



The New York State Office of Court Administration

Attorney for the Child Contracts

and



**In collaboration with
The Appellate Division, Fourth Department
present**

ATTORNEY FOR THE CHILD LEGAL UPDATE

2011

This program is supported by Federal Court Improvement Grant funding from the U.S. Department of Health and Human Services.

AGENDA
THE OFFICE OF COURT ADMINISTRATION
ATTORNEY FOR THE CHILD CONTRACTS
& CHILD WELFARE COURT IMPROVEMENT PROJECT
IN COLLABORATION WITH
THE APPELLATE DIVISION, FOURTH DEPARTMENT
Present
ATTORNEY FOR THE CHILD UPDATE

JUNE 7TH & 8TH, 2011
EMBASSY SUITES
SYRACUSE, NEW YORK

DAY ONE (CHILD WELFARE)

10:00 A.M. – 10:50 A.M.	REGISTRATION AND BREAKFAST
10:50 A.M. – 11:00 A.M.	WELCOME <i>Rachel Hahn, Esq.</i> Coordinator, OCA Attorney for the Child Contracts
11:00 A.M. – 12:00 noon	AGING OUT OF FOSTER CARE <i>Erika Leveillee, MA</i> Youth in Progress Coordinator Adolescent Services Resource Network University of Albany
12:00 noon – 1:00 P.M.	EDUCATION LAW <i>Judith Gerber, Esq.</i> Staff Attorney Legal Aid Bureau of Buffalo, Inc.
1:00 P.M. – 2:00 P.M.	LUNCH
2:00 P.M. – 3:40 P.M.	DISPROPORTIONATE MINORITY REPRESENTATION <i>Khatib Waheed, MEd</i> Senior Fellow, Center for the Study of Social Policy <i>Toni Lang, PhD</i> Deputy Director Permanent Judicial Commission on Justice for Children
3:40 P.M. – 3:50 P.M.	BREAK
3:50 P.M. – 5:05 P.M.	RECENT DEVELOPMENTS IN CHILD WELFARE <i>Margaret Burt, Esq.</i> Attorney in private practice, specializing in child welfare
5:30 P.M. – 7:15 P.M.	RECEPTION
7:15 P.M. – 9:00 P.M.	DINNER

DAY TWO

8:00 A.M. – 9:00 A.M.	BREAKFAST
9:00 A.M. – 10:00 A.M.	THE DISPOSITION PHASE OF DELINQUENCY CASES <i>Stephen Weisbeck, Esq.</i> Director, Juvenile Justice Division Legal Aid Society of Rochester
10:00 A.M. – 11:00 A.M.	TRAFFICKING & PROSTITUTION <i>Elizabeth Fildes</i> Erie County Sheriff, Deputy
11:00 A.M. – 11:15 A.M.	BREAK
11:15 A.M. – 12:45 P.M.	ETHICS AND CONFLICT ISSUES <i>Gary Solomon, Esq.</i> Director of Legal Support The Legal Aid Society (NYC), Juvenile Rights Practice
12:45 P.M.	BOX LUNCH

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 nine (9) credit hours, of which three and one-half (3.5) hours can be applied toward the skills requirement, three (3) hours can be applied to the professionalism and ethics requirement, and two and a one-half (2.5) hours can be applied toward professional practice (family law) requirement. This program is suitable for experienced and newly admitted attorneys.

Destination:

Embassy Suites Hotel
6646 Old Collamer Road
East Syracuse, New York 13057
Tel: 1-315-446-3200

Driving Directions: (From the Embassy Suites Hotel Website)

From 81 North or South take I-90 East. From NYS Thruway (I-90), take Exit 35 to Carrier Circle, follow traffic circle to RT 298 East. Take first left off of 298 East onto Old Collamer Road South and continue through stop sign. Hotel is on the right at the end of the street. From Airport take 81 South and follow above directions.

Recent Developments in Child Welfare

Margaret Burt, Esq.

Tuesday, June 7, 2011

Margaret A. Burt

Margaret A. Burt is an attorney in private practice in Rochester, New York. For thirty one years she has specialized in the representation of children, adults and child welfare agencies in trial court and appellate practice. A substantial amount of her practice involves consulting and training for lawyers, judges, caseworkers and service providers all around the country in the areas of child abuse and neglect, permanency for foster children, the termination of parental rights, adoptions and trial techniques. She provides national and local training on such issues as the Adoption and Safe Families Act, the Indian Child Welfare Act, the Multi-Ethnic Placement Act, confidentiality, the representation of children and trial techniques. She also consults on legislation connected to child welfare issues.

