's attorney (i.e. law guardian) to subjectively determine her client's best interests, particularly when encouraged to do so by the trial judge. A lawyer's determination of "best interests" usurps the Court's function (which is precisely what some judges want), violates the applicable statutes, and conflicts with the promulgated rules of professional responsibility. As an al-

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55. Jean Koh Peters, *The Roles and Context of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1515 (1996).

ternative approach to "best interests," the attorney may simply run with the child's conclusory wishes, "I want to live with my mother," and parrot that to the Court. That is tantamount to the criminal defense attorney telling the court the defendant wishes to be exonerated, without doing anything to possibly achieve that result.

Neither polarized approach satisfies the complex attorney-client relationship.<sup>56</sup> The preferred role may best be described as a collaborative attorney-client endeavor, a relationship which has been advanced by several prominent authors.<sup>57</sup> An analysis would be beyond the scope of this article, although a few comments may be appropriate.

First, the attorney's analysis, advice and conclusions regarding the case are essential, but in most cases should be articulated to the client within the attorney-client privilege. Attorneys offer advice and, in fact, customarily influence their client's position. For example, counsel for the alcoholic mother will attempt to persuade her client to compromise: "The court is very unlikely to grant you custody; we should accordingly seek extensive visitation coupled with your agreement to enroll in a treatment program. If we go to hearing, I'm afraid you will end up with only limited supervised visitation." The child's attorney should similarly say to her client: "I understand why you want to live with your mother, but the judge is unlikely to agree; why don't we ask for extensive visitation and try to get your mother the help she needs, with an understanding of custody consideration as soon as she is better." Most children will agree to a realistic approach, one that meets their desires to the extent counsel deems feasible. In fact, in my experience most children as young as five comprehend the practicalities, provided counsel is patient and understanding (which is not to say that every child of five will react in a similar manner).

Second, in the majority of custody cases, or in at least those cases which are seriously contested, both parents are fit and

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56. A greater absurdity occurs when counsel speaks out of both sides of his mouth, advocating simultaneously the child's wishes and counsel's view of "best interests."

57. See ROBERT H. MNOOKIN & ROBERT BURT, *IN THE INTERESTS OF CHILDREN; ADVOCACY, LAW REFORM AND PUBLIC POLICY* (1985); see also Sarah Ramsey, *Representation of the Child in Protection Proceedings: The Determination of the Decision - Making Capacity*, 17 FAM. L.Q. 287 (1983).

able to raise their child. The law guardian may believe that parent "A" should have custody rather than parent "B," but that subjective conclusion should not be imposed upon the child. The lawyer may even believe that parent "B" has unduly influenced the child. That should be the subject of intensive attorney-client discussions, but in the final analysis the child has the right to have her attorney advocate custody with parent "B."

Last, the attorney's role goes beyond just taking a position in court. Protecting the child client, reassuring the youngster, explaining the process, or shielding the child from needless interviews or forensics, may be of greater importance.<sup>58</sup> I recently represented two teenagers whose father petitioned for modification of custody. The children were happy with the existing arrangement, were doing well, and the custodial mother was exemplary. The children were petrified at the thought of a possible modification and consequential relocation. At the conclusion of my initial interview, I assured them that they were going nowhere, and had every right to feel secure. I would present their position and their fears to the court, attempt to secure a dismissal of the petition, and if the case nevertheless went to trial, would arrange for a judicial "in camera" interview on the record. That advice was, by far, the most important law guardian function in that particular case (in the event, on my motion the father's petition was indeed dismissed prior to hearing).

*B. Limitations on the Traditional Attorney-Client Model, Real and Illusory*

Several reservations have been raised in academic and in judicial circles to the realization of children's representation predicated on the traditional attorney-client model. First, it has been argued that the courts are not bound by children's positions, although they are required to consider "wishes" as one component of the complex "best interests" formula. Professor Guggenheim devotes a major part of his article to a discussion of that ostensible constraint.<sup>59</sup> Of course the child does not de-

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58. See, e.g., *Berlin v. Berlin*, 820 N.Y.S.2d 602 (App. Div. 2006) (affirming a protective order prohibiting successive intrusive forensic examination of the children, pursuant to a motion made by the law guardian).

59. See Guggenheim, *Critique*, *supra* note 1, at 802-08.



termine her own custody—that is why we have judges. After all, judges are not obliged to follow any party's dictates in any case in any area of law. Nevertheless, no one argues that the attorney is thereby precluded from asserting the client's position. As happens in every custody case, Mom desires custody and Dad desires custody – but no one suggests that their respective counsel should desist from arguing each client's position because the judge is not bound, and will in fact decide the case by applying neutral substantive rules. Just why the child's attorney should be different escapes me.

A second ostensible constraint is that children frequently do not want to choose between parents. That is true, and should alter the child's lawyer's position, but constitutes no reason to dispense with counsel altogether. The New York State Bar Association standards commentaries offer the following suggestion:

Further, the custody litigation need not be presented as an all or nothing choice . . . . The child is entitled to the continuation of a meaningful relationship with each parent. Liberal or extended visitation, joint decision making or legal custody, vacations, possibility of modification as the child matures, and, in some cases, an agreement for joint physical custody merit discussion whenever appropriate.<sup>60</sup>

In other words, the child's attorney is not required to argue in favor of custody to parent "A," or as an alternative, custody to parent "B." In every case the child possesses a myriad of interests in addition to the raw custodial issue: visitation, communication with each parent, financial support, and an appropriate education are but some examples. Counsel needs to address each with his client and with the court. Further, the attorneys need to explain the options and permutations of custody to his young client, to shield the child from the onslaughts of parents who frequently pressure their offspring to "elect" them, and to protect the child from intrusive interviews and forensics, may be even greater when the child sees herself caught between two conflicting adults.

