We entered this profession believing in the power of a well-reasoned, well-supported argument. However irrational the world may seem, as attorneys and advocates we rely on our skill to persuade, to transform the perceptions of others and motivate them to action. Our members know their work, and have strongly held opinions on what legal and governmental systems should do for our clients. Given the nature of our field, though, few of us have regular opportunities to use those skills and share that hard-earned perspective.

Let’s change that dynamic, so that NACC members have the platforms we need to make our case. On Monday, May 19, NACC launched the first weekly blog on children, families and the law, encompassing child welfare, juvenile justice and family law issues. Click here to read the blog, and then click on the option to receive a free weekly subscription to the blog, via email or feed, which will deliver the latest posting to you every Monday morning. Please comment in the blog’s comment section. You can also be our guest blogger, writing a post of 600 words or less on a timely but essential issue. Feel encouraged to call me (303-864-5322) with your ideas, or just haul off and send a submission to advocate@NACCchildlaw.org.

You’ll also notice a revived NACC eGuardian, with more (and more relevant) writing on our work, by a broader range of contributors. We want your submissions, here, too, on issues and topics that call for a longer-form treatment, and they can also be sent to advocate@NACCchildlaw.org. Your eGuardian readership is more specialized; they have a substantial knowledge base on child law, but need you to take their understanding to a more sophisticated, higher level. Never assume that someone else can fill our members’ gaps in knowledge and skill; you may be just the person we need to hear from!

Thank you for contributing to this conversation. I look forward to hearing from you.
Representing Children on Appeal: Changed Circumstances, Changed Minds

by Judith Waksberg, JD

I. INTRODUCTION

There is an inherent tension between appellate practice and the representation of children. An appeal is normally a review of a record that is frozen at the time the record is made. The lives of children, however, are not static and the circumstances and conditions of their lives, and those of their families, are constantly changing. Moreover, the changes that time has wrought, including a change in the child’s experience and maturity, can also result in a change in the child’s position in the case. Thus, appellate attorneys representing children are not infrequently confronted with situations in which circumstances have changed significantly from the time of the order appealed from or in which the child has changed his or her position.

Rules and Standards for children’s attorneys make clear that attorneys for children must “zealously advocate the child’s position” and “follow the child’s’ direction throughout the course of litigation.” This is true even when the reasons for the child’s positions or desires may not be evident, or may perhaps seem unwise, to his or her attorney. Although an attorney may also be skeptical of the wisdom of an adult client’s goals, when children are the clients, the attorney’s understandable impulse to protect the child may make it difficult to respect the child’s choices and decisions.

However, only when the attorney is guided by his or her client’s desires and advocates zealously for them will the child’s perspective be presented to the court. Although this mandate applies with equal force to appellate attorneys, its application can be problematic. The appellate process, by its nature, is a deliberative one. Its purpose is to provide a review of the record and an impartial determination by a panel of judges as to whether error occurred during the trial and whether that error requires a reversal of the judgment at trial. Appellate lawyers comb through the record and fashion arguments for and against reversal. The appellate judges review their briefs and the records, discuss the issues among themselves, and then issue an opinion. Such a process is—and should be—careful and thoughtful. As a result, the appellate process is usually a relatively lengthy one. However, the length of time involved in an appeal can create difficulties when the lives of children are at stake. It is certainly not surprising that changes can occur in a child’s circumstances or that such changes or a child’s growing maturity will result in a change in the child’s position on appeal. Dealing with these changes in the context of an appeal can pose some of the most thorny challenges for an appellate attorney representing children.

To a certain extent, as will be discussed below, there are a variety of options built into the structure...
II. CHANGED CIRCUMSTANCES
The Court of Appeals addressed the issue of changed circumstances directly in Matter of Michael B., a case in which the appellant was the child's biological father. Michael had been voluntarily placed in foster care, but many years later, after a finding that his father was fit, the Family Court ordered that Michael be returned to his care. By that time, the father also had in his care other children besides Michael. Michael, however, had been in foster care since his birth and there was evidence that he might suffer psychological trauma if removed from his foster home. The Appellate Division found that Michael's lengthy stay in foster care and his psychological bonding with his foster family gave rise to extraordinary circumstances and awarded custody to Michael's foster parents over his biological father.

The Court of Appeals ruled that when there is a fit parent, the state cannot grant custody to a foster parent. The last two paragraphs of the opinion, however, directly addressed the problem of changed circumstances in these types of cases. The opinion noted that the Court was informed that during the pendency of the appeal, the appellant father was charged with, and admitted to, neglect of the other children in his care. Appellant argued that the Court could not take account of these new developments because they were outside the record. The Court's response was that to ignore these new developments "would exalt the procedural rule—important though it is—to a point of absurdity." The Court went on to state that it would therefore take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining appellant's fitness and right to custody of Michael, and remit the matter to Family Court for a new hearing and determination of those issues.