“Loaded V’s and Loaded Guardianships”

Optional Language to Consider for Article 6 /V Docket Custody Orders And Guardianship Orders that Resolve Art. 10’s

- 1. Custodian/Guardian Grandmother Sue Smith shall not return the child Mary Jones to either of her parents on a permanent temporary basis without a return to court and a court order. ACS /DSS and AFC will be noticed of any subsequent petitions/motions to modify and/or alleging violations of this order. Said notice shall be by_____. ACS/DSS and ATC shall be entitled to participate as a full party in any said subsequent actions if they wish to do so.**
- 2. Upon the court’s written/oral decision of _____, the court found that extraordinary circumstances exist at this time and that further it is in the child’s best interests to be placed in the custody of/ guardianship Grandmother Sue Smith.**

All parties do hereby agree and consent that there are extraordinary circumstances that exist at this time and that further it is in the best interests of the child to be placed in the custody of /guardianship of Grandmother Sue Smith. The parties waive any further argument that extraordinary circumstances exist.

- 3. Parent Joe Jones shall have no visitation or contact with child Mary Jones directly or indirectly unless further ordered by this or another court with appropriate jurisdiction. Parent Joe Jones shall stay away from the child’s home and school**

Parent Joe Jones shall have only supervised contact with the child Mary Jones. Custodian/Guardian Grandmother Sue Smith shall supervise any and all contact.

Parent Joe Jones shall have visitation with the child Mary Jones on each and every Wednesday night from 5pm until 8pm and on every other Saturday from 10AM to 7PM. Parent Joe Jones is responsible for all transportation for such visitation. Parent Joe Jones shall also have reasonable rights to telephone the child. The parties may alter said visitation upon mutual agreement.

- 4. Parent Denise Smith shall not be under the influence of any alcohol or drugs when she visits the child Mary Jones nor shall she use any such substances in the presence of the child. Custodian/Guardian Grandmother Sue Smith may refuse or terminate any visitation where Denise Smith is under the influence of any such substances.**

Parents Joe Jones and Denise Smith shall not harass, threaten or intimidate the child or the custodian and shall refrain from committing any unreasonable risk to the health and safety of the child.

Parents Joe Jones and Denise Smith shall not speak inappropriately about Custodian/Guardian Grandmother Sue Smith in the child's presence or such that the child can hear and shall not encourage the child to disobey or run away.

- 5. Parent Sue Smith shall apply for Preventive Services with _____ and, if eligible for services, shall attend such services until service providers indicate that attendance is no longer necessary.**
- 6. Parent Joe Jones shall seek and attend appropriate services to improve his parenting skills/ for his substance abuse/ mental health problem.**
- 7. Custodian/Guardian Grandmother Sue Smith shall solely have the right to make any and all decisions about the child's educational/health needs and programs and the child shall attend school in Custodian/Guardian Grandmother Sue Smith's district. Only Custodian/Guardian Sue Smith shall sign any needed releases for educational/health purposes and records.**
- 8. Should Custodian/Guardian Grandmother Sue Smith become incapacitated or die prior to the child's 18th birthday, custody of the child shall not revert per se to parents Joe Jones and/or Sue Smith and the issue shall be brought to a court of appropriate jurisdiction.**
- 9. The attorney for the child, _____ shall be entitled at any time to bring any appropriate action for modification or alleging a violation of this order to the appropriate court.**
- 10. Custodian/Guardian Grandmother Sue Smith shall not move or relocate with the child more than 50 miles from her current address.**

Custodian/Guardian Grandmother shall keep the Parents advised at all times of her address and her phone number and shall advise the Parents of any health emergency or serious condition of the child.

Child Welfare Legal Update – Feb 2011

Margaret A. Burt, Esq.
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This is **good** news -
more options is almost always better

Don't worry - BE HAPPY

- More options for courts and agencies
to assist children and families!
- MORE OPTIONS + GOOD DECISIONS =
BETTER OUTCOMES FOR CHILDREN
AND FAMILIES

Subsidized Kinship Guardianship



Subsidized Kinship Guardianship – New SSL §458

Will allow RELATIVES to APPLY to local districts
for an ongoing subsidy outside of foster care or
adoption – then move the court to be
appointed as a guardian

Child must be **under 21** and placed in
foster care before 18

Must be foster care, not an Art. 6 or Art. 10
direct custody arrangement

Can be a foster care under an **Art. 10, a
voluntary under SSL or a PINs or a JD**

Foster parent of the child **must be related, by any degree**, to the child by blood, marriage or adoption and must be the child's **CERTIFIED or APPROVED** foster parent for over **6 months** before any application

