NEW YORK STATE SUPREME COURT
APPELLATE DIVISION, FOURTH DEPARTMENT
ATTORNEYS FOR CHILDREN PROGRAM

HONORABLE GERALD J. WHALEN
PRESIDING JUSTICE

ETHICS FOR ATTORNEYS FOR CHILDREN

January 2017

GENERAL POLICY CONSIDERATIONS

SECTION 7.2 OF THE RULES OF THE CHIEF JUDGE

SUMMARY OF RESPONSIBILITIES OF ATTORNEY FOR THE CHILD

GENERAL POLICY CONSIDERATIONS

Role of the Attorney for the Child

Historically, the definition of the role of the attorney for the child has engendered a great deal of confusion. Many attorneys, and indeed many Judges, have viewed the role of the attorney for the child to be in the nature of a guardian ad litem. It is clear, however, that the role of the attorney for the child is very different from that of a guardian ad litem. A guardian ad litem, who need not be an attorney, is appointed as an arm of the Court to protect the best interests of a person under a legal disability. In contrast, the role of the attorney for the child is to serve as a child's lawyer. The attorney for the child has the responsibility to represent and advocate the child's wishes and interests in the proceeding or action.

With regard to the role of the attorney for the child please carefully review the Rule of the Chief Judge § 7.2 and the Summary of Responsibilities of the Attorney for the Child that follows on pages 3-4 of this document.

Protocols

In view of the age of your clients and the sensitive nature of the cases in which you are appointed, you are presented with unique challenges. As an attorney for children, however, you always should act in a manner consistent with proper legal practice and should not assume the role of social worker, psychologist or advocate for one of the parties. Although it may be tempting to step outside the role of counsel for the child, particularly when the circumstances of the case are especially tragic, the rules of good lawyering are as applicable to you as to any attorney in a civil proceeding or action.

Examples of improper practices include:

- engaging in *ex parte* communications with the Judge without the express approval of all parties
- communicating with the parties in the absence of their counsel
- requesting confidential documents without the proper authorization of a party
- disclosing client confidences without the approval of the client. The attorney for the child should avoid attributing to the child any statements or recommendations regarding the ultimate disposition of the case, unless the child has specifically authorized the attorney for the child to do so <u>and</u> understands the possible implications

- the attorney for the child should not be a witness at any time during the proceeding or action in any subsequent proceeding by the same parties

Because trial courts vary with regard to their expectations of the attorney for the child, you should define your role and ensure that your role is understood by your client(s), the parties and their attorneys, as well as the Judge. We recognize that some trial courts are not fully aware of the proper role of the attorney for the child and, in some instances, may expect the attorney for the child to assume an improper role. Presiding Justice Whalen, the Fourth Department Attorneys for Children Advisory Committee, and the Attorneys for Children Program Office work to educate the bench about the proper role of the attorney for the child.

Section 7.2 of the Rules of the Chief Judge

Section 7.2 Function of the attorney for the child.

(a) As used in this part, "attorney for the child" means a[n attorney] 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 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.

(effective October 17, 2007)

Summary of Responsibilities of the Attorney for the Child

While the activities of the attorney for the child will vary with the circumstances of each client and proceeding, in general those activities will include, but not be limited to, the following:

(1) Commence representation of the child promptly upon being notified of the appointment;

(2) Contact, interview and provide initial services to the child at the earliest practical opportunity, and prior to the first court appearance when feasible;

(3) Consult with and advise the child regularly concerning the course of the proceeding, maintain contact with the child so as to be aware of and respond to the child's concerns and significant changes in the child's circumstances, and remain accessible to the child;

(4) Conduct a full factual investigation and become familiar with all information and documents relevant to representation of the child. To that end, the lawyer for the child shall retain and consult with all experts necessary to assist in the representation of the child.

(5) Evaluate the legal remedies and services available to the child and pursue appropriate strategies for achieving case objectives;

(6) Appear at and participate actively in proceedings pertaining to the child;

(7) Remain accessible to the child and other appropriate individuals and agencies to monitor implementation of the dispositional and permanency orders, and seek intervention of the court to assure compliance with those orders or otherwise protect the interests of the child, while those orders are in effect; and

(8) Evaluate and pursue appellate remedies available to the child, including the expedited relief provided by statute, and participate actively in any appellate litigation pertaining to the child that is initiated by another party, unless the Appellate Division grants the application of the attorney for the child for appointment of a different attorney to represent the child on appeal.

ETHICAL QUESTIONS AND ANSWERS

QUESTIONS & ANSWERS

Q. What is the function of the attorney for children?

A. Attorneys for children are appointed "for minors who often require the assistance of counsel to **help protect their interests** and to **help them express their wishes** to the court" (Family Ct Act § 241 [emphasis added]). The dual role the statute places upon attorneys for children is addressed in section 7.2 of the Rules of the Chief Judge. That rule provides in relevant part:

> (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 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.
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>> (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.
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>> (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.

It is apparent from Rule 7.2 that the attorney for the child is an advocate for the child and not a guardian ad litem. CPLR 1202 (a) provides that the "court in which an action is triable may appoint a guardian ad litem at any stage in the action." A guardian ad litem is "charged with the responsibility of close investigation and exploration of the truth on the issues and perhaps even of recommending by way of report alternative resolutions for the court to consider" (*Braiman v Braiman*, 44 NY2d 584). A guardian ad litem, who need not be an attorney, is appointed to protect the best interests of a person under a legal disability, not to advocate the child's position. The State of New York is not responsible for payment where a guardian ad litem is appointed (*see* CPLR 1204).

Prior to the promulgation of Rule 7.2, the Appellate Division discussed the function of the attorney for the child in *Matter of Carballeira v Shumway* (273 AD2d 753, *lv denied* 95 NY2d 764 [concluding that substituted judgment was proper because the child had just turned 11 years old at the time of the hearing, suffered from numerous emotional disorders, and his judgment was impaired by the degree of control the mother exercised over him]). A recent post Rule 7.2 case discussing the rule is *Matter of Brian S.*, 141 AD3d 1145, where in a neglect case, three children with differing positions were represented by one AFC. A majority of the Appellate Division determined that the two older teenaged children were deprived of effective assistance of counsel because the AFC failed to advocate for their position. In addressing Rule 7.2, the Court concluded that there was no basis to conclude the two older children lacked capacity for a knowing, voluntary and considered judgment or a basis to conclude that following those children's wishes was likely to result in a substantial risk of imminent serious harm where AFC's most serious concern was the children's skipping school and there was evidence that the mother occasionally used drugs in the home and that she may have struck the youngest child on her arm, leaving a small mark. Another recent case discussing Rule 7.2 is *Matter of Zakariah SS. V Tara TT.*, 143 AD3d 1103 (in custody case, AFC not required to advocate 11-year-old child's position because 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; *see also, Matter of Mason v Mason*, 103 AD3d 1207 (mother's contention that AFC improperly advocated a position contrary to child's wishes because AFC did not state basis for taking contrary position was unpreserved because mother failed to make motion to remove AFC. In any event, that contention lacked merit because the record supported the finding that the child lacked capacity for a knowing, voluntary and considered judgment); *Matter of Lopez v Lugo*, 115 AD3d 1237, 1238 (both AFC, who advocated positions contrary to their client's wishes, amply demonstrated a substantial risk of imminent serious harm to the children if their wished were followed).

The attorney for the child is entitled to the same rights as those afforded to the parties' attorneys (*see Krieger v Krieger,* 65 AD3d 1350 [the Appellate Division determined that Family Court improvidently exercised its discretion in failing to adjourn a hearing "to provide the attorney for the child a reasonable opportunity to present additional witnesses"]. Conversely, the attorney for the child has no "special status" (*see*

Matter of William O. v Michele A., 119 AD3d 990 [the court improperly relied upon AFC as an investigative arm of the court and as an advisor, referring to her as a "quarterback" and deferring to her recommendations in making its determination]; *Aquino v Antongiorgi*, 92 AD3d 780, *lv denied* 19 NY3d 805 [error for court to direct that mother could not file additional petitions unless attorney for the child approved]).

Q. How often should the attorney for the child meet with the client?

A. A child client is entitled to independent (*see Davis v Davis*, 269 AD2d 82) and effective representation (*see Matter of Colleen CC.,* 232 AD2d 787*).* In order to represent a child effectively, an attorney for the child 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 [the court erred because its order was issued before the attorney for the child could interview his client, thus prohibiting the attorney from taking an active role in and effectively representing the interests of his client]; *Matter of Lamarcus E.,* 90 AD3d 1095 [The Appellate Division relieved the appellate attorney of her assignment, determining that the child client had been denied effective assistance of counsel. "Counsel's failure to consult with and advise the child to the extent of and in a manner consistent with the child's capacities (citation omitted) constitutes a failure to meet her essential responsibilities as the attorney for the child. Client contact, absent extraordinary circumstances, is a significant component to the meaningful representation of a child."]; *see also Matter of Dominique AW.*, 17 AD3d 1038, *lv denied* 5 NY3d 706).

Q. Should the same attorney for the child be assigned when the child is involved in a subsequent proceeding?

A. Successive appointments are favored. Authority for this proposition is in Family Court Act § 249 (b), which provides: "In making an appointment of an attorney for the child pursuant to this section, the courts **shall,** to the extent practicable and appropriate, appoint the same attorney for the child who has previously represented the child " [emphasis added]; (*see Matter of Kristi LT. v Andrew RV.*, 48 AD3d 1202, *lv denied* 10 NY3d 716 ["the record establishes that the parties have had proceedings before at least three different judges. The same [attorney for the child] was appointed for the child in the first two matters but was not reappointed by Family Court in this matter because the mother objected to his appointment. The court recognized, however, that in appointing a[n attorney for the child] 'the court shall, to the extent practicable and appropriate, appoint the same attorney for children who has previously represented the child (Family Ct Act § 249 [b])'. **The record establishes that the prior [attorney for the child] was available, and we conclude that he should have been reappointed** [emphasis added])."

Q. Under what circumstances is it appropriate to replace an attorney for the child because of a conflict?

A. Where an attorney for the child jointly represents siblings and an actual conflict arises, the attorney for the child should be replaced because continued representation would violate the ethical rules of zealous representation and preservation of client confidences (*see Matter of Brian S*., *supra*, at 1286 (Given inharmonious positions of children it was impossible for AFC to advocate zealously for children and children were entitled to appointment of separate AFC on remittal); *see also Gary DB. v Elizabeth CB.*, 281 AD2d 969; *Matter of H. Children*, 160 Misc 2d 298; *see also Corigliano v Corigliano*, 297 AD2d 328). 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).

Q. Under what circumstances may an attorney for the child divulge a client confidence or secret?

A. It is well settled that a child client's confidences and secrets are privileged communications (*see Matter of Angelina AA.*, 211 AD2d 951, *lv denied* 85 NY2d 808*; Matter of Bentley v Bentley*, 86 AD2d 926). Of course, in the attorney for the child's role as counselor, in an appropriate case, the attorney for the child should always attempt to convince the client that consent to disclosure is the best course of action (*see Matter of Carballeira v Shumway*, *supra* at 757).

Before adoption of the Attorney Rules of Professional Conduct, under the New York Code of Professional Responsibility, disclosure in the event of a legal disability was not permitted. Thus, an attorney could not disclose communications of the client on an issue such as the sexual abuse of the client without the client's consent.

The Attorney Rules of Professional Conduct now permit disclosure in certain instances.

RULE 1.14

Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases,

seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 [confidentiality of information]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Q. Under what circumstances may an attorney for a child be called as a witness in a proceeding involving her client?

A. An attorney for the child may not testify if the attorney-client privilege applies (*see Matter of Angelina AA.*, *supra* [Family Court properly refused to allow attorney for the child to testify about veracity of statements Angelina made at in-camera hearing; she had an attorney-client relationship with the attorney for the child and did not waive privilege]; *Matter of Rebecca B.,* 227 AD2d 315 [subpoenas demanding testimony of attorney for the child properly quashed based upon attorney-client privilege and work product]; *see also, Matter of Herald v Herald*, 305 AD2d 1080 [although mother sought disqualification of attorney for the child on the ground that the attorney for the child might be called as a witness, she failed to meet her burden that the testimony was necessary]; *Matter of Morgan v Becker*, 245 AD2d 889 [permitting attorney for the child to testify about observations during home visits was inappropriate, but harmless]).

It is error for the court to direct the attorney for the child to testify as a witness (*see Matter of Cobb v Cobb*, 4 AD2d 747, *lv dismissed* 2 NY3d 759 ["the (attorney for the child's) testimony on behalf of petitioner in this case appears to be in direct contravention of the Code of Professional Responsibility"]; *Cervera v Bressler*, 50 AD3d 837 [court properly declined to direct AFC to testify and submit his file and notes for discovery because to rule otherwise would violate ethical duties to preserve client confidences and becoming a witness]).

In *Matter of Naomi C. v Russell A.*, 48 AD3d 203, 204, the Appellate Division dismissed a petition to modify an order of custody, stating:

> Although the court was warranted in dismissing the petition on its face, we point out that the questioning of the [attorney for the child] *** by the court is something that should not be repeated. With the parties present, the court asked the [Attorney for the Child], on the record, to discuss the position of the 10-year-old child regarding how well the current custody arrangement was working. Although the court was correct to disallow the "cross-examination" of the [Attorney for the Child] by petitioner's counsel, the court should not consider the hearsay opinion of a child in determining the legal sufficiency of a pleading in the first place. Most importantly, **such colloquy makes the [Attorney for the Child] an unsworn witness, a position in which no attorney should be placed.** "The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to...becoming a witness in the litigation" (Rules of the Chief Judge

[22 NYCRR] § 7.2[b]) (emphasis added).

In *Cervera v Bressler, supra*, the Appellate Division determined that the court erred in denying the father's motion to remove the AFC because the AFC submitted affirmations that included facts not in the record, which were hearsay gleaned from the the mother. That behavior, as well as the AFC's ad hominum attacks on the father, were unprofessional and inappropriate and amounted to the AFC acting as a witness against the father.

Unless an exception applies, Rule of Professional Conduct rule 3.7 requires the attorney for the child to withdraw from the case if the attorney for the child is likely to be a witness on a significant issue of fact.

Q. Under what circumstances may an attorney for the child communicate with a party and when may a party's attorney speak with the attorney for the child's client?

A. During the course of representation of the child the attorney for the child is precluded from communications with a party where the attorney for the child knows the party is represented by counsel, unless the attorney for the child has the prior consent of the party's counsel (*see* Rule of Professional Conduct rule 4.2).

Conversely, the attorney for the child should advise the parties' attorneys at the outset of the proceedings that the child should not be interviewed or examined by such attorneys without the prior consent of the attorney for the child (*see id.*).

Q. What other situations require that the attorney for the child consent before the child may be interviewed?

A. In a custody case, the attorney for the child must consent before the child is interviewed by a mental health expert (*see Campolongo v Campolongo*, 2 AD3d 476 [absence of attorney for the child at interview of child by psychiatrist who was retained by father on advice of father's attorney, without the attorney for the child's knowledge and consent, violated child's right to due process]; *Matter of Awan v Awan*, 75 AD3d 597 [In a custody proceeding, Family Court did not err in striking the testimony of an expert retained by the father, and in precluding further testimony by this expert. The father's attorney violated the Rules of Professional Conduct (22 NYCRR 1200.0) rule 4.2 by allowing a physician, whom the attorney retained or caused the father to retain, to interview and examine the subject child regarding the pending dispute and to prepare a report without the knowledge or consent of the attorney for the child]).

In a child protective proceeding, DSS caseworkers may interview the client of an attorney for child without the attorney for the child's consent (*see Matter of Cristella B.*, 77 AD3d 654 [Family Court properly denied a motion of the attorney for children to direct

the County Department of Social Services (DSS) to refrain from interviewing his clients concerning any issues beyond those related to safety, without 48 hours notice to him. The child who is the subject of a neglect proceeding has a constitutional and statutory right to legal representation, and Rule 4.2 of the Rules of Professional Conduct (22 NYCRR 1200.0), which prohibits an attorney representing another party in litigation from communicating with or causing another to communicate with a child without prior consent of the attorney for the child, applies only to attorneys. DSS has constitutional and statutory obligations toward children in its custody, and has mandate to maintain regular communications with children in foster care on a broad range of issues that go beyond their immediate health and safety]; *see also Matter of Tiajianna M.*, 55 AD3d 1321]).

Q. What is the attorney for the child's role in a stipulation regarding custody and/or visitation?

A. In *Matter of Figueroa v Lopez,* 48 AD3d 906, 907, the Appellate Division reversed Family Court's order, which was based upon a stipulation of the parties resolving a custody matter. The Appellate Division stated:

> Here, **the [attorney for the child] stated that he did not consent to the stipulation.** When he attempted to explain his reason, Family Court responded that it did not care. Family Court also characterized the attorney for the child's position as ridiculous, without allowing an explanation for his position to be placed on the record. The attorney for the child reportedly had obtained information (including possible domestic violence by the father) which made him concerned about unsupervised visitation by the father. Moreover, while not all improper restrictions imposed on an attorney for the child will result in reversal if the record indicates sufficient facts to uphold the determination (see *Matter of White v White*, 267 AD2d at 890; see also *Matter of Vickery v Vickery*, 28 AD3d 833, 834 [2006]; *Matter of Kaczynski v. Van Amerongen*, 284 AD2d 600, 603 [2001]), this sparse record is inadequate (emphasis added).

In *Matter of McDermott v Bale*, 94 AD3d 1542, 1543, the Appellate Division, Fourth Department determined that although the attorney for the child was entitled to a full and fair hearing and the right to object to the parties' stipulation, the attorney for the child could not preclude the court from approving the settlement because "children in custody cases should [not] be given full-party status such that their consent is necessary to effectuate a settlement...There is a significant difference between allowing children to express their wishes to the court and allowing their wishes to scuttle a settlement."

Q. Under what circumstances may the attorney for the child make a report to the court or rely upon hearsay?

A. It is improper for the court to direct the attorney for the child to prepare and

file an “attorney for the child report” – the attorney for the child is not an investigator, but an attorney – thus, the attorney for the child should not submit any pretrial report to the court (*see Matter of Cobb v Cobb, supra*; *see also Matter of Graham v Graham*, 24 AD3d 1051 [improper for court to direct attorney for the child to file a report and the attorney for the child should not have made recommendations, but should have taken a position as did the the parties’ attorneys]. It is also improper for the attorney for the child to relay hearsay to the court outside of a formal written report (*see William O. v Michele A., supra* [the court erred in relying upon attorney for the child’s “information” that the father was untreated sex offender]; *Matter of New v Sharma*, 91 AD3d 652 [“to the extent that the Family Court relied on the detailed accounts provided by the attorney for the child concerning her conversations with the child, it is inappropriate for an attorney for the child to present reports containing facts which are not part of the record”].

Q. When is it proper for the attorney for the child to speak privately with the Judge about the case?

A. Section 7.2 of the Rules of the Chief Judge explicitly prohibit such ex parte communications. Moreover, the Advisory Committee on Judicial Ethics in opinion #95-29 has stated that a Judge “may not discuss with a[n attorney for the child] the position of the [attorney for the child] with regard to the interests of the child outside the presence of the parties, the parents or their attorneys, unless all parties consent.”

Q. May the attorney for the child raise new facts on appeal?

A. Yes, an appellate court may take notice of new facts and allegations to the extent they indicate that the record before it is no longer sufficient for determining issues of fitness and right to custody of the child (*see Matter of Michael B.*, 80 NY2d 299).

Q. What are the attorney for the child’s duties on appeal?

A. The attorney for the child’s duties on appeal include, among other things, the duty to meet with the client to ascertain the client’s position on appeal. Failure to do so constitutes ineffective assistance of appellate counsel (*see Matter of Lamarcus E., supra* at 1096*; Matter of Mark T. v Joyanna U.,* 64 AD3d 1092, 1095). If an attorney for the child wishes to raise contentions in the client’s brief on behalf of the client in opposition to the order appealed from, the attorney for the child must take a cross appeal (*see Matter of Jayden B*., 91 AD3d 1344). The transcript of a *Lincoln* hearing should be sealed and made available only to an appellate court (*see Matter of Sellen v Wright*, 229 AD2d 680).

In *Matter of Kessler v Fancher*, 112 AD3d 1323, the Appellate Division, Fourth Department 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 abandoned.

ETHICS FOR ATTORNEYS FOR CHILDREN
SELECTED CASES

ROLE OF THE ATTORNEY FOR CHILDREN (AFC)

CONTINUITY OF REPRESENTATION

INDEPENDENT REPRESENTATION

CONFLICTS

ATTORNEY-CLIENT PRIVILEGE

AFC AS WITNESS

SEALING THE TRANSCRIPT OF THE LINCOLN HEARING

AFC "REPORTS"

MEETING WITH CLIENTS

AFC CONSENT TO THIRD-PARTY INTERVIEWS

STIPULATIONS

DUTIES ON APPEAL

143 A.D.3d 1103
Supreme Court, Appellate Division,
Third Department, New York.

In the Matter of **ZAKARIAH** SS., Respondent,
v.
TARA TT., Appellant.
(And Another Related Proceeding.).

Oct. 20, 2016.

Synopsis
Background: Mother and father filed separate petitions to modify prior order of custody. The Family Court, Greene County, Tailleur, J., granted father's petition for sole legal and physical custody. Mother appealed.

Holdings: The Supreme Court, Appellate Division, McCarthy, J., held that:

[1] sound and substantial basis in the record supported finding that best interests of child were served by granting father sole legal and physical custody;

[2] mother failed to preserve for appellate review her assertion that family court improperly acted as advocate; and

[3] family court's error in delegating determination of mother's visitation requiring remitting proceedings to establish visitation.

Affirmed as modified.

West Headnotes (4)

[1] **Child Custody**
Weight and Sufficiency
Evidence
Nature of Subject
Sound and substantial basis in the record supported finding that best interests of child were served by modifying prior custody order, which provided for joint legal and physical custody, to grant father sole legal and physical custody; father asserted that mother engaged in systematic and successful effort to program child to hate and fear father, while mother asserted father physically abused child, psychologist opined that child had been "brainwashed" by mother based on, among other things, child using sophisticated language to describe abuse and not being able to offer details to support "global" allegations, psychologist found child's explanations for other claims to be irrational, including that it was a "very strict rule" that father would not allow her to hit her brothers, psychologist found child's negative attitudes towards father correlated to presence of mother or mother's recent interactions, psychologist evaluated mother, who could not produce any records of any kind to support allegations of abuse, and psychologist found father did not engage in harmful alienating behavior.

Cases that cite this headnote

[2] **Child Custody**
Presentation and reservation of grounds of review
Mother's failure to object failed to preserve for appellate review her assertion that family court improperly acted as advocate in proceedings to modify prior order of custody.

Cases that cite this headnote

[3] **Child Custody**
Visitation
Child Custody
Determination and disposition of cause
Upon granting father's petition to modify prior custody order and to award father sole legal and physical custody of child, family court's error in delegating determination of mother's visitation required remitting proceedings to establish visitation.

Cases that cite this headnote

[4] **Child Custody**

Control by and Authority of Parties

A court cannot delegate its authority to determine visitation to a mental health professional.

Cases that cite this headnote

Attorneys and Law Firms

**278 Mack & Associates PLLC Albany (Barrett D. Mack of counsel), for appellant.

Max Zacker, Catskill, for respondent.

John Kosich, Greenville, attorney for the child.

**279 Before: PETERS, P.J., McCARTHY, LYNCH, ROSE and CLARK, JJ.

Opinion

McCARTHY, J.

*1103 Appeal from an order of the Family Court of Greene County (Tailleur, J.), entered September 4, 2015, which, among other things, granted petitioner's application, in a proceeding pursuant to Family Ct. Act article 6, to modify a prior order of custody and visitation.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of a daughter (born in 2004). By a June 2013 stipulated order, the parties had joint legal and physical custody of the child with parenting time on alternating weeks during the school year and three weeks of the summer with each parent. In June 2014, after having decided to relocate to North Carolina, the father filed a petition to modify an existing custody order, requesting joint legal custody of the child with primary physical custody awarded to the mother. Two months later, while the child was on a three-week agreed upon visit with the father in North Carolina, the mother filed a petition to modify the existing custody order, requesting immediate temporary sole legal and physical custody of the child. Subsequently, in November 2014, the father filed an amended petition for modification of the existing custody order, requesting sole legal and physical custody of *1104 the child in North Carolina with visitation to the mother, averring that, based upon his own experience with the child and pursuant to a forensic custody evaluation, the mother had alienated the child from the father and failed to foster any relationship between them. Following a fact-finding hearing, Family Court found a change in circumstances based on both the father's proposed move and a breakdown in the relationship between the child and the father. In its order, the court, among other things, granted the father's petition for sole legal and physical custody of the child and denied the mother's petition for the same. The mother now appeals.

