

Children's Notification of, and Right to Participate in, Permanency Hearings:
Summary of Chapter Amendment [Laws of 2016, ch. 14;A 9718/ S 6389-a]
Signed Mar. 21, 2016; §1: eff. Dec. 22, 2015; §2: eff. June 19, 2016

Janet R. Fink, Deputy Counsel
New York Unified Court System
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E-mail: Jfink@nycourts.gov

The first section of the bill, which will take effect retroactively as of December 22, 2015, substitutes a new paragraph (1-a) of Family Court Act § 1089(b) to replace Chapter 573 of the Laws of 2015, which had been proposed by the New York State Bar Association Children and the Law Committee. It requires local departments of social services to serve notices upon children ten years of age or older regarding their permanency hearings at least fourteen days in advance by regular mail. The requirement remains in Family Court Act §1089(b)(1)(ii) that notice must also be sent to the attorney for the child. Nothing precludes the attorney for the child from consulting with his or her client prior to the service of the notice.

The remainder of the bill, which adds a new section 1090-a to the Family Court Act, takes effect June 19, 2016 (90 days after Governor's Mar. 21, 2016 signature). It provides as follows:

- It reiterates the requirement in Family Court Act §1089 that permanency hearings include an "age-appropriate consultation with the child." [Note: The budget bill enacted in 2015 to implement the Federal *Preventing Sex Trafficking and Strengthening Families Act*, Laws of 2015, ch. 56, Part L, requires that where a child 16 years of age or older has an Alternative Planned Permanent Living Arrangement (APPLA) goal, the Family Court must not simply consult, but must ask the juvenile directly "about the desired permanency outcome" at the permanency hearing.]

- Apart from limited exceptions, the measure restates the precept of Chapter 573 of the Laws of 2015, that is, that children ten years of age and older have a right to participate in their permanency hearings, a right that the child may waive only after consultation with his or her attorney. Nothing precludes children younger than ten from participating in their permanency hearings and no motion is necessary to authorize such participation. In such cases, discretion resides with the Court as to the "manner and extent to which any particular child under the age of ten may participate in his or her permanency hearing based on the best interests of the child." Further, while the section addresses participation, as well as applicable limitations, for children between the ages of ten and fourteen, nothing precludes participation by children over the age of fourteen, including their determination of the nature and extent of such participation, without limitations or exceptions.

- No child may be compelled to participate in a permanency hearing. Nor may the child be compelled to attend in person as the child may choose to participate by telephone, audio-visual or other electronic means or by submission of a statement or letter to the Court. Attorneys for children must consult with child clients ten years of age and older regarding whether they would like to participate and, if so, the extent and manner of their participation and must notify the parties and Court at least ten days in advance of the hearing both as to whether their clients will participate and, if so, the manner of the participation. [This is especially important where special arrangements, e.g., for electronic participation, must be arranged.]

However, failure of the attorney for the child to notify the parties and Court in advance regarding the child's participation is NOT grounds to prevent a child from participating unless a finding to limit the participation has been made pursuant to Family Court Act §1090-a(b)(2), below.

- Family Court Act §1090-a(b)(2) provides that for children between ten and fourteen years of age, the Court, on its own motion, or local social services department may move to limit the child's participation or in-person participation in any portion of the permanency hearing upon a finding that the limitation would be in the "best interests" of the child. The Court must consider: "the child's assertion of his or her right to participate and may also consider factors including, but not limited to, the impact that contact with other persons who may attend the permanency hearing would have on the child, the nature of the content anticipated to be discussed at the permanency hearing, whether attending the hearing would cause emotional detriment to the child, and the child's age and maturity level." If the Court limits the child's participation, it must offer alternative methods of participation, including participation in specific portions of the permanency hearing (e.g., bifurcation of the hearing), or participation by telephone or other available electronic means or by submission by the child of a written statement or letter to the Court.

- The Court must grant an adjournment "whenever necessary to accommodate the right of a child to participate in his or her permanency hearing." However, the measure does not alter the time limits applicable to permanency hearings, that is, that they must be completed within thirty days of commencement. Where the hearing has been adjourned, the Court may nonetheless, either on its own motion or on the motion of any party or the child's attorney, make the federally required "reasonable efforts" and "best interests" findings, for example, if the adjournment would extend beyond the federal deadlines for these findings.

