

Supreme Court of the State of New York

APPELLATE DIVISION

Fourth Judicial Department

Attorneys for Children Program

Presents



**APPELLATE TRAINING FOR
ATTORNEYS FOR CHILDREN**

March 26, 2013

THE APPELLATE DIVISION, FOURTH DEPARTMENT
presents:

APPELLATE TRAINING FOR ATTORNEYS FOR CHILDREN

Tuesday, March 26, 2013

Canandaigua Inn on the Lake
Canandaigua, New York

- 8:45 a.m. Registration
- 9:15 a.m. Welcome
Presiding Justice Henry J. Scudder
Appellate Division, Fourth Department
Tracy M. Hamilton, Esq.
Director, Office of Attorneys for Children
Appellate Division, Fourth Department
- 9:30 a.m. A View From the Bench
Presiding Justice Henry J. Scudder
Appellate Division, Fourth Department
- 10:00 a.m. A View From the Clerk's Office (Including Tips From A-Z)
Frances Cafarell, Esq.
Clerk, Appellate Division, Fourth Department
- 10:45 a.m. Break
- 11:00 a.m. Compiling the Record on Appeal
David Foster, Esq.
Principal Appellate Court Attorney
Appellate Division, Fourth Department
- 11:45 p.m. Lunch (provided)
- 12:45 p.m. Effective Brief Writing
Mary Hope Benedict, Esq.
Principal Law Clerk to Presiding Justice Henry J. Scudder
Appellate Division, Fourth Department
Craig Peterson, Esq.
Chief Appellate Court Attorney
Appellate Division, Fourth Department

PLEASE SEE NEXT PAGE ➡

- 1:45 p.m. Motion Practice
Alan Ross, Esq.
Deputy Clerk, Appellate Division, Fourth Department
- 2:30 p.m. Break
- 2:45 p.m. Role of Child's Attorney on Appeal/Ethics
Tanya Conley, Esq.
Attorney for Children
Legal Aid of Rochester
Andrea Tomaino, Esq.
Principal Attorney
Attorney Grievance Committee, Fourth Department
- 3:45 p.m. Conclusion

The Appellate Division, Fourth Department has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York from March 2, 2011 to March 1, 2014. This program has been approved for a total of five and one-half (5.5) credit hours, of which two and one-half (2.5) credit hours can be applied toward the skills requirement, two (2.0) credit hours can be applied toward the professional practice (family law) requirement, and one (1) credit hour can be applied toward the ethics and professionalism requirement. This program is suitable for experienced or newly admitted attorneys.

ROLE OF CHILD'S ATTORNEY ON APPEAL / ETHICS

Presented by:

Tanya J. Conley, Esq.
Attorney for Children
Legal Aid of Rochester

Andrea Tomaino, Esq.
Principal Attorney
Attorney Grievance Committee, Fourth Dept.
Supreme Court of the State of New York

Attorneys for Children Program
The Appellate Division, Fourth Department

Appellate Training for Attorneys for Children
Canandaigua, NY
March 26, 2013

Tanya Conley

Tanya Conley graduated *cum laude* from Syracuse University College of Law in 2000. Mrs. Conley worked as a Senior Attorney at the Legal Aid Society in Syracuse where she represented battered women in all areas of civil litigation including matrimonial, child support, custody, abuse and neglect.

In 2003, Mrs. Conley became a full time law guardian at the Legal Aid Society of Rochester. She is currently the Supervising Attorney and Director of Appeals and Training in the Attorney for the Child Program at the Legal Aid Society of Rochester. She represents children in custody/visitation, abuse/neglect, Person in Need of Supervision and Juvenile Delinquency matters. She is also an adjunct Professor of Law, teaching "Domestic Violence in the Law," at the Syracuse University College of Law.

Her community activities include membership in the Syracuse Area Domestic Violence Coalition and membership in the Rochester/Monroe County Domestic Violence Consortium. She is a member of the National Association of Counsel for Children, and is an active member of the Monroe County Bar Association Family Law Executive Committee, and the New York State Bar Association.

Mrs. Conley resides in Fairport, NY with her husband and two young sons.