[1] The record contains a sound and substantial basis to support the determination awarding the father sole legal and physical custody of the child. [1] Within our paramount consideration of the evidence as it reflects on the best interests of a child, we have recognized that evidence that a parent's intentional efforts to alienate a child from another parent is so inimical to a child's interests as to raise a strong probability that the offending parent is unfit to be a custodial parent (*see Matter of Gerber v. Gerber*, 133 A.D.3d 1133, 1137, 21 N.Y.S.3d 386 [2015], *lv. denied* 27 N.Y.3d 902, 2016 WL 1250304 [2016]). At trial, the parties presented two irreconcilable pictures of their parenting. Either, as the mother contended, the father had been and continued to be severely physically abusive to the child, or, as the father contended, the mother had engaged in a systematic and successful effort to program the child to hate and fear the father while coaching her to falsely accuse the father of such abuse.

In resolving these competing narratives, Family Court relied heavily on the testimony of a licensed psychologist who had performed a custody evaluation. That psychologist opined that the child had been "brainwashed, coached and rehearsed" by the mother. In support of this conclusion, the psychologist described a litany of ways in which the child acted in a manner consistent with a child of that age who had been coached to accuse an adult of abuse **280 that had not actually occurred. Examples of this included that the child was unwilling to acknowledge any positive experiences that she had with the father, that she arrived at their sessions with a "laundry list" of accusations against the father, that she used sophisticated language to describe the alleged abuse and that she could not offer further detail to describe more "global" statements that she had previously made about the alleged abuse.

***1105** Moreover, the psychologist found explanations that the child gave for other claims that she made to be irrational. For example, when asked to give an example of one of the "very strict rules" that the child claimed the father had for her, the child explained that she was not allowed to hit her brothers. When asked to explain why she believed her father had "pull[ed] her down the steps"—one of her accusations of abuse—the child explained that he had taken such action because she had been "doing a puzzle." On this issue, the psychologist explained, "obviously [the child's explanation] was an unusual response because it was a fabricated allegation, so there is no rational response." Moreover, the psychologist described drastically different attitudes that the child would exhibit in regard to her father on different occasions; negative attitudes toward the father appeared to highly correlate with the actual presence of the mother or the mother's recent interactions with the child.

The psychologist's evaluation of the mother gave her further reasons to discount the allegations of abuse. The mother was unable to produce any records, such as medical records or photographs, that would confirm her or the child's allegations of abuse by the father. Further, the psychologist found incredible some of the mother's explanations for why no such evidence existed. For example, the mother asserted that the reason she did not report the allegedly ongoing and serious abuse of the child was because of the fact that she did not know of the existence of a Child Protective Services hotline.[2] In addition, the psychologist noted that she had interviewed collateral contacts, particularly school employees who worked with the child and who the child had indicated were aware of the father's abuse. Those contacts contradicted the child's claim that she had disclosed any abuse to them, one specifically emphasizing that, as a mandated reporter, she would have been legally required to report such a disclosure if it had in fact occurred. Finally, after evaluating the mother and the child together, the psychologist opined that their interactions established that the child was placed in the position of having to care for the mother's feelings. The psychologist reached a largely opposite conclusion regarding the father, opining that, although he exhibited a lack of communication with the mother, he did not engage in harmful alienating behavior.

Considering the evidence as a whole and particularly ***1106** considering the psychologist's work with all of the parties and her reasoned explanation of how numerous factors led her to conclude that there was "no credible evidence of abuse" by the father but that there was evidence of "coaching, coercion and brainwashing" of the child by the mother, we find no reason to depart from Family Court's determination to credit the psychologist. According appropriate deference to that credibility determination, we find a sound and substantial basis in the record to support the conclusion that awarding the father sole custody ****281** of the child in North Carolina was in the child's best interests (*see Matter of Gerber v. Gerber*, 133 A.D.3d at 1138–1139, 21 N.Y.S.3d 386; *Robert B. v. Linda B.*, 119 A.D.3d 1006, 1008–1009, 988 N.Y.S.2d 709 [2014], *lv. denied* 24 N.Y.3d 906, 2014 WL 5368871 [2014]; *Matter of Burola v. Meek*, 64 A.D.3d 962, 966, 882 N.Y.S.2d 560 [2009]; *Matter of Whitley v. Leonard*, 5 A.D.3d 825, 827, 772 N.Y.S.2d 620 [2004]).

[2] The mother's contention that Family Court improperly acted as an advocate during the trial is unpreserved for our review, as she made no objections to the court's actions that she now complains of, and —contrary to the mother's contention—a review of the record does not support the conclusion that the court engaged in such extreme participation as to render objections unnecessary for the purposes of preservation (*see Matter of Shannon F.*, 121 A.D.3d 1595, 1596, 994 N.Y.S.2d 227 [2014], *lv. denied* 24 N.Y.3d 913, 2015 WL 94671 [2015]; *Matter of Keaghn Y. [Heaven Z.]*, 84 A.D.3d 1478, 1479–1480, 921 N.Y.S.2d 737 [2011]; *see generally People v. Charleston*, 56 N.Y.2d 886, 888, 453 N.Y.S.2d 399, 438 N.E.2d 1114 [1982]). Likewise, the mother never sought the disqualification of the aforementioned psychologist at a time where the court could have assigned a different custody evaluator,[3] and, thus, the contention that she ought to have been disqualified is also unpreserved for our review (*compare Reback v. Reback*, 41 A.D.3d 814, 816, 839 N.Y.S.2d 516 [2007]; *Roundpoint v. V.N.A., Inc.*, 207 A.D.2d 123, 126, 621 N.Y.S.2d 161 [1995]).

[3] **[4]** Nonetheless, Family Court erred by delegating the determination of the mother's visitation to the child's counselor. A court cannot delegate its authority to determine visitation to a mental health professional (*see Matter of Holland v. Holland*, 92 A.D.3d 1096, 1096, 939 N.Y.S.2d 584 [2012]; *Matter of Steven M. [Stephyon*

O.J., 88 A.D.3d 1099, 1101, 931 N.Y.S.2d 720 [2011]). Accordingly, we remit for further proceedings to establish the mother's visitation (*see Matter of Alisia M. [Sean M.]*, 110 A.D.3d 1186, 1188, 973 N.Y.S.2d 831 [2013]; *Matter of Holland v. Holland*, 92 A.D.3d at 1097, 939 N.Y.S.2d 584).

Finally, we reject the mother's contention that the attorney for the child was required to advocate for the child's stated ***1107** wishes to be in the custody of the mother. We find ample evidence in the record that the mother caused severe emotional distress to the child by her ongoing attempts to alienate the child from the father. If the child's professed wishes were acceded to, that distress was likely to continue and perhaps worsen. Moreover, the child's purported wishes were likely to lead to the continuation and amplification of severe and unwarranted damage to the child's relationship with the father. In such circumstances, we find no fault in the attorney for the child's decision to advocate for a position contrary to the child's wishes, of which Family Court was aware, given that such wishes were "likely to result in a substantial risk of imminent, serious harm to [her]" (22 NYCRR 7.2[d][3]; *see Matter of Viscuso v. Viscuso*, 129 A.D.3d 1679, 1681, 12 N.Y.S.3d 684 [2015]). Each of the mother's remaining contentions have been considered and have been found to be without merit.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as delegated to the child's counselor the determination as to respondent's ****282** visitation with the child; matter remitted to the Family Court of Greene County for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

PETERS, P.J., LYNCH, ROSE and CLARK, JJ., concur.

All Citations

143 A.D.3d 1103, 39 N.Y.S.3d 278, 2016 N.Y. Slip Op. 06923

Footnotes

1 The mother does not challenge Family Court's determination that there was a change in circumstances warranting inquiry only into the best interests of the child.

2 The psychologist noted that, in assessing the credibility of such a claim, she considered reports establishing that the mother had previously contacted Child Protective Services in 2004.

3 More generally, the mother never sought the disqualification of the psychologist at any point prior to this appeal.

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141 A.D.3d 1145, 34 N.Y.S.3d
851, 2016 N.Y. Slip Op. 05464

**1 In the Matter of Brian S. and Others, Children Alleged to be Neglected. Cayuga County Department of Social Services, Respondent; Tanya S. et al., Appellants, et al., Respondent.

Supreme Court, Appellate Division,
Fourth Department, New York
15-00314, 526
July 8, 2016

CITE TITLE AS: Matter of Brian S. (Tanya S.)

***1146 HEADNOTES**

Parent, Child and Family
Abused or Neglected Child
Corroboration of Child's Out-of-Court Statement

Parent, Child and Family
Abused or Neglected Child
Child Deprived Effective Assistance of Counsel—Attorney for Child's Failure to Advocate Child's Position

Parent, Child and Family
Abused or Neglected Child
Attorney for Child—Children with Conflicting Interests Entitled to Appointment of Separate Attorneys

Karpinski, Stapleton & Tehan, P.C., Auburn (Adam H. Vanbuskirk of counsel), for respondent-appellant.
Susan James, Attorney for the Child, Waterloo, appellant pro se.
Marybeth D. Barnet, Attorney for the Child, Canandaigua, appellant pro se.
Theodore W. Stenuf, Attorney for the Child, Minoa, appellant pro se.
Harris Beach PLLC, Buffalo (Allison A. Bosworth of counsel), for petitioner-respondent.

Appeals from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered March 2, 2015 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent Tanya S. had neglected the subject children.

It is hereby ordered that the order so appealed from is reversed on the law without costs and the matter is remitted to Family Court, Cayuga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother and each Attorney for the Child assigned to the three subject children (appellate AFC) appeal from an order that, inter alia, determined that the mother neglected the children and placed the children in the custody of petitioner. Initially, we reject the contentions of the mother and the appellate AFCs that petitioner failed to meet its burden of establishing neglect by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). Although the evidence of neglect at the fact-finding hearing consisted largely of hearsay statements made by the children to a caseworker employed by petitioner, those statements were adequately corroborated by other evidence tending to establish their reliability (*see* § 1046 [a] [vi]; *Matter of Gabriel J. [Stacey J.]*, 127 AD3d 667, 667 [2015]; *Matter of Tristan R.*, 63 AD3d 1075, 1076-1077 [2009]). Moreover, the children's out-of-court statements to the caseworker cross-corroborated each other (*see Gabriel J.*, 127 AD3d at 667; *Tristan R.*, 63 AD3d at 1076-1077). In sum, we conclude that the children's statements, "together with [the] negative inference drawn from the [mother's] failure to testify, [were] sufficient to support [Family Court's] finding of neglect" (*Matter of Inman H.*, 49 AD3d 879, 880 [2008]).

2 The mother failed to preserve her further contention that her attorney was improperly excluded from an in camera examination of two of the subject children (*see Matter of Jennifer WW.*, 274 AD2d 778, 779 [2000], *lv denied* 95 NY2d 764 [2000]). In any event, it appears that the limited purpose of the examination was for the court to determine where the children would live during the pendency of the proceeding, and the court did not consider the children's statements at the examination as evidence of the mother's neglect. ***1147

Children in a neglect proceeding are entitled to effective assistance of counsel (*see Matter of Jamie TT.*, 191 AD2d 132, 136-137 [1993]). Here, the appellate AFC for Katie and the appellate AFC for Brian contend that Katie and Brian were deprived of effective assistance of counsel by the Attorney for the Children who jointly represented them as well as their sister Alyssa during the proceeding

(trial AFC). Katie's appellate AFC contends that the trial AFC never met with or spoke to Katie. Although an AFC is obligated to "consult with and advise the child to the extent of and in a manner consistent with the child's capacities" (22 NYCRR 7.2 [d] [1]; *see Matter of Lamarcus E. [Jonathan E.]*, 90 AD3d 1095, 1096 [2011]), there is no indication in the record whether the trial AFC consulted with Katie. The contention of Katie's appellate AFC is therefore based on matters outside the record and is not properly before us (*see Matter of Gridley v Syrko*, 50 AD3d 1560, 1561 [2008]; *Matter of Harry P. v Cindy W.*, 48 AD3d 1100, 1100 [2008]).

We agree with Brian's appellate AFC, however, that Brian was deprived of effective assistance of counsel because the trial AFC failed to advocate his position. The Rules of the Chief Judge provide that an AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]), even if the AFC "believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]; *see Matter of Mark T. v Joyanna U.*, 64 AD3d 1092, 1093-1094 [2009]). There are two exceptions to this rule: (1) where the AFC is convinced that the "child lacks the capacity for knowing, voluntary and considered judgment"; or (2) where the AFC is convinced that "following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]; *see Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1680 [2015]; *Matter of Lopez v Lugo*, 115 AD3d 1237, 1238 [2014]). Here, there is no dispute that the trial AFC took a position contrary to the position of two of the subject children, Brian and Alyssa, both of whom maintained that Katie was lying with respect to her allegations against the mother. Alyssa expressed a strong desire to continue living with the mother, while Brian said that he wanted to live with either the mother or his father, who entered an admission of neglect prior to the hearing and was thus not a custodial option. Nevertheless, when the mother moved to dismiss the petition at the close of petitioner's case based on insufficient evidence of neglect, the trial AFC opposed the motion, stating that, although this was "probably not a very strong case," petitioner had met its burden of proof. Also, during his "cross-examination" of petitioner's sole witness, the trial AFC asked questions designed to elicit unfavorable testimony ***1148** regarding the mother, thus undercutting Brian and Alyssa's position.

Inasmuch as the trial AFC failed to advocate Brian and Alyssa's position at the fact-finding hearing, he was required to determine that one of the two exceptions to the Rules of the Chief Judge applied, as well as "[to] inform the court of the child[ren]'s articulated wishes" (22 NYCRR 7.2 [d] [3]). Here, the trial AFC did not fulfill either obligation (*cf. Matter of Alyson J. [Laurie J.]*, 88 AD3d 1201, 1203 [2011]). Indeed, the record establishes that neither of the two exceptions applied. Because all three children were teenagers at the time of the hearing, there was no basis for the trial AFC to conclude that they lacked the capacity for knowing, voluntary and considered judgment, and there is no evidence in the record that following the children's wishes was "likely to result in a substantial risk of imminent, serious harm to the child[ren]" (22 NYCRR 7.2 [d] [3]). According to the trial AFC, the most serious concern he had about the children was that they frequently skipped school which, although certainly not in their long-term best interests, did not pose a substantial risk of *imminent* and serious harm to them. Similarly, the fact that the mother may have occasionally used drugs in the house, and was thus unable to care for the children, does not establish a substantial risk of imminent and serious harm to Brian or Alyssa. Finally, the fact that the mother, on a single occasion, may have struck Katie on the arm with a belt, leaving a small mark, did not establish a substantial risk of imminent and serious harm to Brian or Alyssa if they continued living with the mother.

We note that, although the record does not reveal whether the trial AFC consulted with Katie, it is clear that Katie's position with respect to the neglect proceeding differed from that of her siblings. Under the circumstances, it was impossible for the trial AFC to advocate zealously ****3** the children's unharmonious positions and, thus, "the children were entitled to appointment of separate attorneys to represent their conflicting interests" (*Matter of James I. [Jennifer I.]*, 128 AD3d 1285, 1286 [2015]; *see Corigliano v Corigliano*, 297 AD2d 328, 329 [2002]; *Gary D.B. v Elizabeth C.B.*, 281 AD2d 969, 971-972 [2001]). We therefore remit the matter to Family Court for appointment of new counsel for the children and a new fact-finding hearing.

Finally, the contention of Brian's appellate AFC that there was insufficient evidence of neglect against respondent father is not reviewable on appeal because, among other reasons, the father entered an admission of neglect, and the resulting order ***1149** was thereby entered upon consent of the parties (*see Matter of Martha S. [Linda*

M.S.], 126 AD3d 1496, 1497 [2015]; *Matter of Violette K. [Sheila E.K.]*, 96 AD3d 1499, 1499 [2012]; *Matter of Carmella J.*, 254 AD2d 70, 70 [1998]).

All concur except Centra, J.P., and NeMoyer, J., who dissent and vote to affirm in the following memorandum.

Centra, J.P., and NeMoyer, J. (dissenting). We respectfully dissent because, in our view, the children received effective assistance of counsel, and we would therefore affirm the order. Respondent mother and respondent father are the parents of Alyssa, Brian, and Katie, who were 15, 13, and 12 years old at the time petitioner filed the neglect petition herein against the parents. The parents lived in separate homes and, at the time of the filing of the petition, the girls lived with the mother and Brian lived with the father. One attorney was assigned to represent the children as Attorney for the Children (trial AFC), as he had done in prior proceedings involving the parents. On this appeal, the three children are each represented by a different attorney (appellate AFC), and only the appellate AFCs for Brian and Katie contend that they were denied the effective assistance of counsel by the trial AFC.

As a preliminary matter, we agree with the majority that petitioner established by a preponderance of the evidence that the children were neglected by the parents. The evidence established educational neglect by the mother inasmuch as Brian's and Alyssa's school attendance was poor while they were in the mother's custody (*see* Family Ct Act § 1012 [f] [i] [A]; *Matter of Cunntrel A. [Jermaine D.A.]*, 70 AD3d 1308, 1308 [2010], *lv dismissed* 14 NY3d 866 [2010]). In fact, the school made a PINS referral for Alyssa based on her excessive absences, but the mother did not follow through with the referral. The evidence also established that the mother inadequately supervised the children inasmuch as she remained in her bedroom for excessive periods of time and was oblivious to the fact that the children were leaving the home to drink alcohol and smoke marihuana (*see* § 1012 [f] [i] [B]). Finally, there was evidence that the mother snorted crushed "hydros, oxies," thus supporting the determination that the mother neglected the children by misusing drugs (*see id.*; *Matter of Edward J. Mc. [Edward J. Mc.]*, 92 AD3d 887, 887-888 [2012]). With respect to the father, he admitted that he inappropriately abused alcohol, which was sufficient to establish that he repeatedly misused alcohol "to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of . . . intoxication" (§ 1046 [a] [iii]), and that he thereby ***1150** neglected the children (*see* § 1012 [f] [i] [B]; *Matter of Samantha R. [Laurie R.]*, 116 AD3d 867, 868 [2014], *lv denied* 23 NY3d 909 [2014]; *Matter of Tyler J. [David M.]*, 111 AD3d 1361, 1362 [2013]).

Children who are the subject of a Family Court Act article 10 proceeding are entitled to the assignment of counsel to represent them (§ 249 [a]; § 1016), and the children are entitled to the effective assistance of counsel, or meaningful representation (*see Matter of Dwayne G.*, 264 AD2d 522, 523 [1999]; *Matter of Jamie TT.*, 191 AD2d 132, 135-136 [1993]). As the above evidence shows, the children were neglected by the parents, and the trial AFC understandably argued in summation that petitioner had proven its case. Although the trial AFC did not set forth the wishes of the children, Family Court was aware that Alyssa wanted to live with the mother, that Brian wanted to live with the mother or the father, and that Katie wanted to live with an aunt. Nevertheless, the appellate AFCs for Brian and Katie contend that Brian and Katie were denied effective assistance of counsel because the trial AFC advocated a finding of neglect, which was against the apparent wishes of his clients.

The appellate AFCs and the majority rely on 22 NYCRR 7.2 (d), which provides that the AFC "must zealously advocate the child's position," and 22 NYCRR 7.2 (d) (2), which provides that, "[i]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests." If an AFC is convinced, however, "that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the [AFC] ****4** would be justified in advocating a position that is contrary to the child's wishes" (22 NYCRR 7.2 [d] [3]). We conclude that the trial AFC was reasonably of the view, in light of the evidence supporting a finding of neglect, that there was a substantial risk of imminent, serious harm to the children if they remained in the custody of the parents, and was not ineffective for advocating a finding of neglect (*see generally Matter of Lopez v Lugo*, 115 AD3d 1237, 1238 [2014]). Indeed, we note that in cases where an AFC has been found to have rendered ineffective assistance of counsel to his or her client in a Family Court Act article 10 proceeding, the reason is that the AFC did not do *enough* to establish

that the child had been abused or neglected (*see Matter of Colleen CC.*, 232 AD2d 787, 788-789 [1996]; *Jamie TT.*, 191 AD2d at 137). In addition, even assuming, arguendo, that the exception set forth in 22 NYCRR 7.2 (d) (3) does not apply to the circumstances of this case, we ***1151** nevertheless would conclude, under all the circumstances presented, that Brian and Katie received meaningful representation (*cf. Jamie TT.*, 191 AD2d at 137; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Present—Centra, J.P., Peradotto, Lindley, DeJoseph and NeMoyer, JJ.

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119 A.D.3d 990, 988 N.Y.S.2d
299, 2014 N.Y. Slip Op. 04983

**1 In the Matter of William O., Appellant
v
Michele A., Respondent, and
John A. et al., Respondents.

Supreme Court, Appellate Division,
Third Department, New York
July 3, 2014

CITE TITLE AS: Matter of William O. v Michele A.

HEADNOTE

Parent, Child and Family
Custody
Modification—Sex Offender Treatment—Ineffective Assistance of Counsel

Margaret McCarthy, Ithaca, for appellant.
Paul R. Corradini, Elmira, for John A. and another, respondents.
Emily Karr Cook, Elmira, attorney for the children.

McCarthy, J. Appeal from an order of the Family Court of Chemung County (Buckley, J.), entered July 12, 2012, which, among other things, partially granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody and visitation.

Petitioner (hereinafter the father) and respondent Michele A. are the unmarried parents of three children (born in 2006, 2007 and 2009). In October 2009, while the father was incarcerated, custody of the two older children was awarded to the children's maternal grandparents, respondents John A. and Wanda A. **991 (hereinafter collectively referred to as the grandparents). In September 2011, the grandparents were awarded custody of the youngest child as well. Later that month, in anticipation of his release from prison, the father commenced this proceeding seeking custody of the youngest child. During subsequent appearances before Family Court, the court continued custody with the grandparents, but awarded the father supervised visitation with all three children. Finally, after an appearance before Family Court in July 2012, the court determined, without holding a fact-finding hearing, that the father was an untreated sex offender and entered an order that modified the supervised visitation schedule, but conditioned **2 any consideration of future custody modification petitions filed by the father on his completing sex offender treatment. The father appeals. [1]

The father contends that he was denied the effective assistance of counsel. We agree. Family Court continued supervised visitation and denied the father's custody application, without holding a fact-finding hearing, based upon its belief that he was an untreated sex offender. [2] This belief came from information provided to Family Court by the attorney for the children that was based on evidence outside of the record, the accuracy of which was challenged by the father, and with no evidence presented as to whether a lack of treatment would be detrimental to the children (*see generally Matter of Carl v McEver*, 88 AD3d 1089, 1090-1091 [2011]). The record demonstrates that Family Court improperly relied upon the attorney for the children as both an investigative arm of the court and as an advisor, referring to her as the court's "quarterback" and regularly deferring to her recommendations in reaching its determinations (*see Weiglhofer v Weiglhofer*, 1 AD3d 786, 788 n [2003]). The failure of the father's counsel to object to this improper use of the attorney for the children or to request a fact-finding hearing regarding the issues of sex offender treatment and the best interests of the children renders the representation less than meaningful (*see Matter of* **992 *Mitchell v Childs*, 26 AD3d 685, 686- 687 [2006]; *see also Matter of Jaikob O. [William O.]*, 88 AD3d 1075, 1077-1078 [2011]). [3] Accordingly, Family Court's order must be reversed.

Lahtinen, J.P., Rose, Lynch and Devine, JJ., concur. Ordered that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Chemung County for further proceedings not inconsistent with this Court's decision.

FOOTNOTES

Footnotes

1 Although the attorney for the children also seeks review of Family Court's order, her arguments regarding an issue not raised by the father are not properly before us inasmuch as only the father appealed (*see Matter of Valmas-Mann v Loewenguth*, 114 AD3d 1091, 1091-1092 [2014]; *Matter of Melissa WW. v Conley XX.*, 88 AD3d 1199, 1201 [2011], *lv denied* 18 NY3d 803 [2012]).

2 The father admitted to being convicted of endangering the welfare of a child in New Jersey in 1994, after engaging in sexual intercourse with two teenage girls when he was 20 years old. At the time he commenced the instant proceeding, the father was incarcerated in New York for failing to register as a sex offender.

3 We note that, although the father was represented by one institutional provider, five different attorneys appeared on his behalf at the nine court appearances. The individual attorneys were not always familiar with his case or prepared to represent him. At several appearances, the father spoke extensively while his counsel largely remained silent.

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115 A.D.3d 1237, 982 N.Y.S.2d
640, 2014 N.Y. Slip Op. 01914

**1 In the Matter of Wilfredo
Lopez et al., Respondents
v
Jennifer Lugo, Appellant. In the Matter of
Wilfredo Lopez, Respondent, v Jennifer Lugo,
Appellant. In the Matter of Jennifer Lugo,
Appellant, v Wilfredo Lopez et al., Respondents.