- Art. 10 - the FF and 1st PH must be completed before any application
- all others, 1st PH must be completed

Must first APPLY to the local district

- LOCAL DISTRICT MUST APPROVE FIRST – Court **cannot order until after** local district's approval of the subsidy
- Local District controls the decision – not the court

- ❖ Return home or adoption not appropriate for child – there are “compelling reasons” why these are not in child’s interests
- ❖ Child has strong attachment to relative and relative has strong commitment to permanently care for child

- ❖ Child consulted - over 18 must consent
- ❖ Cannot consider the financial status of the relatives
- ❖ Criminal record check of all in home over 18 , SCR checks here, other states for last 5 years
- ❖ THAT THIS IS IN CHILD’S BEST INTERESTS

- Relative can now move the court for the guardianship status and if court grants it, child exits foster care and relative will continue to get a monthly subsidy for the child

- Relative will get up to \$2,000 to pay for one-time expenses of guardianship proceeding
- Relative becomes child's sole guardian – local district and court end involvement with child

- If the local district denies a relative's request for this option, can the relative do anything?
YES – they will have a limited fair hearing right with OCFS
- Could we do this for a freed child? Yes, combine with a Permanent Guardianship

- **Will these subsidized guardianships provide medical insurance?** YES – if IV- E then would cover, or if guardian cannot provide insurance, then district shall
- **Any other services?** YES – independent living services, education and training vouchers

- **How long would they get the money?** Until 18, except if child was 16 or older when granted , then to 21
- Money stops if guardian no longer has legal authority like guardianship was revoked or suspended or guardian no longer supporting the child

- FCA §1055-b - ability of a relative to file for guardianship
- FCA § 661 (C) – If goal under an Art. 10 is referral for legal guardianship, relative files in court that has been handling the case
- Motion can be consolidated with the dispo or the next PH

FCA §1055-b and FCA §1089-a will require Judge to consider child 's best interests including:

- ❖ Permanency goal of the child – that there is a compelling reason why return home and adoption are not appropriate for the child

- ❖ FF and 1st perm hearing are completed
- ❖ Will be a safe and permanent home
- ❖ Relationship between child and relative
- ❖ Must consult with the child, 14 or over must ask preference, over 18 must consent

- In dispo or perm hearing
- If in dispo, 1st perm hearing must be finished
- If parents do not consent – must find extraordinary circumstances
- If AFC does not consent, then best interests - DSS/ACS already consented re approval of subsidy

- **MUST** order that ACS/DSS and AFC be notified and parties to subsequent proceeding to modify
- Could you add other terms?
“Loaded Order” – Like Art. 6?
See handout for suggestions!

- FCA §1089(a) - Court **MAY NOT** order anything under the Art. 10
- No supervision or services for the guardian or the parents or respondents
- guardian may be eligible for preventive but court cannot order district to provide

THIS IS AN IMPORTANT CONSIDERATION!

- Guardian has right to physical custody of the child and the right to “make decisions, including issuing any necessary consents, regarding the child’s protection, education, care and control, health and medical needs”

- Parents still have parental rights
- Can seek visitation and can move to modify/cancel this guardianship in the future

How does it stack up against adoption?

- More money for adoptive parent
Unless child over 16, guardianship subsidy will stop at 18 and adoption goes to 21
Adoption means the tax REFUND of \$13, 170 per child!

- Perhaps more “coverage” if caretaker dies having adopted as subsidy can be preserved – maybe this will be clarified
- Depending on circumstances, “getting to” an adoption via a TPR may take a lot longer than a guardianship

- Parent still has rights with guardianship – for visitation, to petition to get child back
- Guardian gets “free” lawyer, almost always true for adoption as well

How does it stack up against Art. 6 custody?

- More money with guardianship - unless parents have some income and the custody comes with child support
- Parent still has parental rights under both - same re parent who wants to get custody back or modify visitation

- Court must have notice, party provisions in all guardianship orders – but could do in custody orders
- About the same as to what the caretaker “gets” – bit more clarity in the law about what the guardianship is - could be equalized if the Art. 6 order well written

- Caretaker gets a “free” lawyer to do guardianship – may have to pay for lawyer themselves or pro se with custody
- For both, court cannot “order” supervision or services but both may be eligible for preventive

- Feds must approve new law (for IV-E purposes)
- Effective date - **April 1, 2011? WE SHALL SEE**
- Emergency regs are out – forms coming

