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Committee on Children and the Law

**Law Guardian Representation
Standards
Volume II: Custody Cases
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INTRODUCTION

The first edition of the child custody standards and commentaries was adopted and published by the New York State Bar Association in 1992. In the subsequent years the number of custody and visitation cases in which a law guardian is appointed has increased substantially, in the family court and in the supreme court. Although appointment remains discretionary, law guardian participation is now virtually routine (and a failure to appoint may constitute an abuse of discretion). So too, in the past few years case law has refined and more clearly delineated law guardian responsibilities.

Hence, in 1999, a second edition was published, with minor revisions to the original standards to reflect the then current practice. The standards were also slightly modified to be consistent with those adopted with respect to other cases in which law guardians are assigned, such as child protective proceedings, though, of course, the unique aspects of custody litigation were addressed and discussed.

The current revision, which also leaves virtually the entirety of the original standards and commentaries unchanged, has been undertaken to reflect more clearly the consensus that has emerged since the last edition that the law guardian must be regarded as the attorney for the child. As an attorney representing a child-client, the law guardian is subject to the same ethical requirements as any other lawyer, including constraints on ex-parte communication, protection of client confidences and secrets, conflicts of interest and becoming a witness in the litigation. As with all lawyers, law guardians are required to discharge their duties in a manner that addresses the needs and circumstances of their clients, and to bear continuously in mind that "[t]he responsibilities of a lawyer may vary

according to the intelligence, experience, mental condition or age of a client...." (EC 7-11)

The custody representation standards apply in every custody or visitation dispute between private persons (usually the parents, though a non-parent may be involved). They are not meant to apply to actions when the government or a child care agency is a party, although several principles, such as interviewing and case development, are of course relevant to both public and private custody proceedings.

The standards apply to private custody or visitation disputes regardless of the court in which the proceeding is pending; hence, they apply to the supreme court as well as the family court. They are applicable regardless of whether the attorney for the child is technically designated and called a "law guardian" or "counsel" (in some supreme court custody proceedings, the attorney is called "counsel for the child"). When proceedings are in more than one court, the law guardian should request appointment to represent the child in all proceedings for continuity in representation. For purposes of this publication, the terms "law guardian" and "counsel" are synonymous and are used interchangeably. The Standards also augment and supplement the Code of Professional Responsibility, which governs every attorney; see, for example, EC 5-1 and DR 4-101 concerning loyalty and confidentiality considerations.

The Court of Appeals has held that there exist no rigid rules or absolutes governing custody determinations; Friederwitzer v. Friederwitzer, 55 N.Y.2d 94, 477 N.Y.S.2d 893 (1982). Although many factors must be considered, the paramount standard is the best interest of the child; Matter of Nehra v. Uhlar, 43 N.Y.2d 242, 401 N.Y.S.2d 168 (1977). Neither parent is presumptively entitled to custody; Dom. Rel. L. §240.

Custody cases are frequently complex, involving multiple issues. They are also notoriously adversarial - the parties are litigating a highly emotional, bitterly contested dispute. The child is often caught between two loving parents. The law guardian stands with the child, assigned to represent his interests, convey the child's wishes, and protect the young client.

The law guardian may face an intrinsic conflict between a child's stated desires and what the attorney perceives to be the child's interests and well-being. To the greatest extent possible, any conflict should be resolved by working closely with the client in developing the client's position, although age and maturity may be taken into consideration when determining the weight to ascribe to a child's desires. It must be recognized that some tension may exist when wishes do not seem to conform to a child's apparent best interests. However, when the child is of sufficient age and maturity to formulate a position, the law guardian must advocate the child's position. The law guardian should avoid actions or positions based on pre-conceived notions about sexual, racial or class roles or stereotypes, and seek to protect the child's interests without trying to impose the attorney's own value system or sociological theories on the child or family.

Once assigned, the statutes and case law contemplate that the law guardian becomes a full and vigorous participant in the proceeding. The law guardian should be served with all documents exchanged between the parties. The law guardian should initiate and respond to discovery demands and motion practice, and should be a participant in all conferences, negotiations and hearings. The law guardian should also consider retaining independent experts. At trial, the law guardian should take an active position, which may entail presenting relevant evidence and cross-examining other participant's witnesses. Throughout, the law guardian should be a strong advocate for the child. Once all the attorneys have presented their clients' stated wishes and all facts have been presented to the court, it is for the court to determine what is in the child's best interests.

Advocacy should not be limited to custody or visitation. The child's material needs are often an integral part of the litigation and should always be a concern of the child's attorney. Of equal significance may be child protection issues.

A law guardian frequently represents siblings who are involved in custody litigation and the standards are applicable whether the attorney represents one or several children. However, the law guardian should be sensitive to the existence of a conflict or potential conflict, should carefully evaluate any potential conflict and, when appropriate, request that the court appoint a separate attorney to represent a sibling. The standards are

applicable regardless of the nature of the dispute, whether it involves an initial custody determination, a modification, a petition for visitation, or an alleged violation of an earlier order.

The standards accordingly address a broad range of issues. However, not every guideline is relevant to every case. The law guardian should seriously consider each standard in the context of the particular proceeding, and should apply those standards which are relevant and appropriate to the specific case. Attorneys should also consult the similar and consistent Summary of Law Guardians' Responsibilities published by the Appellate Division Law Guardian Programs.