Supreme Court, Appellate Division,
Fourth Department, New York
March 21, 2014

CITE TITLE AS: Matter of Lopez v Lugo

HEADNOTES

Parent, Child and Family
Custody
Attorney for Child Advocating Position Contrary to Child's Wishes—Substantial Risk of Imminent Serious Harm Demonstrated

Parent, Child and Family
Custody
Limited Visitation with Noncustodial Parent

Koslosky & Koslosky, Utica (William L. Koslosky of counsel), for respondent-appellant and petitioner-appellant.
Steven R. Fortnam, Attorney for the Child, Westmoreland.
A.J. Bosman, Attorney for the Child, Rome.
Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered January 14, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded sole custody of the subject children to Sandro Lopez.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent-petitioner (mother) appeals, as limited by her notice of appeal, from an order that, inter alia, granted sole custody of the subject children to petitioner-respondent Sandro Lopez (father). Initially, we note that the mother's contentions with respect to Family Court's denial of a motion by the Attorney for the Child (AFC) to withdraw from representing one of the subject children are not before us on this appeal. The appeal is limited by the mother's notice of appeal to the issues of custody, parenting time, contact with the mother's **2 husband and a grandparent's visitation, and thus the mother's contentions regarding the court's resolution of the AFC's motion to withdraw are not properly before this Court (*see Gray v Williams*, 108 AD3d 1085, 1087 [2013]). In addition, the record on appeal does not contain the AFC's motion to withdraw from representing the subject child. "It is the obligation of the appellant to assemble a proper record on appeal" (*Gaffney v Gaffney*, 29 AD3d 857, 857 [2006]), which must include all of the relevant papers that were before the motion court (*see Aurora Indus., Inc. v Halwani*, 102 AD3d 900, 901 [2013]). The mother, "as the appellant, submitted this appeal on an incomplete record and must suffer the consequences" (*Matter of Santoshia L.*, 202 AD2d 1027, 1028 [1994]; *see Matter of Rodriguez v Ward*, 43 AD3d 640, 641 [2007]; *LeRoi & Assoc. v Bryant*, 309 AD2d 1144, 1145 [2003]).

The mother failed to preserve for our review her contention **1238 that the AFC representing the other subject child "failed to advocate for the [child's] position regarding custody and visitation and thus failed to provide [him] with effective representation" (*Matter of Brown v Wolfgram*, 109 AD3d 1144, 1145 [2013]; *see Matter of Mason v Mason*, 103 AD3d 1207, 1207-1208 [2013]). In any event, the mother's contention that both AFCs failed to provide the subject children with effective representation is without merit. Although an AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]), an exception exists where, as here, the AFC "is convinced . . . that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]; *see Mason*, 103 AD3d at 1208; *Matter of Swinson v Dobson*, 101 AD3d 1686, 1687 [2012], *lv denied* 20 NY3d 862 [2013]). Both AFCs noted for the court that they were advocating contrary to their respective clients' wishes, and both amply demonstrated the "substantial risk of imminent, serious harm" (22 NYCRR 7.2 [d] [3]), including the mother's arrest for possession of drugs in the children's presence, the numerous weapons that had been seized from the mother's house, and the credible evidence establishing 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.

Finally, we reject the mother's further contention that there is insufficient evidence supporting the court's determination awarding custody of the subject children to the father, with limited visitation to the mother, and directing that all contact between the mother's husband and the subject children be supervised. "The court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Samuel L.J. v Sherry H.*, 206 AD2d 886, 886 [1994], *lv denied* 84 NY2d 810 [1994]). Here, the record supports the court's conclusion that the mother repeatedly violated the court's orders directing her not to discuss the litigation with the subject children, as well as the orders awarding temporary custody of the subject children to their paternal grandfather. Based on those violations and the dangers to the subject children discussed above, we conclude that the court's determination with respect to custody, limited visitation and supervised contact is in the best interests of the children (*see generally Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]). Present—Smith, J.P., Fahey, Lindley, Sconiers and Valentino, JJ. ***1239**

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103 A.D.3d 1207, 959 N.Y.S.2d
577, 2013 N.Y. Slip Op. 00818

**1 In the Matter of Paula L. Mason, Appellant
v
Aaron G. Mason, Respondent.

Supreme Court, Appellate Division,
Fourth Department, New York
February 8, 2013

CITE TITLE AS: Matter of Mason v Mason

HEADNOTE

Parent, Child and Family
Custody
Attorney for Child Advocating Position Contrary to Child's Express Wishes

Goodell & Rankin, Jamestown (R. Thomas Rankin of counsel), for petitioner-appellant.
Richard L. Sotir, Jr., Jamestown, for respondent-respondent.
town, for Kali A.M.
Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered September 15, 2011 in a proceeding pursuant to Family Court Act article 6. The order awarded respondent sole custody of the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner mother appeals from an order that modified the parties' joint custody arrangement by granting sole custody of the parties' child to respondent father following a hearing. The mother contends that the Attorney for the Child (AFC) improperly advocated a position that was contrary to the child's express wishes because the AFC failed to state the basis **1208 for advocating that contrary position. The mother's contention is not preserved for our review because she made no motion to remove the AFC (*see Matter of Swinson v Dobson*, 101 AD3d 1686, 1687 [2012]; *Matter of Juliet M.*, 16 AD3d 211, 212 [2005]). In any event, we conclude that the mother's contention lacks merit. "There are only two circumstances in which an AFC is authorized to substitute his or her own judgment for that of the child: '[w]hen the [AFC] 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' " (*Swinson*, 101 AD3d at 1687, quoting 22 NYCRR 7.2 [d] [3]). The obligation of the AFC, where the AFC is "convinced" that one of those two circumstances is implicated, is to inform the court of the child's wishes, if the child requests that the AFC do so (*see* 22 NYCRR 7.2 [d] [3]), which the AFC did here (*see Matter of Kashif II. v Lataya KK.*, 99 AD3d 1075, 1077 [2012]). Moreover, we note that the record supports a finding that the child lacked the capacity for "knowing, voluntary and considered judgment" (22 NYCRR 7.2 [d] [3]; *see generally Matter of Rosso v Gerouw-Rosso*, 79 AD3d 1726, 1728 [2010]).

Contrary to the mother's further contention, we conclude that the court did not abuse its discretion in denying her request for an adjournment to enable her new attorney to prepare for the **2 hearing (*see Matter of Anthony M.*, 63 NY2d 270, 283-284 [1984]). We also reject the mother's contention that the denial of her request rendered her attorney's representation ineffective inasmuch as the mother has failed to establish that she received less than meaningful representation or that she suffered actual prejudice as a result of the denial of her request (*see Matter of Tommy R.*, 298 AD2d 967, 968 [2002], *lv denied* 99 NY2d 505 [2003]). Present—Smith, J.P., Fahey, Valentino, Whalen and Martoche, JJ.

End of Document

92 A.D.3d 780, 938 N.Y.S.2d 460
(Mem), 2012 N.Y. Slip Op. 01250

**1 In the Matter of Ramon
M. Aquino, Respondent
v
Jaclyn F. Antongiorgi, Appellant. (Proceeding Nos. 1 and 2.) In the Matter of Jaclyn F. Antongiorgi, Appellant, v Ramon M. Aquino, Respondent. (Proceeding Nos. 3 and 4.)

Supreme Court, Appellate Division,
Second Department, New York
February 14, 2012

CITE TITLE AS: Matter of Aquino v Antongiorgi

HEADNOTE

Parent, Child and Family
Custody
Modification—Waiver of Right to Full Evidentiary Hearing

Carol Kahn, New York, N.Y., for appellant.
Michael R. Varble, Poughkeepsie, N.Y., for respondent.
Neal D. Futerfas, White Plains, N.Y., attorney for the children.
In related visitation and family offense proceedings pursuant to Family Court Act articles 6 and 8, the mother appeals, as limited by her brief, from so much an order of the Family Court, Dutchess County (Forman, J.), dated January 19, 2011, as, after a limited hearing, in effect, denied her petition, in effect, to modify an order of the same court dated November 4, 2009, awarding the father sole custody of the parties' children with certain visitation to her, so as to award her sole custody of the children, denied those branches of her separate petition which were, in effect, to modify the same order so as to award her sole custody of the children and to direct that the children attend therapy, and directed that "[n]o petition requesting additional visitation by the mother shall be accepted by the court until the [attorney for the children] has approved of such a request." ***781**

Ordered that the order dated January 19, 2011, is modified, on the law, by deleting the provision thereof directing that "no petition requesting additional visitation by the mother shall be accepted by the court until the attorney for the children has approved of such a request;" as so modified, the order dated January 19, 2011, is affirmed insofar as appealed from, without costs or disbursements.

Contrary to the mother's contention, the Family Court's determination, in effect, that it would not be in the best interests of the children for it to modify a prior order awarding the father sole custody of the parties' children so as to award her sole custody, has a sound and substantial basis in the record and, accordingly, will not be disturbed (*see Matter of Arduino v Ayuso*, 70 AD3d 682 [2010]; **2 *Matter of Mohabir v Singh*, 63 AD3d 1159, 1159 [2009]; *Matter of Perez v Martinez*, 52 AD3d 518, 519 [2008]). Although, as a general rule, determinations regarding custody and related matters should be made after a full evidentiary hearing (*see e.g. Matter of Brooks v Brooks*, 255 AD2d 382, 383 [1998]), here, the mother consented to the Family Court's so-called "mini-hearing" procedure, thus waiving her right to a full evidentiary hearing (*see Matter of Goldman v Goldman*, 201 AD2d 860, 862 [1994]; *cf. Matter of Richmond v Perez*, 38 AD3d 782, 783-784 [2007]). In any event, a full evidentiary hearing was not necessary, since the Family Court possessed sufficient information to render an informed decision consistent with the best interests of the children (*see Matter of Peluso v Kasun*, 78 AD3d 950, 950-951 [2010]; *Matter of Hom v Zullo*, 6 AD3d 536 [2004]; *see also Matter of Weinschneider v Weinschneider*, 73 AD3d 1194, 1195 [2010]).

We agree, however, with the mother's contention that the Family Court erred in directing that "[n]o petition requesting additional visitation by the mother shall be accepted by the court until the [attorney for the children] has approved of such a request" (*see Matter of Mackenzie M. v Mary U.*, 38 AD3d 1249, 1250 [2007]; *Matter of Shreve v Shreve*, 229 AD2d 1005, 1006 [1996]). We note that the alternatives to that provision proposed by the father and the attorney for the children in their respective briefs also would be improper (*see generally Matter of Williams v O'Toole*, 4 AD3d 371, 372 [2004]; *Matter of Adam H.*, 195 AD2d 1074, 1075 [1993]; *cf. Vogelgesang v Vogelgesang*, 71 AD3d 1132, 1134 [2010]). Mastro, A.P.J., Angiolillo, Eng and Cohen, JJ., concur.

65 A.D.3d 1350, 886 N.Y.S.2d
463, 2009 N.Y. Slip Op. 06847

**1 In the Matter of Brian Krieger, Respondent
v
Traci Krieger, Respondent. Janis
Parazzelli, Nonparty Appellant.

Supreme Court, Appellate Division,
Second Department, New York
September 29, 2009

CITE TITLE AS: Matter of Krieger v Krieger

HEADNOTE

Parent, Child and Family
Custody

In custody proceeding, Family Court erred in failing to adjourn hearing to provide attorney for child with reasonable opportunity to present additional witnesses and in requiring attorney for child to offer expert testimony on issues of child's capacity to articulate her desires and whether child would be at imminent risk of harm if she moved with father to another state, prior to attorney advocating position that could be viewed as contrary to child's wishes.

Janis A. Parazzelli, Floral Park, N.Y., attorney for the child, appellant, pro se.
Donna M. McCabe, East Atlantic Beach, N.Y., for petitioner-respondent Brian Krieger.
Roberta Nancy Kaufman, Hicksville, N.Y., for respondent-respondent Traci Krieger.

In a child custody proceeding pursuant to Family Court Act article 6, the attorney for the child appeals, as limited by her brief, from so much of an order of the Family Court, Nassau ***1351** County (Phillips, Ct Atty Referee), dated April 14, 2008, as, upon the mother's default in personally appearing on scheduled hearing dates, granted the father's petition to modify an order of the same court dated January 5, 2006, inter alia, awarding the parties joint custody of the subject child, so as to allow the father to relocate with the child to the State of Ohio, and awarded sole custody of the child to the father.

Ordered that the order is reversed, on the law, without costs or disbursements, and the matter is remitted to the Family Court, Nassau County, for further proceedings in accordance herewith.

By order dated January 5, 2006, entered on consent of the parties, inter alia, the parties were awarded joint custody of their adolescent daughter, with residential custody to the father. In May 2007, the father filed a petition to modify the order dated January 5, 2006, so as to allow him to relocate with the child to the State of Ohio. By order dated April 14, 2008, upon the mother's default in personally appearing on scheduled hearing dates, the Family Court granted the father's petition, and awarded sole custody of the child to the father.

The attorney for the child appeals from the order dated April 14, 2008, asserting that a number of errors were committed by the Family Court which require reversal of the award of sole custody to the father and the grant of permission for him to relocate with the child to the State of Ohio.

The appointment of an attorney to represent a child in Family Court proceedings, whether the appointment is required by statute or, as in this case, the appointment is made in the court's discretion, is based on the legislative determination "that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition" (Family Ct Act § 241). ****2**

The right to counsel has been held to imply "that the court will afford a respondent and his or her attorney a reasonable opportunity to appear and present evidence and arguments" (*Matter of Scott v Scott*, 62 AD3d 714, 715 [2009]). An attorney appointed to represent a child in a Family Court proceeding should be accorded the same reasonable opportunity to appear and present evidence and arguments on behalf of the child as is accorded the child's mother or father, or other interested party.

Under the circumstances of this case, the Family Court improvidently exercised its discretion in failing to adjourn the hearing to provide the attorney for the child with a reasonable opportunity to present additional witnesses

(*see Matter of* ***1352** *Czaban v Czaban*, 24 AD3d 547 [2005]; *cf. Matter of Steven B.*, 6 NY3d 888 [2006]; *Diamond v Diamante*, 57 AD3d 826, 827 [2008]).

The rules applicable to the representation of a child in a Family Court proceeding require that the attorney adhere to the same ethical requirements applicable to all attorneys: that the attorney zealously advocate the child's position; that the attorney have a thorough knowledge of the child's circumstances; and that the attorney consult with and advise the child, consistent with the child's capacities, in ascertaining the child's position (*see* 22 NYCRR 7.2 [b], [c], [d] [1]). In addition, the attorney for the child must follow the child's wishes to refrain from taking a position for or against requested relief where the child has the capacity to take such a position and is not at imminent risk of harm, regardless of whether the attorney believes that the grant or denial of the requested relief would be in the child's best interest (*see* 22 NYCRR 7.2 [d] [2]).

The Family Court erred, however, in requiring the attorney for the child to offer expert testimony on the issues of the child's capacity to articulate her desires and whether the child would be at imminent risk of harm if she moved with the father to the State of Ohio, prior to the attorney advocating a position that could be viewed as contrary to the child's wishes. The Rules of the Chief Judge do not impose such a requirement (*see* 22 NYCRR 7.2).

The Family Court also erred in awarding sole custody of the child to the father, as the father did not request such relief in his modification petition.

Accordingly, we remit the matter to the Family Court, Nassau County, for a new hearing on the father's modification petition. Upon remittal, the hearing on the father's petition shall be conducted before a different judicial officer; and given the intemperate remarks made by the attorney for the child, and the attorney's confrontational approach toward the court, the Family Court may consider whether it is appropriate to appoint a new attorney for the child or continue the representation.

The parties' remaining contentions either are not properly before this Court or need not be reached in light of our determination. Spolzino, J.P., Angiolillo, Chambers and Hall, JJ., concur.

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273 A.D.2d 753, 710 N.Y.S.2d
149, 2000 N.Y. Slip Op. 06492

In the Matter of Catherine Carballeira, Appellant,
v.
Loren Shumway, Respondent.

Supreme Court, Appellate Division,
Third Department, New York
86313
(June 29, 2000)

CITE TITLE AS: Matter of Carballeira v Shumway

HEADNOTE

PARENT AND CHILD
CUSTODY
Role of Law Guardian

([1]) Family Court properly determined that continuation of joint custody was inappropriate, and awarded sole custody and decision-making authority to respondent--petitioner contends Law Guardian's conduct was improper because he advocated position contrary to expressed wishes of his client, held bias against petitioner, revealed his client's confidences to third parties and failed to call essential witness, respondent's wife--Law Guardian took active role by introducing evidence, presenting witness, cross-examining all other witnesses, participating in Lincoln hearing and submitting closing argument; also, despite Law Guardian's advocacy that custody be awarded to respondent, consistent strong preference of parties' child to live with his mother was acknowledged by Law Guardian and communicated to Family Court; Law Guardian did not act improperly by advocating position that he believed to be in his client's best interest--record shows that Law Guardian intended to communicate that after being exposed to evidence, he had formed professional opinion concerning proper disposition of custody and thus had preference for respondent; there was no evidence that Law Guardian held any personal prejudice against petitioner--nor did Law Guardian's actions constitute improper disclosure of client confidence; child consented to Law Guardian telling respondent about suicide threat made by child; therefore, Law Guardian did not breach client confidence or violate any ethical rule--if petitioner believed respondent's wife to be necessary witness, petitioner should have called her to testify; Law Guardian breached no professional duty in failing to call her as witness.

Rose, J.

Appeal from an order of the Family Court of Ulster County (Mizel, J.), entered April 27, 1999, which, *inter alia,* dismissed petitioner's application, in a proceeding pursuant to Family Court Act article 6, for modification of a prior custody order.

The parties to this proceeding were married in 1986 and are the parents of one child, a son, born in 1987. After marital difficulties arose, the parties separated in 1990 and, following a lengthy and vigorously contested trial, were divorced in 1995. ***754** The judgment of divorce granted the parties joint custody of their son with equally shared physical custody. Thereafter respondent remarried and the parties' animosity steadily increased until petitioner commenced this proceeding in March 1997 seeking sole custody of the child. After appointing a Law Guardian and conducting pretrial proceedings, Family Court conducted an evidentiary hearing spanning 10 days over the period from October 1997 to June 1998. During the course of the hearing, respondent also requested an award of sole custody. In a well-reasoned decision, Family Court determined that continuation of joint custody was inappropriate because the parties could not cooperate in raising their son, and it awarded sole custody and decision-making authority to respondent. It also granted petitioner visitation and a consulting role in major educational and medical decisions concerning the child. Petitioner now appeals.

For purposes of this appeal, petitioner does not dispute that Family Court properly determined that joint custody was inappropriate due to the acrimonious relationship between the parties (*see, Braiman v Braiman,* 44 NY2d 584, 589-590). Nor does petitioner directly contest the merits of Family Court's determination based on the record before it. Rather, petitioner contends that Family Court's decision should be reversed and a new hearing held because the Law Guardian failed to adequately represent the parties' child during the proceeding. Specifically, petitioner alleges that the Law Guardian's conduct was improper because he advocated a position contrary to the expressed wishes of his client, held a bias against

petitioner, revealed his client's confidences to third parties and failed to call an essential witness, respondent's wife.

As they are directed solely to the Law Guardian's representation, petitioner's arguments require us to consider the proper role of a Law Guardian in a custody proceeding. While conceding that a Law Guardian would be justified in substituting his or her own judgment of what is in the best interest of a very young child, petitioner contends that where, as here, the represented child is old enough to articulate his or her wishes, the Law Guardian is required to advocate for the result desired by the child and prohibited from interjecting an independent view of what would best meet the child's needs. We cannot agree with such a categorical position and, instead, affirm Family Court based on the circumstances of this case.

The Family Court Act "establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests *and* to help them express their ***755** wishes to the court" (Family Ct Act § 241 [emphasis supplied]). First and foremost, the Law Guardian is the attorney for the child (Family Ct Act § 242; *see, Matter of Jamie EE.*, 249 AD2d 603) and must take an active role in the proceedings (*see, id.*, at 605-606; *Matter of Jamie TT.*, 191 AD2d 132, 137-138). In that role as attorney, the Law Guardian has the statutorily directed responsibility to represent the child's wishes as well as to advocate the child's best interest. Because the result desired by the child and the result that is in the child's best interest may diverge, Law Guardians sometimes face a conflict in such advocacy (*see, Marquez v Presbyterian Hosp.*, 159 Misc 2d 617, 620-621; *Matter of Scott L. v Bruce N.*, 134 Misc 2d 240, 243-245; Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 Fordham L Rev 1399 [1996]; Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 Buff L Rev 501, 506-507 [1963]).

It is helpful to a resolution of that conflict to note that the child's preference is just one factor the trial court will consider (*see, Eschbach v Eschbach*, 56 NY2d 167, 173). "While not determinative, the child's expressed preference is some indication of what is in the child's best interests. Of course, in weighing this factor, the court must consider the age and maturity of the child and the potential for influence having been exerted on the child" (*id.*, at 173). Depending on the circumstances, "a Law Guardian may properly attempt to persuade the court to adopt a position which, in the Law Guardian's independent judgment, would best promote the child's interest, even if that position is contrary to the wishes of the child" (*Matter of Amkia P.*, 179 Misc 2d 387, 390; *see, Matter of Dewey S.*, 175 AD2d 920, 921).

Here, the Law Guardian took an active role by introducing evidence, presenting a witness, cross-examining all other witnesses, participating in the *Lincoln* hearing and submitting a closing argument (*see, Matter of Burr v Emmett*, 249 AD2d 614, 616). Also, despite the Law Guardian's advocacy that custody be awarded to respondent, the consistent strong preference of the parties' child to live with his mother was acknowledged by the Law Guardian and repeatedly communicated to Family Court. In evaluating the Law Guardian's advocacy of a disposition at odds with the child's preference, we note that the child had his 11th birthday during the course of the hearing. Significantly, petitioner testified that the child suffers from several neurological disorders including Tourettes Syndrome, Obsessive-Compulsive Disorder and Attention Deficit Hyperactivity Disorder. The "neutral" psychologist appointed ***756** by Family Court opined that the child was certainly intelligent but somewhat less mature than average and could be easily manipulated by adults. The record further indicates that the child may be blinded by his love for petitioner, that she exerts influence on his thoughts concerning custody, and that he did not articulate objective reasons for his preference other than his dislike of discipline at respondent's home and the lack of rules and discipline at petitioner's home (*see, Matter of Amkia P., supra*, at 388). Under these circumstances, we find that the Law Guardian did not act improperly by advocating a position that he believed to be in his client's best interest.

Petitioner also complains that the Law Guardian was impermissibly biased against her. A Law Guardian should not have a particular position or decision in mind at the outset of the case before the gathering of evidence (*see, Matter of Apel*, 96 Misc 2d 839, 842-843). On the other hand, "Law Guardians are not neutral automatons. After an appropriate inquiry, it is entirely appropriate, indeed expected, that a Law Guardian form an opinion about what action, if any, would be in a child's best interest" (Besharov, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 241, at 218-219).

Here, in responding to a request for his removal made by petitioner on the ninth day of the hearing, the Law Guardian stated: "And yes, I am biased in this thing. And I think it's no secret, here, that as the case has progressed, I have become biased in favor of one of the parents, because I believe my client's best interests are best served there." The use of the inflammatory term "bias" was inopportune, as it implied a personal and unreasoned prejudging of the issues. Rather, the record shows that the Law Guardian intended to communicate that after being exposed to the evidence, he had formed a professional opinion concerning the proper disposition of custody and thus had a preference for respondent. There was no evidence that the Law Guardian held any personal prejudice against petitioner. Also, a considered opinion as to the best interest of the child seems a natural result by this stage of the proceeding (*see, Matter of Apel, supra,* at 843). As the Law Guardian had not met respondent before the trial and formulated his opinion of both parties only in the course of the hearing, we find no evidence of an actual bias against petitioner. Thus, Family Court properly refused to remove the Law Guardian when petitioner applied for such relief.

Nor did the Law Guardian's actions constitute an improper disclosure of a client confidence. Law Guardians have an attorney-client relationship with their wards (*see, Matter of* ***757** *Angelina AA.*, 211 AD2d 951, 953, *lv denied* 85 NY2d 808; *Matter of Bentley v Bentley*, 86 AD2d 926, 927) and generally may not reveal confidences of the client concerning the representation (*see,* Code of Professional Responsibility DR 4-101 [b] [22 NYCRR 1200.19 (b)]). However, clients, even child clients, may consent to the revelation of confidences by the attorney (*see,* Code of Professional Responsibility DR 4-101 [c] [1] [22 NYCRR 1200.19 (c) (1)]; *Matter of Angelina AA., supra,* at 953). Here, the child consented to the Law Guardian telling respondent about a suicide threat made by the child. Therefore, the Law Guardian did not breach a client confidence or violate any ethical rule.

Finally, petitioner challenges the effectiveness of the Law Guardian's representation for his failure to call respondent's wife as a witness. Having alleged that respondent yielded much of the care and discipline of the parties' child to his wife, petitioner characterizes the wife as the likely primary caregiver of the child if respondent was awarded sole custody and contends that it was absolutely essential that her relationship with the child be examined at the hearing. This contention is also without merit.

