

**ATTORNEY FOR THE CHILD PRACTICE UNDER RULE 7.2:**  
**SOME RELEVANT CASE LAW**

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**February, 2019**

**The Child's Capacity to Make Decisions**

*Matter of Elliot Z.*, 165 A.D.3d 682 (2d Dept. 2018) (assignment of guardian ad litem was error where attorney for child could substitute judgment and provide consent for child to remain in foster care).

*Matter of Audreanna VV. v. Nancy WW.*, 158 A.D.3d 1007 (3d Dept. 2018) (in advocating that mother get custody, AFC properly substituted judgment due to children's ages - approximately six and seven - and disabilities, *and* grandmother's hostility toward mother).

*Matter of Cunningham v. Talbot*, 152 A.D.3d 886 (3d Dept. 2017) (attorney for children properly advocated position contrary to children's expressed wishes to have no visits with mother where children's wishes were both a product of father's influence and likely to result in substantial risk of imminent, serious harm).

*Matter of Shaw v. Bice*, 117 A.D.3d 1576 (4th Dept. 2014), *lv denied*, 24 N.Y.3d 902 (no AFC conflict where son expressed desire to reside with mother, which was not consistent with daughter's expressed wishes, but AFC advised court that son, age nine, wanted to live with mother because at her house "he can stay up late and he doesn't get in trouble," and, in AFC's view, son's position was "immature and thus not controlling" upon AFC)

*Matter of Eastman v. Eastman*, 118 A.D.3d 1342 (4th Dept. 2014), *lv denied* 24 N.Y.3d 910 (mother's contention that AFC improperly substituted judgment unpreserved because mother did not move to remove AFC; in any event, child, seven years old at conclusion of hearing and functioning at kindergarten level, lacked capacity for knowing, voluntary and considered judgment)

*Matter of Venecia V. v. August V.*, 113 A.D.3d 122 (1st Dept. 2013) (no prima facie showing of legal malpractice and disciplinary violations where father contended that AFC "ignored abundant evidence that her clients' judgment was not voluntary and in fact was manipulated by their mother" and ignored forensic expert's findings and other evidence of alienation, but there was no evidence that children lacked requisite capacity)

*Matter of Rosso v. Gerouw-Rosso*, 79 A.D.3d 1726 (4th Dept. 2010) (no error where AFC determined that approximately nine-year-old child lacked capacity for knowing, voluntary and considered judgment)

*E.M.M. v. W.M.*, 62 Misc.3d 1201(A) (Sup. Ct., Kings Co., 2018) (AFC substituted judgment for children, ages five and six, who were not aware of proposed relocation)

*Matter of Hassina S. v. Nadia S.*, 59 Misc.3d 1202(A) (Fam. Ct., Monroe Co., 2018) (AFC advocated for preference of children ages seven, ten and eleven)

*Matter of Gregory S. v. Dana K.*, 52 Misc.3d 1211(A) (Fam. Ct., Erie Co., 2016) (where mother had not complied with visitation orders, attorney for children (ages 17, 12 and 12) communicated children's desire to spend no time with father, but opined that the children were no longer capable of knowing and considered judgment and substituted judgment)

### **Imminent Serious Harm Exception**

*Matter of Cunningham v. Talbot*, 152 A.D.3d 886 (3d Dept. 2017) (attorney for children properly advocated position contrary to children's expressed wishes to have no visits with mother where father had thwarted mother's efforts to contact children, attempted to alienate children from mother, and manipulated children's loyalty to turn them against mother; if father's and children's professed wishes were followed, mother-child relationship would be completely severed)