In the years since Michael B., the Appellate Divisions in all four departments have remanded Family Court cases on appeal when circumstances have so radically changed that the record was no longer sufficient to determine the issue on appeal. An analysis of the kinds of cases that are remitted and the ways in which courts are willing to consider changed circumstances on appeal provides some guidance in determining how to proceed in these situations; these kinds of cases and the various options available to appellate attorneys when circumstances have changed are discussed below.

A. The Appropriate Forum for Changed Circumstances Is Usually the Family Court.
First of all, it is important to note that an acknowledgement of the changing nature of children's lives and its impact on court cases is, for the most part, incorporated into the statutes and case law dealing with these kinds of cases. Thus, for example, a change in circumstances can give rise to a modification of custody. In cases involving abuse or neglect, the Family Court Act permits the Family Court to modify or vacate a
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prior order “for good cause shown,” and certainly, a change of circumstances should constitute good cause. Moreover, permanency hearings, which are held every six months while a child remains in foster care, also provide a forum in which changes in circumstances can result in a change in status of the child, such as the child’s return home or some other change in placement.

Therefore, when circumstances have changed significantly enough from the time the order on appeal was rendered, and there is a statutory means of re-opening the matter, the parties should attempt to do so before the trial court. Whether the changed circumstances are indeed significant and whether they warrant a change of the original order are matters best decided by the trial court. If a new order is issued, that generally will moot out the appeal. If the trial court decides that the change of circumstances does not warrant a change in its order, the movant can usually appeal from that determination as well. By moving to consolidate both appeals, the record reflecting the change in circumstances will be brought to the appellate court’s attention.

However, although Article Ten proceedings involving abuse and neglect provide statutory options in the Family Court to revisit prior decisions, until recently, no such option existed in cases involving termination of parental rights. In these kinds of cases, therefore, appellate courts have shown themselves to be particularly hospitable to arguments that significant changes in circumstances require remanding the case for a new hearing on the best interests of the child. Before the passage of a law permitting restoration of parental rights, there had been no clear means of re-opening cases involving termination of parental rights—even when circumstances had changed drastically. Such radical events as the death of an adoptive parent, or the refusal of a child over the age of fourteen to consent to the adoption (which would make the child a legal orphan) could only be taken into account on appeal.

15. Upon a showing of good cause, a Family Court may “set aside, modify or vacate any order issued in the course of a proceeding” under Article Ten. N.Y.F.C.A. § 1061. In addition, the permanency hearings, which must be held every six months when a child is in foster care, N.Y.F.C.A. § 1089(a), also allow a court to terminate the placement of the child in foster care, return the child to the parent, place the child with a relative, or place the child for adoption among a variety of permissible orders, N.Y.F.C.A. § 1089 (d). A series of provisions that took effect in 2010 permit restoration of parental rights after their termination, but only under very limited circumstances. See F.C.A §§ 635–637.

B. Alerting the Appellate Court to Changed Circumstances

Circumstances may change significantly from the time of the order appealed from in any case involving children, not just cases involving termination of parental rights. When circumstances have changed significantly since the time the original order was issued, an appellate attorney representing a child is faced with the question of whether and how such circumstances, which

11. Matter of Angelina A.A., 322 A.D.2d 967, 968–69 (N.Y. App. Div. 3d Dept. 1995) (noting that N.Y.F.C.A. § 1061 indicates that the court’s power to modify an order for good cause shown “expresses the strong Legislative policy in favor of continuing Family Court jurisdiction over the child and family so that the court can do what is necessary in the furtherance of the child’s welfare”); see also Matter of Sarah S., 2005 WL 2234083 at 2 (N.Y. Fam. Ct. Monroe Co. 2005) (“It seems clear that ‘good cause shown’ would mean a ‘change of circumstances’ to the Fourth Department”).

12. Matter of Angelina A.A., 322 A.D.2d 967, 968–69 (N.Y. App. Div. 3d Dept. 1995) (noting that N.Y.F.C.A. § 1061 indicates that the court’s power to modify an order for good cause shown “expresses the strong Legislative policy in favor of continuing Family Court jurisdiction over the child and family so that the court can do what is necessary in the furtherance of the child’s welfare”); see also Matter of Sarah S., 2005 WL 2234083 at 2 (N.Y. Fam. Ct. Monroe Co. 2005) (“It seems clear that ‘good cause shown’ would mean a ‘change of circumstances’ to the Fourth Department”).

13. N.Y.F.C.A. § 1089 (a), (d).

14. “Article Ten proceedings” are those covered by article 10 of the N.Y.F.C.A., which addresses child-protective proceedings involving abuse or neglect.

15. Upon a showing of good cause, a Family Court may “set aside, modify or vacate any order issued in the course of a proceeding” under Article Ten. N.Y.F.C.A. § 1061. In addition, the permanency hearings, which must be held every six months when a child is in foster care, N.Y.F.C.A. § 1089(a), also allow a court to terminate the placement of the child in foster care, return the child to the parent, place the child with a relative, or place the child for adoption among a variety of permissible orders, N.Y.F.C.A. § 1089 (d). A series of provisions that took effect in 2010 permit restoration of parental rights after their termination, but only under very limited circumstances. See F.C.A §§ 635–637.