If petitioner believed respondent's wife to be a necessary witness, petitioner should have called her to testify. While it is likely that petitioner would not have been permitted to impeach her own witness (*see,* Prince, Richardson on Evidence § 6-419 et. seq. [Farrell 11th ed]), she could have requested Family Court to allow her to treat respondent's wife as a hostile witness (*see,* Prince, Richardson on Evidence § 6-228 [Farrell 11th ed]). Regardless of how Family Court might have ruled, petitioner's failure to take any steps to present the testimony of respondent's wife precludes the present claim of prejudice flowing from the Law Guardian's failure to do so. Accordingly, the Law Guardian breached no professional duty in failing to call her as a witness.

We have considered petitioner's remaining contentions and find them to be without merit.

Crew III, J. P., Graffeo, Mugglin and Lahtinen, JJ., concur.
Ordered that the order is affirmed, without costs.

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48 A.D.3d 1202, 850 N.Y.S.2d
765, 2008 N.Y. Slip Op. 00933

**1 In the Matter of Kristi L.T., Respondent
v
Andrew R.V., Appellant.

Supreme Court, Appellate Division,
Fourth Department, New York
07-01093, 1630
February 1, 2008

CITE TITLE AS: Matter of Kristi L.T. v Andrew R.V.

***1203 HEADNOTE**

Parent, Child and Family
Custody

Family Court erred in determining that change of primary physical custody to mother was in child's best interests —although mother had completed her jail sentence and mandatory programs, had stopped drinking, was living happily with man and his two children, and was engaged to be married to that man, it was not best interests of child to change her primary physical residence—both homes offered suitable environment and both parents could provide parental guidance; there was nothing in record that supported differentiating between parents with respect to emotional and intellectual development; father's salary was modest, but was more than three times that of mother; mother was financially dependent on her fiancé, whose income was more than double that of father; mother had given no thought to how she would support child if something were to happen to her fiancé or to their relationship; father was more fit parent; child had lived with each parent approximately half of her life, and she had had regular visitation with other parent except during period in which mother was in jail—child had expressed positive feelings about all members of both parents' households, had friends in both communities and was doing well in school at time of hearing.

William M. Borrill, New Hartford, for respondent-appellant.
Richard N. Bach, Utica, for petitioner-respondent.
Susan B. Marris, Law Guardian, Manlius, for Jocelyn R.V.
Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered February 27, 2007 in a proceeding pursuant to Family Court Act article 6. The order, among other things, modified a prior custody order.

It is hereby ordered that the order so appealed from is unanimously reversed in the exercise of discretion without costs and the petition is denied.

Memorandum: Respondent father appeals from an order entered in February 2007 that granted the mother's petition to modify a prior order by awarding the mother primary physical custody of the parties' daughter, who was born in December 2000. At least two other judges had previously entered custody orders in the matter. In our view, Family Court improvidently exercised its discretion in determining that a change of primary physical custody was in the child's best interests.

The parties were never married, and they separated when the child was approximately four months old, at which time the mother and child moved in with the mother's parents. In March 2004 the mother sought modification of a prior custody order and was permitted to move with the child and her parents to Connecticut, with monthly visitation to the father. In August 2004 the mother was convicted of driving while intoxicated in Connecticut and received a four-month jail sentence because of her history of such charges. The parties arranged for the father to take physical custody of the child at the end of October 2004, and the parties entered into a stipulation in Supreme Court continuing joint custody and giving the father primary physical custody. A Supreme Court order continuing that arrangement and specifying the terms of visitation to the mother was entered at the beginning of September 2005. The father has had primary physical custody of the child since the end of October 2004. ***1204**

At issue in this appeal is the order granting the mother's petition in July 2006 seeking primary physical custody of the child. Family Court issued a decision in January 2007 and an order in February 2007 granting the petition following three days of testimony in November **2 2006, and a justice of this Court reinstated the September 2005 order and stayed enforcement of the February 2007 order

pending determination of this appeal or until December 31, 2007, whichever occurred first.

In granting the mother's petition, the court concluded that there had been a change of circumstances and that a change in custody was warranted in the best interests of the child, relying on the five factors set forth in our decision in *Matter of Maher v Maher* (1 AD3d 987, 989 [2003]). Although we agree with the court that there was a significant change in circumstances inasmuch as the mother had completed her jail sentence and mandatory programs, had stopped drinking, was living happily with a man and his two children, and was engaged to be married to that man in July 2007, we conclude that the court's determination that it was in the best interests of the child to change her primary physical residence was an improvident exercise of discretion.

As we wrote in *Maher*, among the factors to consider in determining whether a change of primary physical custody is warranted " 'are the quality of the home environment and the parental guidance the custodial parent provides for the child . . . , the ability of each parent to provide for the child's emotional and intellectual development . . . , the financial status and ability of each parent to provide for the child . . . , the relative fitness of the respective parents, and the length of time the present custody arrangement has been in effect' " (*id.* at 989). Here, with respect to the five factors set forth in *Maher*, the evidence presented at the hearing established that the father had been living with his girlfriend, whom he intends to marry, and with their daughter, his girlfriend's daughter, and the subject child. At the time of the hearing, the child was attending kindergarten and school reports showed that after 10 weeks of school her attitude, behavior, participation and work habits were all positive, and her social development, motor skills, knowledge of personal information, and math and language skills were all rated "competently developed." The evidence further established that the child loves both parents, enjoys visitation with her mother, and is comfortable with the other members of both households.

With respect to the first factor set forth in *Maher*, we note that both homes offer a suitable environment and both parents ***1205** can provide parental guidance. With respect to the second factor, there is nothing in the record that supports differentiating between the parents with respect to emotional and intellectual development. There is, however, a marked difference with respect to the third factor, the financial ability of each parent to provide for the child. The father's salary is modest, but it is more than three times that of the mother. The mother is financially dependent on her fiancé, whose net income as owner of a construction business is more than double that of the father. The mother admitted at the hearing, however, that she had given no thought to how she would support the child if something were to happen to her fiancé or to their relationship. She stated, "I never thought about the future. I just think of now."

With respect to the fourth factor, the relative fitness of the respective parents, the mother insists that she is not an alcoholic, although she has been charged with driving while intoxicated several times and was convicted of that crime in Connecticut. She testified that she drinks "like everybody else" but last drank alcohol in October 2004. She attended some Alcoholics Anonymous meetings but did not like them, concluding that "I do much better off on my own dealing, doing things my own way, doing it the way I only know how to do things." The mother's fiancé testified that he has two convictions arising from conduct involving breach of the peace, and that he was convicted of violating an order of protection and of possession of drug paraphernalia. He further testified that the drug charge stemmed from an employee's having left drug paraphernalia in his vehicle. Neither the father nor his girlfriend has a criminal record, and we thus conclude that the record establishes that the father is the more fit parent. ****3**

The fifth factor concerns the length of time the present custody arrangement has been in effect. The father has had primary physical custody since the end of October 2004, while the mother had primary physical custody from approximately March 2001 until the end of October 2004. Thus, the child has lived with each parent approximately half of her life, and she has had regular visitation with the other parent except during the period in which the mother was in jail.

Based on our analysis of the five factors in *Maher*, and given that the child has expressed positive feelings about all the members of both parents' households, has friends in both communities and was doing well in school at the time of the hearing, we cannot agree with the court that the best interests of the child would be served by a change in her

primary physical ***1206** residence. Thus, in the exercise of our discretion, we reverse the order and deny the petition.

We note that the record establishes that the parties have had proceedings before at least three different judges. The same Law Guardian was appointed for the child in the first two matters but was not reappointed by Family Court in this matter because the mother objected to his appointment. The court recognized, however, that in appointing a law guardian "the court shall, to the extent practicable and appropriate, appoint the same law guardian who has previously represented the child" (Family Ct Act § 249 [b]). The record establishes that the prior Law Guardian was available, and we conclude that he should have been reappointed.

We do not address the parties' contentions with respect to relocation because in our view relocation is not in issue. Present—Hurlbutt, J.P., Martoche, Smith, Peradotto and Pine, JJ.

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269 A.D.2d 82, 711 N.Y.S.2d
663, 2000 N.Y. Slip Op. 06744

Michael Davis, Respondent,
v.
Michele Davis, Appellant.

Supreme Court, Appellate Division,
Fourth Department, New York
698, 99-1217
July 7, 2000

CITE TITLE AS: Davis v Davis

SUMMARY

Appeal from an order of the Supreme Court (Peter J. Notaro, J.), entered August 26, 1999 in Erie County, which, *inter alia,* modified the parties' existing joint custody arrangement by awarding sole custody to plaintiff.

HEADNOTE

Parent, Child and Family
Custody
Disqualification of Law Guardian for Accepting Retainer Fee from Parent

In a proceeding to modify the parties' existing joint custody arrangement, Supreme Court, which awarded sole custody to plaintiff father, erred in refusing to remove the Law Guardian who moved to modify the shared custody arrangement on behalf of the parties' children after accepting a retainer fee from plaintiff "to represent the children." Under these circumstances, the Law Guardian is disqualified from so serving by an inherent conflict of interest. Plaintiff's retention and payment of the Law Guardian created an unacceptable actual or ostensible bias in favor of plaintiff. A Law Guardian who has been retained and paid by one of the contesting parents is indelibly cast, either actually or ostensibly, as partial to the parent who hired him or her. Both the best interests of the children and principles of fundamental fairness dictate that such practice not be countenanced. Accordingly, the order awarding sole custody to plaintiff should be reversed, and the matter remitted to a different Supreme Court Justice for the appointment of a new Law Guardian and for further proceedings on the custody issue.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Guardian and Ward, § 21.

Carmody-Wait 2d, Child Custody and Visitation in Matrimonial Actions § 118A:54.

NY Jur 2d, Domestic Relations, §§ 1222, 1229, 1230.

ANNOTATION REFERENCES

See ALR Index under Custody and Support of Children; Guardian and Ward.

APPEARANCES OF COUNSEL

Kadish & Fiordaliso, Buffalo (*Keith Irwin Kadish* of counsel), *Law Guardian.*
Sharon A. Osgood, Buffalo, for appellant.
Siegel, Kelleher & Kahn, Buffalo (*Kenneth A. Olena* of counsel), for respondent. ***83**

OPINION OF THE COURT

Hurlbutt, J.

At issue before us on this appeal is whether Supreme Court erred in refusing to remove a Law Guardian who moved on behalf of the parties' children to modify the existing joint custody arrangement. The Law Guardian sought an award of sole custody to plaintiff father, who retained and paid for the services of the Law Guardian. We conclude that the Law Guardian is disqualified from so serving by an inherent conflict of interest. Thus, the order awarding plaintiff sole custody should be reversed, the motion to renew granted, and, upon renewal, the cross motion granted in part, the Law Guardian removed, and the matter remitted to a different Supreme Court Justice for the appointment of a new Law Guardian and further proceedings on the motion and cross motion for custody.

The underlying facts are as follows. The parties were divorced by judgment entered December 13, 1994. That judgment incorporated a stipulation providing, *inter alia,* that the parties would share custody and have equal time with their two children, born January 18, 1983, and April 17, 1990. Plaintiff subsequently moved to modify

the shared custody schedule and the court appointed attorney Keith I. Kadish, Esq. as Law Guardian for the children in connection with that motion. The parties resolved plaintiff's motion by a stipulation rescheduling the previously ordered shared custody schedule. The stipulation was incorporated into an order, granted June 5, 1997, that modified the judgment of divorce accordingly.

It is undisputed that plaintiff contacted Kadish in the fall of 1997 and informed him that the children no longer wished to reside with defendant. After speaking with the children, Kadish informed plaintiff that he would "require a $1500 retainer to represent the children." Plaintiff paid Kadish $1,500 on March 18, 1998, and a retainer agreement was signed on May 19, 1998. By affidavit reciting his appointment as Law Guardian in the previous postjudgment modification application, Kadish sought and obtained an order, dated August 11, 1998, directing defendant to show cause why an order should be not be made, *inter alia,* modifying custody "from joint legal and physical custody to sole custody for the Plaintiff." Kadish did not disclose in his affidavit that plaintiff had retained him to represent the children.

Defendant cross-moved for sole custody and to remove Kadish as Law Guardian on the ground that he was biased in favor of plaintiff. Plaintiff subsequently moved on his own behalf for ***84** sole custody, asserting in a supporting affidavit that "[y]our Deponent freely admits to sending a check to Mr. Kadish in the amount of $1,500.00 during the Winter of 1997/98 as he was continuing to provide services and a needed outlet for my children, and it was unfair that he should do so without being compensated." He further asserted, "I have had minimal if any contact with Mr. Kadish other than sending him a fax or two with respect to certain incidents." By order dated September 29, 1998, the court denied defendant's cross motion insofar as it sought removal of Kadish as Law Guardian.

In October 1998 plaintiff paid an additional $1,500 to Kadish in anticipation of trial. After plaintiff testified at a deposition concerning the facts of his retention and payment of Kadish, defendant moved unsuccessfully to "reargue" that part of her cross motion seeking removal of Kadish as Law Guardian. The motion was actually one to renew because it was based upon newly discovered evidence (*see, Foley v Roche,* 68 AD2d 558, 567-568). The court denied that motion and, following a plenary hearing, the court awarded plaintiff sole custody. The court further directed that plaintiff and defendant each pay half of the unpaid balance of the Law Guardian's legal fees.

Even assuming, arguendo, that the court properly denied that part of defendant's cross motion seeking removal of Kadish, we conclude that the court should have granted that relief upon renewal of the cross motion, removing Kadish as Law Guardian and appointing a new Law Guardian before conducting the hearing.

Pursuant to Family Court Act § 241, "minors who are the subject of family court proceedings ... should be represented by counsel of their own choosing or by law guardians. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court." Supreme Court has the same power as that of Family Court to appoint a Law Guardian in connection with custody proceedings arising from a divorce action (*see,* NY Const, art VI, § 7 [a]; ***85** *Kagen v Kagen,* 21 NY2d 532, 536; *Frizzell v Frizzell,* 177 AD2d 825, 826, n; *Borkowski v Borkowski,* 90 Misc 2d 957, 958). While appointment of a Law Guardian in contested custody proceedings is not mandatory (*see,* Family Ct Act § 249 [a]; *Matter of Farnham v Farnham,* 252 AD2d 675, 677; *Matter of Church v Church,* 238 AD2d 677, 678), it is the preferred practice (*see, Matter of Farnham v Farnham, supra,* at 677; *Matter of Church v Church, supra,* at 678), and the failure to appoint a Law Guardian has been held to be an abuse of discretion (*see, Vecchiarelli v Vecchiarelli,* 238 AD2d 411, 413).

Almost invariably, custody proceedings are fiercely contested and involve complex and delicate issues. The children who are the subject of such proceedings must therefore be represented by a Law Guardian who is "absolutely independent of any influence from either parent" (*Matter of Scott L. v Bruce N.,* 134 Misc 2d 240, 246). As Family Court (Kaiser, J.) cogently observed in *Matter of Stien v Stien* (130 Misc 2d 609, 615), "[e]ither parent, or both, may try to persuade the court ... that he or she only has the child's best interests in mind. Either parent, or both, may--and often does--see the child

responding badly to the pulling and hauling of a custody battle and place the blame on the other, exonerating him or herself. The bitterer the contention, the greater the need for counsel loyal only to the child, beholden to neither parent, exercising independent judgment, not answerable to either party for her manner of representation."

A Law Guardian who has been retained and paid by one of the contesting parents is indelibly cast, either actually or ostensibly, as partial to the parent who hired him or her. Both the best interests of the children and principles of fundamental fairness dictate that such practice not be countenanced. Children may be represented "by counsel to whom they are merely referred by a parent .... Parents may not, however, retain counsel for their children or become involved in the representation of their children because of the appearance or possibility of a conflict of interest or the likelihood that such interference will prevent the children's representation from being truly independent" (*Matter of Fargnoli v Faber*, 105 AD2d 523, 524, *appeal dismissed* 65 NY2d 631, *mot to vacate denied* 65 NY2d 783, citing *Robert N. v Carol W.*, NYLJ, Sept. 30, 1983, at 15, col 6; *see also, P. v P.*, NYLJ, Nov. 10, 1992, at 29, col 3; *see generally*, Besharov, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 249, at 242-243). Here, plaintiff's retention and payment of the Law Guardian created an unacceptable actual or ostensible bias in favor of plaintiff. ***86**

Accordingly, the order awarding sole custody to plaintiff should be reversed, the motion to renew granted, and, upon renewal, the cross motion granted in part, the Law Guardian removed, and the matter remitted to a different Supreme Court Justice for the appointment of a new Law Guardian and further proceedings on the motion and cross motion for custody. We express no view concerning the merits of the court's award of custody.

Hayes, J. P., Wisner, Scudder and Kehoe, JJ., concur.
Order unanimously reversed, on the law, without costs, motion to renew granted, and, upon renewal, cross motion granted in part, Law Guardian removed and matter remitted to Supreme Court for further proceedings in accordance with the opinion by Hurlbutt, J. ***87**

Footnotes

* Because both plaintiff and defendant subsequently sought to change the custody arrangement from joint to sole custody, we do not address the apparent absence of either jurisdiction or standing in connection with the order to show cause obtained by Kadish (*cf.*, *Blauvelt v Blauvelt*, 219 AD2d 694).

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232 A.D.2d 787, 648 N.Y.S.2d 754

In the Matter of Colleen CC., a Child Alleged to be Neglected. Tioga County Department of Social Services, Appellant; Kathleen CC., Respondent. (Proceeding No. 1.) (And Three Other Related Proceedings.) In the Matter of Robert EE., a Child Alleged to be Abused and/or Neglected. Tioga County Department of Social Services, Appellant; Donald DD., Respondent. (Proceeding No. 2.) (And Six Other Related Proceedings.)

Supreme Court, Appellate Division,
Third Department, New York
75219, 75220
(October 3, 1996)

CITE TITLE AS: Matter of Colleen CC.

Mercure, J.

Appeals (1) in proceeding No. 1, from an order of the Family Court of Tioga County (Sgueglia, J.), entered June 1, 1995, which dismissed petitioner's applications, in four proceedings pursuant to Family Court Act article 10, to adjudicate respondent's children to be neglected, and (2) in proceeding No. 2, from an order of said court, entered June 1, 1995, which dismissed petitioner's applications, in seven proceedings pursuant to Family Court Act article 10, to adjudicate respondent's children and four other children to be abused and/or neglected.

HEADNOTE

PARENT, CHILD AND FAMILY
ABUSED OR NEGLECTED CHILD

([1]) Orders which dismissed petitions to adjudicate respondent's children and other children to be abused and/or neglected reversed --- Law Guardians appointed by Family Court failed to provide effective assistance of counsel to children who were subjects of respective petitions, requiring reversal of Family Court's orders and remittal of matter for appointment of new Law Guardians and new hearing; at their very best, Law Guardians provided children with passive representation; at worst, they were effective allies for respondents; most damning, while officially taking no position on respondents' dismissal motions, both Law Guardians expressed doubt in position espoused by petitioner and questioned whether petitioner had established its case by requisite standard.

Based upon a report by 14-year-old Robert EE. that his father, respondent Donald DD., had sexually abused him for a number of years, petitioner initiated seven separate proceedings against Donald pursuant to Family Court Act article 10 alleging his abuse of Robert and derivative neglect of his two daughters and of the four children of his cohabitant, respondent Kathleen CC. In addition, four separate petitions were filed charging Kathleen with neglect of her children based upon allegations that she allowed Donald to reside in the home and babysit for the children after she was advised of the report ***788** of Donald's sexual abuse of Robert. Family Court appointed two Law Guardians to serve as co-counsel for all seven of the children involved in the proceedings. The matter proceeded to a fact-finding hearing at which the evidence consisted primarily of Robert's in-court and out-of-court accounts of Donald's sexual abuse, the validation testimony of certified social worker Sarah Walsh and the contrary testimony of Donald's retained psychiatric expert, Ivan Fras, whose testimony interrupted petitioner's case in order to accommodate a scheduling problem. At the conclusion of petitioner's case, Family Court dismissed the petitions in proceeding No. 1 upon the ground that petitioner failed to establish a prima facie case of neglect and the petitions in proceeding No. 2 based upon Family Court's determination that petitioner had failed to prove its case by a preponderance of the evidence. Petitioner appeals.

We agree with petitioner's primary contention on appeal, cogently supported by the current Law Guardian, that the Law Guardians appointed by Family Court failed to provide effective assistance of counsel to the children who were the subjects of the respective petitions, requiring reversal of Family Court's orders and remittal of the matter for the appointment of new Law Guardians and a new hearing. Fundamentally, Robert and the other children "had a strong interest in obtaining State intervention to protect [them] from further abuse [or neglect]" (*Matter of Jamie TT.*, 191 AD2d 132, 136), a legal position in direct opposition to that of Donald and Kathleen and, in fact, coincidental with petitioner's (*see,*

supra). As such, it was the Law Guardians' responsibility to take an active role in insuring that evidence sustaining Robert's allegations of sexual abuse and supporting a finding that Kathleen failed to provide her children with proper guardianship was fully developed and supported to the fullest extent possible (*see, Matter of Pratt v Wood,* 210 AD2d 741, 743; *Matter of Jamie TT., supra,* at 137; *cf., Matter of Michael FF.,* 210 AD2d 758, 759-760).

At their very best, the Law Guardians provided the children with passive representation. At worst, they were effective allies for respondents. For instance, in his thorough questioning of Robert, one of the Law Guardians made a point of breaking down Robert's direct testimony, raising the possibility that he had been "coached" by his mother during a recess and effectively impeaching him by exploring prior inconsistent statements, all for the obvious purpose of discrediting his allegations of abuse. The other Law Guardian declined to examine Robert, stating that his co-counsel had already covered all the areas he wished to explore. Most damning, while officially taking ***789** no position on respondents' dismissal motions, both Law Guardians expressed doubt in the position espoused by petitioner and questioned whether petitioner had established its case by the requisite standard. Our reading of the record as a whole leads us to conclude that the children did not receive meaningful representation (*see, Matter of Jamie TT., supra.*)

Although rendered academic by virtue of our determination to remit the matter for a new hearing, we note two further serious errors that would themselves have required reversal. First, by dismissing the petition against Donald at the conclusion of petitioner's case on the basis of its assessment of the preponderance of the evidence, Family Court applied the wrong standard. At that stage, the proper inquiry was whether petitioner had made out a prima facie case, thereby shifting the burden to respondents to rebut the evidence of parental culpability (*see, Matter of Philip M.,* 82 NY2d 238, 244; *Matter of Themika V.,* 205 AD2d 787). Based upon our finding that petitioner had made out a prima facie case, it is clear that Family Court's erroneous determination had the effect of depriving petitioner of an opportunity to cross-examine respondents, if they chose to testify, or, if they did not, the benefit of the strongest inference against them that the opposing evidence permitted (*see, Matter of Themika V., supra,* at 787-788). Second, the evidence that Kathleen was aware of the report against Donald and that she nonetheless allowed him to stay overnight in the home with her four children, and, in fact, allowed him to babysit them, established prima facie that she endangered her children by her failure to exercise a minimum degree of care in providing them with proper supervision or guardianship (*see,* Family Ct Act § 1012 [f] [i] [B]; *Matter of Daniel DD.,* 142 AD2d 750, 751). Accordingly, Family Court erred in dismissing the petition against her.

Cardona, P. J., Casey, Spain and Carpinello, JJ., concur. Ordered that the orders are reversed, on the law and the facts, without costs, petitions reinstated and matters remitted to the Family Court of Tioga County for further proceedings not inconsistent with this Court's decision.

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297 A.D.2d 328, 746 N.Y.S.2d
313, 2002 N.Y. Slip Op. 06188

Dominick Corigliano, Appellant,
v.
Rosa M. Corigliano, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
2001-03382, 480/96
(August 19, 2002)

CITE TITLE AS: Corigliano v Corigliano

HEADNOTES

PARENT AND CHILD
CUSTODY

([1]) Where father alleges that mother works full time in Connecticut and attends college three nights per week, and that parties' eldest child lives with his paternal grandparents during school week and has expressed desire to reside with him, hearing with respect to father's request for custody of subject child is warranted.

PARENT AND CHILD
CUSTODY
Appointment of Law Guardian

([2]) Where father sought custody of parties' eldest child, independent law guardian is appointed to represent subject child separately from his siblings --- law guardian adopted position that subject child remain with mother and his two siblings without making appropriate inquiry; potential conflict of interest warrants appointment of independent law guardian for subject child.

In a matrimonial action in which the parties were divorced by judgment entered July 16, 1998, the plaintiff father appeals from so much of an order of the Supreme Court, Westchester County (Shapiro, J.), entered March 2, 2001, as granted the defendant mother's motion to modify an order of the Family Court, Westchester County (Cooney, J.), entered June 2, 1999, to remove the appointed "case manager," and denied those branches of his cross motion which were to modify that order by awarding him custody of the parties' eldest child and to appoint a law guardian to represent that child separately from his siblings.