Andrea E. Tomaino

Andrea E. Tomaino is Principal Counsel for the Seventh Judicial District Attorney Grievance Committee, an agency of the Appellate Division, Fourth Department. She previously served as a Confidential Law Clerk to the Appellate Division, Fourth Department, before entering private practice, where she concentrated in family law with the firms of Chamberlain, D'Amanda, Oppenheimer & Greenfield, and Woods Oviatt Gilman LLP, in Rochester, New York. Ms. Tomaino has been a frequent lecturer at CLE programs on legal ethics for various County Bar Associations and the New York State Bar Association, and she is the immediate past Chair of the Board of Trustees of Our Lady of Mercy High School in Rochester, New York. She received her BA from the College of the Holy Cross and her JD from Washington & Lee University School of Law.

**NEW YORK STATE SUPREME COURT
APPELLATE DIVISION, FOURTH DEPARTMENT**

**HONORABLE HENRY J. SCUDDER
PRESIDING JUSTICE**



**GUIDELINES FOR ATTORNEYS FOR CHILDREN
IN THE FOURTH DEPARTMENT**

PREFACE

The Departmental Advisory Committee of the Fourth Department Law Guardian Program (Hon. Michael F. Griffith, Chair) drafted these guidelines and they have been approved by the Appellate Division, Fourth Department. The guidelines are an update of guidelines issued by the Departmental Advisory Committee of the Fourth Department Law Guardian Program in the 1980's and 1990's (Hon. John F. O'Donnell, Chair). The guidelines have been updated to reflect current practice in light of case law, statutory changes, Court Rules and Appellate Division, Fourth Department policy. These guidelines contain recommended best practices for all attorneys for children and shall be used as a basis for evaluation of the overall performance of attorneys for children.

FUNCTION OF THE ATTORNEY FOR THE CHILD

The following Rule of the Chief Judge must be followed by all attorneys for children in the Fourth Department:

Section 7.2 Function of the attorney for the child.

(a) As used in this part, "attorney for the child" means a law guardian 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.

SUMMARY OF RESPONSIBILITIES OF THE ATTORNEY FOR THE CHILD

The following Summary of Responsibilities of the Attorney for the Child was drafted by the Statewide Law Guardian Advisory Committee and approved by the Administrative Board of the Unified Court System. The Appellate Division, Fourth Department endorses this summary.

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.

TABLE OF CONTENTS

	Page
Preface	1
Table of Contents	4
Abuse and Neglect Proceedings Article 10, Family Court Act	5
Foster Care Approval Proceedings Social Services Law §358-a	12
Permanency Proceedings Family Court Act § 1086- <u>et seq.</u>	17
Termination of Parental Rights Proceedings Social Services Law §384-b	22
PINS Proceedings Article 7, Family Court Act	28
Delinquency Proceedings Article 3, Family Court Act	34
Custody and Visitation Proceedings Article 6, Family Court Act	40
Appeals	46

Only the Appeals Guidelines are included here. The entire Guidelines are at www.courts.state.ny.us/ad4, click on Attorneys for Children Program Link.

APPEALS GUIDELINES FOR ATTORNEYS FOR THE CHILD

A. The Function of the Attorney for the Child

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.

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's position.

In other types of proceedings, where the child is the subject, the attorney 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.

B. Ethical Responsibilities of the Attorney for the Child

Every attorney must be guided by the Code of Professional Responsibility when representing children. Attorneys for children must represent children zealously within the bounds of the law and must seek any lawful objective of the child through reasonably available means (see DR 7-101). The attorney for the child,

therefore, has an ethical responsibility to zealously pursue an appeal when the child is adversely affected and the child wants to appeal. When the child is not capable of making a knowing, voluntary and considered judgment or where following the child's wishes would likely result in a substantial risk of imminent, serious harm to the child, the child's attorney has the additional responsibility to determine and implement decisions on behalf of the child.

C. Appointment Continues on Appeal

1. By statute, the attorney for the child's representation continues without further court order through any appeal unless the Appellate Division grants the application of the attorney for the child for substitution of appellate counsel and appoints another attorney (see Family Court Act § 1120). If the attorney for the child cannot represent the child on the appeal, the attorney must immediately request that the Appellate Division appoint another attorney.
2. Attorneys for children must request substitution if they do not have adequate experience with appeals or they do not have adequate time to devote to the appeal or for any other reason that would impede their zealous and thorough representation of the child on appeal. Attorneys for children are subject to discipline if they fail to prosecute an appeal. Requests for substitution should be directed to the Attorneys for Children Program office and include date-stamped copies of the notice of appeal and the order appealed from, and if the child is the appellant, proof of service of the notice of appeal.