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60. N.Y. STATE BAR ASSOC., 2 LAW GUARDIAN REPRESENTATION STANDARDS: CUSTODY CASES 24 (3d ed. 2005).

The third articulated limitation to the traditional attorney-client role is the understandable attorney reluctance to advocate that the child live with a dangerously unfit parent, a drug addict or physical abuser for example. That occasionally occurs, but should not be exaggerated. The scenario is simply non-existent in the large majority of contested custody cases. Most parents who seek custody are not of that ilk and if they are, their bid will almost never prevail, regardless of the child's position.<sup>61</sup> In those few situations, the child's attorney should reason with the child, and may well convince the child to forgo an untenable position, or to compromise by accepting visitation coupled with help for the unfit parent. In extreme cases the lawyer is also bound by Rules of Professional Responsibility to refrain from advocating a frivolous position. The issue is of far greater significance to attorneys representing children in child protective cases, where the parent is charged with malfeasance, but that is beyond this article's scope.

Last is the inherent limitation when representing the preverbal child. One cannot apply the attorney-client model when the lawyer represents a six-month-old baby. When representing a child under the age of five or, in some cases, below the age of seven or eight, the attorney is placed in a difficult position. Should she assume the role of guardian ad litem, determining the child's "best interests" independently, and argue accordingly? Should the attorney remain silent, or should he assume a "neutral" position, introducing relevant evidence which the court may weigh, without advocating a specific outcome?

In his publications, Professor Guggenheim suggests a neutral position.<sup>62</sup> The problem with that approach is that the young child would be effectively unrepresented, and at least in the absence of a guardian ad litem, would have no representative to argue for his interests. For example, the "neutral" attorney might feel compelled to desist from arguing in favor of meaningful visitation, regardless of which parent prevails in ob-

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61. The odds of encountering this phenomenon are admittedly greater when a non-parent seeks custody from an unfit parent.

62. See Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1416 (1996) [hereinafter Guggenheim, *Paradigm*].

taining custody. It may be that the attorney representing the very young should remain “neutral” regarding physical custody, as she would if the older child did not want to take a position, but counsel should almost never remain neutral regarding adequate visitation, parental decision making on behalf of the child, satisfying the child’s financial needs through child support, or addressing the child’s psychological needs through professional counseling.

As an alternative, the attorney may assume the role of guardian ad litem. In the best of all possible worlds, the court would appoint a separate guardian ad litem for the very young, as suggested by Judge Breitel in *Braiman*, but that is not the legal world we live in. Alternatively, the American Bar Association standards suggest that the court appoint a “best interests attorney” in the limited number of cases involving the very young child (or the older incapacitated child), defined as “[a] lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directions or objectives.”<sup>63</sup> However, the ABA simultaneously admonishes the attorney to base her “best interests” position “on objective criteria concerning the child’s needs and interests, and not merely on the lawyer’s personal values, philosophies, and experiences.”<sup>64</sup> That is easier said than done, but may constitute the “least worse” solution to representing the preverbal child.

It should be emphasized that dispensing with the traditional attorney-client role should be reserved as a last resort. Most children in most custody cases should be represented by a “real” lawyer acting in just that capacity. For example, the Model Rules of Professional conduct stipulate that, “[w]hen a clients’ capacity to make adequately considered decisions in connection with a representation is diminished . . . because of minority . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the child.”<sup>65</sup> Children do not mature suddenly and pass the magic divide into

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63. A.B.A., STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 6 (1996), available at [http://www.abanet.org/family/reports/standards\\_abuseneglect.pdf](http://www.abanet.org/family/reports/standards_abuseneglect.pdf).

64. *Id.*

65. MODEL RULES OF PROF’L CONDUCT R. 1.14(a) (1983).

legal capacity on a date certain. Children as young as five may be competent regarding some issues, as implied by the Model Rules, even if unable to guide their attorney concerning the central issue of physical custody. As noted, the legal interests of the child extend beyond the seemingly all or nothing custody question.

Professor Guggenheim notes that most custody cases involve children who are under the age of fourteen.<sup>66</sup> That is true, if one measures only initial custody disputes, and most children under the age of fourteen are nevertheless competent to guide their attorney. But custody cases may also return to court, perhaps repeatedly, for modification or enforcement purposes. In the interim, the child has progressed on the competency continuum. The conundrum inherent when representing the very young exists in only a relatively small percentage of cases.

Lastly, I again emphasize the central fact that the New York statutes prescribe a traditional attorney-client relationship, pure and simple. Deviation should be sanctioned only as a last resort, and only to the minimum extent possible. If only the Matrimonial Commission had articulated clearly that simple overarching statutory principle.

#### V. The Matrimonial Commission Report and the Child's Attorney

Having discussed the statutory foundation, the history, and role of the attorney who represents a child, I am finally able to critique the Matrimonial Commission Report, and do so in an appropriate context.

The Commission's evaluation commences with the bizarre statement: "After an extensive review and much deliberation, the Commission has concluded that, the attorney for the child is not a fiduciary and should not be so regarded."<sup>67</sup> Of course. At least to my knowledge, no one has seriously advocated otherwise. Nor can the child's attorney possibly fit the legal definition of a "fiduciary," in other words "[a] person or institution who manages money or property for another and who must exercise a standard of care in such management activity, imposed

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66. See Guggenheim, *Critique*, *supra* note 1, at 822 n.157.

67. MATRIMONIAL COMMISSION REPORT, *supra* note 8, at 39.

by law or contract; e.g. executor of estate; receiver in bankruptcy; trustee.”<sup>68</sup> Just why the Commission needed “extensive review and much deliberation” is mysterious.<sup>69</sup> Of greater significance, the statement is misleading and confusing to the bar and, surely, to the public at large.<sup>70</sup>

The Commission Report continues by endorsing the statewide Law Guardian Advisory Committee’s definition of the role of attorney for the child. Professor Guggenheim has appropriately criticized the Advisory Committee’s definition, which confusingly combines elements of a traditional attorney-client relationship with a guardian ad litem or “best interests” model.<sup>71</sup> I see no reason to reiterate Guggenheim’s critique. At least to that point, the Commission Report has sowed confusion, instead of the much needed clarity.

