New York Law Journal

Column Misrepresented New York Law

Headline-capturing instances are extraordinarily rare and do not merit the wholesale condemnation of New York's overwhelming body of law vis-à-vis child protection.

By **Elliott Scheinberg** | June 28, 2022

Credit: Photocreo Bednarek /Adobe Stock

The recent submission, "What 'Safety First' for Children Should Mean," NYLJ, June 22, 2022, wholly misrepresents New York law.

By way of initial example, the writing *thrice wrongly insists* that children are without a right to object to improper custody and visitation determinations: "*Do children have the right to object to any violation of their rights to be safe and secure in their home? Not as things presently stand in family court.*" [The second and third such claims are presented below.] The following case law establishes the formidable protection afforded children under New York's strong body of law relating to custody determinations.

First, a child may be appointed counsel; as a practical matter, not every case is severe enough to require it. Once appointed, counsel has the same panoply of rights available to the other litigants: "[The] attorney appointed to represent a child in a custody proceeding has the duty and the obligation to zealously represent the child (*Matter of Donna Marie C. v. Kuni C.*, 134 A.D.3d 430). In order to fulfill that weighty responsibility, *the appointed attorney for the child has the right, equal to the right of the attorneys for the litigants*, to fully appear and participate in the litigation, including the right to call, examine, and cross-examine witnesses, and the right to advance arguments on behalf of the child. These rights do not evaporate upon the conclusion of the case in the hearing court; rather, these rights may be protected and enforced by the taking of an appeal on behalf of the child." *Newton v. McFarlane*, 174 A.D.3d 67, 72 (2d Dep't 2019). "In general, an attorney for the child 'must zealously advocate the child's position ... and, if the child is capable of knowing, voluntary and considered judgment, must follow the child's wishes even if the attorney for the child believes that what the child wants is not in the child's best interests.'" *Muriel v. Muriel*, 179 A.D.3d 1529, 1530 (4th Dep't 2020), lv. to appeal denied, 35 N.Y.3d 908 (2020).

Moreover, under well-settled decisional authority, known as a *Lincoln* hearing, children may confidentially and directly communicate their thoughts to the presiding judge outside of the parents' presence, during which time a record is made and sealed: "In the context of a Family Ct. Act article 6 proceeding, this Court has emphasized that 'a *Lincoln* hearing is the preferred manner for ascertaining a child's wishes' (*Matter of Battin v. Battin*, 130 A.D.3d 1265, 1266 n. 2 [2015]; accord *Matter of Gerber v. Gerber*, 133 A.D.3d 1133, 1135 n. 6 [2015]). The fundamental reason is that a child being asked to explain his or her preferences 'should not be placed in the position of having [his or her] relationship with either parent further jeopardized by having to publicly relate [his or her] difficulties with them or be required to openly choose between them' (*Matter of Lincoln v. Lincoln*, 24 N.Y.2d 270, 272 [1969] ...). A true *Lincoln* hearing is conducted in confidence with the court, with only the attorney for the child in attendance, and it is of utmost importance to recognize 'that the right to confidentiality during a Lincoln hearing belongs to the child and is superior to the rights or preferences of the parents' (cites omitted)." *Matter of Gonzalez v Hunter*, 137 A.D.3d 1339, 1342-43 (3d Dep't 2016).

The writing makes a legally undecipherable argument that three Amendments to the U.S. Constitution entitle a child, as a citizen of the United States, to protection in custody and abuse cases in the Family Court and in divorce court. They first recite the 14th Amendment: "nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. The *Graham* case ratifies this concept as applying to children."

They further insist that *the Fourth Amendment* is also applicable to the "citizen child" in abuse and custody cases: "The Fourth Amendment says it is the right of the people to be 'secure in their persons, houses, papers, and effects ...' This should be applied to a citizen child."

The Fourth Amendment only applies to illegal searches and seizures by the police and government agents: "The Supreme Court of the United States held in *Payton* itself that 'the Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest' (445 U.S. at 576) despite 'ample time to obtain a warrant' (id at 583, 100 S.C. 1371). The Court explained that 'the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant" (id. at 590, 100 S.Ct. 1371)." *People v. Williams*, 75 Misc.3d 1211(A) (Sup. Ct. 2022); *People v. Costan*, 197 A.D.3d 716 (2d Dep't 2021), lv. to appeal denied, 37 N.Y.3d 1095 (2021) ("the Fourth Amendment is not violated every time police enter a private premises without a warrant"). Plainly, nothing to do with custody, visitation or child abuse related litigation.