- Upon consent of the child's attorney, a permanency hearing may go forward where the attorney has not been able to have a "meaningful" consultation with the child where the Court finds that:

- (i) the child lacks the "mental capacity to consult meaningfully" and to understand the consequences of the hearing, as determined by "a health or mental health professional or educational professional" as part of a Committee on Special Education and documented in the court record or permanency report; OR

- (ii) the child's attorney made "diligent and repeated efforts to consult with the child and the child was either unresponsive, unreachable, or declined to consult with his or her attorney." [Caveat: failure by the foster parent to make the child available for consultation is not grounds to proceed without consultation by the attorney with his or her child client]; OR

- (iii) when consultation was attempted, the child was "absent without leave from foster care;" OR

- (iv) "demonstrative evidence that other good cause exists and cannot be alleviated in a timely manner."

EFFECTIVE: Section 1 of the bill effective Dec. 22, 2015; section 2 effective June 19, 2016 (90 days after Governor's Mar. 21, 2016 signature).

STATE OF NEW YORK

9178

IN ASSEMBLY

February 1, 2016

Introduced by M. of A. LUPARDO -- read once and referred to the Committee on Children and Families

AN ACT to amend the family court act, in relation to participation by children in permanency hearings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subparagraph (iii) of paragraph 1 of subdivision (b) of
2 section 1089 of the family court act, as added by a chapter of the laws
3 of 2015 amending the family court act relating to permanency hearings
4 for youth in foster care, as proposed in legislative bills numbers
5 S.5258-A and A.7679, is amended to read as follows:

6 (iii) [~~if the child is age ten or older, the notice of the permanency~~
7 ~~hearing shall also be provided to the child. The child has a right to be~~
8 ~~present at the hearing, except upon a waiver of that right after consul-~~
9 ~~tation with the attorney for the child. Upon an application by] the
10 attorney for the child[~~, the court shall grant an adjournment whenever~~
11 ~~necessary to protect the child's right to meaningfully participate in~~
12 ~~the hearing].~~~~

13 (1-a) If the child is age ten or older, no later than fourteen days
14 before the date certain for a permanency hearing scheduled pursuant to
15 this section, the local social services district shall serve the notice
16 of the permanency hearing by regular mail upon the child. Nothing herein
17 shall be deemed to prevent an attorney for the child from consulting
18 with the child about the child's participation in the permanency hearing
19 as required by section one thousand ninety-a of this article prior to
20 the service of the notice required pursuant to this paragraph.

21 § 2. The family court act is amended by adding a new section 1090-a to
22 read as follows:

23 § 1090-a. Participation of children in their permanency hearings.
24 (a)(1) As provided for in subdivision (d) of section one thousand eight-
25 y-nine of this article, the permanency hearing shall include an age
26 appropriate consultation with the child.

27 (2) Except as otherwise provided for in this section, children age ten
28 and over have the right to participate in their permanency hearings and

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

1 a child may only waive such right following consultation with his or her
2 attorney.

3 (3) Nothing in this section shall be deemed to limit the ability of a
4 child under the age of ten years old from participating in his or her
5 permanency hearing. Additionally, nothing herein shall be deemed to
6 require an attorney for the child to make a motion to allow for such
7 participation. The court shall have the discretion to determine the
8 manner and extent to which any particular child under the age of ten may
9 participate in his or her permanency hearing based on the best interests
10 of the child.

11 (b)(1) A child age fourteen and older shall be permitted to partic-
12 ipate in person in all or any portion of his or her permanency hearing
13 in which he or she chooses to participate.

14 (2) For children who are at least ten years of age and less than four-
15 teen years of age, the court may, on its own motion or upon the motion
16 of the local social services district, limit the child's participation
17 in any portion of a permanency hearing or limit the child's in person
18 participation in any portion of a permanency hearing upon a finding that
19 doing so would be in the best interests of the child. In making a deter-
20 mination pursuant to this paragraph the court shall consider the child's
21 assertion of his or her right to participate and may also consider
22 factors including, but not limited to, the impact that contact with
23 other persons who may attend the permanency hearing would have on the
24 child, the nature of the content anticipated to be discussed at the
25 permanency hearing, whether attending the hearing would cause emotional
26 detriment to the child, and the child's age and maturity level. If the
27 court determines that limiting a child's in person participation is in
28 his or her best interests, the court shall make alternative methods of
29 participation available, which may include bifurcating the permanency
30 hearing, participation by telephone or other available electronic means,
31 or the issuance of a written statement to the court.

32 (c) Except as otherwise provided for in this section, a child who has
33 chosen to participate in his or her permanency hearing shall choose the
34 manner in which he or she shall participate, which may include partic-
35 ipation in person, by telephone or available electronic means, or the
36 issuance of a written statement to the court.

37 (d)(1) For children who are age ten and over, the attorney for the
38 child shall consult with the child regarding whether the child would
39 like to assert his or her right to participate in the permanency hearing
40 and if so, the extent and manner in which he or she would like to
41 participate.

