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ADVOCATING FOR CHILD CLIENTS IN CUSTODY CASES INVOLVING PARENTAL ALIENATION ISSUES*

Jaya L. Connors**

I. INTRODUCTION

This article examines the role of children’s advocates in the area of child custody within the context of parental alienation allegations.¹ It briefly addresses child representation standards from an international and national perspective and then focuses more deeply upon New York State. Ultimately, the article takes the position that while New York has one of the most progressive standards of child representation, attorneys for children need to remain vigilant and zealous in their legal response to both their own intrinsic biases as well as those of forensic evaluators—who offer

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¹ See generally, Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. of Child Custody 3: 232, 232-257 (2009) (discussing parental alienation in a custody context); Marlene Moses & Beth A. Townsend, *Parental Alienation in Child Custody Disputes*, 47 Tenn. B.J., 25, 26 (May 2011) (Parental alienation syndrome (PAS) was first coined by psychiatrist Richard Gardner in 1985. In 2010, parental alienation disorder (not PAS) was considered but not included in the Diagnostic and Statistical Manual also known as DSM-5); William Bernet & Amy J.L. Baker, *Parental Alienation, DSM-5, and ICD-11: Response to Critics*, 41 J. Am. Acad. Psychiatry & L. 98, 98 (2013) (The DSM is published by the American Psychiatric Association and lists all mental disorders).

expert opinions regarding children's interests whom they deem are the subjects of parental alienation—in custody disputes.

II. UNITED NATIONS CONVENTION ON THE RIGHTS OF CHILDREN AND NATIONAL STANDARDS ON REPRESENTATION OF CHILDREN IN CUSTODY MATTERS

The principle of child focused representation can be found in the United Nations Convention on the Rights of Children or the CRC, Article 12, a treaty which was ratified by nearly 200 nations,² however, not by the United States.³ Article 12, subsection 1, provides that a child who is capable of forming his or her own views should be allowed to express those views on all matters affecting that child, and due weight should be given to those views in accordance with the age and maturity of the child.⁴ Article 12, subsection 2, allows that in judicial and administrative matters, the child should be afforded an opportunity to be heard, either directly or through a representative, in a manner consistent with national law.⁵

Custody determinations have a profound effect on children's lives, essentially deciding who will parent them. Custody orders delineate not only where the child will live (physical custody of the child), but also determine which caregiver will be responsible for making major decisions regarding the child's upbringing including religious, educational, medical, and other significant needs (legal custody of the child).⁶ While both parents have the right to custody

² United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4c0f535d2> (listing signatory states).

³ Melissa Breger, *Against the Dilution of a Child's Voice in Court*, 20 IND. INT'L & COMP. L. REV. 175, 177 (2010).

⁴ United Nations Convention on the Rights of the Child, *supra* note 2, at art. 12.

⁵ *Id.*

⁶ 27C C.J.S. Divorce §§ 1052, 1057 (July 2018).

of the child, in many instances, however, this is not possible due to the degree of conflict between the parties and/or other factors such as domestic violence, substance abuse and parents' inability to see past their own interests to protect the best interests of the child.⁷

While children in this country do have a constitutionally based right to counsel in certain matters, such as in juvenile delinquency cases where their liberty interests are at stake, they unfortunately do not have such rights in custody matters.⁸ Additionally, since there is no federal requirement directing the appointment of lawyers for children in such matters, this has led to different standards of representation for children in custody cases, depending on the state in which they reside or which has authority to hear their custody matter.⁹ Furthermore, appointment of a representative for the child is generally within the discretion of the court.¹⁰

Children's representatives in custody matters can be attorneys, non-attorneys, or both, depending on the state.¹¹ Some states appoint Guardian Ad Litem (GALs), and the role of the GAL is to advocate for the child's best interests.¹² Some states require the GAL to be an attorney while other states do not.¹³ Some states have one attorney representing both the child's best interest and legal interests: the Legal Guardian Ad Litem or L-GAL.¹⁴ Still, other states have attorneys representing children as they would an adult.¹⁵

⁷ 27C C.J.S. Divorce §§ 1054, 1057, 1060, 1064, 1065.

