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Are Children Silent Witnesses In Custody Fights?

By Dawn J. Post | [Contact](#) | [All Articles](#)
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In response to the Office of Court Administration's proposals regarding attorney and party access to forensic reports, the American Academy of Matrimonial Lawyers adopted a resolution stating that "[t]he theoretical benefit that could be gleaned from showing a forensic report to a child is so clearly outweighed by the potential damages...that the Academy opposes any rule or practice that would permit the child to be shown the forensic report." The New York Chapter of the American Academy of Matrimonial Lawyers stated that it is "strongly opposed to another proposal that would permit attorneys to share the contents of psychological test results with the children they represent." Similarly, the Nassau bar contests the dissemination of forensic reports to children **(NYLJ, March 13)**.

The sweeping prohibition against exposing children to the unpleasant or damaging information contained in forensic reports ignores the reality that attorneys for children (AFC) have an ethical obligation and that in other family court proceedings youth are routinely exposed to such information. Prior to 2008, there was heated debate regarding the proper role of a child's lawyer in neglect and abuse, permanency and termination of parental rights proceedings which was resolved with the promulgation of N.Y. CT. Rules §7.2 (McKinney 2011) and the adoption of the state bar standards.

An attorney for the child takes a client-directed approach in advocating the client's position in all proceedings before the family court. Under rule 7.2(3) of the New York Rules of Court, the AFC must zealously advocate the child's position unless the child "lacks the capacity for knowing, voluntary and considered judgment" or if "following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child." In 2010 the phrase "law guardian" was replaced with "attorney for the child" or "counsel for the child" in nearly two dozen sections of the CPLR, Domestic Relations Law, Executive Law, Judiciary Law, Family Court Act and other statutes. At that time Family Court Administrative Judge Edwina Richardson-Mendelson stated: "I think that it is quite a bit more than semantics. We think the words 'attorneys for the child' make it crystal clear that we are dealing with a lawyer who is an advocate for the child. Use of the word 'guardian' can suggest more than a role as an attorney. It might suggest a role as a parental substitute to both the public and perhaps to court workers and that is not what the attorney for the child's role is" **(NYLJ, April 20, 2010)**.

The Children's Law Center (CLCNY) is unique in that it is one of the few organizations in the country that specializes in providing representation to children in custody/visitation, guardianship, domestic violence and related child protective cases in New York City Family Courts and Integrated Domestic Violence Parts in Supreme Courts. Our mission is to provide a child a strong and effective voice in a legal proceeding that has a critical impact on his or her life. Our core values are to provide high quality representation and to provide children with respectful, supportive, informed and passionate advocates who give a voice to their needs.

Since 1997, CLCNY has been assigned to thousands of custody matters, and our attorneys have been involved directly with the issues and challenges surrounding forensic reports, including the scope and terms of access to such reports. A forensic report can have a direct and substantial impact upon the lives of children, as courts may consider the information obtained by the evaluator during the preparation of the report, and the ultimate recommendations of the forensic evaluator, in determining issues including where and with whom a child will live, visitation with a parent, grandparent, or sibling, and/or who will be designated as a child's legal guardian. Often the forensic report considers domestic violence and its effect on the children.



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Are children who are the subjects in such litigation truly in need of greater protection than children in child protection proceedings? Was that contemplated with promulgation of Rule 7.2, and adoption of the state bar standards? No, the bottom line is "it is their [the child's] lives, their experiences and their futures being discussed" whether you are viewing it through the lens of a custody/visitation or child protective proceeding. Nationally, this view has resulted in the formal adoption of resolutions by national and state child welfare policy and practice organizations that support young people's active engagement in permanency planning and other required court hearings in abuse, neglect, and dependency hearings.¹

More than 25 states have passed legislation or court rules that give young people the right to attend their permanency hearings, including New York (N.Y. Fam. Ct. Act. § 1089(d) (McKinney 2012)). The fact that these measures apply in child protective cases should not bar youth from similarly participating in custody and visitation proceedings. In New York, all attorneys for children, whether in child protective or custody/visitation matters, operate within the same legal and ethical framework.

Moreover CLCNY continues to represent clients in any related child protective proceedings that may be filed during or after the custody/visitation proceeding. The view that children must be protected from forensic reports would result in situations in which the AFC would be asked to protect the child from harmful information contained in the forensic report in a custody/visitation proceeding, such as a parent's mental health or drug abuse, yet, when a child protective proceeding is filed days later, inform and discuss with the child the same issues of mental health or drug abuse which might form the basis of the neglect pleadings.

In any event, are child clients in child protective proceedings so different than in custody/visitation cases?

After losing her job, an unmedicated mother with a bi-polar disorder turns on the gas pilots in her apartment with the eight-year-old child asleep in the bedroom.

A father strangles the mother in the bedroom that the parents share with her. The father then flees, leaving the mother's body in the bottom bunk bed while the eight year-old apparently remains asleep in the top bunk.

A mother repeatedly punishes her children by hitting their legs with wires and cords, resulting in overlapping welts which the children treat with cold steel stored in the refrigerator to reduce the discoloration and swelling.

These are not examples of child protective cases. They are high conflict custody and visitation cases. In our experience, if a forensic report is conducted and a case is scheduled for trial it can be reasonably considered to be high-conflict. "High-conflict custody cases are marked by a lack of trust between the parents, a high level of anger and a willingness to engage in repetitive litigation."² Adults become consumed by the litigation and they either ignore or are incapable of recognizing how their child is feeling and how they are negatively impacted by the constant legal battles, hostile family environment, and acts of verbal and physical aggression. Observationally such parents are so locked into their belief systems that they will disagree with any contrary conclusions of an assessor or therapist and are immune to therapy, education, or persuasion. They view their own actions as inherently being in the child's best interest and will never acknowledge or accept responsibility for their actions or change. They appear self-absorbed and blind to the effects on the child, on the other parent, as well as extended family.

Children in these cases are often raised in family court, even after a determination is made on the original case as one or both parents are prone to initiate subsequent proceedings to modify or enforce the court's original order. It is simply naïve to believe that children in such cases are ignorant of their parents' challenges or faults.

Children are not simply silent witnesses in high-conflict custody and visitation proceedings. Consistent with §7.2 of the Rules of the Chief Judge, and in consultation with a CLCNY social worker to ensure that the information would not result in a substantial risk of serious harm to the child, the AFC must have the discretion like other attorneys to show, review and discuss the forensic report with a client.

Dawn J. Post

The author is the co-borough director of the Brooklyn office of the Children's Law Center.

Endnotes:

1. The American Bar Association and the National Council of Juvenile and Family Court Judges are two of the policy and practice groups to endorse the active participation of children in required court hearings.

2. Child Custody Proceedings Reform, High-Conflict Custody Cases: Reforming the System for Children Conference Report and Action Plan. Conference sponsored by the American Bar Association Family Law Section and The Johnson Foundation Wingspread Conference Center, Racine, Wisconsin, Sept. 8-10, 2000.

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