*Matter of Emmanuel J.*, 149 A.D.3d 1292 (3d Dept. 2017) (attorney for children did not err in substituting judgment for two children, ages approximately seven and ten, who wanted to stay in home with deplorable conditions, where respondent neglected other child who had sleep apnea and hypoxemia which required use of apnea monitor and oxygen therapy while she sleeps, and one of the two children in question missed school because she repeatedly had head lice; was sent to school dressed inappropriately for the weather and smelling of urine or body odor, and would often cry when the issue of her hygiene was raised and stated that she was not supposed to visit the nurse's office and worried that she would get in trouble with respondent and her mother for doing so; suffered from urinary incontinence and frequent urinary tract infections and had, on more than one occasion, been locked in her bedroom overnight and thus forced to urinate on the mattress where she slept, and the resulting mess would not be cleaned; and displayed a marked improvement in demeanor, confidence and academic performance when she was in petitioner's care)

*Matter of Zakariah SS. v. Tara TT.*, 143 A.D.3d 1103 (3d Dept. 2016) (in case involving mother's ongoing attempts to alienate child (born in 2004) from father, Third Department finds no error in AFC's decision to advocate position contrary to child's wishes, of which court was aware, given that such wishes were likely to result in substantial risk of imminent, serious harm)

*Matter of Brian S.*, 141 A.D.3d 1145 (4th Dept. 2016) children deprived of effective assistance of counsel where, when mother moved to dismiss petition at close of petitioner's case, AFC opposed motion, and AFC also asked questions designed to elicit unfavorable testimony regarding mother from petitioner's witness, which undercut children's position; because the children were teenagers, there was no basis for conclusion that they lacked capacity for knowing, voluntary and considered judgment, and there was no evidence that following children's wishes was "likely to result in a substantial risk of imminent, serious harm" where the children frequently skipped school, the mother may have occasionally used drugs in the house and thus been unable to care for the children, and mother may have struck third child on arm with belt on one occasion, leaving small mark)

*Matter of Isobella A.*, 136 A.D.3d 1317 (4th Dept. 2016) (child, who was five and six years old at time of proceedings, lacked capacity for knowing, voluntary and considered judgment, and following child's wishes was likely to result in substantial risk of imminent, serious harm to child where, if AFC had successfully advocated for child's wishes, it would have been tantamount to severing her relationship with her father)

*Matter of Viscuso v. Viscuso*, 129 A.D.3d 1679 (4th Dept. 2015) (AFC properly advocated for result contrary to child's expressed wishes where following child's wishes would be tantamount to severing her relationship with her father, and mother's persistent and pervasive pattern of alienating child from father was likely to result in substantial risk of imminent, serious harm to child)

*Matter of Lopez v. Lugo*, 115 A.D.3d 1237 (4th Dept. 2014) (AFCs properly advocated contrary to clients' wishes where mother had been arrested for possession of drugs in children's presence, numerous weapons had been seized from mother's house, and mother's husband had assaulted child who had attempted to intervene when husband attacked mother with electrical cord)

*Matter of Delaney v. Galeano*, 50 A.D.3d 1035 (2d Dept. 2008) (appeal dismissed because fourteen-year-old child did not want it to proceed and AFC failed to demonstrate basis upon which child's preference could properly be disregarded)

### **Controlling Effect Of AFC's 7.2 Determination**

*Matter of Mason v. Mason*, 103 A.D.3d 1207 (4th Dept. 2013) (AFC, who informed court of child's wishes, was not obligated to state basis for advocating contrary position, and record supported finding that child lacked capacity for knowing, voluntary and considered judgment)

*Matter of Krieger v. Krieger*, 65 A.D.3d 1350 (2d Dept. 2009) (court improperly required that AFC offer expert testimony regarding child's capacity to articulate desires, and whether child would be at imminent risk of harm if she moved with father to Ohio, before advocating position contrary to child's wishes; Rule 7.2 does not impose such a requirement)

### **Communicating Child's Wishes To Court**

*Matter of Lorimer v. Lorimer*, 167 A.D.3d 1263 (3d Dept. 2018) (dissenting judges assert that AFC must help child articulate position, and obtaining *Lincoln* hearing is often best way to fulfill obligation and sometimes is only way to protect child's privacy)

*Matter of Newman v. Doolittle*, 151 A.D.3d 1233 (3d Dept. 2017) (*Lincoln* hearing not mandatory, particularly where attorney for child communicates child's wishes to court)

*Practice Note:* Without more facts it is difficult to understand what the Third Department is getting at here. While the attorney for the child is obligated under FCA § 241 and Rule 7.2 to communicate the child's wishes to the court, the AFC may not go into detail and become an unsworn witness. Thus, the court cannot properly obtain from the AFC the kind of information it would be able to obtain from the child.