⁸ See *In re Gault*, 387 U.S. 1, 41 (1967). For a more in-depth review of the role of children's advocates in custody matters in the United States, See Amy E. Halbrook, *Custody: Kids, Counsel and the Constitution*, DUKE J. CONST. L. AND PUB. POL'Y 179, 180 (2017).

⁹ Halbrook, *supra* note 8, at 191.

¹⁰ 23 PA. STAT. AND CONS. STAT. ANN. § 5334 (2017).

¹¹ See Pa. R.C.P. No. 1915.25. See also, Halbrook, *supra* note 8.

¹² Halbrook, *supra* note 8, at 196-97.

¹³ *Id.* (in Pa., GAL does not have to be an attorney). *But see*, ALASKA STAT. § 25.24.310 (2018) (GAL has to be a lawyer);

¹⁴ See MICH. COMP. LAWS ANN. §722.23 (2016).

¹⁵ See N.Y. Fam. Ct. Act §§ 241, 242, 249 (McKinney 2012).

III. NEW YORK STATE STANDARD OF REPRESENTATION OF CHILDREN IN CUSTODY MATTERS

In all states, custody and visitation matters are based upon an assessment of the child's best interests.¹⁶ Some states define best interests of the child pursuant to black letter law or statute, while other states look to common law or case law.¹⁷

New York goes beyond what is required by federal law and appoints attorneys to represent children in custody matters.¹⁸ Formerly, these attorneys were called law guardians and, at times, even advised the court, orally and in writing, of what was in the child's best interest.¹⁹ The law guardian's recommendation often held great weight with the court's assessment of the child's best interest, particularly when the law guardian acted as a best interests reporter.²⁰ As of 2007, the role of the child's attorney was clarified and along with the view of the child's representative as a lawyer for the child, the name was also changed to Attorneys for Children or AFC.

In some regions of New York, especially upstate, the evolution from Best Interests Lawyer to Attorney for the Child continues to be

¹⁶ See *In re Gault*, 387 U.S. at 41; See also Halbrook, *supra* note 8.

¹⁷ See §722.23 (Michigan has a statutory framework defining best interest factors); See also, N.Y. Domestic Relations Law §240 (McKinney 2017) (New York's best interests determinations are case law driven).

¹⁸ See Family Court Act §249; See also, N.Y. COMP. CODES. R. & REGS. tit. 22, §7.2 (2007) (Rules of the Chief Judge).

¹⁹ See Diane Somber, *Defining the Role of the Law Guardian in New York State by Statute, Standards and Case Law*, 19 TAURO L. REV. 529 (2003).

²⁰ The law guardian as a "best interests" lawyer was a practice employed by attorneys primarily in the upstate regions of New York, specifically in the Third and Fourth Judicial Departments. This view is based on the author's prior experience as an attorney for the child from 1998-2010. There are four Judicial Departments in New York State. The First Department covers New York City and the Bronx and the Second Department covers nine counties including Kings, Queens and Westchester. The Third and Fourth Judicial Departments are in the upstate region. The Third Department includes 28 counties and the Fourth Department covers 22 counties.

a slow and challenging process.²¹ The fact that many of the current attorneys for children were former law guardians—seeing their roles as best interests reporters—contributes to the problem.²²

The standard of legal representation of minors in New York is set forth in Rule 7.2 of the Rules of the Chief Judge, and closely follows the standard of representation as set forth by the CRC, Article 12.²³ Representation of children under Rule 7.2 was further defined by the New York State Bar Association Representation Standards.²⁴ Generally, Rule 7.2 states that if a child has the capacity to make a voluntary and considered judgment, even if the attorney feels that such a judgment is not in the child's best interests,

²¹ See *Weiglhofer v. Weiglhofer*, 766 N.Y.S.2d 727, 730 n.1 (N.Y. App. Div. 2003); See also, *William O. v. Michelle A.*, 988 N.Y.S.2d 299, 301 (N.Y. App. Div. 2014) (AFC is not a “quarterback” for the court); *Robert S. New v. Emma T. Sharma*, 936 N.Y.S.2d 265 (N.Y. App. Div. 2012); *David R. Swinson v. Sherita Brewington*, 925 N.Y.S.2d 96 (N.Y. App. Div. 2011); *James J. Cobb v. Kathy Cobb*, 771 N.Y.S.2d 476 (N.Y. App. Div. 2004); *Edward J. Card Sr. v. Kerry J. Rupert*, 896 N.Y.S.2d 490 (N.Y. App. Div. 2010); *Ronald A. Williams v. Kimberly A. Rolf*, 42 N.Y.S.3d 381, 388 (N.Y. App. Div. 2016).