D. The Right to Appeal

"An appeal may be taken as of right from any order of disposition and, in the discretion of the appropriate appellate division, from any other order under this act" (Family Court Act § 1112 [a]). Interlocutory appeals, i.e., appeals from interim or temporary orders, require the permission of the Appellate Division. To obtain the necessary permission the attorney for the child must file a motion or an order to show cause and must be prepared to show compelling circumstances.

The statutory exception to the requirement that a non-final order may be appealed only with permission is in abuse or neglect cases. In such cases, "an appeal from an intermediate or final order or decision in a case involving abuse or neglect may be taken as of right to the appellate division of the supreme court" (Family Court Act § 1112 [a]). Not only are such orders appealable as of right, but if the effect of an order is to discharge the child, the order shall be stayed if the Family Court or the Appellate Division finds that a stay is necessary to avoid imminent risk to the child's life or health.

A preference in accordance with CPLR 5521 is automatically afforded, without the

necessity of a motion, for appeals under article 3, parts 1 and 2 of article 6 and articles 7, 10, and 10-A of the Family Court Act; and §§ 358-a, 383-c, 384, and 384-b of the Social Services Law (see Family Court Act § 1112).

E. Obligation to Advise the Child of the Right to Appeal

Upon the filing of orders issued pursuant to articles three, seven, ten and ten-A, and parts one and two of article 6 of the Family Court Act; and pursuant to §§ 358-a, 383-c, 384 and 384-b of the Social Services Law, the attorney for the child must promptly advise the child – and in JD and PINS proceedings - the parent or other person responsible (unless the parent or person responsible was the petitioner in the PINS proceeding) in writing of the right to appeal to the appropriate Appellate Division of the Supreme Court, the time limitations involved, the manner of instituting an appeal and obtaining a transcript, the possible reasons upon which an appeal may be based, and the nature and possible consequences of the appellate process. It is also the duty of the attorney for the child to ascertain whether the child wishes to appeal and, if so, to serve and file the necessary notice of appeal (see Family Court Act § 1121 [1], [2], [3]; § 354.2; § 760).

Before an appeal is considered, the attorney for the child must explain to the child and his parents (unless the parents are parties) in language the child can understand, the disposition and its consequences, including the right to and possibility of post-trial motions or requests for new hearings, the consequences of possible violations of the dispositional order, and the continuing jurisdiction of the court. As stated above, the child and the child's parents (unless the parents are parties) must be advised of the right to appeal. The possibility of appeal should be explored fully, including possible grounds. Where the child wants to appeal, after the attorney for the child files the notice of appeal, the attorney for the child, among other things, should order the transcripts, obtain interim relief if appropriate and, unless another attorney for the child has been appointed by the Appellate Division, assemble the record and perfect the appeal.

F. Statutory Obligations and Best Practices

1. If the child is the appellant, the attorney for the child must order the transcripts as soon as possible using a minute order form. Transcripts must be completed within thirty days from receipt of the request. The attorney for the child must be aware of time limits imposed on production of transcripts and take appropriate action when necessary (see Family Court Act § 1121 [7]).
2. An attorney for the child who is substituted on appeal must become fully familiar with all prior proceedings in the case, including any in camera proceedings. In such cases, travel to the Appellate Division in order to review the in camera transcript is ordinarily required. If the attorney for the child on the appeal was not the attorney for the child during the proceeding,

appellate counsel should meet with the child if possible, and should establish a relationship with the child and advise the child of the role of appellate counsel. Where the child is capable of a knowing, voluntary and considered judgment, the attorney for the child must follow the child's wishes regarding the child's position on the appeal, unless to do so would likely result in a substantial risk of imminent, serious harm to the child. Substituted appellate counsel should consult with the attorney who represented the child in the underlying proceeding to determine the position of the prior attorney for the child, why that position was taken, and to gain as much insight as possible into the case.