Ordered that the order is modified by deleting the provisions ***329** thereof denying those branches of the cross motion which were to modify the order of the Family Court, Westchester County, entered June 2, 1999, by awarding custody of the parties' eldest child to the plaintiff father and to appoint a law guardian to represent that child separately from his siblings, and substituting therefor provisions (1) directing an evidentiary hearing with respect to that branch of the cross motion which was to modify the prior order of the Family Court, Westchester County, entered June 2, 1999, and (2) appointing a law guardian to represent the eldest child separately from his siblings; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to Supreme Court, Westchester County, for further proceedings consistent herewith.

A parent who seeks a change of custody is not automatically entitled to a hearing but must make some evidentiary showing sufficient to warrant a hearing (*see Matter of Coutsoukis v Samora,* 265 AD2d 482, 483; *Teuschler v Teuschler,* 242 AD2d 289, 290; *Matter of Miller v Lee,* 225 AD2d 778, 779). A change of custody should be made only if the totality of the circumstances warrants a modification (*see Friederwitzer v Friederwitzer,* 55 NY2d 89, 95-96).

The plaintiff father alleges that the defendant mother now works full time in Connecticut and attends college three nights a week. He further alleges that the parties' eldest child lives with his paternal grandparents during the school week and has repeatedly expressed a desire to reside with him. In view of these allegations, an evidentiary hearing with respect to the branch of the father's cross motion which was, inter alia, to award custody of the subject child to him, is warranted.

The Supreme Court also erred in denying that branch of the father's cross motion which was to appoint a law guardian to represent the subject child separately from his siblings. As the law guardian adopted the position that the subject child remain with the mother and his

two siblings at the outset of the proceeding, without making an appropriate inquiry, the potential conflict of interest in the law guardian's continued representation of the subject child warrants the appointment of an independent law guardian for the subject child (*cf. Matter of Carballeira v Shumway,* 273 AD2d 753; *Matter of Rosenberg v Rosenberg,* 261 AD2d 623, 624).

The appellant's remaining contention is without merit.

Santucci, J.P., H. Miller, Schmidt and Cozier, JJ., concur.

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281 A.D.2d 969, 722 N.Y.S.2d
323, 2001 N.Y. Slip Op. 02304

Gary D. B., Appellant,
v.
Elizabeth C. B., Respondent.

Supreme Court, Appellate Division,
Fourth Department, New York
00-02464, 425.1
(March 21, 2001)

CITE TITLE AS: Gary D.B. v Elizabeth C.B.

HEADNOTES

PARENT AND CHILD
CUSTODY
Withdrawal of Law Guardian

([1]) During trial, after children began to express different preferences concerning parent with whom they wished to live, Law Guardian moved to withdraw from representing all of children; court should have granted that motion because Law Guardian articulated conflict of interest.

PARENT AND CHILD
CUSTODY

([2]) Although prior custody orders were styled "temporary," children were in plaintiff's custody from 1992 until 1995 pursuant to those orders, and they have been in plaintiff's sole custody since 1995 pursuant to judgment of divorce; consequently, court should not have changed custody in absence of evidence that plaintiff was unfit parent; court's determination that plaintiff's parenting skills are inadequate to meet needs of children lacks sound and substantial basis in record; although plaintiff is more strict and demanding than defendant, has less nurturing parenting style, and expects more from children than does defendant, plaintiff has adequately provided for needs of children through many years when defendant was unable to provide any emotional support for them as result of her alcohol and drug dependencies; defendant failed to present medical evidence to support her testimony that she has conquered alcoholism and is no longer in danger of backsliding; defendant also admitted that she continues to take drug that she has abused in past-- plaintiff should retain sole custody of three younger children; however, custody of oldest child was properly awarded to defendant; oldest child, who is now 17, in what psychologist described as attempt to manipulate situation to remove herself from plaintiff's discipline, made superficial cuts to her wrists; following that incident, she went to live with her maternal grandparents and then with defendant--parties and children are required to participate in counseling to improve communications among family members.

WITNESSES
EXPERT WITNESS

([3]) In custody proceeding, court erred in summarily denying plaintiff's motion to strike testimony of court-appointed psychologist; court had issued order appointing psychologist to evaluate parties, defendant's parents and children; order provided that compensation for forensic evaluations and any court appearances was to be paid proportionately to ratio between adult parties and children evaluated; adult parties were to compensate expert for their own proportionate shares of evaluation cost, and children's portion was to be paid by Law Guardian Program; order provided for maximum fee of $2,000, and further provided that, "if it is anticipated that the evaluation may exceed the maximum limit, then a supplemental request will be made to the Court for additional compensation"; defendant called court-appointed psychologist as her witness and, during direct examination, it was revealed that defendant had paid additional fee to psychologist of $800; by paying expert additional amounts without seeking further order of court, defendant created appearance of impropriety, and court should not have summarily denied plaintiff's objection to her testimony.

Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: The parties were married in 1976 and have four children: Jessica, born October 14, 1983; Erin, born January 3, 1986; Nicholas, born March 10, 1989; and Austin, born June 6, 1991. Defendant suffered from alcoholism and drug dependency and,

despite efforts at rehabilitation, continued to drink and abuse controlled substances during the marriage. In December 1992 plaintiff obtained an order granting him temporary custody of the children, as well as an order of protection from Family Court. Those orders were extended by consent of the parties while defendant continued to struggle with her addictions. Plaintiff commenced an action for divorce and in 1995 obtained a judgment of divorce based upon defendant's cruel and inhuman treatment of him. The judgment incorporated the stipulation of the parties that plaintiff would have sole custody of the children and defendant would have only supervised visitation with the children because she was residing in a halfway house at that time. The agreement provided that the custody and visitation arrangement could be reviewed by the court after a period of one year. In order to be available to his children, plaintiff closed his law office in downtown Buffalo and began to practice law from his home.

In July 1996 defendant stopped drinking as the result of having what she described at trial as an "epiphany," and her visitation rights with the children eventually were expanded by stipulation of the parties. In February 1999 defendant commenced this proceeding seeking custody of all the children, after the eldest daughter, then age 15, came to live with defendant after having an argument with plaintiff. Supreme Court granted the petition following a hearing, awarded sole custody of the children to defendant and limited visitation to plaintiff. The court stated that it was a de novo custody determination because an order of permanent custody had never been entered. The court determined that plaintiff's parenting skills are not adequate to meet the needs of the children and that defendant is better equipped to meet those needs.

On appeal, plaintiff contends that the court erred in failing ***970** to give deference to a long-standing custody arrangement in the absence of a determination that he was an unfit parent, and that the court's determination that he was not meeting the needs of the children is not supported by the record. We agree, and modify the order insofar as it awarded custody of Erin, Nicholas and Austin to defendant. We affirm the order insofar as it awarded custody of Jessica to defendant, however, because the record establishes that it is not in the best interests of Jessica to return to plaintiff's custody at this time.

Every custody determination must focus on the best interests of the children, and the continuity and stability of the existing custodial arrangement, whether established by agreement or order, is a weighty factor to consider in determining their best interests (*see, Fox v Fox,* 177 AD2d 209, 210). "[T]he existing arrangement should be changed based only upon ' "countervailing circumstances on consideration of the totality of circumstances" ' " (*Fox v Fox, supra,* at 210-211, quoting *Friederwitzer v Friederwitzer,* 55 NY2d 89, 95; *see also, Salerno v Salerno,* 273 AD2d 818). "Custody of children should be established on a long-term basis, wherever possible; children should not be shuttled back and forth between divorced parents merely because of changes in marital status, economic circumstances or improvements in moral or psychological adjustment, at least so long as the custodial parent has not been shown to be unfit, or perhaps less fit, to continue as the proper custodian" (*Obey v Degling,* 37 NY2d 768, 770).

Here, although the prior custody orders were styled "temporary," the children were in plaintiff's custody from 1992 until 1995 pursuant to those orders, and they have been in plaintiff's sole custody since 1995 pursuant to the judgment of divorce incorporating the stipulation of the parties. Consequently, the court should not have changed custody in this case in the absence of evidence that plaintiff was an unfit parent. In that regard, we conclude that the court's determination that plaintiff's parenting skills are inadequate to meet the needs of the children lacks a sound and substantial basis in the record (*see, Alanna M. v Duncan M.,* 204 AD2d 409). Although plaintiff is more strict and demanding than defendant, has a less nurturing parenting style, and expects more from the children than does defendant, the record supports the conclusion that plaintiff has adequately provided for the needs of the children through the many years when defendant was unable to provide any emotional support for them as a result of her alcohol and drug dependencies. The three younger children are doing well in school and neighbors, friends and fellow church members ***971** testified that plaintiff enjoys a good relationship with the children. The court-appointed psychologist concluded that all of the children had been damaged by defendant's alcoholism, which she characterized as a family disease. She further concluded that the parties have not dealt effectively with the issue of alcoholism with the children, and have instead blamed each other for their problems. The court, however,

appeared to attribute most of the blame for the problems to plaintiff.

We find it significant that defendant failed to present medical evidence to support her testimony that she has conquered alcoholism and is no longer in danger of backsliding. Although defendant testified that she stopped drinking in 1996, she had stopped drinking for a period of seven years earlier in the marriage before beginning to drink again. Defendant also admitted that she continues to take Dexedrine, a drug that she has abused in the past. An adverse inference should have been drawn against defendant for failing to present testimony from her present treating psychiatrist that she is able to take Dexedrine with no danger of abusing it and that she is not in danger of resuming her drinking.

We conclude that plaintiff should retain sole custody of Erin, Nicholas and Austin, and that defendant should have visitation with those children as set forth in the order with reference to plaintiff. We conclude, however, that this is one of those rare cases where the breakdown in communication between the parent and the child that would require a change of custody is "applicable only as to the best interests of one of several children" (*Eschbach v Eschbach,* 56 NY2d 167, 172; *see also, Mitzner v Mitzner,* 209 AD2d 487, 488-489; *Fox v Fox, supra,* at 213). Jessica, in what a psychologist described as an attempt to manipulate the situation to remove herself from plaintiff's discipline, made superficial cuts to her wrists. Following that incident, she went to live with her maternal grandparents and then with defendant. Jessica, who is now 17 years old, has continued to reside with defendant. Given those circumstances, and in view of Jessica's age, we affirm that portion of the order awarding custody of Jessica to defendant and holding visitation between plaintiff and Jessica in abeyance pending their participation in counseling and further order of the court. We also affirm that portion of the order requiring the parties and the children to participate in counseling to improve communications among family members.

Although not determinative here, we are compelled to address two other troubling issues that are brought to our attention on this appeal. During trial, after the children began to ***972** express different preferences concerning the parent with whom they wished to live, the Law Guardian moved to withdraw from representing all of the children. The court should have granted that motion because the Law Guardian articulated a conflict of interest (*cf., Matter of Rosenberg v Rosenberg,* 261 AD2d 623, 624).

Additionally, the court erred in summarily denying plaintiff's motion to strike the testimony of the court-appointed psychologist. The court had issued an order appointing a psychologist to evaluate the parties, defendant's parents and the children (*see,* 22 NYCRR 202.18). The order provided that the compensation for the forensic evaluations and any court appearances was to be paid proportionately to the ratio between adult parties and children evaluated. The adult parties were to compensate the expert for their own proportionate shares of the evaluation cost, and the children's portion was to be paid by the Law Guardian Program. The order provided for a maximum fee of $2,000, and further provided that, "if it is anticipated that the evaluation may exceed the maximum limit, then a supplemental request will be made to the Court for additional compensation." Defendant called the court-appointed psychologist as her witness and, during direct examination, it was revealed that defendant had paid an additional fee to the psychologist of $800. By paying the expert additional amounts without seeking further order of the court, defendant created the appearance of impropriety (*see generally, Davis v Davis,* 269 AD2d 82), and the court should not have summarily denied plaintiff's objection to her testimony.

We modify the order, therefore, by awarding custody of Erin, Nicholas and Austin to plaintiff with visitation to defendant as set forth in the order with reference to plaintiff. (Appeal from Order of Supreme Court, Erie County, Sconiers, J.--Custody.)

Present--Pigott, Jr., P. J., Pine, Hayes, Scudder and Lawton, JJ.

End of Document

227 A.D.2d 315, 642 N.Y.S.2d 685

In the Matter of the Custody of Rebecca B., an Infant. Renee B., Respondent; Michael B., Appellant.

Supreme Court, Appellate Division,
First Department, New York
58041, 58042
(May 28, 1996)

CITE TITLE AS: Matter of Rebecca B.

HEADNOTE

PARENT AND CHILD
CUSTODY

([1]) Orders which, in child custody proceeding, denied respondent's motion to dismiss proceeding on ground that child's Law Guardian lacked standing to bring it, granted Law Guardian's motion to quash subpoenas served upon it and social worker it hired, and denied respondent's motion to disqualify court-appointed psychiatrist, affirmed --- In its dual role as advocate for and guardian of subject child, Law Guardian clearly has interest in welfare of child sufficient to give it standing to seek change of custody; child's communications with Law Guardian, as well as with social worker hired by Law Guardian, implicate attorney-client privilege, or immunity from disclosure for attorney work product and material prepared for litigation, and thus, subpoenas demanding testimony of Law Guardian and social worker were properly quashed; respondent's motion to disqualify court-appointed psychiatrist for bias was also properly denied for lack of proof.

Orders, Family Court, New York County (Judith Sheindlin, J.), entered on or about August 18 and November 8, 1995, which, in a child custody proceeding, denied respondent's motion to dismiss the proceeding on the ground that the child's Law Guardian, Lawyers for Children, Inc., lacked standing to bring it, granted the Law Guardian's motion to quash subpoenas served upon it and the social worker it hired, and denied respondent's motion to disqualify the court-appointed psychiatrist, unanimously affirmed, without costs.

In its dual role as advocate for and guardian of the subject child (*see,* Family Ct Act § 241; *Matter of Samuel W.,* 24 NY2d 196, *revd on other grounds sub nom. In re Winship,* 397 US 358; *Marquez v Presbyterian Hosp.,* 159 Misc 2d 617), Lawyers for Children clearly has an interest in the welfare of the child sufficient to give it standing to seek a change of custody (*cf., Matter of Janet S. M. M. v Commissioner of Social Servs.,* 158 Misc 2d 851). The child's communications with the Law Guardian (*Matter of Angelina AA.* (211 AD2d 951, 953, *lv denied* 85 NY2d 808), as well as with the social worker hired by the Law Guardian (*Matter of Lenny McN.,* 183 AD2d 627), implicate the attorney-client privilege, or the immunity from disclosure for attorney work product and material prepared for litigation, and thus, the subpoenas demanding the testimony of the Law Guardian and the social worker were properly quashed. Respondent's motion to disqualify the court-appointed psychiatrist for bias was also properly denied for lack of proof (*see, Virgo v Bonavilla,* 71 AD2d 1051, *affd* 49 NY2d 982).

Concur--Sullivan, J. P., Rosenberger, Ellerin and Mazzarelli, JJ. ***316**

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by Shaffer v. Winslow, N.Y.Fam.Ct., July 27, 2001

211 A.D.2d 951, 622 N.Y.S.2d 336

In the Matter of Angelina AA. and Others, Children Alleged to be Abused and/or Neglected. Otsego County Department of Social Services, Respondent; Joseph BB., Appellant.

Supreme Court, Appellate Division, Third Department, New York
70350
January 19, 1995

CITE TITLE AS: Matter of Angelina AA.

Peters, J.

Appeal from an order of the Family Court of Otsego County (Nydam, J.), entered November 19, 1993, which granted petitioner's application, in a proceeding pursuant to Family Court Act article 10, to adjudicate respondent's children to be abused and/or neglected.

HEADNOTE

PARENT, CHILD AND FAMILY
ABUSED OR NEGLECTED CHILD

([1]) Order which granted petitioner's application to adjudicate respondent's children to be abused and/or neglected affirmed --- Investigation commenced by hot-line report made by children's mother almost contemporaneously with respondent's acquisition of custody of children pursuant to court order; Family Court found respondent had sexually abused daughter and made derivative finding of neglect concerning other two children; order was entered placing children in custody of their mother for one year; subsequently, Family Court entered temporary order placing children in custody of respondent under supervision of his wife --- While testimony of children's mother was replete with inconsistencies, there was sufficient evidence to support Family Court's determination; statements of daughter were sufficiently corroborated; as respondent conceded at fact-finding hearing that child was sexually abused, identity of perpetrator became relevant issue; corroborative evidence as to identity of abuser is not required; in any event, daughter was consistent in her identification of respondent as perpetrator --- Sexual abuse of one child, standing alone, does not establish prima facie case of derivative neglect against others; however, respondent's conduct may be found to demonstrate such impaired level of judgment as to create substantial risk of harm for any child in his care and thereby support derivative finding of neglect; here, record reflects sufficient cause for such finding --- Respondent additionally contends Family Court erred by refusing to permit Law Guardian to testify as to veracity of statements daughter made at in-camera interview during which Law Guardian was present; as daughter had attorney-client relationship with her Law Guardian and since record does not reflect any willingness on part of child to waive her privilege and permit her Law Guardian to testify or express opinion concerning her veracity, Family Court appropriately refused to permit Law Guardian to testify.

In October 1992 petitioner commenced this proceeding to adjudicate respondent's children, Angelina, Joseph and Alice, to be abused and/or neglected. The investigation commenced by a hot-line report made by the children's mother. The report was made almost contemporaneously with respondent's acquisition ***952** of custody of the children pursuant to court order. Following a fact-finding hearing, Family Court found that respondent had sexually abused Angelina and made a derivative finding of neglect concerning Joseph and Alice. At the dispositional hearing, an order was entered placing the children in the custody of their mother for one year. Respondent appeals. Subsequently, Family Court entered a temporary order placing the children in the custody of respondent under the supervision of his wife.

There must be an affirmance. Contrary to respondent's contentions, we find that Family Court's determination that respondent had abused Angelina and had neglected Joseph and Alice was supported by a preponderance of the evidence *(see,* Family Ct Act § 1046 (b) (i); *Matter of Nicole V.,* 71 NY2d 112). As to respondent's contentions that Family Court gave greater weight to the testimony of petitioner's witnesses than respondent's witnesses and ignored the Law Guardian's oral report, the determination of the Appellate Division regarding custody and the prior Law Guardian's written report, we note that it is axiomatic that great deference will be accorded to

those factual findings made by Family Court which had direct observation of and access to the parties and the professionals who testified. We will not disturb those findings on appeal unless we find that they lack a sound and substantial basis in the record *(see, Matter of Daniel R. v Noel R.,* 195 AD2d 704, 706). While the testimony of the children's mother was replete with inconsistencies, we find that there was sufficient evidence to support Family Court's determination.

We further find that the statements of Angelina were sufficiently corroborated *(see,* Family Ct Act § 1046 (a) (vi); *Matter of David DD.,* 204 AD2d 791; *Matter of Alena D.,* 125 AD2d 753, *lv denied* 69 NY2d 605). Moreover, as respondent conceded at the fact-finding hearing that the child was sexually abused, identity of the perpetrator became a relevant issue. It is well settled that corroborative evidence as to the identity of an abuser is not required *(Matter of Justina S.,* 180 AD2d 642). In any event, here, as in *Matter of Justina S. (supra),* Angelina was consistent in her identification of respondent as the perpetrator.

Respondent further argues that there was insufficient evidence to support Family Court's determination that Joseph and Alice were neglected. It is well settled that the sexual abuse of one child, standing alone, does not establish a prima facie case of derivative neglect against the others *(Matter of Amanda LL.,* 195 AD2d 708). However, a respondent's conduct ***953** may be found to demonstrate such an impaired level of judgment as to create a substantial risk of harm for any child in his care and thereby support a derivative finding of neglect *(supra).* Here, the record reflects sufficient cause for such finding.

Respondent additionally contends that Family Court erred by refusing to permit the Law Guardian to testify as to the veracity of statements Angelina made at an in-camera interview during which the Law Guardian was present. As Angelina had an attorney-client relationship with her Law Guardian *(see, Matter of Bentley v Bentley,* 86 AD2d 926) and since the record does not reflect any willingness on the part of the child to waive her privilege and permit her Law Guardian to testify or express an opinion concerning her veracity, we find that Family Court appropriately refused to permit the Law Guardian to testify *(see, Matter of Karl S.,* 118 AD2d 1002).

Finally, respondent asserts that Family Court abused its discretion in releasing custody of the children to their mother. Family Court listened to extensive argument concerning its dispositional order and, in placing the children with their mother, ensured that respondent have access. Thereafter, the court modified its order and placed the children with respondent with his custody to be supervised by his wife. Since Family Court has modified the order appealed from and has granted respondent temporary custody of the children, we conclude that this portion of the appeal is moot *(see, Matter of Hanington v Coveney,* 62 NY2d 640).

The order of Family Court is, therefore, affirmed in its entirety.

Cardona, P. J., Crew III, Casey and Yesawich Jr., JJ., concur.
Ordered that the order is affirmed, without costs.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Irizarry v. Irizarry, N.Y.A.D. 2 Dept., March 26, 2014

50 A.D.3d 837, 855 N.Y.S.2d
658, 2008 N.Y. Slip Op. 03411

****1** Frank Cervera, Appellant
v
Rossanna Bressler, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
April 15, 2008

CITE TITLE AS: Cervera v Bressler

HEADNOTE

Parent, Child and Family
Visitation

Conditional unmonitored telephone contact and unsupervised visitation between father and child was restored—because no hearing was ever held on order to show cause brought by attorney for child, visitation remained supervised, and telephone contact between father and daughter was monitored, for about 2½ years, based solely on hearsay allegations of mother; mother's allegations of molestation were determined to be unfounded, and her allegations were, in any event, insufficient to show that unsupervised visitation would be detrimental to child's well-being—father's right to "reasonable access and visitation" was violated—court erred in denying father's motion to remove attorney for child; in order to show cause and affirmations, attorney for child included facts which were not part of record, but which constituted hearsay gleaned from mother; this behavior on part of attorney for child, as well as his repeated ad hominum attacks on father's character, was both unprofessional and improper, as it amounted to attorney for child acting as witness against father.

Frank Cervera, Westtown, N.Y., appellant pro se.
Dewbury & Associates, P.C., Upper Nyack, N.Y. (Dara McDonald Warren of counsel), for respondent.
Joshua D. Siegel, Hartsdale, N.Y., attorney for the child.

In a matrimonial action in which the parties were divorced by ***838** judgment dated February 21, 2001, the plaintiff appeals, as limited by his brief, from stated portions of an order of the Supreme Court, Westchester County (Lubell, J.), entered September 18, 2007, which, inter alia, referred those branches of his motion which were for unmonitored telephone contact and unsupervised visitation with the parties' child to the trial court, and denied those branches of his motion which were for an award of an interim attorney's fee, to modify the apportionment of responsibility for payment of the forensic evaluator's fee, and to remove Joshua D. Siegel as the attorney for the child.

Ordered that on the Court's own motion, the notice of appeal from so much of the order as deferred until trial the issues of unmonitored telephone contact and unsupervised visitation is treated as an application for leave to appeal, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the order is modified, on the law, the facts, and in the exercise of discretion (a) by deleting the first, second, third, and fourth decretal paragraphs thereof referring to the trial court those branches of the father's motion which were for unmonitored telephone contact and unsupervised visitation and substituting therefor a provision restoring conditional unmonitored ****2** telephone contact and unsupervised visitation, (b) by deleting the eighth and ninth decretal paragraphs thereof relating to an interim attorney's fee and forensic evaluator fees and substituting therefor a provision directing that a hearing be held to determine the parties' relative financial positions, and (c) by deleting the sixteenth decretal paragraph thereof denying that branch of the plaintiff's motion which was to remove Joshua D. Siegel as attorney for the child and substituting therefor a provision granting that branch of the plaintiff's motion; as so modified, the order is affirmed insofar as appealed from, with costs to the appellant, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings consistent herewith, including, inter alia, an immediate hearing on the issues of telephone contact and visitation, without an updated forensic report, the appointment of a new attorney for the child, and the setting of such conditions of unmonitored telephone contact and unsupervised visitation as the Supreme Court in its discretion may direct.

Since the parties' divorce in February 2001 they have been involved in constant litigation surrounding custody of their child and the visitation rights of the noncustodial father. On September 25, 2003, in open court, the parties entered into a stipulation, later so-ordered by the court, in which they agreed ***839** to joint custody, with primary physical custody with the mother, visitation to the father on alternate weekends and one weekday per week, and the removal of certain restrictions on visitation that had been imposed temporarily.

In July 2005 the attorney for the child, then known as the law guardian for the child, moved by order to show cause, signed by the court on July 28, 2005, for supervised visitation, based on various allegations by the mother, including one allegation of sexual molestation. The sexual molestation allegation was subsequently determined to be unfounded by the Office of Children and Family Services (hereinafter OCFS). Although a hearing on the motion of the attorney for the child was scheduled at least once, for some reason, not apparent in the record, it never took place, and visitation by the father has remained supervised since July 28, 2005.

