COMMENTARY

Why AFCs Should Not Be Appointed To Represent Non-Communicative Toddlers in Custody Disputes

Peter Galasso has previously argued to multiple jurists that AFCs should not be appointed to represent toddlers in child custody cases. Due to the absence of guidance from the Appellate Division, this argument has yet to gain traction in the minds of judges responsible for the appointment of AFCs for toddlers. To safeguard the integrity of the judiciary and to save our clients a substantial amount of money in the process, this misguided practice needs to end.

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By Peter J. Galasso | December 06, 2023 at 10:01 AM

Over the past few years, I have argued to multiple jurists that attorneys (AFCs) should not be appointed to represent toddlers in child custody cases, with varying degrees of receptivity. Due to the absence of guidance from the Appellate Division, this argument has yet to gain traction in the minds of those judges responsible for the appointment of AFCs for toddlers.

However, to safeguard the integrity of the judiciary and to save our clients a substantial amount of money in the process, this misguided practice needs to end. Moreover, as a matter of fact and as a matter of law, AFCs cannot represent the voice or the legal rights of toddlers, who, literally, do not have the ability to understand or to communicate their parenting preferences.

In concluding why judges should not appoint AFCs for toddlers, the explanation lies in the text of 22 NYCRR §7.2, also known as the AFC Rules, which was amended in 2009 and which governs the appointment and role of the AFC. The AFC Rules now require that the AFC, like the attorneys for the parties, be bound by the same ethical rules that govern the conduct of all attorneys.

Pursuant to §7.2 (d), AFCs are required to zealously advocate the positions taken by their child client, except when "the child lacks the capacity for knowing, voluntary and considered judgment" or when the child's position would likely "result in a substantial risk of imminent, serious harm to the child" (22 NYCRR §7.2(d)(3)).

Prior to the 2009 Amendment to §7.2, Law Guardians, as opposed to AFC's, were appointed to assist the court in resolving difficult custody issues in the child's best interests, more as a quasi-social worker or guardian-ad-litem, as opposed to an attorney (See e.g. *In Re Nicole W* 296 A.D.2d608 (3d Dept. 2008)).

Conversely, 22 NYCRR §7.2 is designed to give a child at the center of a custody battle a voice or "say" in the outcome. With that goal in mind, §7.2 reads in pertinent part:

"(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 witness in the litigation.

(d) … the attorney for the child must zealously advocate the child's position *(emphasis added).*

(1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in the 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 interest. 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 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 *(emphasis added)."*

From a purely logical perspective, the requirement that the AFC appointed for a toddler pursuant to §7.2 (d) "zealously advocate the child's position" is an oxymoron. A non-communicative one year old toddler obviously does not have a 'position' for an AFC to advocate. Notwithstanding, because §7.2 does not contain an age limitation, it has been interpreted by many members of the judiciary to authorize their appointment of an AFC to represent toddlers.

This misinterpretation of §7.2 indisputably condones and even encourages the AFC's zealous advocacy of the AFC's position, and not the child's position, which the 2009 amendment to §7.2 was enacted to eradicate and replace. In allowing themselves to be potentially influenced by their favorite AFC on the issue of a toddler's custody, judges undermine the sanctity of the decision-making process by subconsciously factoring into their decision which parent the AFC thinks should be awarded custody, which necessarily portends an appearance of impropriety that must be avoided.

Section 7.2 (d) (3) specifically states that the AFC's power to substitute the AFC's opinion for that of the child can only be exercised in cases where the AFC's opinion is contrary to the child's articulated, albeit ill-conceived preferences. The rule says nothing that suggests AFCs should be appointed for a toddler to express their personal opinions on custody that are not contrary to the child's preference.

The AFC is to be a conduit for the child's voice and preferences, just like attorneys for the parties are to be a conduit for their respective client's voice and preferences. The 2009 Amendment to §7.2 was clearly not intended to in any way continue the prior practice of allowing a law guardian to opine to the judge which parent the law guardian believed will best nurture a child's best interests. That is exclusively the judge's job.

Reading §7.2 in its totality reveals that the only two 'carve out' provisions in the statute that allow AFC's to "substitute" their "contrary" judgment for that of the child are in those situations where a child's articulated preference makes no sense due to the child's age or incapacity or due to the fact that the child's preference would likely imperil the child. Caselaw that has addressed the first carve out normally involves situations where a young child's immaturity predicated the preference or where the custodial parent's alienation of the other parent has wrongfully influenced a child's preference (*Silverman v. Silverman*, 186 A.D.3d 123, 129 (2^{d} Dept. 2018) (where the Second Department held that "[t]his exception generally applies to young children and children with disabilities").