16. See e.g. nn. 24, 25 & 27, infra.

17. Prior to the enactment of statutory authority to restore parental rights, the ability of a lower court to change the result of a termination-of-parental-rights case, even when the circumstances cried out for it, was murky at best. See Theresa C. v. Arthur P., 11 Misc. 3d 736 (Fam. Ct. Ulster Co. 2006) (allowing adoption petition by biological mother who had voluntarily surrendered child after adoptive parents refused to allow child to return to their home); Matter of Frederick S., 176 Misc. 2d 152 (Fam. Ct. Kings Co. 1998) (finding that Family Court Act does not give court power to vacate a termination-of-parental-rights order, but such order can be vacated under New York’s Civil Procedure Law and Rules because a child’s decision to refuse to consent to adoption may be considered “newly discovered evidence,” yet nevertheless denying vacatur); Matter of Anthony S., 176 Misc. 2d 1 (Fam. Ct. Kings Co. 1998) (finding that law guardian (i.e., the lawyer representing the child) has no standing to bring motion and further finding no statutory authority for court to vacate order terminating parental rights). Matter of Timothy A., 171 Misc. 2d 786 (Fam. Ct. Kings Co. 1999) (dismissing petition for custody by biological mother whose rights were terminated for lack of standing even though adoptive parent and child-care agency did not oppose); Matter of Female S., 111 Misc. 2d 313 (Fam. Ct. N.Y. Co. 1981) (finding that Family Court has power to vacate prior termination of parental rights under its parens patriae function); Matter of Rasheed A., 238 N.Y.L.J. 27 (Fam. Ct. Referee, King Co. Aug. 5, 2007).


19. N.Y.F.C.A. § 1052(a); see also n. 15, supra.

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21. Attorneys are often caught in a difficult position in these cases. Although, as noted above, most changes of circumstances are best handled by moving to reopen the lower court, there are situations where such a motion may not be available or appropriate. In such cases, attorneys sometimes have formally moved to enlarge the record on appeal to include the new information. Such motions are tricky, however. The information sought to be included must be reliable, it must be relevant to the issue before the court, and it must be clear why moving to enlarge the record, rather than moving in Family Court, is the proper procedure.

22. As a general rule, if the circumstances can be described as controversial or contested, they should not be drawn to the attention of the appellate court. For example, that a parent is not “cooperating” or that the parent’s relationship with the child has “improved,” are assertions that might very well be contested by another party. In contrast, information of which the court can take judicial notice, even if it is not part of the record below, is acceptable. Examples of such information would be the fact that a parent has made a subsequent admission to neglect or has subsequently been found to have committed neglect or abuse of other children, or that the parent has made an admission in criminal court to the abuse of a child. Appellate courts have also accepted other kinds of information that are generally non-controversial, such as the death of a foster parent or the fact that there is no longer an adoptive resource available to the child. Or, in the case of a child who is fourteen or near to fourteen years old, appellate courts have accepted information that the child will not consent to be adopted. The consent of a child fourteen years or older must be sought for an adoption. If the child will not consent, it is unlikely that an adoption will be granted, and an affirmation of an order terminating parental rights could result in the creation of a legal orphan. The information that a child will not consent to an adoption, even if that decision comes subsequent to the proceedings involving termination of parental rights, is thus crucial information on an appeal, and, as an officer of the court, the attorney for the child may make such a representation to the appellate court on appeal.

23. Michael B., 604 N E 2d at 133 (taking notice of subsequent orders of neglect involving other children based on father’s admission to substance abuse, and remitting matter to Family Court for a new hearing); see also Chow v. Holmes, 63 A.3d 925 (2d Dept. 2009) (holding record no longer sufficient to determine child’s best interests in light of new facts indicating that father was awaiting sentencing for attempted assault, and remitting matter to Family Court).

24. See e.g. Matter of Kayshawn E., 56 A.3d 471 (2d Dept. 2008) (considering new facts, including that prospective adoptive mother has died and that children over fourteen wish to be reunited with biological mother); Matter of Antonette Alasha E., 8 A.3d 375 (2d Dept. 2004) (holding that significant change in circumstances, including death of proposed adoptive mother and biological mother’s progress, warrant remittitur to Family Court for new dispositional hearing).


26. N.Y. Dom. Rel. L. §111(a) (providing that “consent to adoption shall be required… [o]f the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent”).

27. See e.g. Matter of Chloe O., 68 A.3d 1570 (N.Y. App. Div. 2009) (taking into consideration fact that subsequent to filing of appeal, appellant father consented to an order granting custody of child to grandparents, thus rendering appeal moot).