"Visitation is a joint right of the noncustodial parent and of the child" (*Weiss v Weiss,* 52 NY2d 170, 175 [1981]; *see Twersky v Twersky,* 103 AD2d 775 [1984]), and "the best interests of a child lie in his being nurtured and guided by both of his natural parents" (*Daghir v Daghir,* 82 AD2d 191, 193 [1981], *affd* 56 NY2d 938 [1982]; *see Matter of Gerald D. v Lucille S.,* 188 AD2d 650 [1992]). For a noncustodial parent to develop a meaningful, nurturing relationship with his or her child, "visitation must be frequent and regular" (*Daghir v Daghir,* 82 AD2d at 194, *affd* 56 NY2d 938 [1982]; *see Matter of Graves v Smith,* 264 AD2d 844 [1999]; *Matter of Gerald D. v Lucille S.,* 188 AD2d at 650). "Absent extraordinary circumstances, where visitation would be detrimental to the child's well-being, a noncustodial parent has a right to reasonable visitation privileges" (*Twersky v Twersky,* 103 AD2d at 775-776; *see Matter of Brian M. v Nancy M.,* 227 AD2d 404 [1996]; *Matter of Schack v Schack,* 98 AD2d 802 [1983]).

"It is within the sound discretion of the court to determine whether visitation should be supervised" (*Matter of Morgan v Sheevers,* 259 AD2d 619, 620 [1999]; *see Matter of Custer v Slater,* 2 AD3d 1227, 1228 [2003]), and its determination will not be set aside unless it lacks a sound and substantial basis in the record (*see Matter of Khan v Dolly,* 39 AD3d 649, 651 [2007]; *Matter of Kachelhofer v Wasiak,* 10 AD3d 366 [2004]; *Matter of Levande v Levande,* 308 AD2d 450, 451 [2003]). "Supervised visitation is appropriately required only where it is established that unsupervised visitation would be detrimental to the child" (*Matter of Gainza v Gainza,* 24 AD3d 551 [2005]; *see Rosenberg v Rosenberg,* 44 AD3d 1022, 1024 [2007]; *Purcell v Purcell,* 5 AD3d 752, 753 [2004]). ****3** ***840**

Here, because no hearing was ever held on the order to show cause brought by the attorney for the child, signed by the court on July 28, 2005, visitation has remained supervised, and telephone contact between father and daughter has been monitored, for about 2½ years, based solely on the hearsay allegations of the mother. These consisted of the allegations of molestation, which were determined by OCFS to be unfounded, and stories of various incidents, the details of which were disputed by the father and, in any event, were insufficient to show that unsupervised visitation would be "detrimental to the child's well-being" (*Matter of Graves v Smith,* 264 AD2d at 845; *see Purcell v Purcell,* 5 AD3d at 752). Under these circumstances, it is unacceptable to this Court that the hearing in this matter has not been held, although ordered more than 2½ years ago. Moreover, where, as here, "there is much anger, hostility and resentment between the parties" (*Matter of Schack v Schack,* 98 AD2d at 802), it was especially unfortunate that the Supreme Court permitted the mother to have so much control over visitation and, especially, over telephone contact between father and daughter. This arrangement resulted in the violation of the father's right to "reasonable access and visitation" (*Matter of Schack v Schack,* 98 AD2d at 802; *see Matter of Smith v Molody-Smith,* 307 AD2d 364, 365 [2003]).

Additionally, the court should not have required the father to pay the cost of supervising his visitation without determining the "economic realities," including his ability to pay and the actual cost of each visit (*Matter of Rueckert v Reilly,* 282 AD2d 608, 609 [2001]).

Contrary to the father's contentions, the court properly declined to direct the attorney for the child to testify and submit his files and notes as part of discovery. To have ruled otherwise would have resulted in two violations of the ethical requirements applicable to all attorneys,

including an attorney for the child, that the attorney may not disclose a client's confidences and may not become a witness in the litigation (*see* 22 NYCRR 7.2 [b]).

However, the court improvidently exercised its discretion in denying that branch of the father's motion which was to remove Joshua D. Siegel as the attorney for the child. "An [attorney for the child] should not have a particular position or decision in mind at the outset of the case before the gathering of evidence . . . On the other hand, '[attorneys for children] are not neutral automatons. After an appropriate inquiry, it is entirely appropriate, indeed expected, that a[n attorney for the child] form an opinion about what action, if any, would be in a child's best ***841** interest' " (*Matter of Carballeira v Shumway,* 273 AD2d 753, 756 [2000], quoting Besharov, Practice Commentaries, McKinney's Cons Law of NY, Book 29A, Family Ct Act § 241, at 218-219).

"[An] attorney for the child[ ] [is] not an investigative arm of the court. While [attorneys for the children], as advocates, may make their positions known to the court orally or in writing (by way of, among other methods, briefs or summations), presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate practices" (*Weiglhofer v Weiglhofer,* 1 AD3d 786, 789 [2003] [internal quotation marks and citations omitted]).

Here, in the order to show cause signed July 28, 2005, and the affirmation in support, as well as in every affirmation submitted thereafter, the attorney for the child included facts which were not part of the record, but which constituted hearsay gleaned from the mother. This behavior on the part of the attorney for the child, as well as his repeated ad hominum attacks on the father's character, is both unprofessional and improper, as it amounts to the attorney for the child acting as a witness against the father, in violation of the Rules of the Chief Judge (*see* 22 NYCRR 7.2 [b]). ****4** Accordingly, the court should have granted that branch of the motion which was to remove Joshua D. Siegel as the attorney for the child.

With regard to attorney's fees and apportionment of the forensic evaluator's fees, as there is no evidence in the record that the financial circumstances of the parties have ever been fully considered, or that the father has ever been afforded an opportunity to challenge the apportionment of fees, "a right expressly reserved to him in [a] prior order" (*Cervera v Cervera,* 43 AD3d 849, 850 [2007]), we remit the matter to the Supreme Court, Westchester County, for a hearing to consider the parties' relative financial positions.

Contrary to the father's contention, the Supreme Court, in effect, granted that branch of the father's motion which was to rescind so much of the order dated May 15, 2007, as directed the parties to provide certain releases to the forensic evaluator by limiting the scope of such releases to the contact and communication allowed by the so-ordered stipulation dated September 25, 2003. Spolzino, J.P., Lifson, Florio and Dickerson, JJ., concur.

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48 A.D.3d 203, 850 N.Y.S.2d
415, 2008 N.Y. Slip Op. 00981

****1** Naomi C., Appellant
v
Russell A., Respondent.

Supreme Court, Appellate Division,
First Department, New York
2542
February 5, 2008

CITE TITLE AS: Naomi C. v Russell A.

HEADNOTE

Parent, Child and Family
Custody

Bruce A. Young, New York City, for appellant.
Russell A., respondent pro se.
Order, Family Court, New York County (Helen C. Sturm, J.), entered on or about August 9, 2007, which dismissed, without a hearing and without prejudice, the petition to modify an order of custody, unanimously affirmed, without costs.

Petitioner's contention that sufficient grounds exist to modify the parties' so-ordered stipulation is without merit; neither custody nor visitation should be changed without a hearing (*see e.g. David W. v Julia W.*, 158 AD2d 1, 6 [1990]; *Matter of Fischbein v Fischbein*, 55 AD2d 885 [1977]). However, Family Court was not required to hold a hearing here because petitioner failed to make the necessary evidentiary showing (*see David W.*, 158 AD2d at 7).

Although the court was warranted in dismissing the petition ***204** on its face, we point out that the questioning of the Law Guardian (now called Attorney for the Child) by the court is something that should not be repeated. With the parties present, the court asked the Law Guardian, on the record, to discuss the position of the 10-year-old child regarding how well the current custody arrangement was working. Although the court was correct to disallow the "cross-examination" of the Law Guardian by petitioner's counsel, the court should not consider the hearsay opinion of a child in determining the legal sufficiency of a pleading in the first place. Most importantly, such colloquy makes the Law Guardian an unsworn witness, a position in which no attorney should be placed. "The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to . . . becoming a witness in the litigation" (Rules of Chief Judge [22 NYCRR] § 7.2 [b]). ****2**

We have considered petitioner's remaining arguments and find them unavailing. Concur—Lippman, P.J., Gonzalez, Buckley and Sweeny, JJ.

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4 A.D.3d 747, 771 N.Y.S.2d 476
(Mem), 2004 N.Y. Slip Op. 00710

**1 In the Matter of James J. Cobb, Respondent
v
Kathy Cobb, Appellant.

Supreme Court, Appellate Division,
Fourth Department, New York
02-02396, 1552
February 11, 2004

CITE TITLE AS: Matter of Cobb v Cobb

HEADNOTE

Contempt
Civil Contempt

Respondent, who was aware of order mandating that she and parties' child obtain counseling and willfully violated order, was properly held in contempt—court improperly directed Law Guardian to prepare and file "law guardian report" with court ex parte, and court improperly directed Law Guardian to testify as witness.

Appeal from an order of the Family Court, Oneida County (Frank S. Cook, J.), entered September 27, 2002. The order found respondent in contempt of court for willfully violating an order mandating that respondent and the parties' child obtain counseling.

It is hereby ordered that the order so appealed from be and the same hereby is unanimously affirmed without costs.

Memorandum: We conclude that Family Court properly found respondent in contempt of court. The record establishes that respondent was aware of an order mandating that she and the parties' child obtain counseling and that she willfully violated that order (*see Matter of Hicks v Russi*, 254 AD2d 801 [1998]). We note, however, that the court improperly directed the Law Guardian to prepare and file a "law guardian report" with the court ex parte, inasmuch as a law guardian "is the attorney for the children . . . and not an investigative arm of the court" (*Weiglhofer v Weiglhofer*, 1 AD3d 786, 788 n 1 [2003]; *see Matter of Rueckert v Reilly*, 282 AD2d 608, 609 [2001]). Indeed, a law guardian should not submit any pretrial report to the court or engage in any ex parte communication with the court (*see* NY State Bar Assn Commn. on Children and the Law, Law Guardian Representation Standards, vol 2, Standards B-6, B-7 [Nov. 1999]). Moreover, the court improperly directed the Law Guardian to testify as a witness. The Law Guardian's testimony on behalf of petitioner in this case appears to have been in direct contravention of Code of Professional Responsibility DR 5-102 (c) (22 NYCRR 1200.21 [c]), which provides that "[i]f, after ***748** undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issues of fact before the tribunal . . . ." Present —Pigott, Jr., P.J., Hurlbutt, Scudder, Kehoe and Gorski, JJ.

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229 A.D.2d 680, 645 N.Y.S.2d 346

In the Matter of Ernest L. Sellen, Jr., Respondent,
v.
Linda W. Wright, Appellant.

Supreme Court, Appellate Division,
Third Department, New York
73907
(July 11, 1996)

CITE TITLE AS: Matter of Sellen v Wright

Spain, J.

Appeal from an order of the Family Court of Madison County (Humphreys, J.), entered April 20, 1995, which granted petitioner's application, in a proceeding pursuant to Family Court Act article 6, for custody of Jason Wimer.

HEADNOTE

PARENT AND CHILD
CUSTODY

([1]) Order which granted petition for custody affirmed --- Parties' son born in 1984; order of filiation was entered in 1990; prior to commencement of instant proceeding, child was in custody of respondent; petitioner exercised weekend visitation; petition alleged that child was engaged in self-destructive behavior and that respondent was unwilling and/or unable to meet his needs; ultimately, Family Court determined that best interest of child dictated change of custody --- Respondent had been unwilling to participate in child's intellectual or psychological development --- Petitioner played instrumental role in accessing appropriate counseling and had excellent employment history, had made adequate accommodations for child, enjoyed stable family environment and did not have criminal background; respondent had spotty employment history, offered child dirty and unkept living arrangements and had extensive involvement with criminal justice system stemming from her abuse of alcohol; during short time that he was in temporary custody of petitioner, child's school work improved, as did his overall appearance and attitude, and his prospects for stable future were excellent --- Family Court did not err by refusing to disclose contents of Lincoln hearing; children must be protected from having to openly choose between parents or openly divulging intimate details of their respective parent/child relationships; this protection is achieved by sealing transcript of in camera Lincoln hearing; respondent has failed to address specifics of any harm or prejudice that resulted from court's ruling --- Finally, respondent failed to establish and record fails to support kind of parental cooperation, communication and lack of antagonism necessary to grant joint custody.

The parties have a son who was born in 1984. [1] At all times prior to the commencement of the instant proceeding, Jason was in custody of respondent; petitioner exercised weekend visitation, which had been expanded to include Thursday nights. Petitioner filed the instant petition alleging that Jason was engaged in self-destructive behavior and that respondent was unwilling and/or unable to meet his needs; Family Court granted petitioner temporary custody pending a hearing. After a hearing at which both parties and Jason's Law Guardian had an opportunity to present evidence, and a *Lincoln* hearing, Family Court determined that the best interest of Jason dictated a change of custody and therefore granted the petition. Respondent appeals.

It is beyond cavil that the paramount consideration in any custody matter is the best interest of the child (*see, Friederwitzer v Friederwitzer,* 55 NY2d 89, 94; *Matter of Van Hoesen v Van Hoesen,* 186 AD2d 903; *Hathaway v Hathaway,* 175 AD2d 336) and any modification of a preexisting custody arrangement will only be made upon a showing of a change in circumstances which reflects a real need for change to ensure the best interest of the child (*see, Matter of Lizzio v Jackson,* 226 AD2d 760; *Matter of Williams v Williams,* 188 AD2d 906; *Matter of Van Hoesen v Van Hoesen, supra; see also,* Family Ct Act § 652 [a]). The factors included in any inquiry of the requisite change in circumstances include the parent's fitness and ability to provide for the child's intellectual, emotional and psychological development, the length and quality of the preexisting custody arrangement, the quality of the parent's home environment and the child's prospects for the future (*see, Matter of Lizzio v Jackson, supra; Matter of Irwin v Neyland,* 213 AD2d 773). Applying those rules of law to the instant matter, we conclude that the record fully supports Family Court's determination. ***681**

The record reveals that respondent had been unwilling to participate in Jason's intellectual or psychological development. Jason's fourth and fifth grade teachers testified that the child was unprepared for class, was underachieving and that it was difficult and sometimes impossible for them to communicate with respondent. The teachers further testified that after Jason's regular weekend visitation with petitioner the child's homework would be complete, unlike during the week when he was with respondent.

Most disturbing, however, is respondent's lack of understanding and unwillingness to cope with Jason's psychological problems. The school psychologist testified that he conducted a psychological evaluation of Jason which revealed that he had average intelligence and low self-esteem. The psychologist further testified that following a second evaluation a year later, Jason talked about having suicidal thoughts. The psychologist expressed immediate concern and made a genuine effort to contact respondent, to no avail. The school counselor testified that she attempted to communicate with respondent regarding disturbing notes that Jason had written; the counselor wanted him involved in a mentoring program. The counselor's attempt to communicate with respondent was unsuccessful; however, petitioner was very interested in participating in counseling with Jason.

The record reveals that petitioner played the instrumental role in accessing appropriate counseling and also reveals that petitioner had an excellent employment history, had made adequate accommodations for Jason, enjoyed a stable family environment and did not have a criminal background. In contrast, respondent had a spotty employment history, offered the child dirty and unkept living arrangements and had extensive involvement with the criminal justice system stemming from her abuse of alcohol. The testimony indicated that during the short time that he was in the temporary custody of petitioner, Jason's school work improved, as did his overall appearance and attitude, and that his prospects for a stable future were excellent.

Further, we reject respondent's contention that Family Court erred by refusing to disclose the contents of the *Lincoln* hearing.[2] Children must be protected from having to openly choose between parents or openly divulging intimate details of their ***682** respective parent/child relationships (*see, Matter of Lincoln v Lincoln,* 24 NY2d 270, *supra).* This protection is achieved by sealing the transcript of the in camera *Lincoln* hearing. Respondent has failed to address the specifics of any harm or prejudice that resulted from the court's ruling. Upon review of the entire record, we conclude that Family Court properly denied respondent access to the transcript of the *Lincoln* hearing.

Finally, respondent failed to establish and the record fails to support the kind of parental cooperation, communication and lack of antagonism necessary to grant joint custody (*see, Matter of Schwartz v Schwartz,* 144 AD2d 857, 858, *lv denied* 74 NY2d 604).

Cardona, P. J., Mikoll, Crew III and Yesawich Jr., JJ., concur.
Ordered that the order is affirmed, without costs.

Footnotes

1 An order of filiation adjudging and declaring petitioner as the biological father of Jason was entered in Onondaga County on April 2, 1990.

2 We note that the confidentiality of the in camera *Lincoln* hearing in this case has been breached. Parts of the transcript have been reproduced and included in the appendix to each of the briefs submitted on behalf of respondent and petitioner. The child's right to the confidentiality provided in *Matter of Lincoln v Lincoln* (24 NY2d 270) has been violated. The transcript of the *Lincoln* hearing in this case should have been sealed and made available only to an appellate court unless Family Court directed otherwise, and we find no direction to the contrary in the record (*see, Matter of Ladd v Bellavia,* 151 AD2d 1015, 1016).

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91 A.D.3d 652, 936 N.Y.S.2d
265, 2012 N.Y. Slip Op. 00213

**1 In the Matter of Robert S. New, Appellant
v
Emma T. Sharma, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
2011-00924, V-15598-03/10, V-9673-03/10
January 10, 2012

CITE TITLE AS: Matter of New v Sharma

HEADNOTE

Parent, Child and Family
Visitation
Modification of Prior Order Limiting Parenting Time to Brief Visits at Public Places—Hearing

Robert S. New, Grapevine, Texas, appellant pro se.
Patricia Miller Latzman, Port Washington, N.Y., attorney for the child.

In related visitation proceedings pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Nassau County (Eisman, J.), dated December 7, 2010, which, without a hearing, in effect, denied his petition to modify a prior order of visitation of the same court dated January 14, 2010, and granted the application of the attorney for the child to modify the prior order of visitation so as to limit the father's parenting time to brief visits with the child at public places.

Ordered that the order dated December 7, 2010, is reversed, on the law and the facts, without costs or disbursements, and the matter is remitted to the Family Court, Nassau County, for a hearing on the father's petition and the application of the attorney for the child, including an in camera interview with the child, before a different Judge, and thereafter a new determination of the petition and the application; and it is further,

Ordered that pending the hearing and determination of the petition and the application, the visitation provisions as set forth in the order dated January 14, 2010, shall remain in effect.

In October 2010 the father filed a petition to modify a prior order of visitation dated January 14, 2010. In opposing the father's petition, the attorney for the child, based on the father's submissions, requested that the Court limit the father's parenting time to periods of "short duration and in a specific location." In an order dated December 7, 2010, the Family Court, without a hearing, in effect, denied the father's petition and granted the application of the attorney for the child to modify ***653** the prior order of visitation dated January 14, 2010, so as to limit the father's parenting time to brief visits at public places. The father appeals.

Contrary to the father's contention, the Family Court had the authority to grant the relief requested by the attorney for the child in her opposition to his petition (*cf. Matter of Myers v Markey*, 74 AD3d 1344, 1345 [2010]; *Clair v Fitzgerald*, 63 AD3d 979, 980-981 [2009]).

However, under the circumstances of this case, the Family Court erred by, in effect, denying the father's petition and granting the application of the attorney for the child without conducting a full evidentiary hearing. "Generally, visitation should be determined after a full evidentiary hearing to determine the best interests of the child" (*Matter of* **2 *Pettiford-Brown v Brown*, 42 AD3d 541, 542 [2007]; *see Matter of Riemma v Cascone*, 74 AD3d 1082, 1082 [2010]). A hearing is not necessary, however, "where the court possesses adequate relevant information to enable it to make an informed and provident determination as to the child[ ]'s best interest" (*Matter of Riemma v Cascone*, 74 AD3d at 1082-1083 [internal quotation marks omitted]; *see Matter of Perez v Sepulveda*, 51 AD3d 673 [2008]).

Here, the Family Court did not possess adequate relevant information to determine that the limitation of the father's parenting time to brief visits at public places was in the best interests of the child (*see Matter of Riemma v Cascone*, 74 AD3d at 1083; *Matter of Rivera v Administration for Children's Servs.*, 13 AD3d 636, 637 [2004]; *cf. Rosenberg v Rosenberg*, 60 AD3d 658 [2009]; *Matter of Potente v Wasilewski*, 51 AD3d 675, 676 [2008]). To the extent that the Family Court relied on the detailed accounts provided by the attorney for the child concerning her conversations with the child, it is inappropriate for an attorney for the child to present " 'reports containing facts which are not part of the record' " (*Cervera v Bressler*, 50 AD3d 837, 841

[2008], quoting *Weiglhofer v Weiglhofer*, 1 AD3d 786, 789 n [2003]; *see* 22 NYCRR 7.2 [b]).

Accordingly, the matter must be remitted to the Family Court, Nassau County, for a hearing on the father's petition and the application of the attorney for the child, including an in camera interview with the child, and thereafter a new determination of the father's petition and the application of the attorney for the child. In light of certain remarks made by the Family Court Judge, the proceeding should be held before a different Judge.

The father's remaining contentions either are without merit or need not be reached in light of the foregoing determination. Rivera, J.P., Leventhal, Belen and Roman, JJ., concur. ***654**

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24 A.D.3d 1051, 806 N.Y.S.2d
755, 2005 N.Y. Slip Op. 09781

**1 In the Matter of Natasha Graham, Respondent
v
Todd Graham, Appellant.

Supreme Court, Appellate Division,
Third Department, New York
97165
December 22, 2005

CITE TITLE AS: Matter of Graham v Graham

HEADNOTE

Parent, Child and Family
Custody

Award of joint legal custody to both parties, with primary physical custody to petitioner, was proper—although respondent was loving father who had demonstrated willingness to cooperate with court-ordered assessments and restrictions in order to retain custody, he had ***1052** also exhibited irresponsible behavior during relevant period—petitioner also exhibited unacceptable behavior in allowing her animosity toward respondent to interfere with her responsibility to her child, but she offered greater degree of continuity and stability to child, and no allegations were made that her home was unsafe or that her behavior had negatively impacted child—it was improper for Family Court to direct child's attorney, Law Guardian, to file "report" in this case.

Spain, J. Appeal from an order of the Family Court of Schoharie County (Bartlett, III, J.), entered December 17, 2004, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

Petitioner and respondent, now divorced, are the parents of a daughter born in 1995. The custody arrangement between the parties was first established in California where the parties then resided and, after petitioner moved to Washington, D.C. and respondent moved to New York, was continued early in 2004—after a trial —by order of Family Court, Schoharie County. By that order, the child resided with respondent during the school year with petitioner having primary access during the summer, various holidays and each of the three-day holiday weekends during the school year. In July 2004, petitioner commenced this proceeding seeking to modify that custody arrangement, alleging a change in circumstances in the form of, among other things, respondent's alleged increased alcohol abuse. Following a Family Ct Act § 1034 investigation, a new fact-finding hearing and a *Lincoln* hearing, Family Court granted the petition and awarded joint legal custody to both parties, but with primary physical custody to petitioner and the three-day school year weekends, summer and holiday access to respondent. On respondent's appeal, we now affirm. ****2**

As the proponent for a change in an existing custody arrangement, it was petitioner's burden to make "a showing of changed circumstances demonstrating a real need for a change to ensure the child's best interest" (*Matter of Oddy v Oddy*, 296 AD2d 616, 617 [2002]). In evaluating the existence of changed circumstances, "[d]eference is accorded Family Court's determination because it is in the best position to evaluate the credibility of the parties, and its findings will be disturbed only if unsupported by a sound and substantial basis in the record" (*Matter of Yizar v Sawyer*, 299 AD2d 767, 768 [2002]).

Here, our review of the record reveals such competing facts and divergent testimony that we are unable to conclude that Family Court's determination lacks evidentiary support. The difficultly in making a choice between the conflicting positions argued in this case is reflected by the great reluctance with which the Law Guardian advocated for a change in custody (*see* ***1053** *id.* at 768). Respondent is obviously a loving father who has demonstrated a willingness to cooperate with court-ordered assessments and restrictions in order to retain custody. He has, however, according to record evidence, also exhibited sufficiently irresponsible behavior during the relevant period to support the determination of Family Court. Specifically, on at least four occasions, respondent had become intoxicated to the point of becoming incapacitated. Although on these occasions others were present to care for the physical well-being of the child, these instances nevertheless negatively impacted the child in that she was, on at least two occasions,

placed in the position of attempting to revive or care for her inebriated father. Further, at the time the petition was filed, respondent's live-in girlfriend, who had shared the responsibility of parenting the child, had moved back to California, as did—soon thereafter—respondent's father and his wife, who had lent additional support to respondent, leaving respondent without any local extended family to rely on for assistance.

On the other hand, although petitioner has also exhibited unacceptable behavior in allowing her animosity toward respondent to interfere with her responsibility to her child, as evidenced, for example, by her resistance to paying child support, she offers a greater degree of continuity and stability to the child. Moreover, no allegations have been made that her home is unsafe or that her behavior —to this point—has negatively impacted the child. We view the record evidence, taken as a whole, to be sufficient to support Family Court's conclusion that a change in circumstances existed and that it was in the child's best interest to modify the existing custody arrangement (*see Matter of Hrusovsky v Benjamin*, 274 AD2d 674, 676 [2000]; *Matter of Caccavale v Brown*, 271 AD2d 717, 719 [2000]; *Matter of Weeden v Weeden*, 256 AD2d 831, 832-833 [1998], *lv denied* 93 NY2d 804 [1999]; *cf. Matter of Banks v Hairston*, 6 AD3d 886, 887 [2004]).