The Matrimonial Commission additionally endorses the New York State Bar Association Standards on Representing Children in Custody cases,<sup>72</sup> recommending that they be adopted by administrative rule, and thereby attain statewide recognition and greater authority.<sup>73</sup> The State Bar standards essentially advocate an attorney-client role for the child’s attorney (unlike the statewide Law Guardian Advisory Committee). Assiduously avoiding the term “best interests,” the standards speak of the child’s desires, the child’s interests, and, significantly, the development of a case position together with the child.<sup>74</sup> Unlike the American Bar Association, the New York Bar Association has not quite concluded that the attorney for the child should ordinarily function in an unalloyed attorney-client role, but the State Association comes close, a fact noted by

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68. BLACK’S LAW DICTIONARY (6th ed. 1990). The definition is obviously alien to an attorney providing legal representation.

69. MATRIMONIAL COMMISSION REPORT, *supra* note 8, at 39.

70. The relevant footnote states that the regulatory process of a private-paid attorney for the child is included in Part 36 of the Rules of the Chief Judge, *id.* at 39 n.39, which happens to incorporate rules for fiduciaries. That the rules are incorporated in the fiduciary section is unfortunate, and probably only a matter of convenience.

71. See Guggenheim, *Critique*, *supra* note 1, at 789.

72. MATRIMONIAL COMMISSION REPORT, *supra* note 8, at 42.

73. I may be wrong, but I just do not believe judicial administration can enact a rule telling a lawyer what to do when representing a client. What then, is to be gained by converting the bar standards into a rule?

74. LAW GUARDIAN REPRESENTATION STANDARDS, *supra* note 60, at 24.

Professor Guggenheim.<sup>75</sup> However, he continues by criticizing one paragraph of the commentaries to the standards which posits that the law guardian is “the only neutral participant other than the judge, and the person legally bound to represent the child’s interests . . . . Great weight may therefore be given to the law guardian’s position.”<sup>76</sup> In my opinion, the State Bar statement, which, after all, is a commentary and is not an operative standard, is intended only as a truism. A law guardian indeed represents a more “neutral” participant than the embattled parents, and for that reason, along with the fact that judges understandably tend to look to the child’s attorney for a less passionate position, the law guardian’s position tends to be, well, “weighty.”

An isolated commentary paragraph does not detract from the Standard’s thrust. If the Matrimonial Commission had endorsed the State Bar position without embracing the contradictory Law Guardian Advisory Committee position, and had avoided adding the confusing “fiduciary” language, it would have at least contributed to a more traditional model (and one based squarely on the statutory mandates). Even better, the Commission could have endorsed the traditional model outright, thereby ameliorating, if not undoing, decades of conflict and doubletalk.

Surprisingly, the Commission does not discuss, or even cite, the national models for child representation, such as the 1996 Fordham Law School Conference on Ethical Issues in the Legal Representation of Children.<sup>77</sup> Cutting through the then and now jumble of “best interests,” “guardian,” and “child’s wishes” statutes and case law,<sup>78</sup> the Fordham Conference reached a strong consensus, recommending a lawyering position which prohibits the child’s attorney from ever acting as a guardian ad litem:

The lawyer should assume the obligations of a lawyer, regardless of how the lawyer’s rule is labeled, be it as guardian ad litem, attorney ad litem, law guardian or other. The lawyer should not

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75. I confess a relationship with the standards; I was one of the drafters and was the Chair of the Committee at the time of their adoption.

76. See Guggenheim, *Critique*, *supra* note 1 at 824-25.

77. Do they believe that New York is totally unique?

78. See also STANDARDS OF PRACTICE, *supra* note 63, at 6.

serve as the child's guardian ad litem or in another role insofar as the role including responsibilities inconsistent with those of a lawyer for the child.<sup>79</sup>

The Fordham position was subsequently expanded by American Bar Association standards, initially for child protective cases,<sup>80</sup> and, subsequently, for the representation of children in child custody cases.<sup>81</sup> In its commentary, the ABA standards carefully distinguish (as do the New York statutes) the child's legal interests from his "best interests:"

'Legal interests' are distinct from "best interests" and from the child's objectives. "Legal interests" are interests of the child that are specifically recognized in law and that can be protected through the courts. A child's legal interests could include, for example, depending on the nature of the case, a special needs child's right to appropriate educational, medical, or mental health services . . . a child's support, governmental and other financial benefits; visitation with siblings, family members, or others the child wishes to maintain contact with; and a child's due process or other procedural rights.<sup>82</sup>

A similar conclusion has been reached by the American Association of Matrimonial Lawyers (AAML).<sup>83</sup> And recently a Conference on the Representation of Children, hosted by the University of Nevada School of Law, concluded that: "A lawyer appointed or retained to represent a child in a legal proceeding

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79. *Proceedings on the Conference on Ethical Issues in the Legal Representation of Children, Recommendations of the Conference*, 64 FORDHAM L. REV. 1301 (1996). A traditional approach had been advocated by several earlier commentators. See Sarah Ramsey, *Representation of Children in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287 (1983); Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Representing Children*, 59 N.Y.U. L. REV. 76 (1984).

80. STANDARDS OF PRACTICE, *supra* note 63.

81. A.B.A. SECTION OF FAMILY LAW, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES (2003), available at [http://www.abanet.org/family/reports/standards\\_childcustody.pdf](http://www.abanet.org/family/reports/standards_childcustody.pdf).

82. *Id.* at 12.