LAW GUARDIAN REPRESENTATION STANDARDS: CUSTODY CASES
WITHOUT COMMENTARIES

PART A: PRELIMINARY STAGES

STANDARD A-1

The law guardian should interview and observe the child to ascertain the detailed facts relevant to custody, the child's wishes, the need for independent evaluations and the need for or appropriateness of interim judicial relief.

STANDARD A-2

The child should be advised, in terms the child can understand, of the role and responsibilities of the law guardian, including the obligation to preserve client confidences and secrets; the attorney-client privilege; nature of the proceedings; the child's rights; the court process; the possible consequences of the legal action; and how the child may contact the law guardian at any time during the course of the proceedings.

STANDARD A-3

The parents' or other party's attorneys should be advised of the role and responsibilities of the law guardian, including the law guardian's legal standing in the proceedings, and the law guardian's responsibilities to participate fully to protect the child's interests and to express the child's wishes.

STANDARD A-4

The law guardian should obtain and examine every available relevant document.

STANDARD A-5

The child's present home and any proposed home should be visited by the law guardian, whenever the law guardian deems it appropriate.

STANDARD A-6

The law guardian should interview the parties and any other relevant person, including, anyone with relevant knowledge of the child or the parties, as well as any potential factual or expert witnesses.

STANDARD A-7

The law guardian should apply for appropriate court orders to protect the child or obtain temporary relief, determine visitation, and limit repeated or unnecessary interviews or evaluations.

STANDARD A-8

The law guardian should participate whenever any party requests an interim court order which may affect the child.

STANDARD A-9

When appropriate, independent court ordered evaluations or studies should be requested.

STANDARD A-10

The law guardian should consider whether domestic violence may have occurred and, if so, the impact on the child; when appropriate, the law guardian should apply for appropriate court orders to protect the child or obtain relevant relief.

PART B: PRE-TRIAL

STANDARD B-1

All available potential evidence should be obtained and analyzed, including discovery documents, financial statements, expert evaluations and witness statements.

STANDARD B-2

The law guardian should develop a position and strategy in conjunction with the child concerning every relevant aspect of the proceedings.

STANDARD B-3

The law guardian should participate fully in pre-trial conferences and negotiations and should endeavor to resolve the case without the need for a trial.

STANDARD B-4

The law guardian should discuss the case periodically with the child.

STANDARD B-5

The law guardian should prepare thoroughly for trial.

STANDARD B-6

The law guardian should not submit any pre-trial report to the Court, but may submit legal papers and argue orally based on the evidence.

STANDARD B-7

The law guardian should not engage in any ex parte communication with the Court.

PART C: THE TRIAL

STANDARD C-1

When necessary, the law guardian should move for protective orders at the commencement of the trial.

STANDARD C-2

If appropriate, the law guardian should present a law guardian case, including independent evidence and witnesses.

STANDARD C-3

The law guardian should be familiar with the relevant records, reports and evidence; insure that necessary witnesses testify and relevant material is subpoenaed and introduced into evidence; and cross-examine witnesses.

STANDARD C-4

The law guardian should deliver a summation, and prepare any necessary memoranda of law.

STANDARD C-5

If the Court conducts an in-camera interview with the child, the law guardian should request that it be held in chambers with only the judge, the law guardian and a court reporter present and only after the law guardian has advised the child of the purpose, use, and confidentiality of the interview.

PART D: POST-TRIAL

STANDARD D-1

The law guardian should explain to the child, in terms the child can understand, the court's determination and its consequences, the rights and responsibilities of each of the parties, including the child's, the possible right to appeal, and the possibility of future modification.

STANDARD D-2

The law guardian should examine the court order to insure that it complies with the findings and disposition.

STANDARD D-3

If the Court's determination is contrary to the law guardian's position, after considering the wishes of the child, a notice of appeal should be filed and measures undertaken to assure that the appeal is perfected expeditiously. The law guardian should participate fully whenever any other party initiates an appeal.

STANDARD D-4

Whenever possible the law guardian should represent the child in any subsequent relevant proceeding, including a modification, a violation, or an enforcement action. The law guardian should also file a post-disposition motion, such as a modification or enforcement motion, whenever needed to protect or further the child's interests.

LAW GUARDIAN REPRESENTATION STANDARDS: CUSTODY CASES
(WITH COMMENTARY)

PART A: PRELIMINARY STAGES

STANDARD A-1

The law guardian should interview and observe the child to ascertain the detailed facts relevant to custody, the child's wishes, the need for independent evaluations and the need for or appropriateness of interim judicial relief.

COMMENTARY:

An initial client interview is of course crucial. The child's perceptions and factual descriptions concerning the role, relationship and specific activities of each parent (or other party seeking custody) are critical to formulating a law guardian position and structuring a litigation strategy (see Standard B-2). Of equal importance may be the child's knowledge and perceptions concerning intra-family relationships, such as conflicts between his or her parents or between the child and extended family members. The home environment and school history (if the child is of school age) are additional areas to pursue. In the initial and subsequent interviews, the law guardian should be concerned with protecting the attorney-client privilege and with maintaining client confidences and secrets. The law guardian should be prepared to defend the confidentiality of information collected from sources other than the client under the work product doctrine.

At the initial interview, in order to ascertain the child's position, the attorney should explain the proceedings, develop rapport, and raise specific factual questions. Topics might include the time each parent spends at home and with the child, what the child does at different times during the day, what the child does with each parent, the specific parenting tasks performed by each parent or other party, and who the child perceives to be the primary "parenting figure." The child's needs, interests, and his or her wishes should thereby become apparent, or at least significant issues may be illuminated.