The practice of appellate attorneys representing children at The Legal Aid Society is to include an “update” section in the brief after the statement of facts. This section is very short, and, as described above, includes only non-controversial or non-contested facts. If the child has decided that he or she will not consent to adoption, this information will be provided to the court. Including this updated information can also be important even when the circumstances have not changed. Since, at the time the appeal is considered, a year or more may have passed from the issuance of the order being appealed, it is understandable that the appellate court would want to be assured that, for instance, the child is still being cared for in the same foster home and that that foster parent intends to adopt the child. Moreover, in cases where a child was removed from his or her parent pending ongoing neglect or abuse proceedings and the attorney for the child is advocating that the Family Court order be reversed and the child be sent home, the reviewing appellate court would want to know that there have been no significant changes in circumstances since the Family Court’s order so that, if there is a reversal, the parent is capable of resuming care of the child.

It is worth noting that an attorney is not obligated to report changed circumstances to a court if the change in circumstances is adverse to the client’s position. However, if the attorney appears
at oral argument and is specifically questioned about current circumstances, the attorney may not dissemble: New York Rules of Professional Conduct mandate that an attorney may not “make a false statement of fact or law to a tribunal.”

**III. CHANGED POSITION**

Sometimes the difficulty in representing children on appeal arises not from, or not only from, changed circumstances, but also from the child’s change in position. The passage of time, maturity, or a new environment may mean that by the time an appeal is perfected, the child’s position is different from the one the child’s attorney advocated at the hearing below. Obviously, if the child is the appellant but no longer disagrees with the result below, the attorney may move to withdraw the appeal. Representing the child client who is not the appellant, but who has changed her or his position can be extremely challenging. If neither the petitioner nor the respondent wishes to settle the case, the child’s ability to obtain or influence a settlement may be minimal. In those situations, the appellate attorney for the child may find herself in the awkward position of being forced to advocate for a result different from the one that was advocated below on the record. Changing position on appeal raises a host of questions, not the least of which is the application of the doctrine of judicial estoppel.

Judicial estoppel is used to prevent a party who has assumed a certain position in a legal proceeding from assuming a contrary position in another proceeding or to prevent “a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” This doctrine “rests upon the principle that a litigant ‘should not be permitted… to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.’” However, as the Supreme Court has noted, “this estoppel doctrine is equitable and thus cannot be reduced to a precise formula or test.” The unusual position of a child in an appeal from Family Court litigation means that this doctrine must be very carefully applied in cases of this type and overly technical applications of the doctrine have no place in an appeal in which a child has changed position because of changed circumstances or his or her evolving maturity.

For example, judicial estoppel seems completely inappropriate when the change in the child’s position is due to the fact that the child has reached an age at which he or she can express his or her wishes. There are cases in which the attorney for the child at the Family Court proceedings had to formulate a position because the child was too young to express his or her wishes or was incapable of understanding the proceeding, but at the time of the appeal, the child has matured enough to have the capacity to make an informed decision about his or her position in the litigation. At the time of the appeal then, the child’s position may differ from the one taken by his or her attorney at the Family Court proceedings. Technically, the position of the child has changed during the course of the litigation, yet one cannot really say that the child himself or herself has changed position. In these kinds of cases, it would not be fair to hold those children to the original position advocated by their attorney and judicial estoppel should not be used to prevent an appellate attorney from representing the child’s current position on appeal.

Other considerations as well make the application of the doctrine of judicial estoppel inappropriate for children. Time alone can have a significant impact on a child’s position in a case, as the child matures and becomes capable of a more sophisticated understanding of acts and consequences. That a growing maturity may change the child’s position in a case should not be surprising as it is part of what we all understand to be the process of growing up. A child’s changing of position in the course of a Family Court proceeding will therefore likely have nothing to do with attempting to “derive an unfair advantage or impose an unfair detriment on the opposing party.” Rather, it is reflective of a greater maturity, understanding, and ability of the child. The “general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings” that underlie the doctrine of preclusion of inconsistent positions are not violated when a child—due to greater maturity, or perhaps changes in his or her circumstances—changes position on appeal.

Indeed, it is almost impossible to untangle the changes in circumstances in a child’s life from the changes in a child’s position. A child who may have originally supported a finding and removal from

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34. Indeed, the author has been unable to find any cases in New York that specifically apply this doctrine to a change of position by a child in a Family Court or custody proceeding.
36. Environmental Concern, 101 A.D.2d at 593 (quoting Ariz. v. Shamrock Foods Co., 29 F.2d 1208, 1215 (9th Cir. 1930)).
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Because children’s positions, and their circumstances, may change during the time between the Family Court proceedings and the appeal, and because the purpose of any Family Court proceeding is the best interest of the child, it would seem the better course for appellate courts to be as liberal as possible in allowing the child to present his or her position on appeal. A rigid approach can even result in the denial of appellate relief to children. In Matter of Zanna E, the court dismissed the appeal of the respondent-father’s stepdaughter, stating that because the child had testified at the fact-finding hearing that she was abused, she could not be “aggrieved” by the order determining that the abuse had occurred and therefore could not urge reversal on appeal. It is not clear from the opinion, however, whether the child was supporting a finding below or even on whose behalf she had testified below. If the child did not support a finding, but testified because she was called as a witness, it would be unfair to conclude that she could not be aggrieved by the finding. Certainly a child could testify as to the existence of certain facts and assert at the same time that those facts do not legally constitute abuse or neglect.

