

## **CONSIDERATIONS FOR ATTORNEYS FOR THE CHILD ON APPEALS**

- **Appointment continues on appeal** – By statute, the attorney for the child’s representation of the child 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.
- **Substitution** – Request substitution if you do not have adequate experience with appeals or you do not have adequate time to devote to the appeal or for any other reason that would impede the zealous and thorough representation of the child on appeal. You are subject to discipline if you 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.
- **Ethical Responsibilities** – 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 client is a younger child who may lack the maturity or competence to make a decision regarding an appeal, the child’s attorney has the additional responsibility to determine and implement decisions on behalf of the child.
- **The Right to Appeal**
  1. “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. Although the Appellate Division generally may be reluctant to grant such permission, appeals from a non-final order are not precluded. To obtain the necessary permission the attorney for the child must file a motion or an order to show cause and the attorney for the child should also be prepared to show compelling circumstances.
  2. 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 cases 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.

- **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; parts one and two of article 6; and pursuant to sections 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 the case of 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 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 FCA § 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. 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. As stated above, the attorney for the child must file a notice of appeal and, where appropriate, request substitution of counsel, unless the child explicitly and intelligently waives the right to appeal. Where the child wants to appeal, it is the statutory duty of the attorney for the child to file a notice of appeal, obtain interim relief and, unless another attorney for the child has been appointed by the appellate court, assemble the record and perfect the appeal.

- **Preference in the scheduling and hearing of certain appeals** – 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 sections 358-a, 383-c, 384, and 384-b of the Social Services Law (see Family Court Act § 1112).
- **Some Practice Guidelines**
  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 mindful of time limits imposed on production of transcripts and take appropriate action when necessary (see FCA § 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 determine and follow the child's wishes regarding the child's position on the appeal, unless to do so would likely result in substantial, imminent 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 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 FCA § 1121 [7]). When the appellant fails to comply with the statutory time requirements for perfecting the appeal, a motion to dismiss should be considered. Appellate counsel 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 has failed to communicate with the

attorney for the child despite the attorney's repeated attempts thus constituting abandonment of 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 you do not attend oral argument, for example if the appellant's attorney has submitted and you believe attendance is unnecessary under the circumstances of the appeal, you will be expected to attach an explanatory affirmation to your voucher.
8. The attorney for the child should inform the child of the outcome of the appeal. Care should be taken to explain the practical effect of the decision on the child.
9. The attorney for the child should prepare an appropriate response to any motion for reargument or where another party requests 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 of the Fourth Department and the Court of Appeals.