42 (2) The attorney for the child shall notify the attorneys for all
43 parties and the court at least ten days in advance of the scheduled
44 hearing whether or not the child is asserting his or her right to
45 participate, and if so, the manner in which the child has chosen to
46 participate.

47 (3) (i) The court shall grant an adjournment whenever necessary to
48 accommodate the right of a child to participate in his or her permanency
49 hearing in accordance with the provisions of this section.

50 (ii) Notwithstanding paragraph two of this subdivision, the failure of
51 an attorney for the child to notify the court of the request of a child
52 age ten or older to participate in his or her permanency hearing shall

53 not be grounds to prevent such child from participating in his or her
54 permanency hearing unless a finding to limit the child's participation
55 is made in accordance with paragraph two of subdivision (b) of this
56 section.

A. 9178

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1 (4) Notwithstanding any other provision of law to the contrary, upon
2 the consent of the attorney for the child, the court may proceed to
3 conduct a permanency hearing if the attorney for the child has not
4 conducted a meaningful consultation with the child regarding his or her
5 participation in the permanency hearing if the court finds that:
6 (i) The child lacks the mental capacity to consult meaningfully with
7 his or her attorney and cannot understand the nature and consequences of
8 the permanency hearing as a result of a significant cognitive limitation
9 as determined by a health or mental health professional or educational
10 professional as part of a committee on special education and such limi-
11 tation is documented in the court record or the permanency hearing
12 report;
13 (ii) The attorney for the child has made diligent and repeated efforts
14 to consult with the child and the child was either unresponsive,
15 unreachable, or declined to consult with his or her attorney; provided,
16 however that the failure of a foster parent or agency to cooperate in
17 making the child reachable or available shall not be grounds to proceed
18 without consulting with the child;
19 (iii) At the time consultation was attempted, the child was absent
20 without leave from foster care; or
21 (iv) Demonstrative evidence that other good cause exists and cannot be
22 alleviated in a timely manner.
23 (e) If an adjournment is granted pursuant to paragraph three of subdi-
24 vision (d) of this section, the court may, upon its own motion or upon
25 the motion of any party or the attorney for the child, make a finding
26 that reasonable efforts have been made to effectuate the child's
27 approved permanency plan as set forth in subparagraph (iii) of paragraph
28 two of subdivision (d) of section one thousand eighty-nine of this arti-
29 cle; such finding shall be made in a written order.
30 (f) Nothing in this section shall contravene the requirements
31 contained in subparagraph (ii) of paragraph one of subdivision (a) of
32 section one thousand eighty-nine of this article that the permanency
33 hearing be completed within thirty days of the scheduled date certain.
34 (g) Nothing in this section shall be construed to compel a child who
35 does not wish to participate in his or her permanency hearing to do so.

36 § 3. This act shall take effect on the same date and in the same
37 manner as a chapter of the laws of 2015 amending the family court act
38 relating to permanency hearings for youth in foster care, as proposed in
39 legislative bills numbers S.5258-A and A.7679, takes effect; provided
40 however that section two of this act shall take effect on the ninetieth
41 day after it shall have become a law.

**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)**

BILL NUMBER: A9178

SPONSOR: Lupardo

TITLE OF BILL:

An act to amend the family court act, in relation to participation by children in permanency hearings

PURPOSE OR GENERAL IDEA OF BILL:

The purpose of this bill is to require actual notice of and establish a statutory right for the child to attend a permanency hearing regarding the plan for a youth in foster case.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1 of the bill amends Family Court Act § 1089(b(1) to add a new paragraph (iii) to provide that if the youth is age ten or older, he or she shall receive notice of the permanency hearing at least fourteen days in advance.

Section 2 of the bill adds a new section 1090-a to the Family Court Act to set forth the terms of participation for children over the age of 10 and less than 14 in order to:

- *Provide such children with the right to participate and require that such right may only be waived after a consultation with the child's attorney;
- *Allow the court to limit such participation after a best interest finding and take into consideration certain factors including the child's right to participate, and make alternative methods of participation available;
- *Require the attorney for the child to provide 10 days advanced notice of the child's participation to the attorneys for all parties;
- *Require and set forth the terms for an adjournment if necessary to allow the child to participate;
- *Set forth narrow exceptions to when a permanency hearing may be held without prior meaningful consultation between the attorney for the child and the child, including if the child lacks mental capacity; and,
- *Clarify that such provisions shall not impact the rights of children under the age of 10 or ages 14 and older to participate in permanency hearings.

Section 3 of the bill sets an immediate effective date.

