



NEW YORK
CITY BAR

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**REPORT ON LEGISLATION BY THE
COUNCIL ON CHILDREN¹**

**S.5461-B
A.7805-B**

**Senator Schneiderman
M. of A. Weinstein**

AN ACT to amend the civil practice law and rules, the domestic relations law, the executive law, the judiciary law, the family court act, the public health law and the social services law, in relation to the representation of children.

THIS BILL IS APPROVED

The Council on Children of the New York City Bar Association is a diverse group of legal professionals representing eight City Bar committees and various child and family legal services and advocacy organizations. The Council strongly supports S.5461-B/A.7805-B, which would revise the statutory language “Law Guardian” to more accurately reflect the role of attorneys who represent children to be “attorney for the child.” By replacing the term “law guardian” with the term “attorney for the child” throughout New York State statutes, this bill takes an important step toward clarifying the role of the attorney for the child as an advocate, bound by all of the legal and ethical obligations owed by any attorney who represents a client.

The use of “law guardian” has caused undue confusion regarding the role played by an attorney who represents children. Too often, law guardian is believed to be a guardian *ad litem*, meaning that the attorney is expected to merely convey what she believes is in her client’s best interest rather than be a zealous advocate for her client.

This confusion regarding the role of attorneys who represent children is apparent in much of the reported case law. In one Appellate Division formulation, “the law guardian may act as champion of the child’s best interest, as advocate for the child’s preferences, as investigator seeking the truth on controverted issues, or may serve to recommend alternatives for the court’s consideration.” Matter of Plovnick v. Klinger 10 A.D.3d 84, 781 N.Y.S.2d 360 (2d Dept. 2004) quoting Koppenhoefer v. Koppenhoefer, 159 A.D.2d 113, 117 558 N.Y.S.2d 596 (1990)). It would be most difficult for an attorney to assume all of these (occasionally conflicting) roles in a single litigation. It is even more difficult for the other participants in litigation to determine which of these roles the law guardian is playing in a particular case.

In October 2007, the Chief Judge of the State of New York, in consultation with the Administrative Board of the Courts, and with the approval of the Court of Appeals, promulgated

¹ This report has been revised and reissued to reflect amendments made to the bill since the report was first issued in May 2009.

a new section 7.2 of the Rules of the Chief Judge, relating to the functions of the attorney for the child. That section uses the phrase “attorney for the child” to refer to a “law guardian,” and clarifies the role of the attorney for the child as an advocate for the child’s position, in all but the very limited number of situations in which the child lacks capacity for knowing, voluntary and considered judgment, or where following the child’s wishes is likely to result in a substantial risk of imminent, serious harm to the child. Therefore, the current governing doctrine in New York State makes it clear that the law guardian is the attorney for the child and not an investigative arm of the court or an advocate for the attorney’s perception of what would be in the child’s best interest. The proposed Bill would codify this doctrine.

S.5461-B/A.7805-B also reflects the prevailing standard within the legal profession. In June 2007, the Executive Committee of the New York State Bar Association (NYSBA) approved the Standards for Attorneys Representing Children in Child Protective, Foster Care and Termination of Parental Rights Proceedings, as drafted by the NYSBA’s Committee on Children and the Law. In those standards, the NYSBA rejects the use of the term law guardian “because the label is outdated and confusing to attorneys and parties alike.” The City Bar has long supported the need to codify a professional attorney-client model for the representation of children. The proposed Bill will help to ensure that every attorney in New York State understands his or her role when representing a child, and is prepared to zealously advocate for his or her client.

For these reasons, the New York City Bar Association supports S.5461-B/A.7805-B.

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