

Child Welfare for AFC

Best Practices and Ethical Considerations

SHANNON E FILBERT ESQ.

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RULES OF THE CHIEF JUDGE 22 NYCRR 7.2- Function Of The Attorney For The Child

- ❖ AFC is subject to the ethical requirements applicable to all lawyers
 - ❖ Disclosure of client confidences
 - ❖ Conflict of interest
 - ❖ Becoming a witness in the litigation
- ❖ The AFC must **zealously** advocate the child's position.
 - ❖ Must consult with and advise the child to the extent of the child's capabilities
 - ❖ 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 interest**.
 - ❖ 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.

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RULES OF THE CHIEF JUDGE 22 NYCRR 7.2 Function Of The Attorney For The Child Cont.

- ▶ 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 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 articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.



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SUMMARY OF RESPONSIBILITIES OF THE AFC Shannon's pet peeves...

- Commence representation of the child promptly upon being notified of the appointment
- Contact, interview and provide initial services to the client at the earliest practical opportunity and prior to the first court appearance when feasible
- **Consult with and advise the child regularly concerning the course of the proceeding, maintain contact ...things change during these roller coaster cases... remain accessible to your client!**
- Conduct a full factual investigation and become familiar with all information and document relevant to representation of the child
- Evaluate the legal remedies and services available to the child and pursue appropriate strategies for achieving your client's wishes
- Appear at and participate actively in all proceedings pertaining to the child
- Evaluate and pursue appellate remedies available to the child

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ATTORNEY'S DUTY TO PROVIDE EFFECTIVE ASSISTANCE TO CHILD

- ❖ A reversal is warranted where an AFC adopts only a passive role.
 - ❖ *Chamberlain v. Chamberlain*, 260 A.D.2d 671, 687 N.Y.S.2d 485 (3d Dep't 1999).
- ❖ When the case is presented in the first instance by counsel for another party, the child's AFC has a duty to ensure that the evidence sustaining the child's allegations of abuse is fully developed.
 - ❖ *Matter of Jamie TT*, 191 A.D.2d 132, 599 N.Y.S.2d 892 (3d Dep't 1993).
- ❖ An AFC cannot act effectively to protect the child in the course of a fact finding hearing in the absence of meaningful communication with the child.
 - ❖ *Matter of Karl W.*, 168 A.D.2d 997, 564 N.Y.S.2d 940 (4th Dep't 1990).

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Representing a child who lacks capacity to make decisions. Substituting judgment.

- ▶ When substituting judgment the AFC provides effective assistance of counsel by conducting an independent investigation including assistance of experts, ascertaining all relevant facts and then exercising discretion in good faith and to the best of the lawyer's ability.
- ▶ When in doubt as to the best result for the child, the attorney should ensure that all relevant evidence is presented and then aggressively question witnesses in an effort to resolve factual conflicts and assist the judge in reaching the correct result.
- ▶ Whether or not the attorney for the child advocates for the child wishes, the attorney must be treated as an advocate, and may not be compelled by the court to provide evidence, or act as an investigative arm of the court by submitting a report or engaging in ex parte communication with the court.

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FORGET BEST INTEREST STANDARD

► Article 10 removal hearings imminent risk of harm to the child's life or health, not whether it would be better for the child to be residing outside of the home.

► N.Y. Fam. Ct. Act §§ 1027(b)(i), 1028(b)

► Article 10 fact finding hearing, the issue is whether the parents act amount to abuse and/or neglect, and/or whether state intervention is necessary, NOT the child's best interest.

► N.Y. Fam. Ct. Act § 1012

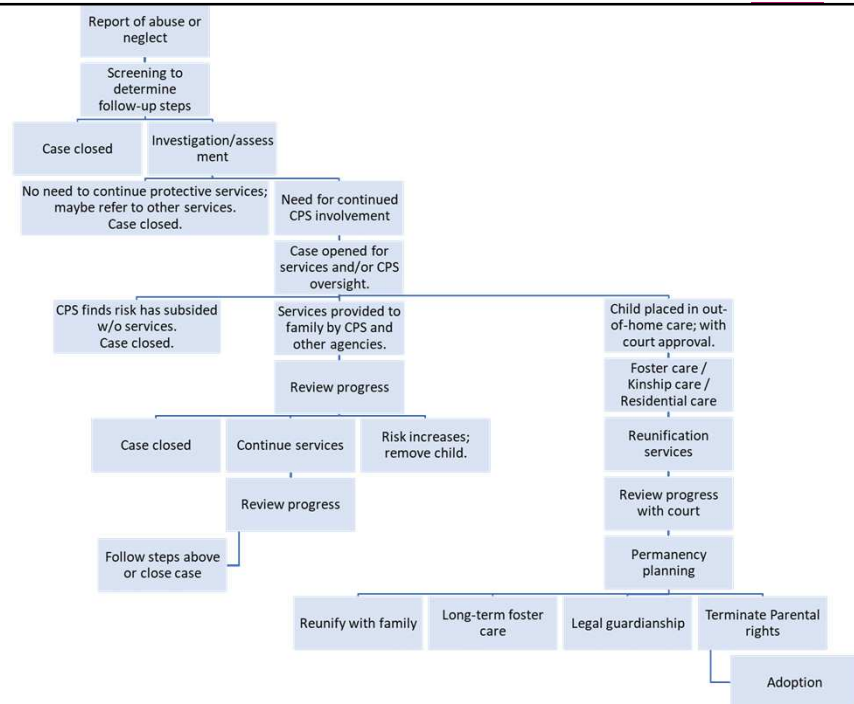
► Even at a dispositional hearing, or a permanency hearing held prior to termination of parental rights, a critical factor in the courts custodial determination is whether a return of the child to the parent would present a risk of neglect or abuse.