As a general principle, this approach is usually much more appropriate than directly asking the child which parent he or she prefers to live with.

The law guardian should also explain the attorney-client relationship, including confidentiality. Whenever possible, the child's facts should be verified and compared with the positions and perceptions of the different litigants. But, regardless of the specifics and the age of the child (except the very young child who may not be able to articulate), the child's perceptions and views are always meaningful to the development of the case and to the attorney- client relationship.

Interviewing the child is not always an easy task, and may even be impossible when representing the very young client. However, the attorney may always observe his or her young client. The child's demeanor, possible health and the child's inter-action with the environment and with persons can thereby be evaluated. Observation may also suggest the need for independent evaluations (see Standard A-9).

Petitions involve children ranging in age from newborn to teenage. The applicable rules of professional responsibility take cognizance of the consequent ethical responsibilities:

The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. (EC 7-11).

Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of

understanding the matter in question or if contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. (EC 7-12).

Perhaps the most critical clauses are 1) that "...the lawyer should obtain from him [the child] all possible aid," and 2) that the disabilities of the client, including age or mental capacity "...casts additional responsibilities on his lawyer." A young child can surely be of aid to the attorney, even if the child's age or maturity precludes dispositive conclusions concerning the case or the child's interests. The responsibility is to secure and verify every salient fact. As a rough approximation, the attorney's "special" responsibilities are inversely related to the age and maturity of the client. The younger the child, the greater need to seek independent sources and assume a greater burden in speaking for the child (of course, children mature at different phases and the attorney must evaluate the maturity and abilities of the particular child, regardless of age).

Interviews with the child client are best conducted at an early date and at a location other than the courthouse. The law guardian's office is usually the preferable environment. It is also critical that the child be interviewed alone, without the presence of either parent or other persons, both to provide an environment where the child feels assured that his or her privacy and confidentiality will be protected and to protect the attorney-client privilege. The law guardian should also evaluate whether the child may have been "coached" by a parent or otherwise influenced to color the facts. However, observations of the child are usually best conducted at the child's home, perhaps as a part of the law guardian's home visit (see Standard A-5).

If the law guardian has not been assigned until subsequent to the first appearance date or, alternatively, has not been able to confer with the child, a brief adjournment should be requested. It is particularly important that temporary orders be briefly deferred, whenever practicable, so that the law guardian may interview the child and obtain information from every possible source.

Last, the initial interview is but the first step of a lengthy attorney-client relationship. Follow-up discussions are essential and the child should see the law guardian on an on-going basis throughout the litigation process.

STANDARD A-2

The child should be advised, in terms the child can understand, of the role and responsibilities of the law guardian, including the obligation to preserve client confidences and secrets; the attorney-client privilege; nature of the proceedings; the child's rights; the court process; the possible consequences of the legal action; and how the child may contact the law guardian at any time during the course of the proceedings.

COMMENTARY:

The initial interview should not be a one-way street. While the law guardian must elicit a great deal of information, the child must obtain and understand information concerning the proceedings, the law guardian's responsibilities, including the ethical obligation to protect client confidences and secrets, and the attorney-client privilege. The child should understand that the law guardian will not reveal the child's communications to the child's parents, the parents' attorneys, or the court. This is a particularly difficult task when the child is of tender age (and is of course impossible when the child is an infant). A mere recitation may be insufficient. The law guardian should enter into a dialogue and continue discussions until assured that the child has achieved an understanding of the proceedings, the consequences which may result, and the law guardian's responsibilities.

The law guardian should further advise the child that he or she may contact the attorney at any time and should provide the child with contact information. The child should understand that the proceedings may be lengthy and complex, and that any questions or concerns will be addressed by the law guardian.

STANDARD A-3

The parents' or other party's attorneys should be advised of the role and responsibilities of the law guardian, including the law guardian's legal standing in the proceedings, and the law guardian's responsibilities to participate fully to protect the child's interests and to express the child's wishes.

COMMENTARY:

Attorneys are frequently unaware of the role and responsibilities of law guardians. Even the term "law guardian" may be an unfamiliar one, particularly to attorneys who ordinarily litigate in the supreme court. It is accordingly important that the law guardian explain his or her functions to the parent's attorneys. A draft letter for this purpose is included at the end of this commentary. An additional draft letter is provided for parents appearing pro se, which includes a recommendation that the parents obtain counsel.

One critical aspect is the law guardian's standing, as counsel for the child, to participate fully. The basic rights of representation, such as the requirement of service of papers, the right to file motions and apply for court orders, and to subpoena witnesses and documents, should be clearly outlined. So too, the rights as counsel for the child to participate in conferences, to introduce evidence, call witnesses, cross-examine other parties' witnesses and to advocate a position merit explanation. In short, the law guardian should advise and remind other counsel that he or she must be treated as an attorney representing a party in interest. When necessary, the law guardian should follow-up by moving for appropriate judicial directives (for example, if the law guardian has not been served with motion papers, he or she should move to dismiss the motion or at least to defer a determination until the law guardian has been properly served and granted an opportunity to be heard).

The law guardian should also explain to other counsel the law guardian's responsibility to formulate a position in conjunction with the child (see Standard B-2) and to articulate and otherwise support that position before the court. The statutory responsibility to express the child's wishes and the responsibility to protect the child's

interests, moving for protective court orders when necessary (see Standard A-8), should be clarified at the earliest practicable date.