²² The author was an AFC and also an 18-b (assigned counsel for indigent parties) from 1998-2010 in one upstate county of New York and saw and observed AFC practices during this time in one county. Additionally, the author was employed by the Appellate Division, Third Judicial Department, Office of Attorneys for Children from 2011-2017. In her capacity as Deputy Director of the Office of Attorneys for Children, she observed AFC practices on a broader scale. The views expressed by the author are her views only and not the views of the Third Judicial Department, Office of Attorneys for Children.

²³ N.Y. Fam. Ct. Act §§ 241, 242, 249 (McKinney 2012); United Nations Convention on the Rights of the Child, *supra* note 2.

²⁴ See NYS Bar Association Representation Standards A-1 (2014)(in custody matters “[w]hether retained or assigned, and whether called “counsel” or “law guardian,” the attorney for the child shall, to the greatest possible extent, maintain a traditional attorney-client relationship with the child. The attorney owes a duty of undivided loyalty to the child, shall keep client confidences, and shall advocate the child’s position. In determining 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. Ethics rules require an attorney “to abide by a client’s decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued.” . . . [i]n addition, the attorney must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”).

the attorney has to be directed by the child's wishes and has to put forth the child's position before the court.²⁵ There are two exceptions.²⁶ First, the attorney can substitute judgment, or put forth his or her own position, if the attorney feels that the child client is not of capacity; and this generally refers to very young children or children with diminished capacity.²⁷ Secondly, the AFC can substitute judgment if the attorney is convinced that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child.²⁸

The "imminent, serious harm" language is critical because it goes further than the statutory language defining child neglect.²⁹ New York's child neglect statute defines a neglected child as one who has been found, by a preponderance of the evidence, to have been or would have been placed in "imminent danger" as a result of the parent or caregiver's act or failure to act.³⁰ The neglect statute does not say "*substantial* imminent danger." Therefore, even if an AFC fears risk of imminent harm to the child by supporting the child's position, pursuant to the dictates of 7.2, the AFC should not substitute judgment.

Because these child capacity assessments and danger assessments are within the sole discretion of the AFC, intrinsic biases can strongly influence such determinations and cause inconsistencies in representation and practice. Arguably, where child law practice is not institutionally based, there is more room for such biases. In upstate regions of New York, child law practices are predominantly comprised of solo practitioners.³¹

²⁵ N.Y. Fam. Ct. Act § 241 (McKinney 2012).

²⁶ *Id.*

²⁷ *Id.*; see also N.Y. STATE BAR ASS'N., *supra* note 24.

²⁸ N.Y. STATE BAR ASS'N., *supra* note 24.

²⁹ See N.Y. Fam. Ct. Act § 1012(f) (McKinney 2017) ("[n]eglected child" means a child less than eighteen years of age (i) whose physical, mental or emotional condition has been impaired or is in *imminent danger* of being impaired as a result of the failure of his parent or other person legally responsible to exercise a minimum degree of care") (emphasis added).

³⁰ *Id.*

³¹ Each of the four Judicial Departments in New York State have Attorney for Children panels, which are administered through the Appellate Courts. While there are also institutional providers in the child law field, the upstate

IV. ISSUE OF PARENTAL ALIENATION

The concept of parental alienation syndrome (PAS) was put forth in the 1980s by Richard Gardner, who theorized the reason that some children rejected their non-custodial parents (primarily men/fathers) completely and without any rational basis was because bitter custodial parents (primarily women/mothers) brainwashed them into believing that the non-custodial parents were sexually abusing them when this was in fact not true.³² Gardner suggested the only way to help these children was to sever ties between mothers and children and deprogram the children in order to change their fabricated beliefs about their fathers.³³