► N.Y. Fam. Ct. Act § 1089(d)

► However, in child welfare proceedings best interest applies to

- Visitation issues
- Treatment and services
- Choice of a custodian

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Article 10/Child Welfare INDICATED REPORT OR UNFOUNDED

- ▶ Hotline call either indicated(some credible evidence) or unfounded.
 - ▶ New York State Office Of Children And Family Services maintains a statewide central register of child abuse and maltreatment for reports made pursuant to the Child Protective Services Act. NY CLS Social Services 422(1)
- ▶ If indicated options: voluntary services, safety plan, custody petition, court intervention by DSS filing a petition(only 4% of reports)
- ▶ Players: DSS, AFC, respondents counsel, contract agency worker, CPS worker, children services worker, possible CASA and more!

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ABUSE FCA 1012-e

- ▶ Abused child means less than 18 years of age whose parent or other person legally responsible for his care;
- ▶ Inflicts or allows to be inflicted serious physical injury.
- ▶ Creates or allows to be created substantial risk of serious physical injury.
- ▶ Commits or allows to be committed sexual abuse.
- ▶ Types of abuse cases:
 - ▶ Physical abuse
 - ▶ Sexual abuse
 - ▶ Excessive corporal punishment that includes serious physical injury

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NEGLECT-FCA 1012-f

- ▶ A child less than 18 years of age whose physical, mental, or emotional condition has been impaired or is at imminent danger of becoming impaired.
- ▶ A parents or custodian's failure to provide a minimum degree of care.
- ▶ Types of neglect cases:
 - ▶ Corporal punishment
 - ▶ Parental drug abuse
 - ▶ Domestic violence
 - ▶ Emotional neglect
 - ▶ Medical neglect/failure to thrive
 - ▶ Educational neglect
 - ▶ An adequate guardianship/failure to supervise
 - ▶ Dirty House

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Article 10/Child Welfare INITIAL APPEARANCE/ARRAIGNMENT

- ❖ Implicit bias
- ❖ AFC assignment/what is your role at the initial appearance if you have not met with her client?
- ❖ Possible conflict of interest?
- ❖ Do you support the Department? Rubberstamp?
- ❖ Position on the record

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Article 10/Child Welfare JUDGE'S OPTIONS AT ARRAIGNMENT

- ▶ Judges options:
 - ▶ Temporary order of supervision with possible conditions
 - ▶ Removal/remand-finding of imminent risk of harm, contrary to the child's best interest to remain home, PH date set 8 months out from initial removal and every 6 months after that. Reserve right to a remand hearing pursuant to 1028.
 - ▶ Release to non-respondent parent pursuant to 1054
 - ▶ Order of protection with conditions (Nicholson case)
 - ▶ Treatment court referral
 - ▶ Visitation parameters: unsupervised, supervised, agency supervised, TSV

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Article 10/Child Welfare AFC NEGOTIATION STRATEGIES

- ▶ ADVOCATE... you are your client's voice!
- ▶ Demand a say in the proposed dispositional contract.
- ▶ AFC must consent to ACD.
- ▶ What is the best outcome to expedite your client's wishes.
 - ▶ ACD,
 - ▶ 1051a finding on consent,
 - ▶ 1051c aid of the court is no longer necessary,
 - ▶ admission,
 - ▶ trial.

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ARTICLE 10 DISPOSITIONS

- ❖ **WITHDRAW**-DSS withdraws the petition and the petition is dismissed without any adjudication.
- ❖ **ADMISSION/PARTIAL ADMISSION**-Respondent admits to the allegation(s) in the petition and makes statements describing having done what is alleged and the court then adjudicates the children to be neglected or abused or both.
- ❖ **CONSENT OR STIP TO ADJUDICATION FCA 1051A**-Respondent consents to the court adjudicating abuse or neglect but does not specifically admit the acts alleged and the court adjudicates the child(ren) as abused or neglected.
- ❖ **SUSPENDED JUDGMENT FCA 1052, 1053**- The court adjudicates abuse or neglect with the respondents' consent or sometimes by admission but allows a process by which the adjudication could be voided if the respondent completes the required dispositional terms. no placement out of the home can occur with a suspended judgment.
- ❖ **ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (AND ACD OR ACOD) FCA 1039**- all parties agree to a dispositional order without an adjudication of abuse or neglect. if the respondent completes the required dispositional terms the petition is dismissed. no placement out of the home can occur with an "ACD" settlement.