Sample introductory letter to attorneys for parents:

I have been appointed to represent [name of child, children] in [case]. Because they have recently been revised, I want to bring your attention to the New York State Bar Association Law Guardian Representation Standards: Vol. II: Custody Cases, ___, 2005 (available at www.nysba.org). The Standards explain my role and responsibility in detail.

The Standards make clear that I am expected, as counsel for the [child, children] to participate fully in the proceedings to protect the [child's, children's] interests and to advocate a position in accordance with the [child's, children's] wishes. Further, I am obligated to protect my client's confidences and secrets. I have the right to file motions, apply for court orders, subpoena witnesses and documents. I should be treated as an attorney representing a party in interest, which includes service of papers relating to this case. I expect to participate fully in pre-trial conferences and negotiations. I am expected to formulate a position in conjunction with my client [s] and to articulate and support that position before the court. Please note that I am not to submit a pre-trial report to the court or engage in any ex parte communication with the court.

I will want to interview your client and will be contacting you to arrange this interview.

Sample introductory letter to parents who are pro se:

I have been appointed to represent [name of child, children] in [case]. I am neither your attorney nor the attorney for the other [parent or other claimant]. I recommend that you secure an attorney to represent you.

In case you are unfamiliar with the role of the [law guardian, counsel for the child], I want to bring your attention to the New York State Bar Association Law Guardian Representation Standards: Vol. II: Custody Cases, ___, 2005 (available at www.nysba.org). The Standards explain my role and responsibility in detail.

The Standards make clear that I am expected, as counsel for the [child, children] to privately interview the [child, children], to participate fully in the proceedings to protect the [child's, children's] interests and to advocate a position in accordance with the [child's, children's] wishes. Further, I am obligated to protect my [client's, clients'] confidences and secrets and to not reveal them to you or anyone else. I should be treated as an attorney representing a party in interest, which includes service of papers relating to this case. I expect to participate fully in pre-trial conferences and negotiations. I am expected to formulate a position in conjunction with my client [s] and to articulate and support that position before the court. Please note that I am not to submit a pre-trial report to the court or engage in any ex parte communication with the court.

I will want to interview you and will be contacting you to arrange this interview. [(If letter is to the custodial parent) I also will be contacting you to arrange an interview with the [child, children].]As I mentioned above, I recommend that you secure an attorney to represent you.

STANDARD A-4

The law guardian should obtain and examine every available relevant document.

COMMENTARY:

The need to study salient documents is clear. Initial papers include the petition or complaint and any cross-petition, answer or cross-complaint. It is from these primary

documents that the law guardian may first glean the nature of the case, the parties' positions, the alleged facts upon which a claim is based and the child's age, family relationships, and the child's residence. Additional court documents may include motions or applications for temporary or protective orders or financial documents. If the proceeding is one for modification of an earlier decree, the law guardian should review the original case file and records; similarly, any prior cases involving the family should be reviewed. If needed, the law guardian should issue subpoenas duces tecum to quickly obtain important documents, and obtain releases from the parties, with the consent of counsel, to secure relevant information. When appointment is delayed, the law guardian should act expeditiously, quickly reviewing the entire court file, obtaining important documents, verifying information and conducting appropriate interviews.

STANDARD A-5

The child's present home and any proposed home should be visited by the law guardian, whenever the law guardian deems it appropriate.

COMMENTARY:

A home visit can constitute an important element in determining the child's interests and formulating a law guardian position (see Standard B-2). The child may be interviewed or observed in his or her usual environment. If the child is spending time in more than one home, the law guardian may decide to visit each household or family unit. The law guardian should plan to protect any information obtained from the home visit under the work product doctrine. If needed, the law guardian may ask the court to order a home study to be conducted by a person who could qualify as an expert witness. See Standard A-9.

STANDARD A-6

The law guardian should interview the parties and any other relevant person, including any one with relevant knowledge of the child or the parties, as well as any potential factual or expert witnesses.

COMMENTARY:

Custody cases are frequently complex, involving hotly contested facts and widely differing perceptions. They are also very emotional and hard fought. For these reasons, and to formulate a position based on accurate facts, the law guardian should attempt to interview every person who may offer relevant information. Interviews may be of special importance in light of the limited discovery techniques customarily employed in custody cases; for example, depositions or interrogatories are rarely utilized.

The parents are obviously important parties and should be interviewed, with their attorney's permission, as well as any non-parent party who seeks custody. Parents are normally represented by counsel and it would be inappropriate to interview the client without counsel's consent, which is frequently given.

In addition to salient factual information, the parent should be asked specific questions concerning his or her detailed plans for the child. Where the child will live, the specific accommodations for the child, specific parenting functions, school plans, the parents' work schedule, day care, the manner in which the parent will address the child's special needs, and the parent's life style are several of the topics which should be covered. In many cases it may also prove useful to observe each party with the child; such an interview should take place after interviewing the child and the parents separately. When there is hint that domestic violence has occurred in the case, the law guardian should specifically inquire and interview the child, the parties, and, if appropriate, other possible witnesses concerning the possible presence of domestic violence, whether physical or verbal.

Other persons may also shed considerable light on the case. Collateral relatives, such as grandparents, may provide useful information and insight. School officials and child care personnel frequently possess important knowledge concerning the child. And mental health professionals, such as psychiatrists or psychologists, may have been provided for diagnostic or therapy service. Any person who may provide useful information or may be a potential witness in the case should be interviewed, including any persons who may reside in the proposed custodial home.

Whenever needed, parental authority for third parties to release information to the law guardian should be requested. If denied, the law guardian may draw appropriate conclusions, discuss the matter with counsel for the relevant party, and may subsequently seek a judicial subpoena for relevant records or testimony.