3. The attorney for the child should ensure that the appeal is heard in a timely fashion. If the child is an appellant, the attorney for the child should perfect the appeal as soon as possible, generally within 60 days of receipt of the transcripts (see Family Court Act § 1121 [7]). When the child is not the appellant, and the appellant fails to comply with the statutory time requirements for perfecting the appeal, the attorney for the child should consider a motion to dismiss. The attorney for the child should cooperate with counsel for the appellant in certifying or stipulating to the record on appeal, making certain that all necessary materials are included. The attorney for the child should respond in a timely and appropriate fashion to all motions served by either party, e.g., motion for an extension of time.
4. The attorney for the child must prepare and file a brief on behalf of the child in a timely fashion. Letters in lieu of brief are not authorized by Appellate Division rules and should not be used. "Adopting" parts of another's brief is rarely justified, and "joining" another party's brief would appear to be inconsistent with the absolute independence representation of the child requires.
5. Particularly where the child is the appellant, the attorney for the child should be mindful of the court's calendar and the duration of the order appealed from, and must not allow an appeal to be mooted by the passage of time.
6. If an appeal will not be perfected – in cases, for example, where the child does not want to pursue the appeal or where the appeal has been rendered moot by a subsequent order - the attorney for the child must file the child's signed consent to withdraw the appeal or move to be relieved and to have the appeal dismissed as moot or abandoned. Please note that Appellate Division rules require attorneys to notify the Court immediately when there is a settlement of any appeal or proceeding or issue therein or if any appeal, proceeding or issue therein has been rendered moot (see 22 NYCRR 1000.18 [c]).
7. In general, the attorney for the child is expected to attend oral argument. If the attorney for the child does not attend oral argument, for example if the

appellant's attorney has submitted and the attorney for the child believes attendance is unnecessary under the circumstances, the attorney for the child will be expected to attach an explanatory affirmation to the voucher.

8. Where the child is of sufficient maturity, the attorney for the child must inform the child of the outcome of the appeal. The attorney for the child should carefully explain the practical effect of the decision on the child.
9. The attorney for the child must prepare an appropriate response to any motion for reargument or where another party requests post-appeal relief. The attorney for the child must file, where appropriate, an application for leave to appeal to the Court of Appeals.
10. The attorney for the child must be aware of and comply with the "special procedures" found in § 1121 of the Family Court Act and with the rules governing appeals of the Fourth Department and the Court of Appeals.

ADVISING THE CLIENT IN WRITING

Under section 1121 (2) of the Family Court Act and the Appellate Division rules, counsel including attorneys for children (AFC) in most Family Court proceedings must promptly advise the client **in writing** of his or her right to appeal from an adverse order. The writing must state the applicable time limitations and the manner of instituting an appeal and obtaining transcripts. In addition, counsel is required to explain the possible reasons upon which an appeal may be based and the nature and possible consequences of the appellate process. These statutory duties apply to proceedings that include JD, PINS, child abuse and neglect, permanent termination of parental rights, adoption, surrenders, and permanency hearings (Family Ct Act §1121 [2]; 22 NYCRR 1022.11a; see *also*, Family Ct Act §§ 354.2; 760 [same duties imposed and also imposing upon the AFC the duty to advise the parent or other person responsible for the child's care, if the parent or other person is not the petitioner]).

While the AFC should exercise extreme caution to comply with the statute, particularly in JD/PINS cases, it seems clear that **the statute and rules do not address the many cases where the child cannot read or is not capable of understanding an explanation**. Moreover, it is often not clear whether the child is "aggrieved" by a particular result. If the AFC believes that the child got what he or she wanted, there would seem to be no reason to discuss the possibility of appeal. Perhaps the best practice in such cases is caution: if the child is remotely capable of understanding, the AFC should explain the result and attempt to ascertain whether the child is happy with it. The attorney file should document the conversation and reflect that the AFC considered the issue of appeal and acted appropriately under the circumstances. Of course, where possible, particularly in JD/PINS cases, notice should be in writing.



Mark T. v. Joyanna U.
64 A.D.3d 1092, 882 N.Y.S.2d 773
NY, 2009.

64 A.D.3d 1092882 N.Y.S.2d 773, 2009 WL
2252543, 2009 N.Y. Slip Op. 06053

In the Matter of Mark T., Appellant
v
Joyanna U. et al., Respondents. (And Another Re-
lated Proceeding.)
Supreme Court, Appellate Division, Third Depart-
ment, New York

July 30, 2009

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

HEADNOTE

Guardian and Ward
Law Guardian

In paternity proceeding, 11 1/2 -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 11 1/2 -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

64 A.D.3d 1092

(Cite as: 64 A.D.3d 1092, 882 N.Y.S.2d 773)

ity 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 Stand-

ards 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 T.T.*, 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 11 1/2 years of age at the time of the argument of the appeal-suffered from any infirmity

64 A.D.3d 1092

(Cite as: 64 A.D.3d 1092, 882 N.Y.S.2d 773)

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 T.*, 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.

Copr. (c) 2010, Secretary of State, State of New York NY, 2009.

Matter of Mark T. v Joyanna U.

64 A.D.3d 1092

END OF DOCUMENT

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of a Proceeding under Article 6 of the
Family Court Act

Family Court Docket V-XXX-XX

Joyce A. S,

Petitioner,

AFFIRMATION IN SUPPORT
OF ORDER TO SHOW CAUSE

Vs.