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Article 10/Child Welfare PERMANENCY HEARINGS

▶ Permanency hearing goals:

- ▶ Return to parent- most common
- ▶ Adoption-freed child
- ▶ Kinship guardianship-subsidized, requires DSS approval
- ▶ Permanent placement with a relative/article 6
- ▶ Another planned permanent living arrangement with resources

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Article 10/Child Welfare AFC ROLE IN PERMANENCY HEARINGS

- ▶ Permanency hearing report. Mailed at least 14 days in advance. Review with your client in advance.
- ▶ Barriers to return.
- ▶ Reasonable efforts toward reunification. Court must make specific findings. AFC can object!
- ▶ Child's right to be present at their permanency hearing. FCA 1090
- ▶ Compliance with dispositional contract.
- ▶ Have the issues that brought the family into court been adequately addressed.
- ▶ Most kids want to go home! This is the time to hold the Department of social services accountable to prove reasonable efforts. Do not consent if you do not feel they have!

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Grounds for TPR in New York SSL 384-b

▶ **ABANDONMENT**

- ▶ Child must be in foster care or article 10 direct care for more than 6 months.
- ▶ In the most recent 6 there was no meaningful contact or communication with child or agency or foster care parent/care provider.
- ▶ Parent was physically and financially able- presumed unless proof otherwise
- ▶ Agency did not discourage or prevent contact.
- ▶ Agency need not prove diligent efforts or attempts to contact parent.
- ▶ No dispositional hearing required
- ▶ Clear and convincing standard of proof

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Grounds for TPR in New York SSL 384-b

► **MENTAL ILLNESS OR MENTAL RETARDATION**

- Child must be in foster care or article 10 direct care for more than 12 months.
- Parent is presently mentally ill or mentally retarded to the extent that they can not safely care for the child now and in the foreseeable future.
- Diligent efforts do not have to be proven
- Dispositional hearing is not required
- Expert witness must be appointed, attempt to examine the parent and required to testify.
- Clear and convincing evidence standard of proof

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Grounds for TPR in New York SSL 384-b

► **SEVERE OR REPEATED ABUSE**

- Child must be in foster care or article 10 direct care for NO minimum time.
- Child was severely abused as found in article 10 or as described in regarding criminal convictions or:
- 2 adjudications of child abuse against parent in 5 years.
- Clear and convincing evidence standard of proof
- Diligent efforts by agency unless there is an exception available for no reasonable efforts:
 - No reasonable efforts order was granted by the court
 - Effort to reunite would have been detrimental to the child
 - Parent was incarcerated and failed to respond on more than one occasion
 - Parent failed for more than 6 months to keep the agency advised of address

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Grounds for TPR in New York SSL 384-b

► PERMANENT NEGLECT

- Child must be in foster care or article 10 direct care for more than 12 months, even if there has not been an article 10 disposition in place, OR child has been in care for 15 of the last 22 months.
- The agency offered diligent efforts to the parent to provide reunification consisting of visitation, services designed to assist the specific problems, etc.
- Parent was physically and financially able to have contact and plan.
- Parent failed to maintain contact with the child OR failed to plan for the child's future by failing to resolve the issues that resulted in the child being placed in and staying in care.
- Clear and convincing standard of proof
- Practical pointer- most common, use permanency hearing reports, contract and plan for services, case planning reviews etc.

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SUSPENDED JUDGMENTS ON PERMANENT NEGLECT TPRs FCA 633

Court can issue suspended judgment on a permanent neglect TPR for up to one year and can issue extension for additional one-year, but no more!

Suspended judgment orders must have terms, conditions and duration specified.