TPR and Incarcerated/Inpatient Parents



Chapter 113 Laws of 2010

- Provides new reason that district does not have to file a TPR at 15/22

AND

- Some changes to SSL §384- b Perm Neglect Definition

At the 15 month mark, the district can choose not to file a TPR if

- Incarceration/inpatient status significant factor why child in foster care AND
- parent has meaningful role in the child's life

- Proof of "meaningful role"
 - letters, phone calls, visits and communication with child, worked with agency and others, comply with the service plan, worked on relationship, in child's best interests to have parent remain in child's life

- Does not add new grounds or take away any old ground

TPR grounds of perm neglect have been modified :

- court is to consider any "particular constraints" and "special circumstances" that limited the family contact or availability of services

- Also , re exception to the requirement of diligent efforts proof in perm neglect TPRs, if exception when a parent has not advised an agency where they are living for a 6 months period, court MAY consider “particular delays or barriers” that parents had in letting agencies know where the parent is located

- Haven’t courts always done that? May take case law to discern if significant change
- Fourth Department has ruled that the changes in the definition are not retroactive for TPRs completed before June 2010
Matter of Yasiel P. dec’d 12/20/10 (4th Dept.)

- Court can direct agency to “undertake steps to aid in completing” assessment re the use of the exception
- Court’s position on reasonable efforts, TPR grounds at PH
- Important to clarify visitation, services for incarcerated and in patient parents

- SSL § 409-e consultation on service plan reviews can be done by video/teleconferencing
- Service plan must reflect special circumstances and needs if parent incarcerated or an inpatient for substance abuse

Restoration of Parental Rights



Restoration of Parental Rights

- Allows Family Court to reinstate the parental rights of a parent after a TPR and return the child to the custody and guardianship of a birth parent or parents
- FCA § 635- 637

- TPR over **2 years earlier** and on abandonment, mental illness, mental retardation or permanent neglect
- Child **14 or older**, still in foster care, does not have a goal of adoption

- **Clear and convincing proof** that restoration and return to parent's custody is in the child's best interests—presented by the person petitioning for the restoration

- Child, parent, AFC and court would have to agree (not clear if both parents would have to agree)
- AFC or agency with custody or respondent parents could file the petition to restore and everyone else must be served as well as the respondents' prior attorneys

- Court can do it over the district's objection where person filing motion proves clearly and convincingly that the district is withholding its consent without "good cause" (no further definition)

- Case with PH court or TPR Judge, same attys
- The original findings of fact remain
- Could apply to cases where TPR occurred more than 2 years ago as of 11/11/10
- In PHs on freed child, court could "recommend" that a petition be considered

- option of "provisionally" granting restoration for 6 months and mandating agency supervision, reports
- While provisional, custody options

- Unclear what other parent's role would be
- Notice?
- Child Support?
- Visitation?

Trial discharges of youth and voluntary return to care



- ❖ Family Court can order ongoing, repeated "trial discharges" over 18 until 21 with consent
- ❖ Youth between 18 and 21 who within last 24 months were discharged at their own request, can move to return to foster care – ACS/DSS must notify youth of this if they leave
- ❖ NEW FCA § 1091

- Youth needs assistance and supervision but not willing to physically stay in foster care
- Can do “trial discharge” – DSS/ACS still has care and custody but child not in a foster care

Door open for youth to return to foster setting without any “replacement” process

- Trial discharge may maintain IV-E status
- Some courts have been doing these for awhile and have found them quite helpful
- Will not work if youth will not consent, can’t be forced

- Youth left care age 18 - would not consent to remain or to trial discharge
- Youth not 21, out of care for less than 24 months
- Youth or DSS/ACS makes motion or brings OTSC
- Can have help of former AFC

- Court finds compelling reason that youth has no reasonable alternative to foster care, youth consents to go to educational or vocational program and return is in child's best interests

- Both youth and local district consent to youth's return **EXCEPT court can do over local district objection if finds district is "unreasonable" in refusal to consent, must make a finding in writing – unreasonable defined as court making the findings required to make youth eligible**

- **Court can order the return to care to be immediate if compelling reason why that is in youth's best interests**
- Court must set up and do PHs again
- NOTE – not sure if IV-E eligible MAKE IV-E ORDERS in case!

- If voluntarily returned once, youth can make a second motion to return a second time but not again
- second time, make all the same findings again and must consider the youth's compliance with previous order including the participation in an educational or vocational program

- Many courts have been doing ongoing trial discharges now but now clearly permitted
- Return to care provision seemingly apply to youth who had previously refused to remain in care if otherwise qualify
- Disagreement if applies to JD and PINS!
