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EXPERT OPINION

## Custody Litigation: Growing Pains as Children’s Rights Get Bolder

A continued discussion on the surrounding issues involved with attorneys for children.

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By Robert Z. Dobrish | January 10, 2024 at 02:03 PM



For many years there has been controversy surrounding the use of attorneys for children. I myself recently had published (April 4, 2023) an article for this paper entitled “A Somewhat Modest Proposal for Custody Cases: Bring Back the GALs” calling for the return of the Guardians ad Litem to serve in an advisory role in custody cases.

In another article entitled “Raising Children’s Rights” (published here in February of this year), I warned that attorneys for children were encroaching upon the provinces of attorneys for the parents and might even one day be able to institute a custody proceeding in the name of the child.

More recently, Peter Galasso wrote an article for this publication critical of using AFCs in cases where an infant or toddler was involved. His article was responded to by four well respected AFC’s who, on Dec. 13, in this Journal, took issue with his suggestions.

At around the same time, Paul Feigenbaum wrote an article published here on Dec. 11, 2023 calling our attention to the decision of Justice Edmund Dane in the case of *TH v. GM*, which provided that exclusive occupancy might be granted in situations where a child appears to be harmed psychologically by the arguments occurring between parents that create tensions in the home.

In this article I would like to discuss how these several issues coalesce and might affect custody cases in New York, with particular attention to the role that children’s attorneys play.

At the current time, there are very few qualified professionals who are willing to serve as forensic examiners in custody cases. The few who are willing are expensive, overburdened and seem to take ages to produce their report. Part of the problem is that their reports form the basis for cross examination by the attorneys and often the examiner is forced to justify observations and conclusions that are difficult to explain and defend, particularly from a witness chair. Getting paid for services is another problematic area as at least one parent is generally in disagreement with the result and becomes a very reluctant payor.

Incidents where there have been tragedies resulting from domestic abusiveness sometimes have been blamed on flawed forensic reports and recent legislation and pending legislation is designed to require more training and more accountability for forensic examiners. This movement has resulted in even fewer mental health professionals being willing to serve as experts in custody cases.

Thus, there are presently significantly fewer resources available to assist the court in making a decision about custody, which is, probably, the most difficult one that must be made by a judge in a family matter.

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The AFCs argue that they are such a resource and are able to and do serve an important role as advisors. Certainly, they have a role to advise the court as to what their client—the child—wants. But there are serious questions relating to whether a child's wishes ought to be factored in and, if so, to what extent.

One issue relates to a child's age and brain development. Another issue is the extent of any influence on the child that may be actual or psychological, but in any case come from an outside source and may put pressure on the child to express a particular position about an issue. There are bonding, alignment and alienation issues that can influence choices and are sometimes characteristic of age and gender. These all should impact on the weight to be given to a child's preferences regardless of age, and there is a clear need to explore and understand why any child expresses any preference.

Case law provides that age is one of the critical determinatives as to the weight to be given to a child's preferences, the older the child the greater the weight. But adolescence is a tricky age and many would say that it is the most difficult time in a child's life for a divorce to happen and that some children react in a way that could be irrational and even harmful.

So far as young children are concerned, one has to wonder what an attorney can do to represent that child's wishes when those wishes cannot be articulated rationally. Usually if an adult had such a disability, a guardian would be appointed. Perhaps so should it be for a child.

The American Academy of Matrimonial Lawyers published standards for representing children in 1994, and revisited the issues with new standards in 2008, concluding that:

2.1...In the event that the court seeks to appoint counsel for children who lack the capacity to direct their representation, the lawyer should strive to refuse the appointment.

In its commentary, the standards assert:

The most serious threat to the rule of law posed by the assignment of counsel for children is the introduction of an adult who is free to advocate for his or her own preferred outcome in the name of the child's best interests.

We, as attorneys, are not trained to, nor are we born with, the ability to substitute our own judgment for that of the child. We are advocates not Solomons.

The AFC who substitutes judgment becomes an advocate for his or her own preferences which are often the result of biased thinking. But the AFC, unlike the forensic expert, the parent, the witness or the GAL, does not have to justify their judgement and is not subject to cross examination.

Our adversary system breaks down at the point where attorneys for the parties are unable to question those who influence the decisions, opinions, conclusions and recommendations which influence the result.

It is for these reasons that Peter Gallaso, myself and others have questioned the appointment of an AFC for a small child and instead, have recommended using Guardians ad Litem who can be cross-examined. And even in cases involving older children, it may be preferable to appoint a Guardian ad Litem who is NOT required to advocate the child's wishes but, instead, inquire regarding the child's best interests and be required to report and defend any conclusions.

That brings us to the Feigenbaum article about Judge Dane's decision, which ordered a party out of the home because of the harmful impact of feuding parents on a child. In that case it appears that the 13-year-old child claimed he had to lock his room to keep his father out, and the AFC supported the application of the mother for exclusive occupancy. That

is really all we know from the decision, one in which the wishes of a child brought about an exclusive occupancy decision. We do not have very much information about that child, and surely more information was available to Judge Dane and probably made a difference.

What we do know is that the Adverse Childhood Experience studies conclude that children are traumatized (and thereby scarred) by going through certain experiences and among them is abusiveness and disagreement in the home. Justice Ellen Gesmer addressed this issue decades ago when she sat in the matrimonial part and discussed it in some of her cases.

The decision by Judge Dane was a long time coming, and of great significance, both positive and negative. Positive in that it protects children who are in danger, but negative in that it gives children a power that if unbridled could create a runaway train.

We need to be careful when we involve children in the divorce process, despite the fact that custody cases involve them at the very heart. We must be very careful to understand that an attorney for the child is, or should be, an advocate for the child's wishes, which may or may not be in the child's best interests, and which should be explored and understood.

Judges do not like to decide what is in a child's best interests, and there is no data to suggest that judicial decisions in this area are either wise or just. They are only decisions, which must be made because the parents won't or can't do it themselves. Clearly, any process which moves the parents closer to making their own decisions for their own children is the better process, and when it is successful, the system will be better for it.

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