

Family Court Appeals: What's Hot, What's Not, and Why They Often Can't Wait

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What Family Court Appeals Are We Talking About?

- Abuse and Neglect cases under Article 10 of the Family Court Act
 - Termination of Parental Rights cases under the Social Services Law
 - Family Offense Petitions under Article 8 of the Family Court Act
 - Custody and Visitation appeals under Article 6 of the Family Court Act
 - Child Support under Article 4 of the Family Court Act
 - Paternity cases under Article 5 of the Family Court Act
- Not discussing Delinquency cases under Article 3 of the Family Court Act*

FCA §§ 261 & 262 guarantee right to counsel for almost all parties in these cases.

What is Distinctive about Family Court Appeals?

- Family Court appeals (especially abuse and neglect cases) proceed on two tracks simultaneously: **What happened? and What's happening now?** This affects the practice of these cases in numerous ways, particularly re timing.
- While the Article 10 case is proceeding to fact-finding on the question whether the parent abused or neglect the child, the Family Court monitors the family, possibly deciding whether to remove the child and place them in foster care or with a relative, and if so what visitation orders to put into effect, etc. FCA §1089(a)(2) requires the Family Court to hold permanency hearings every six months for children placed in foster care to monitor the child's current status. As a result, the parent and ACS (or other child protection agency) are simultaneously litigating the trial regarding the allegations in the petition AND what orders are in place during the pendency of the trial, particularly involving the status of the child either with the parent or in care.
 - There can be a similar two-track framework in other family court appeals but it may not be as significant as in the Article 10 context.
- FCA §1112(a) provides an appeal of right for any intermediate or final order in an Article 10 proceeding. Other Family Court proceedings require leave to appeal for intermediate orders. Appellate Division regularly decides appeals re visitation, preliminary hearings, interim orders, etc.
- The Order of Disposition is the final judgment in these cases – brings up for review any intermediate order which “necessarily affects” the final judgment, under CPLR 5501(a). Most importantly, this includes the fact-finding order.

What Are the Timing Issues re Family Court Appeals?

- While the appeal is pending, the Family Court proceeding continues on these two tracks (unless a stay of fact-finding is ordered). If child is in foster care, the Family Court continues monitoring, parent can seek return of child or increased visitation, parent remains subject to any orders, etc.
- Appealing an intermediate order in an Article 10 proceeding (removal of the child, visitation, procedural issues, etc.) requires careful attention to timing and whether appeal can be resolved while it still matters. For example, consider whether fact-finding will be finished before you will likely receive a resolution of an appeal of an order placing a child in foster care.
- An interim stay is available from the Appellate Division under CPLR 5519(c) and FCA §1114. Each Department has specific procedures on these.
- **Mootness:**
 - New orders moot previous orders.
 - Dispositional orders moot pre-finding orders.
 - Permanency orders (every 6 months!) moot previous permanency orders.
 - Expiration of the dispositional order moots an appeal of its provisions.
 - Findings of abuse or neglect are NOT mooted.
 - Exceptions to mootness apply in some contexts. E.g., Matter of Jamie J., 30 N.Y.3d 275, 281 (2017).
- When the children are in foster care, the clock is ticking toward a termination of parental rights petition. Social Services Law §384-b(L)(i), as well as federal law, generally require the filing of the TPR petition when a child has been in foster care for 15 of the previous 22 months. (There are exceptions).
- FCA §1112(a) provides scheduling preference for most of these appeals.

What Are the Specific Considerations To Keep in Mind in Family Court Appeals?

- The background of these appeals is that **“Looking to the child's rights as well as the parents' rights to bring up their own children, the Legislature has found and declared that a child's need to grow up with a normal family life in a permanent home is ordinarily best met in the child's natural home.”** Matter of Michael B., 80 N.Y.2d 299, 309 (1992).
- The Court of Appeals recently recognized that these legislative findings are substantiated by recent works of social science. Matter of Jamie J., 30 N.Y.3d 275, 279 n.1 (2017).¹

¹ I'll paste here the full footnote from the Court of Appeals:
According to amici, those legislative findings are further substantiated by amici's experience and by recent works of social science (see e.g. Kristin Turney & Christopher Wildeman, Mental and Physical Health of Children in Foster Care, 138 [No. 5] Pediatrics at 1, 3 [2016] [documenting "vast" differences between the physical and mental health of those children placed in foster care and those in general population, many of