83. AMER. ACAD. OF MATRIMONIAL LAWYERS, REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS (1995). The AAML position is that the older child should be represented by an attorney who assures a traditional attorney-client relationship, while the young or preschool child should not be represented at all.

should serve as the child's lawyer, regardless of how the lawyer's role is labeled or the age of the child."<sup>84</sup>

Every nationally promulgated set of standards for representing children has accordingly endorsed the same basic thesis (although, as Professor Guggenheim notes, the approaches vary when applied to the very young or otherwise incapacitated child). So too, the New York statutes compel a traditional attorney-client relationship, as outlined at the commencement of this article, and the statutes predate the impressive national symposiums. The Matrimonial Commission could have urged a return to New York's statutory standards, as bolstered by the prevailing national principles, citing the position of the organized bar and the academic community.<sup>85</sup> Or the Commission could have suggested an entirely different approach, such as "best interests" advocacy, and recommended the necessary statutory amendments to achieve that result (though both Professor Guggenheim and I would object vehemently). It did neither, falling back on a confusingly modest encouragement of the attorney-client model, and a plea for additional study of an issue which has already been studied to death.

Turning their attention next to prevalent trial court transgressions, the Matrimonial Commission concludes: "A recurring problem cited in the response to the Commission's surveys

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84. Barbara Kaban et al., *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. 682, 683 (2006). Professor Guggenheim cogently summarizes the ABA and AAML standards; there is no need to duplicate his outline (Guggenheim, *Critique*, *supra* note 1 at 795.). Although the ABA standards include the possibility of appointing a "best interests" attorney when the child is very young or otherwise seriously impaired, the premise is that most attorneys will adhere to a straight attorney-client relationship, with the child directing the litigation's objectives:

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. The child's attorney should pursue the child's expressed objectives, unless the child requests otherwise, and follow the child's direction throughout the case.

FAMILY LAW STANDARDS OF PRACTICE, *supra* note 81, at 11.

85. I do not mean to suggest that other states have avoided the "best interests" approach. Far from that. Like New York, many state courts have articulated a conflicting approach. See, e.g., *In re Esperanza M.*, 955 P.2d 204 (N.M. Ct. App. 1998) (where the New Mexico court commented that the applied state statute "signifies a guardian ad litem's dual role of representing the child's best interests, while also presenting the child's position to the court").



relates to the court's expectations regarding the role of the attorney for the child."<sup>86</sup> Following a gentle reminder that the attorney must advocate for the child "as is required of any other attorney in a civil proceeding or action,"<sup>87</sup> the Report lists a series of prohibited albeit prevalent judicial errors. What is remarkable is not the list itself, but rather the fact that although each has been specifically proscribed pursuant to Appellate Division case law, each is nevertheless commonly engaged in by the trial courts. Thus, the court shall not make "improper requests for recommendations,"<sup>88</sup> shall not delegate judicial responsibilities (does not the trial bench know that?), shall not engage in *ex parte* communications,<sup>89</sup> shall not request that the attorney for the child select the forensic expert (that, too, is a clear abdication of judicial responsibility), and shall never request reports prepared by the attorney for the child.<sup>90</sup> The request of a law guardian report has also been found to violate the canons of judicial ethics.<sup>91</sup> Whether *ex parte* or shared, a pre-trial report prepared by counsel, replete with hearsay comments, subjective impressions, and recommendations regarding custody, is patently offensive in any case.<sup>92</sup> Yet, the practice constitutes part of the everyday life of children's attorneys throughout the State (*ex parte* verbal conversation between law guardians and judges are also not unheard of).

Judicial disregard of the most elementary rules governing attorney conduct poses a serious problem, one which is only exacerbated when continued after multiple appellate reversals. Something is happening, something which may be immune to even Matrimonial Commission condemnation.

To this writer, the problem's root is the appointive powers exercised by the trial bench. As long as the trial judge chooses the attorney for the child in each case (directly or indirectly via

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86. MATRIMONIAL COMMISSION REPORT, *supra* note 8, at 43.

87. *Id.*

88. *See In re Devin XX*, 797 N.Y.S.2d 661 (App. Div. 2005).

89. *See Weiglhofer v. Weiglhofer*, 766 N.Y.S.2d 727 (App. Div. 2003).

90. *Id.*

91. *See* N.Y.S. COMMISSION ON JUDICIAL CONDUCT ON THE MATTER OF JOHN G. CONNOR (2003) (the Judicial Commission admonished a judge who had requested a report from the law guardian).

92. A report should be distinguished from a post-trial brief, which, by definition, is limited to arguing the evidence on the record, is served on each party, and is accompanied by adversary briefs.

instructions to court clerks), many judges will continue to view the attorney as an arm of the court and resist the notion of independent counsel. Interestingly, every case cited in the above analysis involved a panel law guardian. I do not believe a New York City Family Court Judge would dream of requesting an ex parte report from a law guardian employed by the Juvenile Rights Division. Perhaps the only viable solution lies in systemic reform of the appointive process, a vital need which the Matrimonial Commission disregarded altogether.<sup>93</sup>

## VI. The Matrimonial Commission and Systemic Problems

In its law guardian section, the Matrimonial Commission does not generally comment on the systemic problems of the law guardian (or child's attorney) system. The only exception is the "private pay" law guardian mechanism. I'll commence with an analysis of that issue, but continue with a discussion of additional organizational aspects which, in my opinion, merit inclusion in any program to improve the representation of children: the appointive power of judges and the oversight responsibilities of the Office of Court Administration.

### A. "Private Pay"

A "private pay" law guardian (or a private pay attorney for the child) is appointed by the court, but paid by the parents (or other contestant). The court establishes a fee, ordinarily based on a "market rate" of several hundred dollars per hour, and stipulates the percentage to be paid by each parent. The practice represents a stark departure from the "traditional" law guardian who represents the child, submits a voucher at the conclusion of the proceedings, and is paid by the state at the statutory rate of seventy-five (75) dollars per hour.