Their next argument is equally without foundation in New York law: "Against their will, *child citizens* are sent by judges every day to homes of parents who subsequently harm them even when courts were told of that possibility. *This might not happen if children had specified rights of safety first adhered to in family court where courts are required to equally apply constitutional rights to them.*"

The writing further knots the untenable reasoning of the "citizen child" with the 10th Amendment and for the third time, contrary to settled law (above), claims that children cannot assert any objection during a custody trial: "The 10th Amendment says that powers not delegated to Congress nor prohibited by the Constitution are reserved for the states or to the People. *Children are people. Children are citizens.* As citizens, children are entitled to all enumerated rights in the Constitution and the Amendments. *Yet, children have no right in federal or state law to object to a visitation order entered by any court in any divorce action. Nor can a child object to any custody order entered by a court.* During divorce proceedings, children are too often essentially treated as property to be 'distributed' between parents. This is done under the guise of doing what is in their 'best interests.' But 'best interests' often gets turned on its head where there are allegations of child abuse during divorce." "Nor can a child object to any custody order entered by a court."

Critically, in *Ankenbrandt v. Richards*, 504 U.S. 689, 693 (1992), the U.S. Supreme Court repeated settled law in the federal system: "The domestic relations exception upon which the courts below relied to decline jurisdiction has been invoked often by the lower federal courts.

The seeming authority for doing so originally stemmed from the announcement in *Barber v. Barber*, 21 How. 582, 16 L.Ed. 226 (1859), that the federal courts have no jurisdiction over suits for divorce or the allowance of alimony... Subsequently, this Court expanded the domestic relations exception to include decrees in child custody cases. In a child custody case brought pursuant to a writ of habeas corpus, for instance, the Court held void a writ issued by a Federal District Court to restore a child to the custody of the father. 'As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction'" [at 702]; *Sobel v. Prudenti*, 25 F. Supp. 3d 340, 353 (EDNY 2014) ("The root of the domestic relations exception to federal subject matter jurisdiction stems from "the policy consideration that the states have traditionally adjudicated marital and child custody disputes and therefore have developed competence and expertise in adjudicating such matters, which federal courts lack." *Thomas v. New York City*, 814 F. Supp. 1139, 1146 (E.D.N.Y. 1993) (citing *Ankenbrandt*, 504 U.S. at 703-04). Thus, federal courts recognize that "[t]he whole subject [of the] domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94).

New York law states that "children are not chattel, and custody and visitation decisions should be made with a view toward what best serves their interests, not what would reward or penalize a purportedly 'innocent' or 'blameworthy' parent." *Tropea v. Tropea*, 87 N.Y.2d 727, 742 (1996). Unlike equitable distribution, where the assignment of assets is final and immutable, custody proceeds along a nonfinite continuum that remains permanently subject to judicial review and modification because courts sit in the role of parens patriae over children. *Finlay v. Finlay*, 240 N.Y. 429 (1925); there is nothing proprietary about a child. *Ex parte Livingston*, 151 A.D. 1 (2d Dep't 1912).

New York judges, as all judges throughout the nation, take allegations of child abuse extremely seriously. There can be no dispute that heartbreaking decisions with tragic consequences on children have been made. While even one such instance is far too many and may in no way ever be minimized as an unfortunate statistical casualty, the fact remains that these headline-capturing instances are extraordinarily rare and do not merit the wholesale condemnation of New York's overwhelming body of law vis-à-vis child protection, and of the jurists who implement them within the parameters of governing jurisprudence. Each tragedy has served as an important lesson by moving the needle for additional protection.

Elliott Scheinberg *is a member of the New York State Bar Association Committee on Courts of Appellate Jurisdiction. He is the author of The New York Civil Appellate Citator (NYSBA, 2d ed., 2 vols. 2022) and Contract Doctrine and Marital Agreements in New York (NYSBA, 4th ed., 2 vols. 2020). He is also a Fellow of the American Academy of Matrimonial Lawyers.*