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## Guardian now 'attorney for the child'

**BY SARA STOUT ASHCRAFT**  
Daily Record Columnist

Those family law practitioners who also serve as law guardians are sometimes confronted with upset parties and counsel concerning just what the role of the law guardian is.

Based on the recommendations of the Statewide Law Guardian Advisory Committee, in October 2007 Chief Judge Judith S. Kaye issued an administrative order setting down the function of the law guardian as the attorney for the child. By substituting "attorney for the child" in place of "law guardian," Judge Kaye further defined the lawyer's role. (In this column, "attorney for the child" and the more familiar "law guardian" are used interchangeably.)

Although most law guardians have seen Judge Kaye's order, family law practitioners who are not members of the Law Guardian Panel may not be aware of it. It states: "Pusuant to the authority vested in me, and in consultation with the Administrative Board of the Courts, and with the approval of the Court of Appeals, I hereby promulgate, effective immediately [Oct. 17, 2007] a new section 7.2 of the Rules of the Chief Judge, relating to the functions of the attorney for the child, to read as follows:

"Section 7.2 Function of the attorney for the child.

(a) As used in this part, 'attorney for the child' means a law guardian appointed by family court pursuant to section 249 of the Family Court Act, or by the supreme court or a surrogate's court in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto.

"(b) The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: *ex-parte* communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation.

"(c) In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the

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attorney for the child must zealously defend the child.

"(d) In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position.

"(1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.

"(2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of

action that in the attorney's view would best promote the child's interests.

"(3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position."

Exactly what does the new section mean in practical terms?

- ♦ The law guardian is the attorney for the child. The classic attorney-client relationship exists.

- ♦ The law guardian must avoid engaging in unethical behavior under the Lawyers Code of Professional Responsibility. For law guardians, the most likely occasions in which this provision could be violated are *ex-parte* communications, breach of attorney-client privilege and

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becoming a witness, see, e.g., *Naomi C. v. Russell A.*, 2008 NY Slip Op 981 (First Dept.).

Law guardians should be prepared to note these restrictions to parties, parties' counsel and the court, if necessary.

♦ The law guardian must advocate for the child's position. The law guardian's personal view of what would be in the best interests of the child only comes into play when the guardian is convinced the child lacks the capacity to

make a reasoned judgment as to his or her wishes, or that to follow the child's wishes likely would result in serious, imminent harm to the child. Even under such circumstances, if the child asks the law guardian to do so, the law guardian must tell the child's wishes to the court.

In short, law guardians are their clients' lawyers; they are not social workers, mediators or witnesses.

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*Sara Stout Ashcraft is a partner in Ashcraft, Franklin & Young LLP. She concentrates her practice in the areas of matrimonial and family law.*