### **Parent's Standing To Raise, And Preservation Of, Issue**

*Matter of Daniel K.*, 166 A.D.3d 1560 (4th Dept. 2018) (father's contention that AFC was ineffective not preserved where father failed to make motion seeking AFC's removal, and claim that AFC improperly substituted judgment was based on matters outside record)

*Matter of Emmanuel J.*, 149 A.D.3d 1292 (3d Dept. 2017) (by not moving for removal of AFC, respondent failed to preserve contentions that AFC improperly substituted judgment and should have withdrawn due to conflict in children's positions)

*Matter of Elniski v. Junker*, 142 A.D.3d 1392 (4th Dept. 2016) (mother failed to preserve contentions that AFC was biased against her and failed to provide meaningful representation and act in child's best interests where mother made no motion to remove AFC)

*Matter of Roseman v. Sierant*, 142 A.D.3d 1323 (4th Dept. 2016) (in custody proceeding, father lacked standing to complain about court's alleged errors in proceeding with hearing in absence of AFC; there is general prohibition on one litigant raising legal rights of another)

### **Communicating With Child In Violation Of Rule 4.2 Of Rules Of Professional Conduct**

*Matter of Madris v. Oliviera*, 97 A.D.3d 823 (2d Dept. 2012) (since disqualification implicates party's right to be represented by counsel of his/her own choosing and any restrictions must be carefully scrutinized, party seeking disqualification has burden to make clear showing that disqualification is warranted and conclusory assertions of conduct violating disciplinary rule will not suffice).

*Matter of Awan v. Awan*, 75 A.D.3d 597 (2d Dept. 2010) (in custody/visitation proceeding, no error where family court struck testimony of father's expert and precluded further testimony by expert because father's attorney violated Rule 4.2 of Rules of Professional Conduct by allowing retained physician to interview and examine child regarding pending dispute and prepare report without knowledge or consent of attorney for child).

*Matter of Brian R.*, 48 A.D.3d 575 (2d Dept. 2008) (attorney for father disqualified where he communicated with one of the subject children, and used her as interpreter when speaking with parties, without knowledge and consent of child's lawyer).

*Matter of Marvin Q.*, 45 A.D.3d 852 (2d Dept. 2007), appeal dism'd, 10 N.Y.3d 927 (respondent's attorney properly disqualified where attorney violated rule by allowing members of firm to interview child, and by procuring affidavit from child regarding pending proceedings, without consent of child's lawyer, and violated child's due process rights; family court also properly precluded use of child's affidavit).

*Campolongo v. Campolongo*, 2 A.D.3d 476 (2d Dept. 2003) (where, in matrimonial action, defendant's counsel caused defendant to retain psychiatrist to interview child and prepare report without knowledge of child's lawyer, counsel was properly disqualified and psychiatrist's report and testimony were properly precluded).

*Anonymous 2017-1 v. Anonymous 2017-2*, 62 Misc.3d 289 (Sup. Ct., Nassau Co., 2018) (mother's counsel violated Rule 4.2 and children's due process rights, and disqualified from representing mother, where he drove mother and children from their home and talked to children about private investigator mother and counsel believed was working with father and police to engineer mother's arrest to influence outcome of custody dispute; counsel risked influencing children to think favorably of counsel and mother and unfavorably of father, and, even if he believed his presence was necessary to thwart mother's possible arrest, failure to notify attorney for children and indifference to attorney-client relationship justified disqualification).

*Matter of Thea T.*, 174 Misc.2d 227 (Fam. Ct., Suffolk Co., 1997) (County Attorney denied permission to interview child where child had already been interviewed repeatedly).