As noted earlier in this article, the "private pay" attorney is not a law guardian—the relevant statutes conflict with the practice.<sup>94</sup> In fact, the notion was unheard of until the early 1990s, thirty years after enactment of the law guardian statutes. Apparently sparked by the 1990 amendment to Section 35 of the Judiciary Law, which permitted the Supreme Court to

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93. See *infra* Part VI.

94. See *supra* note 4 and accompanying text.

appoint a law guardian, a few Supreme Court judges devised the scheme to replace the statutory state system.<sup>95</sup> Not to be outdone, several family court judges subsequently found that they, too, could direct “private pay.”<sup>96</sup> The practice spread like wildfire, with no control, no supervision, and no authorization. In recent years, the Office of Court Administration has slightly reigned in the largely anarchic practice by requiring certification and limiting total annual compensation of the professional “private pay” attorney. And, as might be expected, in recent years legal challenges have been mounted in each judicial department.

The “private pay” attorney first appears at footnote 8, page 6, of the Commission Report, when the Commission notes that the practice’s validity has been upheld by some Appellate Divisions while other Appellate Divisions have vacated “private pay” orders, concluding that the system is *ultra vires*.<sup>97</sup> In fact, the Second Department, and only the Second Department, has fully upheld the scheme.<sup>98</sup> In upholding the “private pay” arrangement, the court relied on an attenuated reading of the relevant statute, holding that, “Judiciary Law section 35 allows the court to utilize an alternative method to compensate attorneys who have been assigned to represent individuals with the financial ability to retain counsel.”<sup>99</sup> Of course, the relevant individual, a child, almost never has the financial ability to retain counsel, so the court neatly transferred the financial test to an irrelevant individual, the parent. The court also invoked the ancient discredited common law “necessaries” doctrine, whereby a father must supply his child with “necessaries” (a lawyer?).<sup>100</sup> The common law necessities doctrine has long been superseded by modern child support statutes, which go far beyond supplying the bare “necessaries” encompassed by the doctrine, such as basic food and clothing. The doctrine’s resur-

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95. One of the earliest cases is *Bronstein v. Bronstein*, 610 N.Y.S.2d 638 (App. Div. 1994). “Private pay” was not thought of prior to the Section 35 amendment, i.e., when children were unrepresented, and may have actually benefited from a “private pay” lawyer, or any other lawyer.

96. See *Matter of Wolfson v. Wolfson*, 644 N.Y.S.2d 746 (App. Div. 1996).

97. MATRIMONIAL COMMISSION REPORT, *supra* note 8, at 6 n. 8.

98. See *Plovnick v. Klinger*, 781 N.Y.S.2d 360 (App. Div. 2004).

99. *Id.* at 364.

100. *Id.* at 365.

rection for the purpose of promoting highly priced attorneys as “necessary” for junior’s legal interests may be amusing, but represents a sad commentary on this state’s commitment to children’s representation.<sup>101</sup>

The Fourth Department has held that the system may be utilized in Supreme Court, but not in Family Court,<sup>102</sup> while the First Department has yet to render a definitive decision.<sup>103</sup> To complete the appellate cycle, the Third Department has reached a conclusion diametrically opposite to the Second Department’s position. Citing the relevant statutes,<sup>104</sup> the court found the practice to be invalid:

With respect to compensation, while the statutes and regulations speak directly to a procedure for payment from the state, there is no specific statutory or regulatory scheme for direct payment of an appointed Law Guardian by a parent or parents [cite omitted]. The lack of parameters for a direct-pay system creates the potential for issues about the integrity of the appointment process in such situations (which often pay no attention to the statutory caps on compensation for assigned counsel), draws into question the independence of the Law Guardian, and raises concerns about fundamental fairness to all children regardless of the economic status of their parents.<sup>105</sup>

The “private pay” phenomenon has indeed created a dual system. Children of affluent parents receive highly paid counsel, while other children are represented by lower paid “state” counsel. Independence, or at least the perception of independence, is compromised when the judge hand picks an attorney

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101. I have not been able to find a case similar to *Plovnick* anywhere in the United States.

102. *Lyndon A.H. v. Diane T.O.*, 673 N.Y.S.2d 989 (App. Div. 1998).

103. The Commission states in footnote 8 that the First Department permits the practice, but that is very unclear. MATRIMONIAL COMMISSION REPORT, *supra* note 8, at 6 n.8. In the only case cited, *Tran v. Tran*, 716 N.Y.S.2d 5 (App. Div. 2000), the court notes that the trial court required the defendant to pay the law guardian fee, but never discusses the issue in its brief opinion. The probable explanation is that the Appellate Division simply recited the provisions of the order, including those like the “private pay,” that may not have been appealed from.

104. The most pertinent provision is N.Y. FAM. CT. ACT § 248 (McKinney 1999) (stating “[t]he costs of law guardians . . . shall be payable by the State of New York”).