Suspended judgment order must contain date for court review no later than 30 days before the end of the duration of the suspended judgment

Order must contain a TPR warning and be provided to the parent along with a service plan report

Agency must file and OTSC or a motion before the end of the suspended judgment if alleging violation or seeking an extension or the SJ will be deemed satisfied and no TPR will be possible

Once the OTSC or motion for violation or extension, the suspended judgment is tolled until resolution of the motion

If violation found, the court is to review the child's best interests and can revoke the suspended and TPR or extend suspended judgment for up to one year if not so extended before

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CONDITIONAL SURRENDERS AND ADOPTIONS WITH CONDITIONS

SSL 383-c, SSL 384, FCA1055-a, DRL 112-b

**AFC must agree to the conditions.

- ❖ Possible conditions AFC can negotiate for their client
 - ❖ Type of visits if any and amount: in person, virtual, phone call, supervised, unsupervised etc.
 - ❖ Update written or picture
 - ❖ Drop-dead clause
 - ❖ Keeping apprised of updated contact information
 - ❖ Gift exchanges
 - ❖ Anything other you would like to negotiate as long as it is consented to

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Hypothetical #1 fact pattern

- ▶ Neglect proceeding-DSS requesting remand/removal
- ▶ 3 children total, 10-year-old Tom, half siblings 5-year-old Mike and 3-year-old Liz
- ▶ 8 separate loop marks on Child Tom's buttocks and upper thighs/indicated report
- ▶ Healing bruises on child Tom's upper arms and behind his ears
- ▶ No marks on Mike and Liz/purely derivative in the neglect petition
- ▶ Tom disclosed that his mother was present when her boyfriend of the youngest 2 children "schools him" Re: virtual schoolwork
- ▶ CPS has located non-respondent Bio dad of Tom who is willing to have Tom reside with him, but not for siblings
- ▶ Non-respondent father has only seen Tom sporadically over the past few years.
- ▶ DSS has located a 1017/maternal aunt who made the initial report

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Hypothetical #1 cont.

INITIAL APPEARANCE/ARRAIGNMENT

Can you accept assignment as AFC to all 3 children?

Can you support the remand/removal request of the Department?

Should you take any position at the initial appearance?

What should your response be to the judge when they ask for your position?

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Hypothetical #1 cont.

Assume you are assigned to only represent Tom and have had the opportunity to meet with your client alone over a zoom call. Your client Tom was released to his non-respondent father pursuant to FCA 1054 with a NC order of protection against mom's boyfriend. Respondent mother was granted supervised access. His younger siblings were placed in 1017 custody of maternal Aunt but he only sees them once in a while and misses them dearly. He does not want to visit with his mother and has anxiety attacks when forced to. He wants to go live with his aunt and visit with his father to try and build a relationship.

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Hypothetical #1 cont. 2ND APPEARANCE/FURTHER PROCEEDINGS

During the interview with your client what are some things that need to be addressed to prepare you for the next appearance?

What do you advocate for at the next appearance?

Best practices for future representation of Tom?

Be involved in negotiations/contract proposals.

Is a permanency hearing scheduled with a release to a non-respondent father?

Sibling access?

Access with respondent mother?

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Hypothetical #2 FACT PATTERN

- ▶ Neglect proceeding-DSS requesting remand/removal
- ▶ 2 children total, 15-year-old Jennifer, half sibling 2-year-old Lisa
- ▶ Buffalo Bills lost and there was a domestic incident between Lisa's parents. Jennifer intervened to stop her stepfather from hurting her mother and was struck with a beer bottle and suffered severe lacerations to her face. Lisa was present during the incident.
- ▶ Jennifer was treated at Children's Hospital for injuries and the police arrested her stepfather for endangering the welfare of a child, assault and criminal obstruction of breathing against her mother.
- ▶ Jennifer reports her mother and stepfather engage in physical altercations often after her stepfather drinks to intoxication.
- ▶ CPS has located Jennifer's biological father who is willing to have Jennifer reside with him but CPS reports Jennifer told them she would like to remain with her mother and younger sister.
- ▶ Jennifer does not want to see her stepfather Michael and just wishes her mother would leave him.

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Hypothetical #2 cont. INITIAL APPEARANCE/ARRAIGNMENT

Can you accept assignment as AFC to both children?

Can you support the remand/removal request of the Department?

Should you take any position at the initial appearance?

What should your response be to the judge when they ask for your position?

Should you attempt to call the 15-year-old Jennifer prior to going on the record in front of the judge?

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Hypothetical #2 ISSUE SPOTTING

- ▶ Remand v. temporary order of supervision with an order of protection removing respondent stepfather from the home.
- ▶ Domestic violence advocate referral/safety plan.
- ▶ Visitation for stepfather with either child.
- ▶ Proposed contract and plan for services.
- ▶ Resolution/disposition.
- ▶ Client's position/zealous advocate

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Practical advice... Pay attention!

- ▶ Child welfare cases take years!
 - ▶ Recidivism
 - ▶ Complex roller coasters.
- ▶ Know your cases...preparation is key.
 - ▶ Timeline, family tree etc.
- ▶ Review orders, prepare orders and know what orders are in place.
- ▶ Meet with your clients! Always know their position prior to a court appearance and follow up after each court appearance. Build a good rapport.
- ▶ Remember you are representing children and it is very common for their position to change throughout the case.
 - ▶ Counsel your client and preserve your reputation at the same time as zealously advocating for your client. Tightrope walk! You can do it!