

ETHICS

Role of the Attorney for the Child
&
Ethical Considerations

RESOURCES

- 4th Dept Guidelines/ NYSBA Guidelines
- ETHICS FOR ATTORNEYS FOR CHILDREN
 - General Policy Considerations
 - Ethical Q & A
 - Cases on AFC Ethics
- Attorneys for Children Program
 - Linda Kostin or Tracy Hamilton (4th)
 - John Kraigenow or Betsy Ruslander (3rd)

ROLE OF THE AFC

- Attorney for the Child not Guardian ad Litem
- FCA Section 241 says AFC necessary
 - To help protect child's interests
 - To help child express wishes to the Court
- Conflict when child's stated wishes do not conform to what AFC believes is in child's best interest

ROLE OF THE AFC – con't

- Court Rule – Based on 4th Dept. definition
 - If client can make knowing, voluntary, considered judgment, AFC directed by child's wishes even if AFC disagrees (JD, PINS – no substituted judgment)
 - If AFC believes that client lacks capacity to make sound judgment or AFC convinced that child's wishes will result in a substantial risk of imminent serious harm (7 yr. old who wants to live w/ abusing parent), AFC may take contrary position but must inform the Court of child's stated wishes

Matter of Brian S., 141 AD3d 1145 (4th Dept 2016) Neglect Case

- No basis for trial AFC to substitute judgment
- Because all three were teenagers, no basis to conclude they lacked capacity for knowing, voluntary and considered judgment
- No substantial risk of *imminent*, serious harm to the children where
 - Children frequently skipped school
 - Mother may have occasionally used drugs in the home and was thus unable to provide care for the children
 - Mother, on one occasion, may have struck one child on the arm with a belt and left a small mark
- AFC also failed to advise Court he was substituting judgment

Matter of Brian S., (Con't)

- Conflict of interest for AFC to represent all three subject children where position of two of the children was contrary to position of the third
- Ineffective assistance of counsel where AFC
 - Failed to advocate clients' position
 - Asked questions on cross-examination that were designed to undercut clients' position

Matter of Lopez v Lugo
115 AD3d 1237 (4th Dept 2014)

Although an AFC must zealously advocate the child's position, an exception existed where both AFCs amply demonstrated the substantial risk of imminent, serious harm to the children

- Mother arrested for possession of drugs in the children's presence
 - Numerous weapons seized from the mother's home
 - Credible evidence established that the mother's husband assaulted one of the subject children who attempted to intervene when the husband attacked the mother with an electrical cord.
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Matter of Viscuso v Viscuso,
129 AD3d 1679 (4th Dept 2015)

- ❑ AFC Justified in substituting judgment.
 - ❑ The mother's persistent and pervasive pattern of alienating the child from the father was likely to result in a substantial risk of imminent, serious harm.
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Matter of Zakariah SS. V Tara TT.,
143 AD3d 1103 (3d Dept 2016)

- ❑ Custody case
 - ❑ AFC not required to advocate 11-year-old child's position
 - ❑ following the child's wishes to live with the mother was "likely to result in a substantial risk of imminent, serious harm" to the child because of mother's ongoing attempts to alienate the child from father
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MATTER OF CARBALLEIRA v SHUMWAY
273 AD2d 753, lv. denied 95 NY2d 764 (3d Dept 2000)

- Third Dept. held substituted judgment proper in custody case but stressed that
 - Child was 11 years old and immature for his age
 - Suffered from numerous psychological disorders
 - Mother exercised unhealthy control
 - AFC repeatedly informed court of child's preference to live with mother

Matter of Payne v Montano,
166 AD3d 1342 (3d Dept 2018)

- AFC must take an active role
- Family Court dismissed mother's petition to modify custody - "thin record" failed to support modification request
- Child did not want to continue visitation as ordered
- The AFC should have taken a more active role in the proceedings by presenting witnesses that could speak to the child's concerns and/ or conducting a more thorough cross-examination of the mother
- Accordingly, the trial AFC did not provide effective assistance

CONFIDENCES & SECRETS

- AFC is ordinarily precluded from revealing to the court or parties communications the client wishes to remain confidential
 - Rules of Professional Conduct
 - 1.6 client confidentiality - informed consent required with very few exceptions
 - 1.14 client with diminished capacity - at risk of substantial harm unless action taken and lawyer cannot adequately act in client's own interest

Confidences and Secrets – con't

- Can reveal confidences only where the client has diminished capacity and only to the extent reasonably necessary to protect the client's interests
 - In role of counselor, AFC usually can convince client to disclose but if not remember
 - You are NOT a Mandated Reporter

Independent Representation

- Child entitled to Independent Representation
 - *Davis v Davis*, 269 AD2d 82 (4th Dept 2000) AFC who is retained and paid by one of the contesting parties in a custody proceeding is indelibly cast, either actually or ostensibly, as partial to the parent who hires him or her
 - In order to represent a child effectively, an AFC should have regular contact to ascertain the child's wishes and concerns and to counsel the child concerning the proceeding (see *Matter of Christopher B. v Patricia B.*, 75 AD3d 871 (3d Dept 2010)[court erred because its order was issued before the AFC could interview his client, thus prohibiting the AFC from taking an active role in and effectively representing the interests of his client].