JUSTIFICATION:

This bill amends Chapter 573 of the Laws of 2015 to further clarify and improve on the rights of children to participate in permanency hearings.

Children in foster care often feel disconnected - by adult decisions that have not been fully explained at all to them. Involving children in their critical life decisions helps build self-efficacy skills. Self-efficacy - a person's own belief in his/her capabilities to organize and execute the courses of action required to produce a given goal - provides the building blocks for motivation, well-being and personal accomplishments throughout one's life course. Giving children in foster care the opportunity to share their feelings, ideas, needs and desires will help them gain a sense of control over their lives, practice the art of advocating for their well-being and develop the decision making and negotiating skills needed to be self-reliant. Child involvement also enhances the perception held by adults of children's competence, heightens adults' commitment and energy, makes adults feel more effective and confident and makes adults more aware of the needs and concerns of children. Seeing the children involved in the complex cases before the court reminds all participants of the importance of their work.

The Child and Family Services Improvement Act of 2006 (P.L. 109-288), requires courts conducting permanency hearings to review the foster care status of a child and consult with each child in an age appropriate manner regarding his or her permanency plan. In New York, this language was inserted into FCA § 1089(d). Chapter 327 of the Laws of 2007 requires Family Court judges to consult with children in an age appropriate manner at all permanency hearings. Recent federal law, the Preventing Sex Trafficking and Strengthening Families Act (P.L.113-183), has strengthened this requirement requiring the court to ask the child regarding the permanency outcome designated for him or her.

Since 2007, many states have amended statute and court rule to give children in foster care actual notice of their permanency hearings and the right to be present. As of March 2013, 28 states and the District of Columbia give the child actual notice of the permanency hearings and 34 states give children the right to be present during permanency hearings. New York does not.

In New York when a child is in foster care, the local social services district must prepare and finalize the family services plan in consultation with the parents and with the child, if the child is ten years of age or older. Social Services law requires the consultation to be done in person, unless impracticable or harmful to the child. This provision has been in effect since 1979. The only amendment has been to add the ability to use technology if an in person meeting is impracticable. Just recently, OCFS adopted a Bill of Rights for Children and Youth in Foster Care which was developed in conjunction with youth in foster care. It affirms the right of a child in foster care "to have a voice in determining my permanency goal, including, developing on my age or ability, to participate in Service Plan Review meetings and Permanency Hearings, to give input into the development and review of my services plan."

The National Council of Juvenile and Family Court Judges, in 2012, adopted a policy that "children of all ages should be present in court and attend each hearing, mediation, pretrial conference, and settlement conference unless the judge decides it is not safe or appropriate."

Allowing children and youth to participate in their permanency hearings allows them to feel more informed about their lives and to gain an understanding of the process by which they have been removed from the home and remain in foster care. Indeed, youth have a more positive feeling about the fairness of their legal proceedings, which can be a protective factor against criminal justice system involvement. Children and youth gain an understanding of the decisions being made about their lives, understanding of what is expected to occur, a sense of control over their life and learn to advocate for themselves.

Learning self-advocacy is a crucial developmental goal. It builds critical self-efficacy skills - a person's own belief in his/her capability to organize and execute the courses of action required to produce a given goal which provide the building blocks for motivation, well-being and personal accomplishments throughout one's life course. Through court participation, children develop decision-making and negotiating skills. Children and youth also learn to deal with setbacks.

A clear example of a youth who learned to advocate for herself is found in Matter of Andrea D., where Andrea was in court and argued that her local social services department be ordered to pay for driver's education classes for her. The court held that Andrea "articulates that driver's education the first step to a driver's license - is a key component of self-sufficiency" and ordered the department to assist her in registering for and pay for the class.

Certain children may not wish to participate or may have an important test or other event. This bill explicitly allows the children to determine their level of participation by consultation with his or her attorney and the opportunity to waive the right to appear. Permitting the attorney for the child to apply for adjournment guarantees that this statutory right to appear in the hearing to determine his or her own fate will be taken seriously by the courts and the parties.

Some jurisdictions across the state, including the 7th Judicial District, Albany County Family Court, and the New York City Family Court, have developed local court rules regarding the participation of children and youth in their court proceedings. However, many courts have not. This patchwork practice is neither uniform nor widespread, despite years of training and advocacy. New York needs clear statutory rights to notice of an upcoming permanency hearing and of participation to ensure that all children and youth who wish to participate in the decision-making process that determines the next six months of their lives know about the opportunity and are given the preparation and assistance to meaningfully participate.

PRIOR LEGISLATIVE HISTORY:

This is a new bill.

FISCAL IMPLICATIONS:

Undetermined.

EFFECTIVE DATE:

Immediately.