Amber M,

Shane L.,

Monroe County Department of Human Services,
Respondents.

TANYA J. CONLEY, ESQ, being an attorney duly licensed to practice law in the State of New York, affirms under penalty of perjury that the following, upon information and belief is true:

1. I am Appellate counsel at The Legal Aid Society, Attorney for the Child Program, and as such, I represent the subject child, Sierra R, on this Stay Application and pending appeal. I am familiar with the papers and proceedings filed in this instant application.
2. This affirmation is submitted in support of the Application to Stay the Monroe County Family Court Order signed and entered on April X, 20XX and is seeking the following relief:
 - A.) Staying the Order of the Monroe County Family Court entered on April X, 20XX, pending a determination of appeal, by which Monroe County Family Court Judge Joan S. Kohout directed the child to be removed from her placement with her natural mother, and to have the child's paternal grandmother assume sole custody of the child; and
 - B.) Granting parole of the subject child to her mother, Amber M, on the condition that Amber M continue to reside with Margaret M; or

- C.) Granting parole of the subject child to her mother, Amber M, on the condition that Amber M and her child reside together in an alternate foster care placement where Amber M can be a boarder in the foster home in which her child, Sierra R resides

PROCEDURAL HISTORY

3. Sierra R was born February X, 20XX. Sierra's father, Shane R, signed a voluntary placement instrument, placing Sierra in foster care. Sierra's mother, Amber M did not sign the voluntary instrument. Rather, the Monroe County Department of Human Services, by Cynthia Lewis, and witnessed by Agnes Messing caseworker, signed the instrument and indicated that "DHS has guardianship of Amber and consents for her." (See Exhibit A attached hereto and made a part hereof) The first permanency hearing was held April XX, 20XX. The next permanency hearings were held September XX, 20XX, March XX, 20XX, October XX, 20XX and April X, 20XX. Monroe County Family Court took judicial notice of the attached orders. (See orders from Permanency Planning Hearings, Exhibit B attached hereto and made a part hereof)
4. At the first appearance on the original Petition for Approval of an Instrument, Judge Kohout expressed concern about the Department of Human Services' ability to consent on behalf of Amber M because the Guardianship pertained to her "affairs" and not her "child." (See Decision and Order, Exhibit C, attached hereto and made a part hereof) The Family Court scheduled a hearing for July XX, 20XX. At the hearing, the testimony showed that the child could be placed in a foster home with her mother, until a supervised independent living program became available for Ms. M. Testimony at the hearing showed that Amber M had been on a list to get into a DDSO group home, but the

list was extremely long. Amber M had been on the list for one year as of July 20XX and there was still an additional four year anticipated wait list. At each subsequent permanency hearing, Family Court inquired if the Department of Human Services intended to file a termination of parental rights petition and at each hearing, the Department denied such intent. Rather, the plan for the child was consistently to remain with her mother in the foster home of Margaret M until a supervised independent living program for Amber M became available. Margaret M also indicated at each hearing that she was prepared to continue to support Amber M in her parenting of Sierra R.

5. On September 11, 20XX, Sierra's paternal grandmother, Joyce S, filed a custody petition and on November 5, 20XX, Ms. S filed an amended petition seeking custody, or in the alternative, visitation with Sierra. Ms. M opposed removal of Sierra from their shared residence. A hearing was held on Ms. S's petition over several days in February and March of 20XX. On April 6, 20XX, Monroe County Family Court awarded custody of the child to the Petitioner paternal grandmother and terminated the Order of Placement under the Voluntary Instrument. On April 7, 20XX, Ms. M filed an Order to Show Cause in the Appellate Division, seeking a Stay pending the appeal process.

6. Family Court Act §1114 states in relevant part, "The party applying for the stay shall state in the application the errors of fact or law allegedly committed by the family court."

7. An Appellant not eligible for an automatic stay may apply for a discretionary stay pursuant to Civil Practice Law and Rules §5519(c). The facts the Court should consider in determining a stay motion include the apparent merit of the

appeal, the harm that might result to the appellant if the stay is denied, and the potential prejudice to the respondent if the stay is granted. *City of New York v. Public Service Comm.* 12 N.Y. 2d 786 (1962).