PAS was unsupported, contradicted by empirical research and invalidated by scientific and professional authorities.³⁴ Thereafter, scholars and researchers in this field reformulated PAS, which they found overly simplistic, into a more moderate concept calling it just “parental alienation.”³⁵ They did so in order to understand the behavior of some children whose rejection of a parent seemed disproportionate to the child’s actual relationship with that parent.³⁶ They suggested there were a number of reasons, including the

regions predominantly have general practitioners who also engage in child law practice. The upstate regions have few institutional providers for children. *Program Overview*, ATTORNEYS FOR CHILDREN PROGRAM, <http://www.courts.state.ny.us/ad3/OAC/Forms/ProgramSummary.pdf>. As of today’s date, there are 600 attorneys on the Third Department panel and 850 attorneys on the Fourth Department panel. *Purpose of the Attorneys for Children Program*, SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, <https://www.nycourts.gov/courts/ad4/AFC/AFC-index.html>.

³² See Nancy S. Erickson, *Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse*, FAMILY AND INTIMATE PARTNER VIOLENCE QUARTERLY (2013). See also, Joan S. Meier, *Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen’s Decision Tree*, JOURNAL OF CHILD CUSTODY (2010). See also, Joan S. Meier, *Parental Alienation Syndrome and Parental Alienation: A Research Review*, NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN (September 2013).

³³ See also, Meier, *supra* note 1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

behavior of the alienating parent, which needed to be considered.³⁷ These experts also rejected the harsh, punitive remedy of deprogramming suggested by Gardner and instead focused on therapeutic measures to support the child and the family and advocated for contact between the child and both parents.³⁸ While research has shown there are very few cases where children are actually alienated, courts have continued to use the term freely and incorrectly, sometimes mixing the concept of PAS with parental alienation and giving greater emphasis to alienation concerns than other factors when making custody determinations, even though evidence of long-term harm to children as a result of parental alienation is only speculative.³⁹

V. FACTORS CONSIDERED IN AWARDING CUSTODY BY NEW YORK COURTS AND THE “FRIENDLY PARENT DOCTRINE”

New York’s custody determinations are based on a list of factors, a totality of circumstances, as outlined by case law.⁴⁰ Some of the factors considered by the courts include, but are not limited to, the parties’ respective abilities to provide stable homes for the child, their relationships with the child, their ability to guide and provide for him or her, the child’s wishes, and the parties’ willingness to foster a positive relationship between the child and the other party.⁴¹

Fostering a relationship between the child and the other parent is a crucial factor in these cases. New York courts have long found that a parent’s interference with another parent’s relationship with the child is a significant factor when assessing parental fitness and conducting a best interests analysis.⁴² This is also referred to as the

³⁷ Meier, *supra* note 1.

³⁸ *Id.*

³⁹ *Id.* See Erickson, *supra* note 32. See also, *Montoya v. Davis*, 66 N.Y.S.3d 350 (2017) (court discussed PAS when in fact the related issue concerned parental alienation disorder). See also, Meier, *supra* note 1, at 249.

⁴⁰ *Eschbach v. Eschbach*, 56 N.Y.2d 167 (N.Y. 1982). See also, DRL § 240, *supra* note 15.

⁴¹ See *Anson v. Anson*, 798 N.Y.S.2d 185 (N.Y. App. Div. 2005).

⁴² *Bliss ex rel. Ach v Ach*, 56 N.Y. 2d 995 (1982).

“friendly parent doctrine.”⁴³ The appellate courts in the second, third, and fourth judicial departments have found that a parent’s interference with the other parent’s relationship with the child is a per se finding that the alienating parent is unfit to act as the custodial parent.⁴⁴ However, by placing so great an emphasis on the behavior of the alleged alienating parent in determining the child’s best interests, not clearly understanding the concept of parental alienation disorder, courts are failing the children by not considering other compelling factors which may be causing the child to reject the non-alienating parent.⁴⁵ Unfortunately, these decisions have had a significant effect and bias on practice by AFCs, especially in the upstate regions.⁴⁶

VI. PARENTAL ALIENATION & PRACTICE BY AFCs IN UPSTATE NEW YORK REGIONS

Looking at parental alienation cases within the historical context briefly outlined above, and with the understanding that actual cases of parental alienation are rare, it is nevertheless indisputable that AFCs should be concerned if there is evidence to show that a parent is interfering with the other parent’s relationship with the child. This is, at the very least, bad parenting. However, AFCs should not automatically assume, if they see some evidence of parental interference, that the interfering parent is alienating the child from the other parent. Nor should they infer that because a child does not want to see a certain parent, this automatically means

⁴³ See, Margaret K. Dore, *The “Friendly Parent” Concept: A Flawed Factor for Child Custody*, 6 LOY. PUB. INT. L. 41 (2004).