105. *Redder v. Redder*, 792 N.Y.S.2d 201, 203 (App. Div. 2005) (citing N.Y. Fam. Ct. Act § 248).

to be paid by the parties who are vying for custody.<sup>106</sup> It gets worse. "Private pay" representation is unfortunately a political patronage plum. With little control over lucrative judicial assignments, party politics and office politics proliferate. I have been a duly certified member of the Westchester "private pay" panel for several years. But I have yet to be assigned a single case. Perhaps I lack the ability to represent "important" children, despite decades of law guardian representation; but I fear the reason lies elsewhere. In several counties (such as my home county of Westchester) a few attorneys maintain a political "lock" on the plum, a fact which has been publicized and should have been known to the Commission.<sup>107</sup> For example, in 2001 the *New York Post* reported that the "private pay" law guardian assigned to represent the children of financial mogul Ron Perelman "raked in an estimated 1.5 million since the litigation began five years ago," and quoted a "court insider's remark, '[i]t's all patronage . . . she makes more money than any judge.'"<sup>108</sup>

Of greater significance, the recent scandals in the Kings County Supreme Court centered, in part, on lavishing private law guardian fees on an attorney who, in turn, plied gifts and other favors on the judge. Thus, in 2003 *Newsday* reported that, "Supreme Court Judge Gerald Garson [subsequently indicted and convicted] assigned 18 law guardianships to attorney Paul Siminovsky [the lawyer in question], half of all such assignments . . .," and that Siminovsky was the Judge's "favorite attorney."<sup>109</sup> *Newsday* subsequently reported that the District Attorney "alleged Siminovsky received [law guardian] assignments from Garson in exchange for . . . gifts, as well as cash"<sup>110</sup>

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106. The atmosphere may become even uglier if the parent who has been ordered to pay refuses, precipitating a contempt action in the midst of a custody dispute. See *Siskind v. Schael*, 823 N.Y.S.2d 436 (App. Div. 2006).

107. In 1998, the New York State Bar Association recommended systemic reform, including the publication and dissemination "of privately paid law guardians by name, county, judge, date and amount of fee awarded." N.Y.S. BAR ASS'N., REPORT TO THE TASK FORCE ON LAW GUARDIANS, THE PRIVATELY PAID LAW GUARDIAN, FINAL REPORT 12 (1998). That bit of recommended sunshine has never been implemented.

108. *Gaurdian's Gravy Train Ends*, N.Y. POST, Oct. 14, 2001 at 12, col. 2.

109. Graham Rayman, *The Judge's 'Favorite'; Attorney Assigned 18 Gaurdianships*, NEWSDAY (Long Island, New York), Queens Ed., June 4, 2003, at A6.

110. Anthony DeStefano, *Hynes: Garrison Just the Start*, NEWSday (Long Island, New York), Queens Edition, Aug. 7, 2003, at A17.

and that Justice Garson accepted dinners and gifts after “rewarding lawyer Paul Siminovsky with law guardian assignments.”<sup>111</sup> Siminovsky subsequently admitted “he committed crimes with Garson . . . and Garson gave him law guardianships in return.”<sup>112</sup> Lastly, in reversing an Appellate Division order dismissing some of the charges against Garson, the Court of Appeals cited the indictment charging that “from January 1, 2002 through March 12, 2003, defendant [Garson] accepted lunches, beverages and cigars from Siminovsky in exchange for assigning law guardianships, and giving ex parte advice to Siminovsky concerning cases that were pending before defendant.”<sup>113</sup> Is that the representation we want for our children?

Against that backdrop, it is astonishing that the Matrimonial Commission unhesitatingly endorses the practice, recommending legislation to authorize courts throughout the state to appoint “private pay” counsel for children in custody cases.<sup>114</sup> The only justification the Commission offers is economic—a statute would “place the responsibility for the cost of these [children’s attorney] services upon those who can afford them, [and] reduce the case load and cost of publicly funded programs and assignments.”<sup>115</sup> The Commission Report does not include one word regarding political favoritism, fairness, bribery or independence, and not a word on the need to at least control the excesses. If economics is the issue (and I agree that affluent parents should not benefit from the public purse), the solution might be a statute requiring wealthy parents to reimburse the state for the state-paid child’s attorney. The independence and integrity of the system would thereby be preserved, without expanding a misconceived, legally questionable, and scandal-prone practice.

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111. Anthony DeStefano, *Free Review of Garison Rulings*, NEWSDAY (Long Island, New York), Queens Edition, Aug. 7, 2003, at A07.

112. Anthony DeStefano, *Brooklyn Court Officials’ Trial; Lawyer Details Court ‘Crimes,’* NEWSDAY, City Edition, Sept. 2, 2004, at A15.

113. *People v. Garson*, 848 N.E.2d 1264 (N.Y. 2006).

114. See MATRIMONIAL COMMISSION REPORT, *supra* note 8, at 44. The validity of the practice is of course unsettled, and ripe for Court of Appeals resolution. Until such time, or until the legislature acts, each department may go its own way.

115. *Id.*

### B. *The Appointive Process*

A paramount American jurisprudential rule is attorney independence. Lawyers, whether retained or appointed, are supposed to be autonomous, freed from any dependence upon the judge or the judicial system as a whole. Thus, the ABA Standards for Lawyers Representing Children in Custody Cases, admonishes that, “[t]he Court must assure that the lawyer is independent of the court, court services, the parties [i.e., the parents], and the state.”<sup>116</sup>

An essential element in assuring independence is the separation of the judge and the court from the appointive process. Where representation has been institutionalized, as when a legal aid society or similar organization provides representation, the attorney is automatically endowed with considerable independence. The individual who enters the courtroom, with or for her assigned client, has not been chosen by the court. The attorney’s future assignments are not at stake, and, of equal significance, the client does not perceive that counsel’s independence has been compromised. However, where representation is afforded through a panel system, other mechanisms are needed to separate the individual attorney from the court. For that reason, the New York State Bar Association Standards for Providing Mandated Representation, which, *inter alia*, encompasses law guardians, stipulates:

Where mandated representation is to be provided by assigned counsel, the selection of the individual attorney to be assigned shall not be made by a judge or court official except in an emergency or in exceptional circumstances. The selection of the individual attorney to be assigned shall be made by someone outside the court system in order to ensure the independence of counsel.<sup>117</sup>

The system of providing representation to adults in criminal and civil proceedings complies fully with the organizational standards cited above. Assigned counsel plan administrators maintain the panels and assign individual counsel, usually on a rotational basis. The judge has no input.