In sum, restricting the appellate attorney to the arguments made in the trial court may very well mean that the interests and wishes of the child will not be represented on appeal. The expectation that a party maintain a consistent position during the course of the litigation—an expectation that is inconsistent with the reality of the representation of children—cannot be reconciled with the zealous representation of a child at every juncture of the litigation.

IV. FINDING THE PATH TO ZEALOUS REPRESENTATION ON APPEAL

Each individual case poses its unique challenges, and the appellate attorney, in every case, must be working with the client to determine the most efficient route to achieving the client’s goals in the litigation. For example, if there has been a finding of abuse or neglect below resulting in the child’s placement in foster care and the child’s objective at the time of the appeal is to return home, the appellate attorney should investigate whether this may be accomplished through avenues other than obtaining a reversal on appeal, which is always a rare event. If the parent has completed or is involved in services addressing the original problem, it may be appropriate, and more desirable, to move in the Family Court to advocate for the child’s return home.

Clearly, effective and sensitive counseling of the client is just as important a component of representing a child on appeal as it is in the Family Court. The appellate attorney has to explain the ramifications of the appeal and review the possible options available for the child. For example, the client might want the attorney to advocate for the child’s return home, yet also understand that the existence of a finding of

37. Id.
38. 77 A.D.3d 1364 (N.Y. App. Div. 4th Dept. 2010).
39. Id. at 1364.
40. In Zanna E, the court also denied the father’s biological daughter the opportunity to appeal the finding of derivative neglect as to her, stating that this child could not “seek affirmative relief” from the finding because she did not file a notice of appeal—this despite the fact that the father himself was appealing the finding. See id. at 1364. Given that circumstances may change, or the child’s position may change, it seems too restrictive to require the child to file a notice of appeal in order to participate in an appeal filed by another party. Indeed, it appears that the Appellate Division’s First and Second Departments have never required that the child file a notice of appeal in order to take a position urging reversal on appeal. This seems to be the better stance, as it provides appropriate flexibility for the attorney to represent the child’s position on appeal. However, if the child does not file a notice of appeal and no other party appeals, then of course no appeal can be perfected. If a child is aggrieved by an order of the Family Court, the only way to ensure that the order is appealed is for the child’s attorney to file a notice of appeal.
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Neglect means that the child’s parent has to comply with services and that there will be oversight of the home—which might be to the child’s advantage. if so, on appeal, the attorney could be advocating that the dispositional order placing the child in foster care was not in the child’s best interest and should be reversed or remanded, but that the finding of neglect was proper and based on a preponderance of the evidence.

Because the issue for the court in the dispositional phase of the case is always the best interests of the child, it is not logically inconsistent to argue on appeal that, given the time that has passed since the entry of the original order, the best interests of the child are no longer served by the dispositional order on appeal. although the passage of time alone will not usually be sufficient to make such an argument, counsel may be able to rely on evidence presented below that would support such a conclusion, or there may be changed circumstances which indicate that the record below is no longer sufficient to determine the issue on appeal.

Situations in which a child changes his or her position between the trial and appeal may require serious counseling of the client. suppose, for example, that a twelve-year-old female client made allegations of sexual abuse against her father. a year later, at the time of the appeal, she tells her attorney that the allegations were not true and the attorney does not know that the child’s statements are false, then the attorney’s duty to the client is to advocate her position zealously to the court. again, because the recantation creates a change in circumstances, this may be a situation where moving in family court to reopen the hearing below should be contemplated.

Another important ethical consideration is that a client’s confidences or secrets may not be revealed unless the client has consented to such disclosure.43 there are exceptions to this rule, but its application can be particularly tricky with young clients. For example, a fifteen-year-old female client may tell her attorney that she prefers to remain in foster care and not return to the care of her mother. however, the client does not want this wish revealed; she still loves her mother and wants a continued relationship with her, and does not want to hurt her mother’s feelings and further damage their already fragile relationship. This client may direct her attorney not to file a brief on appeal: to file a brief challenging the neglect finding and her placement in foster care would not represent her position; on the other hand, to file a brief supporting the finding and the placement in foster care would be disclosing information she does not want revealed. The appellate attorney must evaluate in each situation how best to accomplish the goals of the child client.

V. conclusion

Changed circumstances are almost always a legitimate basis for seeking renewed review in the family court or arguing on appeal that the matter should be remanded so that the family court can take account of the new circumstances. A change in the child’s position, although it may be uncomfortable for the appellate attorney, must also be analyzed carefully to determine whether such a change is necessary in order to zealously represent the child on appeal. In representing children, whose lives—and whose minds—change more quickly than the legal process can proceed, it is important that the child’s attorney be flexible in considering how to advocate for the client. whether to move in family court to reopen a case, to reveal the reason for the change of position on appeal, or to argue that the evidence is now insufficient to determine the child’s best interests are all strategic questions for the attorney in determining how best to represent his or her client. The important thing to keep in mind is not the attorney’s discomfort with the position, but how tactically to act in order to achieve the client’s goal. Appellate courts are well aware of the tension between a traditional appellate review of a record on appeal and the need for an order on appeal to reflect the current reality of the lives of children involved in a particular case. in their struggle to reconcile and balance these tensions, New york courts and lawyers have cobbled together a practice that attempts to respect the construct of appellate review and, at the same time, to ensure that appellate review is meaningful to the lives of the children it is meant to protect.