STANDARD A-7

The law guardian should apply for appropriate court orders to protect the child or obtain temporary relief, determine visitation, and limit repeated or unnecessary interviews or evaluations.

STANDARD A-8

The law guardian should participate whenever any party requests an interim court order which may affect the child.

COMMENTARY:

As a full participant in the proceedings, assigned to represent the child's interests, the law guardian should quickly determine whether the child needs temporary or protective relief and, if so, should move for appropriate measures. Children may unfortunately become pawns in a matrimonial action, to be fought over or perhaps used as bargaining chips. The law guardian should move expeditiously to protect his or her client. The law guardian may move for the appointment of an independent expert in lieu of adversarial experts (see Standard A-9), or may move to limit the number of experts or the number of diagnostic sessions, to protect the child against repeated or unnecessary evaluations. Custody actions frequently become a "battle of the experts," with each side retaining expert psychologists, psychiatrists, counselors, social workers, or any combination thereof. While evaluation may be necessary, the child should not be subjected to continuing rounds of visits with different experts, paid to develop specific positions. Where child abuse is alleged in the course of a custody action, the law guardian may want the court to order an independent evaluation by child protective services and may need to apply to stay the custody action until the investigation is completed. When appropriate, the law guardian should also determine the need for and

immediately seek a protective order limiting visitation or contact between child and the alleged abuser.

Further, issues of temporary visitation, therapy, protection, or support frequently arise. The law guardian's role is not limited strictly to custody (see Standard B-2), and the child's attorney should do everything possible to assure every aspect of the child's needs. The law guardian should be a full participant (Standard A-8) and should not hesitate to take a position, to initiate a request for temporary orders, or to move for modification of existing interim orders. Temporary orders may remain in effect for several months and may structure the litigation (for example, the parent who has temporary custody may have an advantageous negotiation position). It is important that the child's interests be assessed and advocated at the earliest possible date. (See also Standard B-3 concerning participation at conferences or negotiations.)

STANDARD A-9

When appropriate, independent court ordered evaluations or studies should be requested.

COMMENTARY:

The most important evidence in a custody dispute may be reports and testimony by independent diagnostic experts. Professionals retained and paid by a party may be biased or are often suspected of bias, and expert testimony offered by the two opponents often conflict. The law guardian, who represents only the child, may secure court ordered independent evaluations. Examples include psychiatric, psychological, educational, medical, and social work evaluations, as well as a probation investigation or a probation "home study." The court may order any of these, or any combination, at the request of the law guardian, or sua sponte. The law guardian should not hesitate to move for appropriate independent evaluations at the earliest practical date.

STANDARD A-10

The law guardian should consider whether domestic violence may have occurred and, if so, the impact on the child; when appropriate, the law guardian should apply for appropriate court orders to protect the child or obtain relevant relief.

COMMENTARY:

Domestic violence is a relevant and important consideration in any custody or visitation proceeding. And violence may have affected the child, regardless of whether the child witnessed such events. In recognition of the importance of domestic violence, the Legislature has mandated that whenever a party in an action concerning custody or visitation pleads and proves that another party has committed an act of domestic violence, “the court must consider the effect of such domestic violence upon the best interests of the child”; D.R.L. § 240(1)(a). In the rare case when the person seeking custody or visitation has been convicted of a homicide, the court must apply the special provisions of Section 240(1-c). It is the law guardian’s responsibility to independently consider allegations of domestic violence. Equally, it is the law guardian’s responsibility to raise, argue, and prove such acts even in the absence of a party’s allegations, whenever consistent with the law guardian’s position and strategy on behalf of the child (see Standard B-2).

The law guardian may assess possible domestic violence by reviewing relevant documents, by interviewing the child (Standard A-1), by interviewing the parents or other relevant persons (Standard A-6), or asking for an evaluation (Standard A-9). Whenever indicated, the law guardian should apply for appropriate protective or other orders, temporary or permanent (see Standards A-7 and B-2), and present evidence to prove the presence of violence and its effect on the child. If necessary, experts may be retained for that purpose.

The law guardian should also consider any acts of domestic violence when arguing and proving a specific custody and visitation disposition. For example, when indicated, the law guardian should advocate supervised visitation (including the amount, duration, and conditions), or, in cases involving serious violence, advocate that the court

preclude any visitation.

PART B: PRE-TRIAL

STANDARD B-1

All available potential evidence should be obtained and analyzed, including discovery documents, financial statements, expert evaluations and witness statements.

COMMENTARY:

Assembling and analyzing relevant evidence constitutes an important first step in determining the law guardian position and plan (Standard B-2), participating in negotiations (Standard B-3), and preparing for trial. As the case progresses, medical or mental health evaluations will be completed, school reports will become available, interviews will be completed, and documentary evidence produced. Affidavits filed by a party (or other person), perhaps to support temporary relief, will also be available, as well as documents relating to any prior litigation.

It is important that the law guardian obtain and review every source of information which may be relevant to custody or visitation. If, for example, custody is one aspect of a divorce action based on alleged cruelty, the allegations and documents to support a fault divorce may well be relevant to the issue of parental fitness and best interests of the child (and false allegations may be as significant as valid charges). Most custody disputes also involve the material needs of a child, and may involve maintenance or a property distribution. The required detailed financial statements, including the net worth statements, are crucial to determine the material needs of the child and may be important in determining a parent's motivation and sincerity. All relevant documents should be obtained and reviewed in light of the child's wishes and interests. The law guardian should also obtain the names, qualifications and summary of expected testimony of expert witnesses.