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116. STANDARD OF PRACTICE FOR CUSTODY CASES, *supra* note 83, at 20.

117. N.Y. STATE BAR ASS’N, STANDARDS FOR PROVIDING MANDATED REPRESENTATION, Standard A-3 (2005).

Unfortunately, the important principle has not been applied to children. On the contrary, the standards and rules governing attorney independence have been systematically violated. Except in those courts served by institutional representation, such as JRD in New York City, the judge chooses the attorney, either directly or through his court clerk or court attorney.<sup>118</sup> The attorney is consequently utterly dependent on the court, for that case as well as for future appointments. Anecdotal evidence is rife with reports of attorneys removed from the certified law guardian list on a “de facto” basis—the relevant judge simply ceases to choose that lawyer, ever. Over the years several attorneys have advised me that they were relegated to the “unused” portion of the certified list. On several occasions an attorney has also advised that his representation has been severely compromised by his utter dependence on the bench; for example, he could not file a motion which might benefit the child client because the judge would be alienated. In effect, certification to be a member of a law guardian panel is tantamount to receiving a fishing license; you qualify, but may not necessarily catch any fish. Your success is dependent upon judicial discretion and favor.

In light of the current appointive mechanism, the list of judicial “evils” outlined by the Matrimonial Commission should come as no surprise.<sup>119</sup> The keeper of the appointive keys may perceive the child’s attorney as an arm of the court, a personal appointee who may be invited to engage in *ex parte* communications, select forensic evaluations, or draft hearsay-riddled subjective reports to guide the court. Perhaps the surprise is that the majority of judges nevertheless adhere to ethical and case law constraints.

The problem is exacerbated in cases involving the “private pay” attorney, and “private pay” is limited almost exclusively to custody cases. The lucrative financial rewards, coupled with an exclusive “club” atmosphere, cut against even mild independence and foster rank favoritism if not corruption. Assuming continuation of the practice, the least that might have been rec-

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118. There is some variation; for example in some New York City Family Courts a law guardian is assigned “intake” and is thereby automatically assigned cases which are filed that day.

119. See MATRIMONIAL COMMISSION REPORT, *supra* note 8, at 40-44.



ommended is the removal of the appointive power from the judges' hands. For similar reasons, the present system discourages exercise of the child's statutory right to choose counsel; substitution of the judge's personal choice of counsel is more difficult to achieve than the substitution of an attorney randomly selected by a non-court administrator.<sup>120</sup>

One perfectly feasible solution to this vexing problem, neglected by the Matrimonial Commission, is to move the appointive process to a higher level, one removed from the day-to-day trial court milieu. As noted earlier, each department maintains a law guardian director's office within the Appellate Division. The directors have successfully implemented training programs, continuing education seminars, directories of non-legal experts (such as investigators, psychologists and social workers), and each is active in the process of certifying and re-certifying panel attorneys. Each is fully familiar with the trial courts within the department. A rather simple measure, achievable through court rule, would be to vest the Law Guardian Director with the authority to appoint the child's attorney in each case, with rotational selection mandated. The problems inherent in judicial assignment would be greatly ameliorated. The perception and the reality of independence would be restored, and the subjective powers of the trial courts (Family and Supreme) replaced by a far more objective administration. An alternative method would be the establishment of a law guardian plan administrator, on a departmental or at the state level, paralleling the adult assigned panel administrators. The proposal is not utopian. All I am suggesting is that the system utilized for adults be employed for children.<sup>121</sup> Just why needed fundamental reform of the assignment system escaped the Matrimonial Commission is mystifying; it clearly should have

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120. See Guggenheim, *Critique*, *supra* note 1, at 808. Professor Guggenheim's experience parallels mine; on one occasion, for example, the court denied my motion to represent teenage children, whose reasonable position had been rejected by the assigned law guardian, on the ground that I would not be a "neutral" participant.

121. I realize that the law guardian directors are nevertheless part of the court system, although removed from the trial courts. Hence the system would not conform strictly to the NYSBA standards. I also realize that the adult representation system is far from perfect, and in many respects law guardian representation is superior. All I am suggesting is that in this respect the adult assigned counsel system merits replication.

formed part of any prescription to afford children meaningful representation.

### C. *Oversight Responsibilities*

The final component of New York's children's representation structure which merits discussion is the oversight responsibility of the Office of Court Administration or, more accurately, OCA's Board of Directors, the Administrative Board.<sup>122</sup> Statutorily, the law guardian system is envisioned as one integrated statewide organization.<sup>123</sup> To accomplish the goal of a unified system, while maintaining a regional presence throughout the state's four departments, specific authority is granted to OCA, while other functions may be delegated to the Appellate Divisions. However, Appellate Division authority is subject to administrative board standards and oversight. Hence, the Appellate Division law guardian panels and contracts are "subject to the approval of the administrative board of the courts."<sup>124</sup> The overarching provision is Section 246 of the Family Court Act:

The administrative board of the judicial conference [now OCA] may prescribe standards for the exercise of the powers granted to the appellate divisions under this part and may require such reports as it deems necessary.<sup>125</sup>

The section has never been implemented. There exist no statewide standards, and as far as I know, the Administrative Board has never exercised its right to require reports. Instead, each Appellate Division has gone its own way, exercising near plenary power in designating panels and entering agreements with attorneys, although, OCA has on occasion entered into agreements with legal aid societies to replace Appellate Division directed representation. More critically, the determination of the type of representation to be provided in each county, and in each court (Family and Supreme), has been made on an ad

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122. The Administrative Board of the Courts includes the Chief Judge of the Court of Appeals, as chair, and the four Appellate Division presiding judges. See N.Y. CONST. art. 6, §28.

123. See *supra* Part I.

124. N.Y. FAM. CT. ACT § 243(b) (McKinney 1999).

125. *Id.* § 246.

hoc basis, with no apparent statewide process and in the absence of articulated standards.

