

# Discussion Questions and Authority

(to accompany Panel Discussion:  
AFC Problems and Solutions)

Appellate Division, Fourth Department  
Attorneys for Children Program Update  
Auburn, NY  
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Questions for Discussion:

1. How should the Attorney for the Child (AFC) make contact with the parties? In your county, how and when do you find out whether the parties are represented and who represents them? What do you do? What would a “best practice” look like? What do you need and how do you get there?
2. In your county, are orders sometimes proposed with open-ended provisions that grant essentially standard-less decision-making authority to extra-judicial others? e.g., visitation shall be suspended until the child’s counselor approves. How about orders that specify conditions precedent to future applications to the court? e.g., Mr. C. may not apply for supervised visitation unless he has completed drug testing. Any problem with such provisions? Assuming you agree with (or don’t oppose) the objective of the provision, what do you do when one is proposed? What do you propose instead?
3. Rules for custody and access differ based on the parties’ relationship to the child. Different rules may apply if the matter involves modification of a prior order or a de novo determination. What do you do when the wrong rule or a misstatement of a rule is being stated? Does it matter if the error appears to favor your position? What is the risk to your client? Any risk to future clients?
4. Does it matter if the prior order was based on a stipulation or on a hearing?
5. May an AFC call a party to testify at a hearing to determine custody? Related question: can a respondent in an article 10 proceeding be called to testify?
6. What is the role of the AFC after the case is closed? E.g., Six months after an order determining custody and access has been entered? What is the role of the AFC regarding appeals?
7. In an article 6 proceeding, the attorney for a party moves pursuant to CPLR 408 for leave to call your client to testify. Does CPLR 408 apply to article 6? What are your options?
8. How does the AFC relate the child’s wishes without divulging the child’s confidences?
9. Use of experts: who are the experts in your county and what are their qualifications?

Selected Authority:

### 1. Making Contact.

“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 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 Rule 4.2 ; NYSBA Ethics Opinion #656)” (Appellate Division Fourth Dept, *Ethics For Attorneys For Children*, Ethical Questions and Answers [August 2011][emphasis added]).

For ideas and comparison with your own practice, see CLC letters and “waiver” statement (handout/cd).

### 2. Orders Imposing Conditions

*Matter of Bray v Destevens*, 78 AD3d 1564 (4th Dept 2010)(court lacks authority to impose conditions precedent [drug and alcohol assessment and physiological assessment) to the resumption of a parent’s contact and visitation with a child)

*Matter of Davenport v Ouweleen*, 5 AD3d 1079 ( 4th Dept 2004)(error to condition future application for resumption of visitation or communication upon completion of mental health evaluation and compliance with treatment recommendations)

*Ralph M. v Nancy M.*, 280 AD2d 995 (4th Dept 2001)(error to condition right to petition for visitation upon participation in and completion of counseling)

### 3. Custody/Access Standards

#### **Modification Between Parents - relationship between change in circumstances + “BIC”?**

*Matter of Di Fiore v Scott*, 2 AD3d 1417 (4th Dept 2003)(and cases cited therein)(as long as the custodial parent has not been shown to be unfit, or perhaps less fit, to continue as the proper custodian, parent seeking change in an established custody arrangement must show a change in circumstances that reflects a real need for change to ensure the best interest of the child)

*Matter of Neely v Ferris*, 68 AD3d 1258 (3d Dept 2009)(visitation order cannot be modified unless sufficient change in circumstances since entry of prior order, which, if not addressed would have adverse effect on BIC); *see also Matter of Vasquez v Barfield*, 81 AD3d 1398 (4th Dept 2011)(alternation of prior order of visitation proper upon showing of real need for change to ensure BIC)

*Yohon v Yohon*, 23 AD3d 988 (4th Dept 2005)(even if JHO erred by conducting a de novo hearing on a petition for modification, plaintiff demonstrated a change in circumstances reflecting a real need for change to ensure the best interests of the child).