41. the juvenile rights practice is an interdisciplinary practice involving attorneys, social workers, and paralegals. the advantages of working with social workers in counseling clients on these very difficult issues cannot be overstated.

42. N.Y. R. Prof. Conduct 3.3 cmt. 8.

43. N.Y. R. Prof. Conduct 1.6(a)(1).
Practice Tips for Interstate Compact for Placement of Children

by Gerard F. Glynn, JD, MA, LLM

The Interstate Compact on the Placement of Children (ICPC) can be one of the most frustrating processes child welfare practitioners encounter. When a child involved in a child welfare case is placed in another state, the parties have to comply with the Interstate Compact for the Placement of Children. Here are some practical tips to help you navigate the ICPC maze:

» Know all the administrative steps and identify the specific person handling the matter.
- Who is the local caseworker filling out the paperwork?
- Who is the local supervisor reviewing the paperwork?
- Who in your state will review the paperwork and submit it to the receiving state? (All state administrators can be found [here](#).)
- Who is the person in the receiving state accepting the referral?
- Who will be the local person in the receiving state conducting the home study? (This will probably be the hardest person to identify. You will have to get cooperation from the receiving state to identify this person for you.)

» Be the squeaky wheel and make sure the matter gets the attention it deserves.
- Develop a “tickler system” (Outlook reminders, iOS reminders, case management software, index cards, a nagging spouse, etc.), reminding you to contact each person at each stage to ensure that the matter is progressing. Here are a few ideas for developing a good tickler system.
- Remember your matter is not as important to other people as it is to you and the child or family you serve. The local person in the receiving state already has a caseload of children whom she knows. Your child is unknown. Be able to articulate a compelling reason why your specific placement is important. If there is no specific and articulable reason your case is unique, make it so they don’t have to hear from you again if they do their job well.
- Remember, each person mentioned is a decision-maker. They have the authority to influence the speed of the process and how the matter is presented to the next person in the chain.
- Also remember, you catch more flies with honey than with vinegar. In being the squeaky wheel, don’t offend people or come off as a jerk. If you make the child’s needs compelling, others in this chain of decision-makers will want to help you and the child or family you serve.

» Avoid the ICPC if you can.
- This is a cumbersome process that can delay a positive placement for a child.
- Any state, court, agency or person sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption must comply. The ICPC does not apply to a family member placing a child in another state. To permit a family member to make a placement, the child welfare proceeding must be dismissed without any conditions, or a placement can occur before a child welfare case is ever opened.
- Recognize the risk of avoiding the ICPC. Without it, there will be no services or oversight to the child or family in the receiving state.

» If you can’t avoid the ICPC, try to qualify for an expedited process.
- There are some placements that have very specific short timelines. The details of an expedited placement can be found [here](#).
- If the proposed placement in another state is with a relative, expedited placement can be pursued if the child is (a) under 2 years of age; or (b) in an emergency shelter; or (c) has spent a substantial amount of time in the proposed placement.
- Even if there are specific timelines, you will still need to be a squeaky wheel to make sure the deadlines are met.
Amicus Curiae

IN RE PETITION OF R.W., ET AL.

by D. Andrew Yost, JD, MA
Senior Staff Attorney

Permanency Goal Changes Should be Final Appealable Orders

NACC joined the The Legal Aid Society of the District of Columbia, Center for Family Representation, Family Defense Center, and Family Law Professors Vivek S. Sankaran, Christine Gottlieb, and Martin Guggenheim as amici, arguing to the D.C. Court of Appeals that permanency goal changes should be immediately appealable either as a final order or injunction. The Court of Appeals has scheduled oral arguments for Tuesday, June 17, 2014 at 10:00 AM EST.

The brief urges the court to reconsider the decision in In re K.M.T., 795 A.2d 688 (D.C. 2002)(per curiam), which held that a change in permanency goal from family reunification to adoption is not a final order for appeal. Along with the other amici, NACC argued that K.M.T. impeded the Court’s ability to clarify the statutory “reasonable efforts” requirement and thereby prevent lower court errors in making permanency goal changes and has frustrated the court’s capacity to remedy errors when they do occur because of the bonds that children form with their caregivers between the time that a placement decision is made and the time that the court reviews a contested adoption. Because years may pass between when a court changes the permanency goal from reunification to adoption and the time a final adoption is ordered, appellate courts face an agonizing choice: whether to disrupt bonds that have formed between the child and foster parents while court-ordered separation has weakened the relationship to the natural family, or to leave uncorrected errors that occurred earlier in the neglect case. Overturning In re K.M.T. and allowing immediate appeal of permanency goal changes would provide the court an opportunity to review the record and correct errors that may undermine the “reasonable efforts” requirements. Stable placements serve a child’s best interest. But the interest in maintaining a stable placement can also frustrate or nullify a court’s ability to correct fundamental errors made earlier in the process, weakening the “reasonable efforts” requirement to reunify families. Court’s often hear testimony that remedying errors and reunifying the family would harm the child’s development because of the disruption of the child’s incorporation into an adoptive family. Instead of allowing errors to persist or time to pass before a permanency goal is appealed, courts should be permitted review of the decision to promptly resolve disputes between biological parents and foster parents. Deferring review may undermine confidence in the neglect process and drag out disagreements about reunification efforts. The brief argues that a decision to change the permanency goal is a modification of the final disposition in the neglect case, and therefore qualifies as a final appealable order under D.C. Court of Appeals case law. And even if it were not, it has the practical effect of an injunction compelling the department to redirect its services from strengthening the bonds between the parents and the child to undermining them. In any event, permitting prompt appellate review serves the best interest of all parties, including the child.