Cooperation may be enhanced by advising the attorney of the law guardian's role and responsibilities (see Standard A-3). Gentle persuasion may yield information

which would be unavailable as a matter of right (the likely testimony of a witness called by a party, for example). When necessary, the law guardian should move for court ordered disclosure of relevant material well before the scheduled trial date.

STANDARD B-2

The law guardian should develop a position and strategy in conjunction with the child concerning every relevant aspect of the proceedings.

COMMENTARY:

The desirability of shaping and advocating a complete law guardian plan constitutes a major theme throughout the Bar Association Standards for Representing Children. Given the importance of a custody determination and the wide latitude of the court in determining custodial, visitation and financial issues, the need for such development is manifest. Indeed, the formulation of a comprehensive position and plan may be the paramount law guardian responsibility, for it represents the key to effective advocacy necessary to protect the child's interests.

Development should have commenced at an early date, although the goals and specifics may be refined and updated as the litigation progresses. The ingredients include the results of multiple interviews with the child (Standards A-1 and B-4), interviews with the parents and other relevant persons (Standard A-6), home visits (Standard A-5), records and documents available to the attorney, and relevant evaluations including independent evaluations, ordered by the court (Standard A-9).

When the child is too young to articulate his or her wishes or provide assistance to counsel, the law guardian must of course determine the child's interests independently. As other attorneys in the case, the law guardian should advocate a position on behalf of the client. When the child is of sufficient age to articulate his or her desires and to assist counsel, the plan should be developed with the child's cooperation and agreement. The child often has a keen insight concerning his or her needs. If the child is of sufficient age and maturity, the court must elicit his views (see Standard C-5).

The law guardian's position should be developed through an ongoing and

extended attorney-client dialogue. Children may be reluctant to indicate their wishes when confronting a dispute between two parents; the attorney should encourage a meaningful dialogue entailing a discussion of every option and the advantages as well as the disadvantages of each possibility. The child should feel free to articulate his views and concerns, but should never feel compelled to choose between parents.

Further, the custody litigation need not be presented as an all or nothing choice. Unless patently unfit, each parent is entitled to a meaningful relationship with his or her child (and a non-parent may be entitled in appropriate circumstances). 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, the possibility of modification as the child matures, and, in some cases, an agreement for joint physical custody merit discussion whenever appropriate. The child should also be advised that custody is never a permanent award, although it is not lightly or frequently changed. The child should not feel that he or she must "elect" a custodial parent but, should be encouraged to speak in terms of where he or she wishes to live or should live, with appropriate measures for a continued meaningful relationship with the "non-residential" parent. The legal positions of each parent should be explained and ongoing parental responsibilities should be discussed, including visitation rights of the "non-residential" parent even when the child would prefer the absence of visitation. It may be appropriate to tell the older child of an evaluator's findings.

The prognosis of the litigation may also be explained and realistic alternatives offered. For example, the reluctance of the court to award custody to an unfit or less fit parent even if the child wishes to live with that parent should be discussed, as well as the alternative of advocating liberal visitation and joint decision making. In most cases it is thereby possible to articulate a position with which both the law guardian and the child agree, one which will further the child's needs and interests without seriously compromising his or her desires.

In developing the child's position, the law guardian should advise the child, that neither the child nor the law guardian will decide the case and determine who the custodial parent will be. The decision is made by the judge after considering all the relevant evidence, including the child's wishes.

When representing more than one child the law guardian should, as early as possible, determine carefully whether a conflict or potential conflict exists. If so, the law guardian should request that the court appoint separate attorneys for the children.

Last, it is important that the law guardian plan include every aspect of the litigation which is relevant to the child. Custody, visitation and decision making are of course essential components. When appropriate, protection of the child should be included (for example, the need for a protective order or curtailed visitation). Of equal significance are the material needs of the child, including housing arrangements, medical insurance and child support. The law guardian should carefully develop a plan encompassing every relevant element.

STANDARD B-3

The law guardian should participate fully in pre-trial conferences and negotiations and should endeavor to resolve the case without the need for a trial.

COMMENTARY:

Custody trials are lengthy, bitter and divisive. Tension between the parents is further exacerbated and the child may need to testify (even in-camera testimony may be traumatic to the young client). Pre-trial conferences or informal negotiations between the

attorneys are of course a common occurrence and may succeed in resolving the case. In fact, most custody disputes are settled at the pre-trial level.

The law guardian's full participation is essential and should encompass every potential resolution method, from phone calls to formal conferences; in some cases, mediation should be suggested as an alternative to litigation. Whatever the forum or format, every issue should be raised. The law guardian should be an active participant when discussions are proposed by the court or counsel to a party, and should initiate discussions whenever a resolution may be possible.

One key to meaningful negotiations is the law guardian position and strategy (Standard B-2). A plan should be developed before serious discussions are held and should guide the law guardian throughout the litigation process. In most cases the law guardian's proposed outcome and the child's desires should be presented to the other contestants, along with supporting evidence.

Another key is the interests and wishes of the child, which should be integrated into the plan (see Standard B-2). These, and only these factors, guide the law guardian. Any proposed settlement which is deleterious to the child should be rejected, even if both parties to the custody dispute agree. Compromise may be possible and every effort should be made to resolve differences, provided they do not hurt the child. Even a trial, with the almost inevitable difficulties, is preferable to a settlement which goes against the child's interests and wishes.

STANDARD B-4

The law guardian should discuss the case periodically with the child.