⁴⁴ *Sanders v. Jaco*, 48 N.Y.S.3d 729, (N.Y. App. Div. 2017); *Gerber v Gerber*, 21 N.Y.S.3d 386, (N.Y. App. Div. 2015); *Viscuso v Viscuso*, 12 N.Y.S.3d 684 (N.Y. App. Div. 2015).

⁴⁵ See Alayne Katz, *Junk Science v. Novel Scientific Evidence: Parental Alienation Syndrome, Getting it Wrong in Custody Cases*, 24 PACE L. REV. 239, 240-41 (2003); *Rutland v. O’Brien*, 41 N.Y.S.3d 292 (N.Y. App. Div. 2016).

⁴⁶ See *Viscuso*, 129 12 N.Y.S.3d 684; *Zakariah SS. v. Tara TT.*, 39 N.Y.S.3d 278 (N.Y. App. Div. 2016);

the child is an alienated child. In the recent case of *Spaulding v Spaulding*, although the AFC supported the child's position to lessen parenting time with the father, she also expressed a contrary concern that the child would become "alienated" from the father if he did not have weekly visits with him.⁴⁷ However, the evidence in this case showed it was the father whom the child had heard disparaging the mother, not the other way around. Fortunately, the forensic expert in this case did not find alienation and determined the child's anxiety was based on many factors, including the level of conflict between the parties.⁴⁸ As evidenced by the *Spaulding* case, there is research that suggests when a parent denigrates and disparages the other parent, children often support the parent who is being denigrated; and in many situations, where both parents engage in disparaging behavior towards each other, research shows that children's relationship with both parents deteriorates.⁴⁹ Furthermore, in most of these cases, the alleged alienating parent is also the child's primary caregiver with whom the child has a close relationship; and generally, along with alienation allegations, these cases also include allegations of domestic violence and child abuse, which many times gets overshadowed and insufficiently addressed by the court when alienation is alleged.⁵⁰

It is also important for AFCs to understand there is no conclusive research to support the premise that alienation has a long-

⁴⁷ See *Porter-Spaulding v. Spaulding*, No. 524164, 2018 WL 3650559, at *1 (N.Y. App. Div. Aug. 2, 2018) (here, the evidence showed the child heard the father and the paternal grandmother disparaging the mother; and, the child was unable to sleep properly at night at the father's home because his household included many family members and the home was noisy in the evenings). See also Jenna Rowen & Robert Emery, *Examining Parental Behaviors of Co-Parents as Reported by Young Adults and their Association with Parent-Child Closeness*, 3 COUPLE & FAM. PSYCHOL., RES. & PRAC., 165, 165-177, Am. Psychol. Ass'n (2014).

⁴⁸ *Porter-Spaulding*, 2018 WL 3650559, at *1.

⁴⁹ See Rowen & Emery, *supra* note 47.

⁵⁰ See *Viscuso*, 12 N.Y.S.3d at 687 (mother, who was the primary caregiver, alleged father had committed acts of domestic violence against her); see also *Zakariah*, 39 N.Y.S.3d at 279-280 (primary caregiver mother alleged father had physically abused child).

term impact on children's health and well-being.⁵¹ Therefore, even if a child's attorney believes a parent is repeatedly interfering with the other parent's relationship with the child, and the child is adamant about wanting little or no contact with the non-interfering parent, without more evidence to bolster the alleged harm to the child to something akin to child abuse and more supportive of the "substantial, imminent danger" language, there is no basis for the AFC, to substitute judgment.⁵² Moreover, it is crucial for AFCs to remember they are the only ones in the courtroom who speak for the child, and the child's position is only *one* of the many factors the court considers when making a best interests determination.⁵³