It was, however, improper for Family Court to direct the child's attorney, the Law Guardian, to file a "report" in this case (*see Weiglhofer v Weiglhofer*, 1 AD3d 786, 788 n [2003]). Notably, the Law Guardian was careful to characterize his written submission at the end of the proof as his "summation" and appropriately relied solely on record evidence in support of his position. Family Court, however, not only referred to the "summation" as a "report" but, in lieu of making independent findings, adopted—in its own decision—the Law Guardian's submission in its entirety. The Law Guardian also made "recommendations" in his submission; evidence that he, as well as Family Court, may have misunderstood his role. ***1054**

The use by a court of the "recommendation of the Law Guardian" has too long been tolerated in Family Court and matrimonial proceedings. When a court asks the child's attorney to make "a recommendation," it improperly elevates the Law Guardian's position to something more ****3** important to the court than the positions of the attorneys for each of the parents. Attorneys representing parents do not advocate on behalf of their clients by making "reports" and "recommendations." The Law Guardian should take a position on behalf of the child at the completion of a proceeding—whether orally, on the record, or in writing (*see id.* at 788 n)—and that position must be supported by evidence in the record.

The findings and conclusions that we have made in this case are based upon our search of the record with due deference to Family Court's credibility assessments. We have not given the Law Guardian's summation greater weight than the arguments and positions of the attorneys for the parents and we have treated the "recommendations" of the Law Guardian more properly as the position of the attorney representing the child.

We have considered respondent's remaining contentions and find them to be without merit.

Mercure, J.P., Carpinello, Rose and Kane, JJ., concur. Ordered that the order is affirmed, without costs.

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75 A.D.3d 871, 905 N.Y.S.2d
361, 2010 N.Y. Slip Op. 06125

**1 In the Matter of Christopher B., Appellant
v
Patricia B., Respondent. (And
Two Other Related Proceedings.)

Supreme Court, Appellate Division,
Third Department, New York
July 15, 2010

CITE TITLE AS: Matter of
Christopher B. v Patricia B.

HEADNOTE

Parent, Child and Family
Custody
Hearing

Family Court erred in denying petition seeking modification of custody order without first holding evidentiary hearing where father alleged that child was sexually abused while in custody of mother and that mother violated terms of prior order; father presented records from county agency indicating that mother reported that child was victim of sexual abuse—further, Family Court's order was in error insofar as it was issued before attorney for child could interview his client, thus prohibiting attorney from taking active role in and effectively representing interests of his client.

Abbie Goldbas, Utica, for appellant.
Sheila M. Hurley, Catskill, attorney for the child.

Egan Jr., J. Appeal from an order of the Family Court of Chenango County (Sullivan, J.), entered April 1, 2009, which, among other things, dismissed petitioner's application, in three proceedings pursuant to Family Ct Act articles 6 and 8, for modification of a prior order of custody and visitation.

The parties are the parents of a daughter born in 2003. In November 2007, while the father was incarcerated, the parties entered into an agreement in Family Court whereby they were granted joint custody of the child, with the mother having primary physical custody and the father having certain visitation rights. In August 2008, after the father had been released from custody, the parties entered into a further stipulation in conjunction with a divorce action in Supreme Court that continued the prior joint and primary physical custody arrangement, granted the father visitation rights, provided restrictions of the child's contact with each parties' respective paramours and also ordered that the child reside within 30 miles of the City of Utica, Oneida County. In March 2009, the father filed an emergency petition seeking a modification of the custody order alleging, among other things, that the child had been sexually abused by the then-17-year-old boyfriend of the mother's older daughter. The father also filed a family offense petition and a petition alleging that the mother violated, among other things, the court ordered visitation schedule. **2

At the initial court appearance, conducted several days later, Family Court engaged both pro se parties in a brief discussion *872 as to what they would "like to accomplish," but no testimony was taken and no hearing was scheduled. The attorney for the child appeared and advised the court that he had just returned from vacation and had not had a chance to speak to the child. Family Court concluded that the child's well-being was not being jeopardized and advised the parties that it would issue an order directing that the child not be in the presence of her sister's boyfriend without one of the parties being present, but otherwise continued Supreme Court's order. The father now appeals. *

"Modification of an established custody arrangement requires a showing of sufficient change in circumstances reflecting a real need for change in order to insure the continued best interest of the child" (*Matter of Rue v Carpenter*, 69 AD3d 1238, 1239 [2010] [internal quotation marks and citations omitted]; *see Matter of Bronson v Bronson*, 63 AD3d 1205, 1206 [2009]; *Matter of Karpensky v Karpensky*, 235 AD2d 594, 595 [1997]). The party seeking the modification—the father—bears the burden of demonstrating such change in circumstances (*see Matter of Fielding v Fielding*, 41 AD3d 929, 929 [2007]), and his petition must "allege facts which, if established, would afford a basis for relief" (*Matter of Bryant-Bosshold v Bosshold*, 273 AD2d 717, 718 [2000]). "Generally an evidentiary hearing is necessary and should be conducted unless the party seeking the modification

fails to make a sufficient evidentiary showing to warrant a hearing or no hearing is requested and the court has sufficient information to undertake a comprehensive independent review of the [child's] best interests" (*Matter of Chittick v Farver*, 279 AD2d 673, 675 [2001] [citations omitted]; *see Matter of Fielding v Fielding*, 41 AD3d 929, 929 [2007]; *Matter of Cornell v Cornell*, 8 AD3d 718, 719 [2004]). "[S]ubstantiated allegations that a child has been subjected to sexual abuse in the custodial parent's home would constitute a sufficient change of circumstances warranting modification of an existing custody arrangement" (*Matter of Gary J. v Colleen L.*, 288 AD2d 720, 722 [2001]).

Here, upon our review of the record, we find merit to the contention that Family Court erred in denying the father's petition seeking modification of the custody order without first holding an evidentiary hearing. The father made specific allegations that the child was sexually abused while in the custody of ***873** the mother and that the mother violated the terms of the prior order. In support of his petition, the father presented records from the Oneida County Child Advocacy Center, which indicate that, in January 2009, the mother reported that the child was the victim of sexual abuse. Moreover, at the initial court appearance, the mother, although not under oath, stated that no criminal charges were pursued against the child's alleged abuser, but admitted her belief that such abuse did occur. In light of this, and in view of the lack of information before Family Court which would permit it to determine whether modifying the prior order would be in the child's best interest, we find that the father established a sufficient evidentiary basis to warrant a hearing (*see Matter of Howard v Barber*, 47 AD3d 1154, 1155 [2008]).

We likewise find Family Court's order was in error insofar as it was issued before the ****3** attorney for the child could interview his client, thus prohibiting the attorney from taking an active role in and effectively representing the interests of his client (*see* Family Ct Act § 241; *Matter of Figueroa v Lopez*, 48 AD3d 906, 907 [2008]; *Matter of Vickery v Vickery*, 28 AD3d 833, 834 [2006]). Accordingly, we remit this matter to Family Court for a full evidentiary hearing to resolve the issue of a change in circumstances and best interest of the child. We have reviewed the parties' remaining arguments and find them to be without merit.

Cardona, P.J., Peters, Spain and McCarthy, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as dismissed petitioner's modification petition; matter remitted to the Family Court of Chenango County for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

FOOTNOTES

Footnotes

* Family Court's dismissal of the father's family offense and violation petitions was not addressed in the father's brief, and any issues with respect thereto are deemed abandoned (*see Matter of Silano v Oxford*, 10 AD3d 466, 467 n [2004], *lv denied* 3 NY3d 603 [2004]; *Rothberg v Reichelt*, 5 AD3d 848, 849 n [2004]).

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17 A.D.3d 1038, 794 N.Y.S.2d
195, 2005 N.Y. Slip Op. 03394

**1 In the Matter of Dominique A.W. and Others, Infants. Monroe County Department of Human and Health Services, Respondent; Colleen C.-G., Appellant.

Supreme Court, Appellate Division,
Fourth Department, New York
04-01525, 418
April 29, 2005

CITE TITLE AS: Matter of Dominique A.W.

HEADNOTE

Parent, Child and Family
Termination of Parental Rights
Permanent Neglect

Termination of respondent's parental rights with respect to her 17-year-old daughter, who was residing in residential facility, was error—there was no prospective adoptive home for daughter and petitioner was in process of developing independent living plan for her —law guardian failed to follow applicable guidelines and standards with respect to daughter's situation—termination of parental rights with respect to daughter will result in " 'legal orphanage,' " and despite failure of respondent to address specific problem that led to daughter's removal, may not be in daughter's best interests.

Appeal from an order of the Family Court, Monroe County (Marilyn L. O'Connor, J.), entered May 27, 2004 in a proceeding pursuant to Social Services Law § 384-b. The order terminated respondent's parental rights, committed guardianship and custody of the children to petitioner and authorized petitioner to consent to the adoption of the children.

It is hereby ordered that the order so appealed from be and ***1039** the same hereby is unanimously modified on the law by vacating those parts of the first three ordering paragraphs with respect to Dominique A.W. and as modified the order is affirmed without costs and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: Respondent mother appeals from an order of disposition that, upon a finding of permanent neglect, terminated her parental rights with respect to five of her children, committed their guardianship and custody to petitioner, and freed them for adoption. Contrary to the contention of respondent, Family Court did not abuse its discretion in terminating her parental rights with respect to her four younger children and freeing those children for adoption rather than entering a suspended judgment with respect to those children (*see Matter of Philip D.*, 266 AD2d 909 [1999]; *see also Matter of Stephen S.*, 12 AD3d 1181, 1182 [2004]; *Matter of Susan C.*, 1 AD3d 991 [2003]). "The court's focus at the dispositional hearing is the best interests of the child [ren] . . . [and] [t]he court's assessment that respondent was not likely to change [her] behavior is entitled to great deference" (*Philip D.*, 266 AD2d at 909). In addition, the record establishes that the respective foster mothers of those children wish to adopt them (*see id.*). Thus, petitioner established that it is in the best interests of those children to be freed for adoption (*see id.*; *see also* Family Ct Act § 631; *Matter of Jason J.*, 283 AD2d 982 [2001]).

We agree with respondent, however, that on the record before us the court abused its discretion in terminating respondent's parental rights with respect to the oldest child, Dominique. A separate termination proceeding was commenced against Dominique's father and, according to ****2** the record, he lives in another part of the country and stated that he wished to surrender his parental rights. Dominique is now 17 years old and is residing in a residential facility. At the time of the dispositional hearing, there was no prospective adoptive home for Dominique and petitioner was in the process of developing an independent living plan for her.

One law guardian represented all five children and, while he spoke favorably with respect to the prospective adoptive mothers of the four younger children, he failed to address Dominique's situation. Indeed, at oral argument of this appeal the law guardian acknowledged that he had never met Dominique and opined that she was at least 16 years of age. He understood that she was then

"AWOL" from a residential facility. Such a possibility is not mentioned in the record.

The Guidelines for Law Guardians in the Fourth Department ***1040** issued in 1987 by the Departmental Advisory Committee of the Fourth Department Law Guardian Program provide in relevant part with respect to permanent neglect proceedings that, before an initial appearance on behalf of a child over age three, the law guardian should arrange to visit and interview the child in an age-appropriate manner to ascertain facts concerning, inter alia, the child's wishes and needs. After the fact-finding hearing, the child should be consulted and apprised of the specific dispositional plans proposed. At the dispositional hearing, the law guardian should, inter alia, present and advocate a specific dispositional plan to the court and inform the court of the child's wishes. None of those services was provided to Dominique.

The New York State Bar Association's Committee on Children and the Law has also promulgated Law Guardian Representation Standards with respect to, inter alia, proceedings for the termination of parental rights. Standard A-4 of part IV provides that the law guardian should interview the child to ascertain detailed facts and the child's wishes concerning placement and adoption. Standard A-5 of part IV provides that the child "should be advised, in terms the child can understand, of the nature of the proceeding, the child's rights, the parents' rights, the role and responsibility of the agency, the court, the foster parents and the law guardian, the attorney-client privilege and the possible dispositional alternatives available to the court." Standard D-1 of part IV provides that the law guardian "should present and advocate a specific dispositional plan to the court and apprise the court of the child's wishes." Finally, Standard E-1 of part IV provides that the law guardian should explain to the child "the disposition and its consequences, the rights and possibilities and post-disposition motions and hearings and the responsibilities of each of the parties." None of the above standards has been met, and we note that in fact the court seemed confused about the plan for Dominique.

The termination of respondent's parental rights with respect to Dominique will result in " 'legal orphanage' " (*Matter of Amber AA.*, 301 AD2d 694, 697 [2003]) and we conclude that, despite the failure of respondent to address the specific problem that led to Dominique's removal, the termination of respondent's parental rights with respect to Dominique may not be in Dominique's best interests (*see id.* at 697-698; *Matter of Michael E.*, 241 AD2d 635, 638 [1997]). We therefore modify the order by vacating those parts terminating respondent's parental rights with respect to Dominique, committing her guardianship and custody to petitioner and freeing her for adoption, and we remit the matter to Family Court for appointment of a different law ***1041** guardian and a new dispositional hearing. Present—Pigott, Jr., P.J., Hurlbutt, Martoche, Smith and Pine, JJ.

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77 A.D.3d 654, 909 N.Y.S.2d
109, 2010 N.Y. Slip Op. 07165

****1** In the Matter of Cristella B. Suffolk County Department of Social Services, Respondent, et al., Respondents. Robert C. Mitchell, Attorney for the Children, Nonparty Appel ***655** lant; Shannon C. et al., Nonparty Foster Parents. (Proceeding No. 1.) In the Matter of Elizabeth B. Suffolk County Department of Social Services, Respondent, et al., Respondent. Robert C. Mitchell, Attorney for the Children, Nonparty Appellant; Shannon C. et al., Nonparty Foster Parents. (Proceeding No. 2.) In the Matter of Jose B. Suffolk County Department of Social Services, Respondent, et al., Respondent. Robert C. Mitchell, Attorney for the Children, Nonparty Appellant; Shannon C. et al., Nonparty Foster Parents. (Proceeding No. 3.)

Supreme Court, Appellate Division,
Second Department, New York
October 5, 2010

CITE TITLE AS: Matter of Cristella B.

HEADNOTE

Parent, Child and Family
Abused or Neglected Child

In child protective proceedings, Family Court properly denied motion of attorney for children to direct County Department of Social Services (DSS) to refrain from interviewing children concerning any issues beyond those related to safety, without 48 hours notice to him—child who is subject of neglect proceeding has constitutional and statutory right to legal representation, and Rule 4.2 of Rules of Professional Conduct (22 NYCRR 1200.0), which prohibits attorney representing another party in litigation from communicating with or causing another to communicate with child without prior consent of attorney for child, applies only to attorneys; furthermore, DSS has constitutional and statutory obligations toward children in its custody, and has mandate to maintain regular communications with child in foster care on broad range of issues that go beyond child's immediate health and safety.

Robert C. Mitchell, Central Islip, N.Y. (Elizabeth A. Justesen of counsel), attorney for the children and nonparty appellant pro se.
Christine Malafi, County Attorney, Central Islip, N.Y. (James G. Bernet and Frank J. Albert of counsel), for petitioner-respondent.
Stephen R. Hellman, Esq. P.C., West Sayville, N.Y., for Shannon C., and Timothy C., nonparty foster parents.
Steven Banks, New York, N.Y. (Tamara A. Steckler and Gary Solomon of counsel), amicus curiae.

In three related child protective proceedings pursuant to Family Court Act article 10, the ****2** attorney for the children appeals from so much of an order of the Family Court, Suffolk County (Quinn, J.), dated November 13, 2009, as denied that branch of his motion which was to direct the Suffolk County Department of Social Services to refrain from interviewing the children concerning any issues beyond those related to safety, without 48 hours notice to him.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

The three subject children have been in the custody of the Suffolk County Department of Social Services (hereinafter the DSS) since September 2006. In an order dated January 20, 2009, the Family Court, Suffolk County (Tarantino, J.), inter alia, in effect, approved the permanency goal of returning the children to their parents, and set a date for their return. The attorney for the children appealed, and by decision and order dated September 8, 2009, this Court reversed the order dated January 20, 2009, insofar as appealed from, and directed a new permanency hearing (*see Matter of Cristella B.*, 65 AD3d 1037 [2009]). Prior to the commencement of the new permanency hearing, the attorney for the children moved, inter alia, to direct the DSS to refrain from interviewing the children concerning any issues beyond those related to safety, without 48 hours notice to him. In support of this request, the attorney for the children ***656** argued that since the agency had taken a position in conflict with the children's wishes at the previous hearing, allowing a DSS caseworker to interview the children without prior notification to her would deprive them of their right to counsel. The Family Court denied that branch of the motion of the attorney for the children which was to

direct the DSS to refrain from interviewing the children on issues unrelated to safety without prior notification. The attorney for the children appeals, and we affirm.

We recognize that a child who is the subject of a neglect proceeding has a constitutional and statutory right to legal representation (*see* Family Ct Act §§ 241, 249; *Matter of New York City Dept. of Social Servs. [Luz S.]*, 208 AD2d 746, 747 [1994]; *Matter of Jamie TT.*, 191 AD2d 132, 135-137 [1993]). Moreover, rule 4.2 of the Rules of Professional Conduct (22 NYCRR 1200.0), which prohibits an attorney representing another party in the litigation from communicating with or causing another to communicate with the child without the prior consent of the attorney for the child, operates to protect the child's right to counsel (*see Matter of Brian R.*, 48 AD3d 575, 576 [2008]; *Matter of Marvin Q.*, 45 AD3d 852, 853 [2007]). However, rule 4.2 applies only to attorneys and, thus, neither prohibits a DSS caseworker from interviewing a child entrusted to the agency's care, nor justifies a significant restriction on the agency's access to the child by imposing a requirement that the caseworker notify the child's attorney before interviewing the child on issues unrelated to safety (*see Matter of Tiajianna M.*, 55 AD3d 1321, 1323 [2008]).

Furthermore, the DSS has constitutional and statutory obligations toward children in its custody, which distinguishes the role of an agency caseworker from that of an attorney representing a parent or another party in a Family Court proceeding (*see* NY Const, art XVII, § 1; *Palmer v Cuomo*, 121 AD2d 194, 196 [1986]). Once a child is placed in foster care, through a designated agency such as DSS, the agency has a duty to conduct family assessments and to develop a plan of services "made in consultation with the family and each child over 10 years old, whenever possible" (18 NYCRR 428.6 [a] [1] [vii]; *see* Social Services Law § 409-e). Additionally, after the first 30 days of placement, a DSS caseworker is required to have monthly "face-to-face" contact with the child for the purpose of "assess[ing] the child's current safety and well being, to evaluate or re-evaluate the child's permanency needs and permanency goal, and to guide the child towards a course of action aimed at resolving problems of a social, emotional or developmental nature ***657** that are contributing towards the reason(s) why such child is in foster care" (18 NYCRR 441.21 [c] [1]). Given this statutory and regulatory framework, DSS has a mandate to maintain regular communications with a child in foster care on a broad range of issues that go beyond the child's immediate health and safety. Accordingly, the Family Court properly denied that branch of the motion of the attorney for the children which was to direct the DSS to refrain from interviewing the subject children on issues unrelated to safety without prior notice to their attorney. Rivera, J.P., Dickerson, Eng and Austin, JJ., concur.

End of Document

75 A.D.3d 597, 906 N.Y.S.2d
70, 2010 N.Y. Slip Op. 06166

**1 In the Matter of Aamir Awan, Appellant
v
Paras Awan, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
2009-11047, V-16412/09
July 20, 2010

CITE TITLE AS: Matter of Awan v Awan

HEADNOTE

Parent, Child and Family
Custody
Expert Testimony

In custody proceeding, Family Court did not err in striking the testimony of expert retained by father, and in precluding further testimony by expert; father's attorney violated Rules of Professional Conduct rule 4.2 (22 NYCRR 1200.0) by allowing physician, whom attorney retained or caused father to retain, to interview and examine child regarding pending dispute and to prepare report without knowledge or consent of attorney for child; further, father's attorney also failed to inform mother's attorney of that examination.

McLaughlin & Stern, LLP, New York, N.Y. (Peter Alkalay and Eric Wrubel of counsel), for appellant.
Adam E. Small, Merrick, N.Y., for respondent.
Robert C. Mitchell, Riverhead, N.Y. (Diane B. Groom of counsel), attorney for the child.

In a proceeding pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Suffolk County (Tarantino, Jr., J.), dated November 11, 2009, which, after a hearing, inter alia, granted the mother's petition to enforce ***598** a provision of a custody and visitation order of the same court dated March 14, 2008, and, in effect, denied his motion to modify certain provisions of the order dated March 14, 2008.

Ordered that the appeal from so much of the order as granted that branch of the petition which was to enforce the provision of the order dated March 14, 2008, so as to permit the mother to travel to Pakistan with the subject child in late 2009 and directed the father to execute a document permitting the child to obtain a passport is dismissed as academic, without costs or disbursements; and it is further,

Ordered that the order is affirmed insofar as reviewed, without costs or disbursements.

Shortly after the subject child's birth, the parties separated. They eventually negotiated a settlement agreement that provided, inter alia, for joint custody with residential custody to the mother and visitation to the father. Pursuant to an order of the Family Court dated March 14, 2008, which embodied the terms of the settlement agreement, the mother was permitted to travel outside of the United States with the child after obtaining medical clearance for the child to travel. The father failed or refused to execute the passport documents necessary for the child to travel out of the country. The mother then petitioned the Family Court for an order enforcing the prior order and the father moved to modify certain provisions of the prior order so as to prohibit the mother from taking the subject child out of the country.

The father's appeal from so much of the order as, in effect, granted the mother permission to travel to Pakistan with the child in late 2009 and directed him to execute a document permitting the child to obtain a passport has been rendered academic, as that trip already has occurred (*see* **2 *Delor Corp. v Quigley, Langer, Hames, Perlmutter, Mankes & Nuskind, Partnership*, 287 AD2d 680, 682 [2001]; *Children's Vil. v Greenburgh Eleven Teachers' Union Fedn. of Teachers, Local 1532, AFT, AFL-CIO*, 249 AD2d 433, 434 [1998]).

The appeal from so much of the order as, in effect, denied the father's motion to modify certain provisions of the order dated March 14, 2008, so as to prohibit all foreign travel is not academic (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). However, in order to obtain modification of a custody order or arrangement to which the parties voluntarily agreed, the movant must show that there has been a significant change in circumstances since the original agreement, and that modification is in the best interests of the child (*see Matter*

of Penn v Penn, 41 AD3d 724 [2007]; ***599** *Matter of Battista v Fasano*, 41 AD3d 712, 713 [2007]; *DiVittorio v DiVittorio*, 36 AD3d 848, 849 [2007]; *Matter of Feliciano v Micheli-Hartford*, 35 AD3d 739 [2006]). The father did not demonstrate his entitlement to modification of the original order (*see Matter of Rodriguez v Hangartner*, 59 AD3d 630, 631 [2009]; *Matter of Faltings v Faltings*, 35 AD3d 464, 465 [2006]; *Matter of Smith v DiFusco*, 282 AD2d 753 [2001]; *cf. Matter of Ganzenmuller v Rivera*, 40 AD3d 756, 757 [2007]).

The Family Court did not err in striking the testimony of Dr. Ronald Jacobson, an expert retained by the father, and in precluding further testimony by Dr. Jacobson. The father's attorney violated the Rules of Professional Conduct (22 NYCRR 1200.0) rule 4.2 by allowing a physician, whom the attorney retained or caused the father to retain, to interview and examine the subject child regarding the pending dispute and to prepare a report without the knowledge or consent of the attorney for the child (*see Campolongo v Campolongo*, 2 AD3d 476, 476-477 [2003]). "The appointment of an [attorney for the child] to protect the interests of a child creates an attorney-client relationship, and the absence of the [attorney for the child] at the subject [examination and] interview constituted a denial of the child's due process rights" (*id.* at 476-477, citing *Matter of Samuel H. [Matter of New York City Dept. of Social Servs. (Luz S.)]*, 208 AD2d 746, 747 [1994]; Family Ct Act § 241). Further, the father's attorney also failed to inform the mother's attorney of that examination. Skelos, J.P., Hall, Roman and Sgroi, JJ., concur.

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94 A.D.3d 1542, 943 N.Y.S.2d
708, 2012 N.Y. Slip Op. 03327

****1** In the Matter of Amanda
J. McDermott, Respondent
v
Andrew John Bale, Respondent. Sanford A.
Church, Esq., Attorney for the Children, Appellant.