Section 243 of the Family Court Act provides three distinct methods to provide representation: a) an OCA agreement with a legal aid society, b) an Appellate Division agreement with “qualified attorneys,” and c) a panel system.<sup>126</sup> Who determines which of the three very different arrangements will be implemented in each of the state’s sixty-two counties? The answer is obvious if one reads the statutes: The Administrative Board, as implemented by OCA. However, in forty-five years OCA has never published or otherwise expressed standards to determine that significant issue, and has published no reports to guide the bar and the public. For forty-five years Suffolk County law guardian services have been provided by full time law guardians under an OCA contract. However, in neighboring Nassau County, demographically almost identical to Suffolk, the panel system has been used exclusively. There may be a reason for the dichotomy (other than historical accident), but, if so, the reason has never been published or otherwise explained. To cite one additional example, several different organizations provide law guardian services in New York City, together with panel representation (and “super panel” representation provided by “private pay” attorneys). That, too, appears to be largely ad hoc, with organizations added as law guardian assignments expanded into heretofore unserved areas, such as foster care and child custody. What is missing is a coherent plan with appropriate analysis and justifications.

These examples could be multiplied across the state. There is nothing inherently wrong when different modes of representation are employed, or different organizations provide services within one geographic area. In fact, one could argue that multiplicity is healthy. But that cannot justify the absence of articulated reasons, or the lack of promulgated standards which may be reviewed and ultimately replicated in similar situations.

Of course, the need for statewide standards, practices, and oversight extend beyond the determination of the mode of representation. One example is individual attorney caseload limits. Presently, a child’s attorney may maintain a virtually unlimited

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126. *Id.* § 243.

caseload. Another example is the ability to rectify systemic deficiencies through class action or special litigation. In New York City, JRD maintains a special litigation division, financed as part of the OCA agreement. However, that capability is sorely missing throughout the remainder of the state. Perhaps JRD could undertake statewide responsibility in that limited area, or a statewide office to mount systemic challenges might be funded separately.<sup>127</sup> A law guardian backup center to provide independent professional assistance would also constitute a major improvement, one which is squarely within the Administrative Board's purview. Today a panel law guardian who confronts an unusually complicated or novel issue has nowhere to turn.<sup>128</sup> Lastly, the current law guardian disciplinary system is totally ad hoc; the applicable procedures vary, and a child, a parent, or any other interested party cannot possibly know where to file a complaint or how a complaint will be determined. Statewide substantive and administrative rules, promulgated by OCA, and perhaps administered by the appellate divisions, could satisfy that unmet need.

The above examples are only illustrative. The essential fact is that in forty-five years the statutorily intended statewide authority remains unfulfilled. The Matrimonial Commission could have achieved much good by addressing the issue and recommending that, at long last, the OCA exercise its authority to establish standards and to supervise the unified New York State system of providing children's representation.

### Conclusion

Professor Guggenheim entitled his article "A Law Guardian by Any Other Name," reflecting the Matrimonial Commission's recommendation that the appellation "law guardian" be

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127. A few examples of possible litigation which is beyond the capabilities of individually paid attorneys or small county organizations include (a) the practice of detaining children far from their homes in violation of their right to assist in their defense (there exists only five secure detention facilities outside New York City); or (b) extended delays in implementing the placement of children.

128. A law guardian backup office (modeled in the still active criminal defense backup center) was briefly funded by the state legislature in the 1980s, but was abolished when the annual appropriation was not renewed despite its success and popularity within the law guardian community.

changed to “child’s attorney.”<sup>129</sup> The recommendation should be implemented, terminating decades of needless confusion.<sup>130</sup> Several additional Commission proposals are meritorious, including the adoption of statewide standards of representation and the abolition of clearly invalid practices, such as *ex parte* communications between children’s attorneys and the courts.

The Commission recommendations are nevertheless largely cosmetic. Unfortunately, the sole substantive recommendation is the legitimization of the “private pay” system—the Commission would have been well advised to propose the opposite. Of greater significance, the Matrimonial Commission essentially punted regarding the essential question of the child attorney’s role and responsibilities, endorsing conflicting standards, adding a new dose of confusion by raising the “fiduciary” issue, and advocating further unnecessary study. Moreover, the Commission’s overly brief law guardian section omits entirely any mention of systemic problems, including the problematic appointive procedures and the long neglected, albeit necessary, adoption of statewide standards to guide the selection and conduct of attorneys who provide representation to society’s most vulnerable citizens.

To return to my opening theme, all one has to do is read the original statutes which established, and still govern, law guardians (or, if renamed, children’s attorneys). The message is clear, provided the reader disregards the decades of practice and case law aberrations. An attorney for a child is simply an attorney, one whose responsibilities are to protect the client’s interests and attempt to achieve the client’s goals, as refined through consultation and realistic legal assessments. The overall statutory structure, a sophisticated allocation between statewide responsibilities (to be enforced by OCA) and significant authority delegated to the appellate divisions, remains a viable blueprint—but has never been implemented in a meaningful manner. There is no need for additional study, or for new substantive legislation. We need only the courage to follow the original scripture.

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129. See Guggenheim, *Critique*, *supra* note 1.

130. The proposal is not novel—for several years the New York State Bar Association has advocated the same.

The Matrimonial Commission should be commended for recommending and supporting several bold initiatives, including the enactment of no-fault divorce, the encouragement of alternate dispute resolution techniques such as mediation, the substitution of "parenting time" for visitation, and the expansion of parent education programs. It is indeed unfortunate that the Commission's constructive approach stalled when it reached the very significant subject of children's representation. I end by reiterating my agreement with Professor Guggenheim's concluding remark: "The Commission missed an important opportunity to make a lasting contribution to this important area of practice."