Unfortunately, when examining case law from the upstate regions of New York, the pattern suggests that AFCs are failing to adhere to the strictures of child representation in alienation cases as set forth in 7.2. An example of this is the *Viscuso* case.⁵⁴ In *Viscuso*, the appellate court determined that the AFC properly substituted judgment because, if the AFC had followed the child's wishes to have custody remain with the mother, it would have been "tantamount to severing her relationship with the father, and [that] result would not be in [the child's] best interest[s]."⁵⁵ In this case, the mother alleged domestic violence, and the father alleged parental alienation. The court found the mother's allegations of domestic violence were not credible but determined there was parental interference based on the mother's repeated violations of the court order by discussing the parties' litigation with the child, her attempts to make the child fearful of the father, and encouragement of the child to medicate herself before seeing the father.⁵⁶ The court concluded since there was parental interference, this finding along

⁵¹ See Meier, *supra* note 1, at 249.

⁵² See N.Y. Fam. Ct. Act § 1012(e) (McKinney 2017) (definition of abused child).

⁵³ See Breger, *supra* note 3, at 185.

⁵⁴ *Viscuso*, 129 12 N.Y.S.3d at 687.

⁵⁵ *Id.* at 1680.

⁵⁶ *Id.* at 1681-82. Unfortunately, the *Viscuso* court does not define what it means by "medication." If for instance the mother had encouraged the child to take illegal substances, strong prescription medication, etc. there might have been some basis for the AFCs concerns and decision to substitute judgment.

with the child's wishes to remain with the mother automatically meant there was parental alienation. Sadly, by arriving at this conclusion, the court also accepted the AFC's substitution of judgment and effectively eroded the child's right to meaningful representation as directed by 7.2.

The *Viscuso* decision was followed by the *Zakariah* case.⁵⁷ In *Zakariah*, the AFC substituted judgment for his 12-year old client due to concerns that the mother was alienating the child from the father. The mother's allegations of physical abuse by the father were found not credible. In concluding there was parental alienation in this case, the AFC and the court relied heavily on the recommendations of the forensic evaluator, who concluded the child had been brainwashed by the mother.⁵⁸ The appellate court in *Zakariah*, citing *Viscuso*, supported substitution finding that the mother's alienation had caused the child severe emotional distress and if the child's wishes had been adhered to by the AFC, it would have led to further distress for the child likely resulting in substantial imminent serious harm.⁵⁹

Unfortunately, even in cases where children are older, the AFC's biases and the court's deference to the child's attorney continues to undermine the child's voice when parental alienation allegations are raised as illustrated by the case of *Rutland v. O'Brien*.⁶⁰ In *Rutland*, the trial court AFC represented two children, a 16-year-old daughter and a 12-year-old son. Despite the children's desire to continue to have weekly parenting time with their mother, the trial court AFC filed a motion, which was granted, to have the mother's parenting time temporarily suspended.⁶¹ While there was evidence to show that the mother disparaged the father in front of the children, and on Facebook posts and in texts with the daughter, these facts alone do not justify the AFC's substitution of judgment. More concerning in this case were the ethical practices of the AFC

⁵⁷ *Zakariah*, 39 N.Y.S.3d at 279.

⁵⁸ *Id.* The findings of the forensic evaluator will be discussed in the next section.

⁵⁹ *Zakariah*, 39 N.Y.S.3d at 281.

⁶⁰ *Rutland*, 41 N.Y.S.3d at 292.

⁶¹ *Id.* at 294.

who did not object when the father called the daughter's counselor as a witness to testify about confidential and privileged matters without the daughter's knowing consent.⁶² While the appellate court raised some concerns about the adequacy of the trial AFC's representation, this was done in a footnote.⁶³

Although New York courts allow children to meet directly with the judge in contested custody matters, called Lincoln hearings, where only the child, the AFC, and the judge are present, if the AFC's position is contrary to that of the child's position, such substitution minimizes and negates the child's voice.⁶⁴ What is more disturbing and problematic is the covert practices engaged in by some AFCs, and tacitly sanctioned by some judges, to indicate their non-support of the child client's position. These are done through subtle and not so subtle hints to the court, by tone of voice or gesture, to show that the AFC's position is inconsistent with that of the child.⁶⁵

VII. PROBLEMS WITH FORENSIC / EXPERTS' EVALUATIONS IN ALIENATION CASES

The other problem with parental alienation cases is the issue of experts. In high conflict custody matters, courts often look to psychologists for assistance, seeking an evaluation of the parties and children in order to assist the court in its best interest determination.