- Identify the central issue or basis for the finding in the Family Court proceeding and focus your appeal on that issue.
 - Unlikely to win based solely on procedural or evidentiary error.
 - Can't approach these appeals the same way as a criminal appeal – in a criminal case, if you are arguing that evidence should have been suppressed you don't have to also demonstrate your client is not guilty. To win in Family Court appeals, you need to show the Court that the children are not at imminent risk of harm with the parent.
 - You can make procedural or evidentiary arguments, of course, but those arguments are most effective as part of the argument that the neglect finding was error. Try to challenge the finding directly.
- Look into what's going on with the family now.
 - Are children still in foster care? Are they home with the parent? Has supervision ended? Is there a TPR?
 - The family's current status won't be in the record, but courts often ask about it, and it can shape their view of the appeal one way or the other.
 - The Court of Appeals has indicated that "changed circumstances" may be considered when appropriate in Family Court appeals. *Matter of Michael B.*, 80 N.Y.2d 299, 318 (1992). This is a limited exception and not a way to bring in material outside the record – but the family's status and the status of ongoing court proceedings can be appropriate.
- The Court of Appeals has emphasized that abuse and neglect determinations require case-by-case analysis closely based on the facts, and that per se rules are not appropriate in this context (aside from the exceptions in the statute)
 - **Nicholson v. Scoppetta, 3 N.Y.3d 357 (2004) is the fundamental case in this area.** If you're doing an Article 10 appeal, be familiar with this case.
 - *Matter of Afton C.*, 17 N.Y.3d 1 (2011) is a good example of the inappropriateness of per se rules in these cases.
 - The rule that the finding must be based on the specific evidence in this case, and not on a generalized argument, creates possibilities for arguments on appeal.
- There often will not be evidence of actual harm to the child, and the neglect finding will be based on a determination that the child's "physical, mental or

which persist even after adjusting for child and household characteristics]; Diane Mastin, Sania Metzger & Jane Golden, *Foster Care and Disconnected Youth: A Way Forward for New York* [Apr. 2013], available at http://www.fysany.org/sites/default/files/document/report_final_April_2_0.pdf [accessed Oct. 25, 2017] [finding young adults who age out of foster care face particularly poor chances of achieving educational objectives, gaining employment, or developing strong family relations and stable housing arrangements]; Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 [No. 5] *Am Econ Rev* 1583 [2007] [suggesting that children on the margin of placement tend to have better outcomes when they remain at home]).

emotional condition **is in imminent danger of becoming impaired**” under FCA § 1012(f)(i). Where there is no evidence of actual harm, these findings can be challenged on the basis that no *imminent danger* to the child was shown – a possible risk is not enough, the record needs to support a finding of an actual imminent danger.

- These arguments are subject to the response that the court doesn’t need to wait until the child is actually harmed to intervene. That is of course true, but there does need to be a showing of imminent danger and not just concerns about a risk. These arguments depend largely on the facts of the case.
- This point is important because findings are sometimes made based on the Family Court’s perhaps idiosyncratic view of risk. For example, some judges may think leaving an 11-year-old home alone after school is perfectly safe and others may think that’s highly risky.
- The Appellate Division rarely remands for decision. If the Court determines the Family Court has erred, the Court can decide the case itself.
 - In reviewing a family court ruling, appellate courts have authority “as broad as that of the trial court’s” that enables them “to render an independent judgment as warranted by the facts.” *Allen v. Black*, 275 A.D.2d 207, 209 (1st Dep’t 2000).

What Are Some Big Issues in Family Court Appeals Recently?

- Res ipsa cases under FCA §1046(a)(ii).
 - These may allege shaken baby syndrome/abusive head trauma – there have been growing doubts about this diagnosis in the medical literature and the caselaw in recent years. E.g., *People v Bailey*, 144 A.D.3d 1562 (4th Dep’t 2016).
 - Consider whether there are errors in the Family Court’s imposition of the burden of proof in these cases, or in its evaluation of the expert testimony and the underlying science.
- Substance abuse cases under FCA §1046(a)(iii) and §1012(f)(i)(B).
 - FCA §1046(a)(iii) creates an exception to the doctrine precluding per se rules under certain specific circumstances involving substance abuse.
 - Consider whether the Family Court has conflated the two standards, or erroneously applied the 1046 standard in an inappropriate case.
- Parents with Mental Illness
 - The fact that the parent has a mental illness cannot itself be sufficient to support a finding.
 - Consider whether the finding is based on evidence of imminent danger to the child, and not solely on the parent’s illness.