STANDARD B-5

The law guardian should prepare thoroughly for trial.

COMMENTARY:

As noted previously, in a custody case the law guardian and the child enter an ongoing and sometimes lengthy relationship (see the commentary following Standard A-1). Continued discussions with the client increase in importance as the litigation moves

from the preliminary stages through negotiation and possible trial. Standard B-4 is intended as a reminder of the importance of close communications as the case progresses.

As a full participant, the law guardian should also thoroughly prepare for trial. The nature of preparation depends upon the case. Examples include pre-trial discussions with experts who will be called upon to testify, and the preparation of witnesses whom the law guardian may call to testify. The law guardian should also research the appropriate law, draft an opening statement, prepare any appropriate motions which may be made during the trial, and draft appropriate memoranda of law.

STANDARD B-6

The law guardian should not submit any pre-trial report to the Court, but may submit legal papers and argue orally based on the evidence.

STANDARD B-7

The law guardian should not engage in any ex parte communication with the Court.

COMMENTARY

The law guardian is an attorney, assigned to represent the child. Hence the law guardian is an advocate, participating fully in motion practice and the pre-trial procedures (see, e.g., Standards A-7 and A-8). At trial, the law guardian should introduce relevant evidence, subpoena relevant material, and cross examine witnesses (see Part “C”). In short, the law guardian acts as an attorney and should use every lawyering skill appropriate to further a result favorable to the child client’s interest and position.

In some cases, a law guardian has been requested by the Court to submit a separate pre-trial report and recommendations, or the attorney has elected to submit such a report. Frequently, the report includes hearsay statements, summaries of out of court interviews, impressions, or factual conclusions. The preparation and submission of such a report is inconsistent with the purpose and role of an attorney. The law guardian is not a social worker or a probation investigator. If expert assistance or reports are needed or desirable, the law guardian should request that the Court order the relevant expert

evaluation or study; see Standard A-9. The law guardian may also independently retain an expert, such as a social worker or psychologist, to conduct a study and prepare a report. Expert reports may be introduced as evidence, and the expert may be called as a witness. However, the attorney should never assume the role of an expert witness.

Further, a law guardian who submits a report and recommendation opens the possibility that he will or should be called as a witness. A professional who has submitted a report may be called for testimony and cross-examination by any party, and may be questioned, under oath, concerning the factual basis of the report and the specific reasons for a conclusion, as well as questions based on hypothetical facts. Any party may also try to refute a witness's testimony. Presenting testimony as a witness is thus incompatible with legal representation. And the possibility raises a conflict under DR 5-102 of the Code of Professional Responsibility, which provides that "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on behalf of the client, the lawyer shall withdraw as an advocate before the tribunal...." A law guardian who submits a pre-trial report and recommendations may have no choice but to withdraw as law guardian, or may be subject to a disqualification motion.

The canons of professional responsibility also proscribe any ex parte communication, oral or written, with the Court; see EC 7-35. As an attorney, the law guardian should never submit any written material to the Court without promptly delivering a copy to other counsel (or the party, if unrepresented), and should never orally communicate with the Court regarding the case without notice to the other attorneys or parties.

A law guardian may of course advocate a position and discuss the relevant available evidence and facts at pre-trial conferences and negotiations (Standard B-3), in making closing arguments, or in arguing a motion. But that is different from submitting a report. The law guardian, as an attorney, may also prepare and submit a post-trial memorandum summarizing and discussing the evidence in the record, making legal arguments, and advocating a disposition (see Standard C-4). A post-trial memorandum, unlike a pre-trial report, is based on testimony and other evidence found in the record.

PART C: THE TRIAL

STANDARD C-1

When necessary, the law guardian should move for protective orders at the commencement of the trial.

STANDARD C-2

If appropriate, the law guardian should present a law guardian case, including independent evidence and witnesses.

STANDARD C-3

The law guardian should be familiar with the relevant records, reports and evidence, insure that necessary witnesses testify and relevant material is subpoenaed and introduced into evidence, and cross-examine witnesses.

STANDARD C-4

The law guardian should deliver a summation, and prepare any necessary memoranda of law.

COMMENTARY:

One important law guardian responsibility is to protect the child. Hence the need to consider if a protective order is desirable and, if so, to apply for the relevant judicial decree. For example, a party may wish to call the child as a witness in open court. In almost all cases, the child's testimony in court would be inappropriate and any testimony should be in-camera (Standard C-5). In such event, an early judicial determination should be sought. Or a party may be pressuring the child to take a position or to testify in a specific way; such harassment may be prohibited by a protective order. To cite but one additional example, evidence which is of questionable relevance or validity but may be highly emotional can and should be barred by protective order.

As the child's advocate, the law guardian's interest is to insure that, to the greatest extent possible, all relevant facts, expert opinions, and records that support the law guardian's position are introduced into evidence, including, when relevant, evidence concerning domestic violence. Standards C-2 and C-3 thus encourage the law guardian

to be familiar with the possible evidentiary material (see Standard B-1), and to question and cross-examine witnesses whenever necessary for a full presentation. Similarly, as the advocate for the child, the law guardian should subpoena and call witnesses and present evidence.

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

STANDARD C-5

If the Court conducts an in-camera interview with the child, the law guardian should request that it be held in chambers with only the judge, the law guardian and a court reporter present and only after the law guardian has advised the child of the purpose, use, and confidentiality of the interview.