⁶² *Rutland*, 41 N.Y.S.3d at 296.

⁶³ *Id.* at 295 n.3. (in most cases, children are represented by one AFC at the trial level and another, appellate AFC at the appellate level).

⁶⁴ *See Lincoln v. Lincoln* 24 N.Y.2d 270 (N.Y. 1969). *Lincoln* hearings are confidential hearings between the child, the Judge and the AFC and thereafter sealed. Neither the parties nor their counsel can be present, and the child's statements to the Judge cannot be revealed to the parties at any stage of the litigation by the Judge or the AFC, and such hearings are for corroboration purposes only.

⁶⁵ These views are solely the author's views and based on the author's experiences as an AFC from 1998-2010.

However, these reports can end up doing more harm than good.⁶⁶ There is no scientific evidence to show that psychological evaluations in such cases are valid or beneficial.⁶⁷ Psychologists are unable to agree on what exactly *mental health* is since the science in this field is not clear, so when they are asked to analyze families in complex custody cases and offer recommendations as to what custodial outcome would be in the child's best interests, their recommendations lack scientific reliability and validity.⁶⁸ Additionally, psychologists oftentimes trivialize allegations of abuse and domestic violence allegations and place too much emphasis on parental interference behaviors.⁶⁹ And while qualifications of some psychologists may be impressive, they are meaningless in this venue since there is no evidence that better credentials have resulted in better outcomes for children.⁷⁰ Furthermore, while psychological or forensic evaluations and testimony from evaluators can bolster the AFC's showing of harm to the child from "imminent danger" to "substantial imminent danger," psychologists also carry their own set of biases which are pervasive in the evaluator's reports and testimony.⁷¹ And if the AFC

⁶⁶ See, Ira Daniel Turkat, Ph.D., *Psychologist Recommendations in Custody Disputes Can Be Harmful, Even Fatal*, 32 AM. J. OF FAM. LAW 5, 6 (2018).

⁶⁷ Turkat, *supra* note 66, at 5.

⁶⁸ See, Timothy M. Tippins, *Psychological Testing: Controversy and Consensus*, N.Y. L. J. 1, 3 (July 18, 2018 2:45 PM), <https://www.law.com/newyorklawjournal/2018/07/18/psychological-testing-controversy-and-consensus/> (Tippins argues custody evaluations do not meet the standards of expert reliability articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1993), later articulated by the NY Court of Appeals in *People v. Wesley*, 83 N.E.2d [1994]). See also, Toby G. Kleinman, *Ethics on Trial: A Comment*, 13 J. of Child Custody 147, 151 (2016). (Kleinman notes "Principle 2.04 of the Code of Ethics requires psychologists' work to be based upon established scientific and professional knowledge" (citation omitted) "while 5.01 requires avoidance of false or deceptive statements." (citation omitted). He states those psychologists who promote PAS or some incarnation of PAS should be held accountable for their assertions since they are promoting unscientific and unreliable theories and thus should be brought before ethics boards).

⁶⁹ Kleinman, *supra* note 68. See also, Erickson, *supra* note 32.

⁷⁰ See, Turkat, *supra* note 66, at 3.

⁷¹ See, Tippins, *supra* note 68.

does not possess the necessary trial skills to reveal the bias and address the lack of scientific support for such evaluations, the expert's position is heavily relied upon by the courts.⁷² Additionally, in upstate regions of New York, unlike downstate, the number of psychologists who perform forensic evaluations is extremely limited, and thus these few evaluators are directing the course of case law in this area.

In the *Zakariah* case, addressed above, great weight was given to the psychologist who completed the forensic evaluation.⁷³ The evaluator opined that the mother had brainwashed the child and recommended the remedy suggested by PAS theoretician Gardner: a period of "deprogramming" for the child.⁷⁴ Following the expert's recommendation, the court not only changed custody from the mother to the father, who lived in North Carolina, but followed her deprogramming directive by awarding full custody to the father.⁷⁵ The child was later hospitalized in North Carolina.⁷⁶

The issue of bias in forensic evaluators was recently addressed head-on by the court in *Montoya v Davis*.⁷⁷ This only came to the forefront because the bias of the evaluator was so overt, the court had no choice but to address it. It should be noted that the forensic psychologist in *the Montoya* case was the same evaluator as in the *Zakariah* case.⁷⁸ Here, the 11-year-old child, diagnosed with autism and ADHD, had lived with this mother since he was three-years-old

⁷² Tippins, *supra* note 68, at 1.