Supreme Court, Appellate Division,
Fourth Department, New York
11-02154, 490
April 27, 2012

CITE TITLE AS: Matter of McDermott v Bale

***1543 HEADNOTE**

Guardian and Ward
Attorney for Child
Participation in Custody Proceeding

Sanford A. Church, Attorney for the Children, Albion, appellant pro se.
Muscato, Dimillo & Vona, L.L.P., Lockport (P. Andrew Vona of counsel), for petitioner-respondent-respondent.
James D. Bell, Brockport, for respondent-petitioner-respondent.
Appeal from an order of the Family Court, Orleans County (James P. Punch, J.), entered January 21, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parents joint custody of their children, with petitioner-respondent having primary physical residence.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, the Attorney for the Children (AFC) appeals from an order granting the parties joint custody of their two children, with primary physical residence to petitioner-respondent mother and liberal visitation to respondent-petitioner father. The order incorporated the terms of a written stipulation executed by the parties on the eve of trial. The AFC refused to join in the stipulation, but Family Court approved the stipulation over the AFC's objection. We reject the AFC's contention that the court erred in approving the stipulation. Although we agree with the AFC that he " 'must be afforded the *same opportunity as any other party to fully participate in* [*the*] *proceeding*' " (*Matter of White v White*, 267 AD2d 888, 890 [1999]), and that the court may not "relegate the [AFC] to a meaningless role" (*Matter of Figueroa v Lopez*, 48 AD3d 906, 907 [2008]), the children represented by the AFC are not permitted to "veto" a proposed settlement reached by their parents and thereby force a trial. The record reflects that, unlike in *Matter of Figueroa*, upon which the AFC relies, the court here gave the AFC a full and fair opportunity to be heard, and the AFC stated in detail all of the reasons that he opposed the stipulation. Indeed, the court gave credence to many of the comments made by the AFC, as did the attorneys for the parents, ****2** both of whom agreed to modify the stipulation to address several of the AFC's concerns.

We cannot agree with the AFC that children in custody cases should be given full-party status such that their consent is necessary to effectuate a settlement. The purpose of an attorney for the children is "to help protect their interests and to help them express their wishes to the court" (Family Ct Act § 241). There is a significant difference between allowing children to express their wishes to the court and allowing their wishes to scuttle a proposed settlement. We note that the court is not required to appoint an attorney for the children in contested custody proceedings, although that is no doubt the preferred practice (*see Matter of Amato v Amato*, 51 AD3d 1123, 1124 [2008]; *Davis v Davis*, 269 AD2d 82, 85 [2000]). Thus, there is ***1544** no support for the AFC's contention that children in a custody proceeding have the same legal status as their parents, inasmuch as it is well settled that parents have the right to the assistance of counsel in such proceedings (*see* § 262 [a] [v]; *Matter of Kristin R.H. v Robert E.H.*, 48 AD3d 1278, 1279 [2008]).

In sum, we conclude that, where the court in a custody case appoints an attorney for the children, he or she 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 determines that the terms of the settlement are in the children's best interests. Parents who wish to settle their disputes should not be required to engage in costly and often times embittered litigation merely because their children or the attorney for the children would prefer

a different custodial arrangement. Present—Centra, J.P., Peradotto, Lindley, Sconiers and Martoche, JJ.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by McDermott v. Bale, N.Y.A.D. 4 Dept., April 27, 2012

48 A.D.3d 906, 851 N.Y.S.2d
689, 2008 N.Y. Slip Op. 01461

**1 In the Matter of Luis F. Figueroa, Respondent
v
Lydia M. Lopez, Appellant. Charles E.
Andersen, as Law Guardian, Appellant.

Supreme Court, Appellate Division,
Third Department, New York
500994
February 21, 2008

CITE TITLE AS: Matter of Figueroa v Lopez

HEADNOTE

Guardian and Ward
Law Guardian

Order which granted petition to modify prior order of custody was reversed—having appointed Law Guardian, Family Court could not thereafter relegate Law Guardian to meaningless role—Law Guardian stated that he did not consent to stipulation, and when he attempted to explain his reason, Family Court responded that it did not care; Family Court also characterized Law Guardian's position as ridiculous, without allowing explanation for his position to be placed on record; Law Guardian reportedly had obtained information (including possible domestic violence by father) which made him concerned about unsupervised visitation by father.

Charles E. Andersen, Law Guardian, Elmira, appellant.

Lahtinen, J. Appeal from an order of the Family Court of **907 Broome County (Pines, J.), entered February 23, 2006, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

Respondent (hereinafter the mother) was awarded sole custody of the parties' child in September 2004 and, a year later, petitioner (hereinafter the father) filed a modification petition seeking custody. At the commencement of a hearing on the father's petition, the parties stipulated on the record to joint custody, with the mother having primary physical custody and the father receiving visitation. The Law Guardian stated that he did not consent to the terms of the stipulation and, when he attempted to explain his reasons, he was cut off by Family Court and not permitted to give his reasons. Following entry of an order based on the terms of the stipulation, the Law Guardian and the mother * appealed. **2

Although appointing a Law Guardian is not statutorily required in contested custody proceedings, doing so is the preferred practice (*see Matter of Robinson v Cleveland*, 42 AD3d 708, 710 [2007]) and such an appointment was important in this proceeding to protect the interests of the child (*see Matter of Miller v Miller*, 220 AD2d 133, 135 [1996]). Having made the appointment, Family Court cannot thereafter relegate the Law Guardian to a meaningless role (*see Frizzell v Frizzell*, 177 AD2d 825, 825-826 [1991]). We have previously observed that "a Law Guardian 'must be afforded the same opportunity as any other party to fully participate in a proceeding' " (*Matter of White v White*, 267 AD2d 888, 890 [1999], quoting *Matter of Machukas v Wagner*, 246 AD2d 840, 842 [1998], *lv denied* 91 NY2d 813 [1998] [emphasis omitted]).

Here, the Law Guardian stated that he did not consent to the stipulation. When he attempted to explain his reason, Family Court responded that it did not care. Family Court also characterized the Law Guardian's position as ridiculous, without allowing an explanation for his position to be placed on the record. The Law Guardian reportedly had obtained information (including possible domestic violence by the father) which made him concerned about unsupervised visitation by the father. Moreover, while not all improper restrictions imposed on a Law Guardian will result in reversal if the record indicates sufficient facts to uphold the determination (*see Matter of White v White*, 267 AD2d at 890; *see also Matter of Vickery v Vickery*, 28 AD3d 833, 834 [2006]; *Matter of Kaczynski v Van Amerongen*, 284 AD2d 600, 603 [2001]), this sparse record is inadequate. While **908 the Court is troubled by the fact that, despite a hearing transcript of two pages, this appeal took more than a year to perfect and was argued nearly two years from the date of the order appealed from, reversal is nonetheless required.

Cardona, P.J., Peters, Spain and Kane, JJ., concur. Ordered that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Broome County for further proceedings not inconsistent with this Court's decision.

FOOTNOTES

Footnotes

* The mother did not perfect her appeal and it is therefore deemed abandoned (*see Pahl v Grenier*, 279 AD2d 882, 883 n [2001]).

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112 A.D.3d 1323, 978 N.Y.S.2d
501, 2013 N.Y. Slip Op. 08701

**1 In the Matter of Mary L. Kessler, Petitioner
v
Scott M. Fancher, Respondent. Scott A. Otis, Attorney for the Children, Appellant. (Appeal No. 2.)

Supreme Court, Appellate Division,
Fourth Department, New York
December 27, 2013

CITE TITLE AS: Matter of Kessler v Fancher

HEADNOTES

Appeal
Parties Aggrieved
Custody Proceeding

Parent, Child and Family
Custody
Abandoned Petition

Scott A. Otis, Watertown, appellant pro se.
Mary L. Kessler, petitioner pro se.
Scott M. Fancher, respondent-respondent pro se.
Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered September 10, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of a custody order.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: The Attorney for the Children (AFC) appeals from a decision of Family Court dismissing various petitions filed by the parents of two minor children. We note at the outset that no appeal lies from a decision (*see Pecora v Lawrence*, 28 AD3d 1136, 1137 [2006]). We exercise our discretion, however, to treat the notice of appeal as valid and deem the appeals as taken from the seven orders in the respective appeals that were entered upon the single decision (*see* CPLR 5520 [c]).

We conclude that the children are not aggrieved by the orders in appeal Nos. 1 and 3 through 6 inasmuch as those orders dismissed petitions filed by one parent alleging that the other parent had violated an order of custody or seeking a personal order of protection against the other parent (*see Matter of Lagano v Soule*, 86 AD3d 665, 666 n 4 [2011]; *see generally Parochial Bus Sys. v Board of Educ. of City of N. Y.*, 60 NY2d 539, 544-545 [1983]; *Mixon v TBV, Inc.*, 76 AD3d 144, 148-149 [2010]). Moreover, inasmuch as the AFC opposed the relief requested in the petition in appeal No. 7, we conclude that the children are not aggrieved by the order dismissing that petition. We therefore dismiss the AFC's appeals from the orders in appeal Nos. 1 and 3 through 7.

With respect to the order in appeal No. 2, which dismissed ***1324** the petition of Mary L. Kessler (mother) seeking modification of a custody order, the mother has not taken an appeal from that order. The children, while dissatisfied with the order, cannot force the mother to litigate a ****2** petition that she has since abandoned (*see Matter of McDermott v Bale*, 94 AD3d 1542, 1543-1544 [2012]). As we wrote in *McDermott*, "children in custody cases should [not] be given full-party status such that their consent is necessary to effectuate a settlement . . . There is a significant difference between allowing children to express their wishes to the court and allowing their wishes" to chart the course of litigation (*id.* at 1543). We thus affirm the order in appeal No. 2 and see no need to address the AFC's remaining contentions. Present—Scudder, P.J., Centra, Lindley, Sconiers and Valentino, JJ.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by In re A.D., N.Y.Fam.Ct., May 3, 2016

91 A.D.3d 1344, 938 N.Y.S.2d 692, 2012 N.Y. Slip Op. 00620

**1 In the Matter of Jayden B. and Another, Infants. Oswego County Department of Social Services, Appellant; Erica R., Respondent.

Supreme Court, Appellate Division, Fourth Department, New York
11-00694, 158
January 31, 2012

CITE TITLE AS: Matter of Jayden B. (Erica R.)

HEADNOTES

Parent, Child and Family
Abused or Neglected Child
Domestic Violence

Parent, Child and Family
Abused or Neglected Child
Corroboration of Child's Out-of-Court Statement

Nelson Law Firm, Mexico (Annalise M. Dykas of counsel), for petitioner-appellant. Courtney S. Radick, Attorney for the Child, Oswego, for Jayden B.
Stephanie N. Davis, Attorney for the Child, Oswego, for Nathan F.
Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered March 24, 2011 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the petition is granted, and the matter is remitted to Family Court, Oswego County, for further proceedings in accordance with the following memorandum: We conclude that Family Court erred in determining that petitioner failed to prove by a preponderance ***1345** of the evidence that the children who are the subject of this proceeding are neglected children based upon, inter alia, domestic violence between respondent and the mother of the children and in therefore dismissing the petition herein (*see* Family Ct Act § 1046 [a]). We note at the outset that the respective Attorneys for the Children did not take an appeal from the order, and thus to the extent that their briefs raise contentions not raised by petitioner, they have not been considered (*see Matter of Sharyn PP. v Richard QQ.*, 83 AD3d 1140, 1143-1144 [2011]).

Upon our review of the record, we conclude that petitioner established by a preponderance of the evidence that the children were in imminent danger of emotional impairment based upon the alleged incidents of domestic violence between the children's mother and respondent (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Afton C. [James C.]*, 17 NY3d 1, 8-9 [2011]). We note that, in connection with her admission in the separate neglect proceeding brought against her, the mother admitted that she and respondent "had several disagreements and arguments . . . in the presence of the children and [that] sometimes [the children] were afraid." Respondent failed to appear at the instant fact-finding hearing, and thus we draw the "strongest inference [against her] that the opposing evidence permits" based upon her failure to testify at the hearing (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]; *see Matter of Kennedie M. [Kimberly M.]*, 89 AD3d 1544, 1545 [2011]). ***2**

According to the evidence presented at the fact-finding hearing, when the police responded to the residence on a specified date, both the mother and respondent admitted that they had been engaged in a loud argument in the living room, during which they struck each other. The police officer observed a scratch on the mother's neck, which the mother admitted she received while she and respondent were "fighting." The police officer further observed that the one-year-old child (younger child) was crying in a bedroom, and he described the child as "shook up" and "scared." We conclude that the younger child's proximity to the physical and verbal fighting that occurred in the living room, together with the evidence of a pattern of ongoing domestic violence in the home, placed him in imminent risk of emotional harm (*see Kennedie M.*, 89 AD3d at 1545; *cf. Matter of Larry O.*, 13 AD3d 633 [2004]).

Although the hearing court's determinations are entitled to great deference (*see generally Matter of Syira W. [Latasha B.]*, 78 AD3d 1552, 1553 [2010]), we conclude that the court's determination that the statements of

the five-year-old child (older ***1346** child) were not corroborated is not supported by a sound and substantial basis in the record. "Corroboration, for purposes of article 10 proceedings, is defined to mean '[a]ny other evidence tending to support the reliability of the previous statements' " of the child (*Matter of Christina F.*, 74 NY2d 532, 536 [1989]), and here we conclude that the older child's statements were sufficiently corroborated.

The caseworker for Child Protective Services testified at the fact-finding hearing that the body language of the older child changed when he spoke about his mother and respondent, and that he refused to talk to her while he was at his mother's house. While at his father's house, however, the older child explained to the caseworker that he did not want to speak with her at his mother's house because his mother repeatedly entered and then left the room. He told the caseworker that his mother and respondent fought often; that respondent had locked them out of the house; and that he was afraid of respondent. He demonstrated with the use of two "Barbie" dolls a physical fight that involved hair-pulling and pushing, which ended with the intervention of a male doll, who represented a police officer. Furthermore, the evidence at the fact-finding hearing established that the police responded to the home of respondent and the mother on several occasions for reports of domestic violence. A neighbor testified that she heard loud fighting between respondent and the mother on a weekly basis and that she observed the police responding to those fights at least once per month. The neighbor further testified that she had seen that the mother had been locked out of the house by respondent on more than one occasion. The child care provider for the children testified that the older child told her on several occasions that respondent hurt his mother, and the child care provider in fact observed a large bruise on the mother's face. When she questioned the mother about the bruise, the mother explained that it had happened in a bar, but after his mother left the house the older child told the child care provider that "[respondent] did it." We therefore further conclude that the ongoing pattern of domestic violence also placed the older child in imminent risk of emotional harm, thus compelling the conclusion that both children are neglected based upon the actions of respondent (*see Kennedie M.*, 89 AD3d at 1545). We thus reverse the order, grant the petition, and remit the matter to Family Court for a dispositional hearing. Present—Scudder, P.J., Smith, Sconiers, Gorski and Martoche, JJ.

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90 A.D.3d 1095, 934 N.Y.S.2d
553, 2011 N.Y. Slip Op. 08693

**1 In the Matter of Lamarcus E., a Child Alleged to be Neglected. Otsego County Department of Social Services, Respondent; Jonathan E., Appellant.

Supreme Court, Appellate Division,
Third Department, New York
510914
December 1, 2011

CITE TITLE AS: Matter of
Lamarcus E. (Jonathan E.)

HEADNOTE

Parent, Child and Family
Abused or Neglected Child
Child Denied Meaningful Assistance of Counsel—Counsel's Failure to Consult with Child

Christopher Hammond, Cooperstown, for appellant.
Steven Ratner, Otsego County Department of Social Services, Cooperstown, for respondent.
Michelle I. Rosien, Philmont, attorney for the child.

Spain, J.P. Appeal from an order of the Family Court of Otsego County (Burns, J.), entered July 28, 2010, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate respondent's child to be neglected.

Respondent is the father of the subject child (born in 2002). In August 2009, while under petitioner's supervision, the father told petitioner that he intended to relocate to Connecticut in October 2009 to work and live with his girlfriend, but that he would not be taking his son with him. Thereafter, petitioner filed a neglect petition against the father alleging that he planned to permanently relocate to Connecticut without his child and without any viable plan for the child's care in his absence, and that the father planned to place the child in foster care. Upon receipt of the petition, Family Court removed the child and placed him in the custody of petitioner. The father relocated to Connecticut the next day. Following a fact-finding hearing, the father was determined to have neglected his child and, after a dispositional hearing, Family Court directed that **1096 the child continue his placement with petitioner. The father now appeals. No **2 appeal has been taken on behalf of the child.

The attorney assigned to represent the child on this appeal is not the same attorney who continues to represent the child in Family Court. Although the child's appellate attorney has taken a position on this appeal that is consistent with that taken by the child's attorney in Family Court, she has reported in her brief that she has not personally met with her client, who is now nine years old. She explains that the child's attorney in the ongoing proceedings in Family Court has been "able to provide me with continuing information on my client, his position and the status of the [proceedings in Family Court]." The child's appellate attorney has provided this Court with no further explanation.

Given the foregoing, we find that the child has been denied the meaningful assistance of appellate counsel (*see Matter of Jamie TT.*, 191 AD2d 132, 136-137 [1993]). Counsel's failure to "consult with and advise the child to the extent of and in a manner consistent with the child's capacities" (22 NYCRR 7.2 [d] [1]) constitutes a failure to meet her essential responsibilities as the attorney for the child. Client contact, absent extraordinary circumstances, is a significant component to the meaningful representation of a child. Therefore, given the circumstances herein, and for the reasons clearly articulated in *Matter of Mark T. v Joyanna U.* (64 AD3d 1092, 1093-1095 [2009]) and *Matter of Lewis v Fuller* (69 AD3d 1142 [2010]), "the child's appellate counsel will be relieved of her assignment[.] [T]he decision of this Court will be withheld and a new appellate attorney will be assigned to represent the child to address —after consulting with and advising the child—any issue the record may disclose" (*Matter of Lewis v Fuller*, 69 AD3d at 1143; *see Matter of Dominique A.W.*, 17 AD3d 1038, 1040-1041 [2005], *lv denied* 5 NY3d 706 [2005]).

Rose, Kavanagh, Stein and Garry, JJ., concur. Ordered that the decision is withheld, appellate counsel for the child is relieved of assignment and new counsel to be assigned to represent the child on this appeal.

64 A.D.3d 1092, 882 N.Y.S.2d
773, 2009 N.Y. Slip Op. 06053

**1 In the Matter of Mark T., Appellant
v
Joyanna U. et al., Respondents.
(And Another Related Proceeding.)

Supreme Court, Appellate Division,
Third Department, New York
July 30, 2009

CITE TITLE AS: Matter of Mark T. v Joyanna U.

HEADNOTE

Guardian and Ward
Law Guardian

In paternity proceeding, 11½-year-old child did not receive meaningful assistance of appellate counsel; by proceeding on appeal without consulting and advising his client, appellate counsel failed to fulfill his essential obligation—accordingly, decision was withheld, child's appellate counsel was relieved of his assignment and new appellate attorney was assigned to represent child.

Christopher A. Pogson, Binghamton, for appellant.
John D. Cadore, Binghamton, for Joyanna U., respondent.
Teresa C. Mulliken, Harpersfield, for Paul V., respondent.
J. Mark McQuerrey, Law Guardian, Hoosick Falls.

Malone Jr., J. Appeal from an order of the Family Court of Broome County (Pines, J.), entered March 27, 2008, which, among other things, in a proceeding pursuant to Family Ct Act article 5, granted the motion of respondent Joyanna U. to dismiss the petition.

In December 1996, petitioner and respondent Joyanna U. (hereinafter the mother) engaged in a sexual relationship. At **1093 that time, the mother was also engaged in a sexual relationship with respondent Paul V. (hereinafter respondent). The following month, petitioner assaulted respondent, was arrested and incarcerated. The mother and respondent were married several days later and the subject child was born in October 1997. After respondent and the mother divorced in 2007, petitioner commenced this paternity proceeding, seeking a DNA test to establish that he was the biological father of the subject child and, in addition, petitioned for visitation. The mother moved to dismiss the paternity petition based on the ground of equitable estoppel. After conducting a hearing, Family Court granted the motion and also dismissed the visitation petition. Petitioner appeals. No appeal has been taken on behalf of the child.

The child is represented by a different attorney on this appeal, who filed a brief in **2 support of an affirmance of Family Court's order, which is a position counter to that taken by the attorney representing the child in Family Court. While taking a different position on behalf of a child on appeal is not necessarily unusual, the child's appellate attorney appeared at oral argument and, in response to questions from the court, revealed that he had neither met nor spoken with the child. He explained that, while he did not know the child's position on this appeal, he was able to determine his client's position at the time of the trial from his review of the record and decided that supporting an affirmance would be in the 11½-year-old child's best interests.

In establishing a system for providing legal representation to children, the Family Ct Act identifies, as one of the primary obligations of the attorney for the child, helping the child articulate his or her position to the court (*see* Family Ct Act § 241). As with the representation of any client, whether it be at the trial level or at the appellate level, this responsibility requires consulting with and counseling the client. Moreover, expressing the child's position to the court, once it has been determined with the advice of counsel, is generally a straightforward obligation, regardless of the opinion of the attorney. The Rules of the Chief Judge (22 NYCRR 7.2) direct that in all proceedings other than juvenile delinquency and person in need of supervision cases, the child's attorney "must zealously advocate *the child's* position" (22 NYCRR 7.2 [d] [emphasis added]) and that, in order to determine the child's position, the attorney "must consult with and advise the child to the extent of and in a manner consistent with the child's capacities" (22 NYCRR 7.2 [d] [1]). The rule also states that "the attorney for the child should be directed by the wishes of the child, even if the attorney for the **1094 child believes that what the child wants is not in the child's best interests" and that 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" (22 NYCRR 7.2 [d] [2]). The rule further advises that the attorney representing the child would be justified in advocating a position that is contrary to the child's wishes when he or she "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" (22 NYCRR 7.2 [d] [3]). In such situations the attorney must still "inform the court of the child's articulated wishes if the child wants the attorney to do so" (22 NYCRR 7.2 [d] [3]; *see Matter of Carballeira v Shumway*, 273 AD2d 753, 754-757 [2000], *lv denied* 95 NY2d 764 [2000]). The New York State Bar Association Standards for representing children strike a similar theme in underscoring the ethical responsibilities of attorneys representing children, including the obligation to consult with and counsel the child and to provide client-directed representation (*see generally* NY St Bar Assn Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings [June 2008]; NY St Bar Assn Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings [June 2007]).

In October 2007, the Administrative Board of the Courts of New York issued a policy statement, entitled "Summary of Responsibilities of the Attorney for the Child," which outlines the necessary steps that form the core of effective representation of children. These enumerated responsibilities, which apply equally to appellate counsel, include—but are not limited to—the obligation to: "(1) [c]ommence representation of the child promptly upon being notified of the appointment; (2) [c]ontact, interview and provide initial services to the child at the earliest practical opportunity, and prior to the first court appearance when feasible; (3) [c]onsult with and advise the child regularly concerning the course of the proceeding, maintain contact with the child so as to be aware of and respond to the child's concerns and significant changes in the ****3** child's circumstances, and remain accessible to the child."

Clearly, the child in this proceeding has not received meaningful assistance of appellate counsel (*see Matter of Dominique A. W.*, 17 AD3d 1038, 1040 [2005], *lv denied* 5 NY3d 706 [2005]; *Matter of Jamie TT.*, 191 AD2d 132, 135-137 [1993]). He was, at ***1095** the least, entitled to consult with and be counseled by his assigned attorney, to have the appellate process explained, to have his questions answered, to have the opportunity to articulate a position which—with the passage of time—may have changed, and to explore whether to seek an extension of time within which to bring his own appeal of Family Court's order. Likewise the child was entitled to be appraised of the progress of the proceedings throughout. It appears that none of these services was provided to the child (*see Matter of Dominique A. W.*, 17 AD3d at 1040-1041).

Moreover, while the record reflects the position taken by the attorney for the child in Family Court, there is nothing in the record to indicate that the child—who was 11½ years of age at the time of the argument of the appeal—suffered from any infirmity which might limit his ability to make a reasoned decision as to what position his appellate attorney should take on his behalf. Indeed, absent any of the extenuating circumstances set forth in 22 NYCRR 7.2 (d) (3), the appellate attorney herein should have met with the child and should have been directed by the wishes of the child, even if he believed that what the child wanted was not in the child's best interests (*see* 22 NYCRR 7.2 [d] [2]). By proceeding on the appeal without consulting and advising his client, appellate counsel failed to fulfill his essential obligation (*see Matter of Jamie TT.*, 191 AD2d at 136-138).

Accordingly, the child's appellate counsel will be relieved of his assignment, a new appellate attorney will be assigned to represent the child to address any issue that the record may disclose, and the decision of this Court will be withheld.

Spain, J.P., Lahtinen, Stein and Garry, JJ., concur. Ordered that the decision is withheld, appellate counsel for the child is relieved of assignment and new counsel to be assigned to represent the child on this appeal.

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