Conflicts

- Disqualification is not necessary where the interests of the siblings are not adverse and an actual conflict is not demonstrated (see *Matter of Rosenberg v Rosenberg*, 261 AD2d 623; *Anonymous v Anonymous*, 251 AD2d 241; *Matter of Zirkind v Zirkind*, 218 AD2d 745).
- Gary D.B. v Elizabeth C.B.*, 281 AD2d 969 – where siblings express different preferences concerning parent with whom they wish to live, AFC motion to withdraw should have been granted based on articulated conflict
- Matter of Brian S.*, *supra*

REPORTS

LG Reports – Never

- *Cobb v Cobb*, 4 AD3d 747, *lv denied* 2 NY3d 759
 - the court improperly directed the AFC to prepare a “law guardian report” to the court ex parte inasmuch as the AFC is the attorney for the child, not an arm of the court
 - The AFC should not submit **any** pretrial report to the court or engage in any ex parte communication w/the court
 - Court improperly directed the AFC to testify as a witness & AFC violated DR-502 (now Rule 3.7) in doing so

CONTINUITY OF REPRESENTATION

Matter of Kristi L.T. v Andrew R.V., 48 AD3d 1202, *lv denied* 10 NY3d 716

- 4th Dept. noted that the same AFC had been appointed for the child in prior 2 matters but was not reappointed in the 3rd because mother objected to appointment. That was error. The attorney was available and should have been reappointed
- Fam Ct Act 249 (b) provides that the court shall to the extent practicable and appropriate appoint the same attorney who previously represented the child

Stipulations

Matter of Figueroa v Lopez, 48 AD3d 906 (3d 2008)

- AFC must be afforded the same opportunity to participate in a proceeding as any other attorney.
- Here, AFC did not consent to a stipulation regarding custody of his client. When he attempted to explain why, the court said it didn’t care and characterized the attorney’s position as ridiculous without allowing AFC to place his position on the record. The AFC reportedly obtained information that made him concerned about supervised visitation.
- While not all restrictions placed upon an AFC result in reversal where there is an adequate record, here the record was inadequate.

Stipulations – con't

- Where the court in a custody matter appoints an attorney for the children, the attorney has the right to be heard with respect to a proposed settlement and to object to the settlement but not the right to preclude the court from approving the settlement in the event that the court determined that the settlement was in the children's best interests. *Matter of McDermott v Bale*, 94 AD3d 1542 (4th Dept 2012)

Duties on Appeal

- Your representation on appeal continues unless you request substitution.
- File Notice of Appeal if the child disagrees with any part of the order, even if you plan to seek substitution.
- If AFC wishes to raise contentions in the child's brief in opposition to the order appealed from (e.g., argue for a reversal), AFC must file a notice of appeal and take cross appeal (see e.g. *Matter of Jayden B.*, 91 AD3d 1344).
- If you do not want to continue as AFC on an appeal, contact the AFC Office to request substitution

Duties on Appeal – con't

- Matter of Mark T. v Joyanna U.*, 64 AD3d 1092 (3d Dept 2009)
Appellate AFC was different than trial AFC. At oral argument, AFC revealed that he neither met with or spoken with his client. He said that he could determine the child's position from the record and decided that supporting an affirmance was in the 11 ½ year-old child's best interests. After reviewing the Rule of the Chief Judge, etc. the court determined that the child had not received meaningful representation. The child was entitled to consult with and be counseled by his attorney to express his position and be apprised of the progress of the appeal. Without something in the record indicating the 11 ½ year old was unable to make a reasoned judgment, the attorney was bound to argue his client's position.

Duties on Appeal – con't

- *Matter of Kessler v Fancher*, 112 AD3d 1323 (4th Dept 2013); *Matter of Lawrence v Lawrence*, 151 AD3d 1879 (4th Dept 2017)
 - Fourth Dept affirmed the dismissal of the mother's petition seeking modification of a custody order because the mother had not taken an appeal and the children could not force the mother to litigate a petition she had since abandoned.
 - *Rutland v O'Brien*, 143 AD3d 1060 (3d Dept 2016)
Thompson v Bray, 148 AD3d 1364 (3d Dept 2017)
 - Third Dept determined merits of AFC's appeal from an order modifying custody, although neither parent had taken an appeal.
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