COMMENTARY:

A special law guardian responsibility is to protect the child against the usually intimidating and traumatic experience of testifying against his or her parent in their presence. Case law clearly supports the principle that as an alternative, in almost all cases the child may be interviewed in chambers with only the judge, the law guardian and a court reporter present.

If the child is very young, testimony is in all probability unnecessary and an in-camera interview may not yield useful information. For the older child, ascertaining the child's wishes through testimony or interview may be necessary and in fact is required by case law precedent. An interview should usually be held only in chambers with the law guardian seated next to his or her client. In exceptional cases, it may be appropriate

or beneficial for the older child to testify in open court. The law guardian should determine whether to call the child as a witness, and should request that the court conduct an in-camera interview, whenever appropriate.

The in-camera interview is a confidential proceeding except in extraordinary circumstances. The court should not be planning to reveal the content to parents' counsel or others. In very limited circumstances where previously undisclosed material information is disclosed by the child, the court may reveal the information to the limited extent necessary. If requested, the court may permit opposing counsel to propose written questions to be asked by the judge (of course the law guardian may object to a specific question). Because the format for in-camera interviews may vary, the law guardian should determine in advance what procedure the judge will be using. A stenographic record of the interview must be made, and the record sealed for appellate review (CPLR 4019). The attorney should thoroughly prepare the child for in camera interviews or testimony, advise the client of the nature of and purpose of the procedure, and the use and disclosure that may be made of the information and opinions she provides to the court.

PART D: POST-TRIAL

STANDARD D-1

The law guardian should explain to the child, in terms the child can understand, the court's determination and its consequences, the rights and responsibilities of each of the parties, including the child's, the possible right to appeal, and the possibility of future modification.

COMMENTARY:

Custody decrees are frequently complex, encompassing issues such as custody, visitation, special conditions or limitations, travel, decision making for the child, and child support. It is essential that the child clearly understand every aspect. As always in explaining complicated issues, the law guardian should engage in a colloquy with the child and continue discussions until assured that maximum knowledge and understanding has been reached. It is of particular importance that the child understands his or her

continuing relationship with each parent (or the non-parent party) and each parent's continuing responsibilities to the child.

Custody orders are never final and may be modified at any time until the child reaches majority. The child should understand this principle and know that the law guardian and the court are always available if, for example, his visitation or custodial needs should change, though the client should be advised that custodial changes are not easily made. Last, the child should be advised of his or her right to appeal (see Standard D-3) and the possibility of post-dispositional modifications (see Standard D-4).

It is also helpful to maintain communication with the child subsequent to the trial. Post-trial problems may thereby be ameliorated or appropriate legal action commenced.

STANDARD D-2

The law guardian should examine the court order to insure that it complies with the findings and disposition.

COMMENTARY:

Custody orders may be lengthy and often incorporate complicated provisions. For these reasons, the guidelines suggest that the law guardian examine any proposed order submitted for settlement and further examine the actual order when issued (a variance may be corrected by informal request or motion). If necessary, the law guardian should submit a counter-proposed order or amendment.

STANDARD D-3

If the Court's determination is contrary to the law guardian's position, after considering the wishes of the child, a notice of appeal should be filed and measures undertaken to assure that the appeal is perfected expeditiously. The law guardian should participate fully whenever any other party initiates an appeal.

COMMENTARY:

When the case has been determined by the Family Court or the Supreme

Court the law guardian has standing to initiate and argue an appeal; see e.g., Fam. Ct. Act §1120.

Accordingly an appeal to the appropriate appellate division should be initiated whenever the law guardian, after considering the child's wishes and desires, concludes that the court's determination is contrary to the law guardian's position and grounds exist upon which to base an appeal. The law guardian's position should have been developed at an early date, with the child's involvement and, when the child is of sufficient age to articulate his or her own desires and to assist counsel, with the child's cooperation and agreement; see Standard B-2. If necessary, temporary appellate relief should be requested, such as a stay of the custody or visitation order.

The decision to appeal is implemented initially by filing a notice of appeal. However, the law guardian should follow up by securing the necessary transcripts and perfecting the appeal or, alternatively, requesting that the appellate division appoint a new law guardian for that purpose (the law guardian should become familiar with the rules and practice of the relevant department). The law guardian appointment continues through appeal, regardless of which party initiates the appellate process (Fam. Ct. Act §1120). The attorney's responsibilities are to file the notice of appeal and either perfect the appeal or request that the court appoint separate counsel for that purpose.

Last, the attorney maintains responsibility when a different party appeals a decision. If a party appeals a decision from the Family Court or the Supreme Court, the law guardian should file a brief and participate fully at oral argument. Alternatively, the law guardian may move that the appellate division appoint a new law guardian for appeals purposes; an appropriate motion should be made shortly after the notice of appeal is filed.

STANDARD D-4

Whenever possible the law guardian should represent the child in any subsequent relevant proceeding, including a modification, a violation, or an enforcement action. The law guardian should also file a post-disposition motion, such as a modification or enforcement motion, whenever needed to protect or

further the child's interests.

COMMENTARY:

A custody determination may be in effect for many years, but is always subject to modification. Violation or enforcement actions may also be brought at any time. Continuity of representation is of great importance and, whenever possible, the law guardian should represent the child in any proceeding subsequent to the initial custody determination.

The law guardian also has standing to initiate a post-dispositional motion seeking a modification of the original order or the enforcement of the order. The attorney should not hesitate to do so whenever appropriate in the child's interests. The law guardian should also maintain communications with the child (see Standard D-1) and family, and may of course initiate inquires or otherwise stay abreast of the situation.