2. Id. at 2.
3. Id.
4. Id. at 3.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id. at 6.
10. Id.

Membership News

Thank you to all our members for your continued support of the NACC.

Please take a minute to update your NACC Member Profile on our website. We are expecting our membership numbers and website visitors to increase over the next few months and your profile will most likely be viewed.

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removed and Father was required to comply with a treatment plan. Father’s only efforts to comply consisted of attending two domestic-violence counseling sessions and a single post-removal visit with the children. Father was hostile and verbally abusive to service providers, and denied that any domestic violence had occurred, despite police identifying him as the aggressor in a March 2009 incident in which he admitted biting Mother’s face and being stabbed by Mother in the abdomen. Father failed to appear at all but two CHINS hearings and was incarcerated for a felony firearm conviction in September 2009. Father did not inform the Department of Child Services (DCS) of his incarceration. By mid-2010, Mother had fallen out of compliance with the treatment plan and DCS filed for termination of Mother and Father’s parental rights. Immediately after his release from prison in January 2012, Father contacted DCS, told them of his incarceration, and asked to resume visitation with E.M. and El.M. But DCS did not permit any visits because the visitation order had been conditioned on Father’s participation in court-ordered services, which he had abandoned—though he had completed parenting and anger-management classes while in prison. Father also resumed attendance at hearings. But by then, adoption by the children’s maternal grandmother had become the sole permanency plan, and DCS continued to pursue termination. The trial court heard testimony that E.M. and El.M.’s half-siblings suffered post-traumatic stress disorder (PTSD) due to their Father’s domestic violence, that no bonding had occurred between Father and E.M. and El.M., and that the children were enjoying a stable and permanent placement with their grandmother. The trial court found that Father continued to deny his domestic violence issues and that he failed to comply with the treatment plan or see his children in over two years. The court terminated Father’s rights, acknowledging his belated attempts to comply with the treatment plan after his release from prison but emphasizing his failure to comply before his incarceration and the children’s need for permanency.

The Supreme Court vacated the appellate opinion, holding that the evidence was sufficient to support termination of the father’s parental rights because the trial court was within its discretion to weigh the children’s needs more heavily than the father’s belated efforts and that the father’s domestic violence against the mother constituted child abuse.

In late 2008, one-year-old E.M., his newborn sister El.M., and their five older half-siblings were adjudicated Children in Need of Services (CHINS), based on reports of Father’s repeated domestic violence against Mother. The children were eventually

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2. Id. at 640.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id re E.M., 4 N.E.3d at 640.
8. Id. at 640.
9. Id. at 640-41.
10. Id. at 641.
11. Id.
12. Id.
14. Id.
15. Id. at 641.
16. Id.
17. Id.
the children, undergone a psychological evaluation, and completed or nearly completed additional parenting and anger-management classes by the time of the final hearing. Thus, the majority concluded that the trial court placed too much weight on Father’s past conduct without sufficiently taking into consideration evidence of changed conditions at the time of the termination hearing.

The Indiana Supreme Court granted transfer, vacated the Court of Appeals opinion, and concluded that the Court of Appeals contravened the standard of review by reweighing the evidence presented at trial. The Supreme Court began its analysis by noting the heightened burden of proof—clear and convincing evidence—required at termination. The Court reaffirmed the trial court’s prerogative to weigh the evidence, and the appellate court’s limited review of (1) whether the evidence clearly and convincingly supports the trial court’s finding, and then (2) whether the findings clearly and convincingly support the judgment.

The Supreme Court stated that this review is “akin to the ‘reasonable doubt’ standard’s function in criminal sufficiency of the evidence appeals—in which ‘we do not reweigh the evidence or assess the credibility of the witnesses,’ and consider only whether ‘there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.”

The Supreme Court reviewed the lower court’s findings and held that they were sufficient to clearly and convincingly support the judgment. The Court then took up the more difficult question of whether the evidence supported those findings. The Court held in the affirmative.