⁷³ This evaluator is frequently used by the courts in high conflict custody matters in the Third Judicial Department. She has promoted PAS or some form of PAS (ie. parental alienation disorder) in some of the evaluations she has completed.

⁷⁴ Dore, *supra* note 43, at 8.

⁷⁵ *Zakariah*, 39 N.Y.S.3d at 279.

⁷⁶ This author was advised by the attorney who used to represent the mother in this case that the subject child was hospitalized in North Carolina for an eating disorder and put on a feeding tube, which they suspect may have been due to the "deprogramming."

⁷⁷ *Montoya v Davis*, 66 N.Y.S.3d 350 (N.Y. App. Div. 2017).

⁷⁸ This information was available to the author based on the author's previous employment with the Office of Attorneys for Children, and upon conversations with attorneys who worked on both cases.

and had therapeutic visits with the father.⁷⁹ The father, who lived in another state, had only seen the child three times within the past few years.⁸⁰ Initially, the father sought to have unsupervised visits with the child but thereafter moved for custody. The trial court, following the recommendations of the forensic evaluator, determined the mother had severely alienated the child and granted sole legal custody to the father.⁸¹ The court also suspended parenting time between the mother and the child for six months in order to “deprogram” the child.⁸² Fortunately, the appellate court reversed its decision finding, among other things, that the evaluator had failed to remain objective and “her opinions and recommendations were afflicted by a pervasive and manifest bias against the mother.”⁸³ Among other things, the evaluator consistently disparaged the mother and showed contempt for her while praising the father and finding him blameless. She made broad generalizations about the character of the parties and minimized the child’s wishes.⁸⁴ The evaluator had completed two evaluations, an initial one and an updated one, and although her recommendations in her second evaluation had drastically changed from the first, she failed to explain why this was so even though she had not met with the mother again for the second evaluation.⁸⁵ She discounted all of the collateral contacts whose opinion differed from hers, and blamed the inconsistency of the father’s therapeutic contact with the child on the mother’s failure to pay the health insurance to cover the cost of the therapist, although the father had been ordered to cover the cost of therapeutic visits.⁸⁶ Additionally, while testifying, she overstepped her authority and role by directing the AFC to substitute judgment instead of supporting the client’s

⁷⁹ *Montoya*, 66 N.Y.S. 3d at 353 (there were allegations of domestic violence in this case as well).

⁸⁰ *Id.* at 351-352.

⁸¹ *Id.* at 353, 355.

⁸² *Id.* at 353-356.

⁸³ *Id.* at 353.

⁸⁴ *Id.* at 353-354.

⁸⁵ *Montoya*, 66 N.Y.S. 3d at 352-355.

⁸⁶ *Id.*

position.⁸⁷ In this case, the AFC appropriately advocated for his client's position.

VIII. CONCLUSION

The implementation of Rule 7.2 was a major step in empowering children and hearing their voices in court proceedings. While it has only been a little over ten years since the role of the children's lawyer was clarified to define the role as attorney for the child, there is every fear that the standard of child representation in child custody cases involving parental alienation is eroding. This is all the more concerning because, although research has shown that actual parental alienation cases are rare, findings of parental alienation continue to flourish in courts and children's voices are being suppressed. AFCs and New York courts should be vigilant in ensuring that the established guidelines under 7.2 are strictly adhered to and any decision to substitute judgment should be done only after a meaningful analysis by the AFC. Such substitution should initiate further scrutiny by the courts to ensure that the child is receiving effective representation. Moreover, there should be less reliance on forensic evaluators, especially in contested custody matters where alienation is alleged, since such evaluations have little, if any, scientific validity and are generally filled with the evaluator's inherent biases, as evidenced in the *Montoya* case.⁸⁸

⁸⁷ *Montoya*, 66 N.Y.S. 3d at 352-355.

⁸⁸ *Id.* at n.5.