### Non-Parent Custody

*Bennet v Jeffries*, 40 NY2d 543 (1976)(“extraordinary circumstances,” e.g., parental surrender, abandonment, unfitness, persisting neglect, + BIC)

*Matter of Tucker v Martin*, 75 AD3d 1087 (4th Dept 2010)(award to stepdad not biological Dad; strong dissent)

DRL 72(2)(grandparents)(extraordinary circumstances, including “extended disruption of custody,” including “24 continuous months”)

### Modification of Third Party Custody/Visitation

*Matter of Guinta v Doxtator*, 20 AD3d 47 (4th Dept 2005)(after award custody to nonparent, court may not revisit “extraordinary circumstances;” just as between parents, standard is change of circumstances and BIC)

*Matter of Anderson v Roncone*, 81 AD3d 1268 (4th Dept 2011)(petitioner mother failed to demonstrate sufficient change in circumstances to discontinue supervised visitation and supervised visitation was in children’s best interests)

### Third Party Access

*Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991])(only a “parent” – biological or adoptive – has standing under DRL 70 to seek visitation against the wishes of a fit custodial parent., i.e., NOT extraordinary circumstances)

*Matter of Debra H. v Janice M.*, 14 NY3d 576 (2010)( homosexual partner of biological parent is “parent” for purpose of DRL 70 where child was born during couple’s civil union pursuant to Vermont law)

DRL 72 (1)(grandparents [standing + BIC])

*Matter of Emanuel S. v Joseph E.*, 78 NY2d 178 (1991)(gp standing = equitable circumstances/death of parent, then BIC)

*Matter of Follum v Follum*, 302 AD2d 861 (4th Dept 2003)(relationship between statute and 2-part test)

### Modification of Third Party Access

*Matter of Wilson v McGlinchey*, 2 NY3d 375 (2004)(on a petition to modify third-party [grandparent] visitation order, standard is a subsequent change of circumstances - not extraordinary circumstances; ultimately, standard is BIC))

## **4. Modification of Order Based on Stipulation v Evidentiary Hearing**

*Matter of Yelton v Froelich*, 82 AD3d 1679 (4th Dept 2011)(an existing custody arrangement based on stipulation of the parties is entitled to less weight than a disposition following a plenary trial), citing *Matter of Alexandra H v Raymond H.*, 37 AD3d 1125 (4th Dept 2007)(where modification

was to “stipulated order”)

**5. AFC’s right to call parties to testify?**

*Matter of Krieger v Krieger*, 65 AD3d 1350 (2d Dept 2009)(court erred in failing to adjourn hearing to provide AFC with reasonable opportunity to present additional witnesses)(AFC “should be accorded the same reasonable opportunity to ... present evidence ... as is accorded the child’s mother or father or other interested party”)

*Matter of Figueroa v Lopez*, 48 AD3d 906 (3d Dept 2008)(order based on stipulation reversed where AFC did not consent and court did not allow AFC to explain his reasons), *citing Matter of White v White*, 267 AD3d 888, 890 [Law Guardian must be afforded same opportunity as any other party to fully participate in a proceeding]).

Related question: are article 10 respondents subject to disclosure and may they be called to testify?

*Matter of Tyler S.*, 192 Misc2d 728, 737 (Fam Ct Kings County 2002)(as in any other civil proceeding, respondent in article 10 may be required to answer interrogatories, and may suffer an adverse inference from silence at trial); *citing Matter Commissioner of Social Servs. v Phillip De G.*, 59 NY2d 137, 141 (1983)(in paternity proceeding adverse inference may be drawn against witness because of his failure to testify, whether based on constitutional or statutory grounds).

**6. Role of AFC After Disposition**

*Matter of Renee B.*, 227 AD2d 315 (AFC has interest in welfare of child sufficient to confer standing to seek change of custody)

On Appeal

See FCA article 11 (AFC representation continues on any appeal; duty to inform client regarding right to appeal, etc.)

*Matter of Mark T v Joyanna U.*, 64 AD3d 1092 (3d Dept 2009)(appellate AFC who did not consult with client failed to provide meaningful assistance of counsel)

*see also, Matter of Dominique A.W.*, 17 AD3d 1038, lv denied 5 NY3d 706

**7. CPLR 408 (leave of court required for disclosure in special proceedings)?**

*Matter of Lisa W. v. Seine W.*, 9 Misc.3d 1125(A) (Fam Ct Kings County 2005); *Matter of Dominick R. v Jean R.*, 7 Misc.3d 1027(A) (Fam Ct., Kings County, 2005)(custody proceedings are "special proceedings" under CPLR 408; thus discovery requires court leave; also has an analysis as to when discovery should be permitted)

*Matter of K.Z. v P.M.*, 29 Misc3d 572 (Fam Ct Orange County 2010)(application to compel discovery of medical records in family offense proceeding denied at fact-finding stage because not relevant to whether family offense occurred).

8. How does the AFC relate the child’s wishes without divulging his confidences?

9. Use of experts. Who are the experts in your county and what are their qualifications?