The reasons for the second carve out are self-evident. An AFC should be expected to take a contrary position to that of his client when his client selects a course of action that is "likely to result in a substantial risk of imminent, serious harm to the child." For example, an AFC would clearly be free to take a contrary position when a child wants to reside with a drug addict parent, who also possesses illegal weapons in her home (*Lopez v. Lugo* 115, A.D.3d 1237 (4th Dept. 2014), (where the AFC advocated contrary to a child's wishes to reside with the mother, who was arrested on drug charges in the children's presence)).

Similarly, in a case where the children's wish was to never see their mother again due to their father's wrongful brainwashing, §7.2 (d)(3) empowers the AFC to advocate a position that is contrary to the child's preference because following the child's preference would terminate their relationship with their mother, which would "likely result in a "substantial risk of imminent, serious harm" to the child (*Cunningham v. Talbot*, 152 A.D.3d 886 (3d Dept. 2017) (where AFC was justified in advocacy for an opinion contrary to child whose preference was the result of father's undue influence)).

Section 7.2 (d)(3) also mandates that in those situations where the AFC takes a position contrary to the child's wishes, the AFC must still 'inform the court of the child's articulated wishes if the child wants the attorney to do so.' Since no part of the AFC's obligation in that respect could possibly be exercised when representing a toddler, in deciding to hear the AFC's opinion in such cases, the court has to treat the language in §7.2(d)(3) that limits the AFC's ability to substitute their judgment only when it is "contrary" to the preference of a child as a nullity.

That legal incongruity, however, does not seem to discourage some judges from continuing this dubious practice.

What is also often lost in the judiciary's thinking in appointing AFC's to represent toddlers is the fact that cost to the parties that the misplaced appointment of an AFC to represent their toddler child can often be overwhelming. As a result of a judge's appointment of an AFC to represent a toddler, the child's parents, provided they have the means, are usually directed to pay the AFC's normal hourly wage, pursuant to the court's errant order appointing the AFC in the first place. That order also automatically subordinates the fees of the parties' attorneys of choice to the fees generated by the AFC.

The AFC's pecuniary interests naturally become even more pronounced upon being appointed as an AFC in a high wealth matrimonial to represent a toddler, which is often a plum and highly sought after assignment. No client to whom to answer. No responsibility for the outcome. Guaranteed fees. Perhaps the easiest money to be made in practicing matrimonial law.

Despite the fact that changing this ill-conceived and inequitable policy will greatly benefit and protect our clients, who should not be ordered to foot the bill of an AFC appointed to represent a toddler, the pecuniary considerations connected with this practice cannot be ignored. Likewise, in custody cases involving the indigent, by prohibiting judges from appointing AFCs for toddlers, the State will also be saving on a cost it should not bear.

At the very least, whether a toddler or a very young child can articulate an intelligent and meaningful preference for one parent over the other should clearly be determined by the court prior to the appointment of an AFC and prior to the entry of an order where the state requires the child's parents to pay the AFC's fees.

Indeed, in recent erudite articles and letters published in the New York Law Journal, the use of in-camera interviews with children by the Court has been wisely encouraged (See e.g. Praemonitus Praemonitus: "The Importance of the In-Camera Interview in Child Custody Matters" by Phillip Katz, Esq. NYLJ 2-27-23; "Court System Should Train Judges on the Importance of In-Camera Interviews With Children in Contested Custody Case", by Sondra Miller, NYLJ letters to the editor, March 24, 2023, at page 7)).

As the parens patriae or the superparent to children whose custody is at issue, judges should be required to meet with toddlers before the state is permitted to compel a parent to pay an AFC, especially when the AFC's only role would be to

implicitly supplant the court's role as the child's superparent.

It is indisputable that hearing the voices of older children whose time with their parents is being negotiated is very important. Whether those voices should be heard by the judge in chambers or through the appointment of an AFC is fodder for a different article. Paying AFCs to express their opinions about what's best for a toddler is, however, not authorized and is a practice that produces ethical issues that custody litigation should avoid.

In the end, fiscal responsibility should guide the judiciary in moderating and in limiting the appointments and the use of AFCs. Forcing financially distressed litigants or the state to pay an AFC to appear on behalf of a toddler at every court conference, at a contempt hearing unrelated to parental access, or at trial on days when equitable distribution is being addressed is both fiscally irresponsible and ill-conceived.

Going forward, judges also need to ensure that the court's integrity is no longer potentially compromised by their appointment of AFCs to render advisory decisions on custody that trained and educated healthcare professionals are precluded from rendering from the witness stand.

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