The Court ruled it reasonable for the trial court to find that the Father’s violence towards Mother constituted abuse of E.M. and El.M., especially given the well-documented and traumatic affect that witnessing violence has on a children’s development. A lack of beatings does not equate to a lack of abuse. The Court also held the finding that Father denied all services was proper, despite his later efforts to comply with the treatment plan, because the trial court was referencing his pre-incarceration conduct when making that particular finding. And the Court acknowledged the trial court’s ample record basis to fault Father for continuing to deny that he had issues with domestic violence, including his unequivocal testimony that he had no issues with domestic violence, despite the biting and stabbing incident, and his conviction for a violent crime. Finally, the Supreme Court held the trial court’s finding that Father did not complete any counseling or therapy was technically correct, albeit of limited probative value. The Court went on to affirm the trial court’s determination that termination was in E.M. and El.M.’s best interest. The Supreme Court took pains to note the competing interests latent in a termination proceeding proceeding between permanency and reunification. Yet despite [Father’s] efforts, there were strong indications that he still had not come to terms with the domestic violence that triggered DCS’s involvement. The children’s best interests—especially their need for permanency after years in ‘temporary’ placement—are paramount. After hearing the extensive testimony and reviewing voluminous exhibits, the trial court was within its discretion to find the children’s needs to be weightier than Father’s belated efforts. Still, the Court acknowledged the potential distortion that may arise when focusing solely on permanency, and that “preservation efforts have too often been extended halfheartedly to non-custodial minority fathers.” Moreover, terminating a fit parent’s relationship with his children fails to advance the State’s parens patriae interest, and gravely and irreparably harms families. And an even greater harm arises when that termination is motivated by even unconscious racial bias. In a respectful and poignant dissent, Justice Rucker argued that the trial courts findings were not supported by the evidence and thus constituted clear error. For example, there was no evidence that E.M. and El.M. actually witnessed domestic violence—only their half-siblings did—and that even if they had there was evidence to suggest they did not suffer any adverse affects. Additionally, the evidence showed Father did engage in some services, although his participation was reluctant and less than satisfactory. And once those clearly erroneous findings are set aside, the remaining findings are insufficient to support the judgment.

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18. Id.
20. Id.
21. Id. at 642.
22. Id.
23. Id.
24. Id.
26. Id. at 644.
27. Id.
28. Id.
29. Id.
30. Id.
31. In re E.M., 4 N.E.3d at 646.
32. Id. at 646.
33. Id. at 648.
34. Id. at 649.
35. Id. at 648.
36. Id. at 648.
37. In re E.M., 4 N.E.3d at 648-49.
38. Id. at 651-52.
39. Id. at 652.
40. Id.
Finally, Justice Rucker argued that as a matter of policy making “permanency the lodestar of the analysis would invert it. The guiding principle is the child’s best interests, and preserving a relationship with a fit parent is clearly in the best interest of the child. As some commentators have noted, an overemphasis on permanency in the child welfare context can in some cases produce undesirable results.” Furthermore, “we should encourage rather than frustrate the efforts a father makes in attempting to take responsibility in raising his child or children. And while social science research and child welfare advocates recognize ‘significant benefits to children when non-custodial fathers remain involved in their lives,’ research also unfortunately indicates that ‘historically, child welfare services have systematically minimized the role and the involvement of the African-American father’” (citations omitted). Justice Rucker concluded that “[the combination of an imperfect father, a system that presupposes the absence of African-American males from the household, and an institutional focus on permanency have all merged in this case resulting in the termination of ‘one of the most valued relationships in our culture.’ This certainly cannot be in E.M and E.L.M’s best interest” (citations omitted).

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41. Id. at 654.
42. Id. at 655.
43. Id.
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Read how Allie became involved in working with therapy animals and how this plenary session will help your practice:

I became interested in how therapy animals can help maltreated children back in 2003 after leaving the courtroom and upon joining NDAA. After spending years placing young children on the witness stand, I saw first-hand how unfriendly courtrooms are to children despite efforts that we make to make them more child-fair. I saw this concept as an innovative way to help children feel comfortable and safe during interviews and while testifying. So I began interviewing children’s advocacy center staff and prosecutors. This was a new concept back then and I saw some programs that were well-run with highly qualified therapy animal teams; I also saw some practices that were concerning to me from a safety standpoint. I started putting together guidelines of what would make the process safe for children, the animals and staff. I was also interested in having more than dogs help the children therapeutically (because some children are afraid of dogs) and to focus on cats, rabbits and other small animals that could go through the evaluation process and become therapy animals. My work culminated in August 2009 in the production of a manual and program called Therapy Animals Supporting Kids (TASK) with my co-author Diana McQuarrie (Executive Director, Denver Pet Partners). Since then, it has been my goal to educate professionals about how therapy animals can benefit their work in a safe manner, help children, and allow for better outcomes.

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by Kendall Marlowe, MA, JD

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- Implementing best practices by providing certification, training, education, and technical assistance to promote specialized high quality legal advocacy
- Advancing systemic improvement in child-serving agencies, institutions and court systems
- Promoting a safe and nurturing childhood through legal and policy advocacy for the rights and interests of children and families