8. Appellant, Amber M, is seeking a stay, and as attorney for Sierra, your deponent is supportive of a stay because the child's placement with her mother should not have been disturbed, particularly to place the child with a relative who is not physically or financially able to provide for the child's needs. Placing the child with her paternal grandmother deprives Sierra of her constitutionally protected rights to be raised by her parent, and places her in a relative's home, where she will not have a physically capable caretaker, nor a financially stable caretaker. Placing Sierra in a home where the caretaker has no suitable income, no ability to purchase the necessary items for Sierra, and severe physical limitations places Sierra's physical and emotional well being in peril.

9. It is respectfully submitted that Appellant has a strong likelihood of success on the merits of this appeal. It is well settled that in order for a grandparent or other non-parent to assume custody of a child over the parent's objections, the petitioning party must prove by a preponderance of evidence of "surrender, abandonment, persisting neglect, unfitness or other extraordinary circumstances." (*Bennett v. Jeffreys I*, 40 NY2d 543, 544 (1976)). As Appellant outlined in her moving papers, there was not sufficient evidence to support a finding that extraordinary circumstances existed such that Sierra should be deprived of her superior rights to be raised by her parent, Amber M. There has never been a finding of neglect or permanent neglect against either parent. Neither parent abandoned the child. Ms. M has not voluntarily relinquished custody of her child. Although the Department of Human Services had temporary care and custody of Sierra

under the Voluntary Instrument, the testimony at the trial conclusively established that Amber M was the primary caretaker of the child on a daily basis even though she was supervised by Sierra's foster mother. Although Ms. M is mentally retarded, that disability is not sufficient to establish extraordinary circumstances. *Miller v. Michalski*, 11 AD3d 1029 (4th Dept. 2004).

10. The child will be irreparably harmed if she is moved from her current foster home, away from her mother and her foster family, the only home she has ever known, to reside with her grandmother. Ms. S is unable to physically care for this active two year old toddler. Ms. S utilizes a walker to ambulate. She is unable to sit, stand or walk for long periods of time. She is currently taking prescribed medicine for back pain. She is unable to lift over ten to twenty pounds. By her own testimony, Ms. S would be unable to lift Sierra in and out of her port-a-crib. Ms. S would be physically unable to chase the child if the child were running into danger. Testimony at trial proved that Sierra is an extremely active toddler; climbing all over the foster mother's baby proofed home and often is able to climb over baby gates, or take baby gates down. Ms. S is not current with her monthly rent and is currently residing in a one bedroom apartment. Her elderly father also resides in the one bedroom apartment and sleeps in a chair because there are not other appropriate sleeping accommodations. Ms. S has no source of income other than food stamps, she is behind in her rent and testified she would be unable to purchase clothing or toys for the child. The child is currently enjoying stability in the foster home with her mother. Removing her and placing her in a situation where she would be suffering from grinding poverty, while at the same time not have a custodian able to physically corral her, would place her safety and well being in peril.

11. Ms. S would not be prejudiced by a stay pending appeal. Ironically, the longer the child stays in foster care, the stronger her case becomes. Further, she is currently visiting with Sierra on a weekly basis and those visits could continue, preserving the relationship between the child and her grandmother.

12. The Attorney for the Child intends to promptly comply with appeal deadlines.

13. No previous application has been made for the relief sought herein.

WHEREFORE, it is respectfully requested that an order be granted

- 1.) staying enforcement of the judgment and order appealed from pending the determination of this motion, and pending the determination of this appeal; and
- 2.) Granting parole of the subject child to her mother, Amber M, on the condition that Amber M continue to reside with Margaret M; or
- 3.) Granting parole of the subject child to her mother, Amber M, on the condition that Amber M and her child reside together in an alternate foster care placement where Amber M can be a boarder in the foster home in which her child, Sierra R resides

Dated: April X, 20XX

Tanya J. Conley, Esq.
Attorney for Sierra RD
Legal Aid Society
1 West Main Street, Suite 800

NEW YORK RULES OF PROFESSIONAL CONDUCT
22 NYCRR Part 1200

Selected Rules

RULE 1.6:
Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

- (1) the client gives informed consent, as defined in Rule 1.0(j);
- (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
- (3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney–client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime;
- (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct or;

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

RULE 1.7:

Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

**RULE 1.9:
Duties to Former Clients**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

**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. 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.

RULE 3.7:
Lawyer as Witness

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

- (1) the testimony relates solely to an uncontested issue;
- (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
- (3) disqualification of the lawyer would work substantial hardship on the client;
- (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
- (5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

- (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
- (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

RULE 4.2:
Communication with Person Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

RULE 4.3:
Communicating with Unrepresented Persons

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.