ATTORNEYS FOR THE CHILD

PRESENTED BY LAURA A. MISKELL, ESQ.

A. Different ways to represent children:
   1. Custody/Visitation
   2. Family Offenses
   3. Support Court- Paternity, CS when alienation is raised
   4. Neglect
   5. PINS
   6. JD
   7. Surrogate's Court
B. Starting a new case
   1. Review Appointment Order
   2. Letter to Parents or Child is child is Respondent (sample of both)
   3. Review all pleadings, orders, documents given; request of attorneys; review prior file
C. Interviewing client
   1. Description of duties
   2. Ethical considerations to client and as their attorney : AFC is obligated to consult with and advise the child to the extent of and in a manner consistent with the child's capabilities (even babies): 22 NYCRR 7.2(d)(1); *Matter of Lamarcus E.,* 90 AD3d 1095 (case provided)
   3. Where
   4. Who brings in client(s)
   5. Follow up interviews
D. Interviews with others – ethical considerations
E. Representation of client in court
   1. Zealous representation: 22 NYCRR 7.2(d)(2);
   2. Best interests v. client's desires: ethical considerations – *Matter of Mark T. v. Joyanna U.,* 64 AD3d 1092
   3. Attorney / client privilege
   4. Substituting judgment - 22 NYCRR 7.2(d)(3); *In the Matter of Brian S., Katie S., and Alyssa S.* (case provided); *Matter of Lopez v. Lugo, 115 AD3d 1237* (case provided)
F. Appeal issues

https://www.nycourts.gov/courts/ad4/AFC/AFC-ethics.pdf

Rules of the Chief Judge

PART 7. Law Guardians

§7.2 Function of the attorney for the child.

(a) As used in this part, "attorney for the child" means a law guardian appointed by the family court pursuant to section 249 of the Family Court Act, or by the supreme court or a surrogate's court in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto.

(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 a witness in the litigation.

(c) In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.

(d) In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position.

(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 a 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 interests. 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 the 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.

MATTER OF JAMES I

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128 A.D.3d 1285 (2015); 9 N.Y.S.3d 745; 2015 NY Slip Op 04533

In the Matter of JAMES I. and Others, Neglected Children. BROOME COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent; JENNIFER I., Appellant.

Appellate Division of the Supreme Court of New York, Third Department.

Decided May 28, 2015.

Peters, *P.J.*

[128 A.D.3d 1286]

Appeal from an order of the Family Court of Broome County (Connerton, J.), entered July 30, 2013, which, in a proceeding pursuant to Family Ct Act article 10-A, modified the permanency plan for respondent's children.

Respondent is the mother of three children — James I. (born in 1998), Jessie I. (born in 2001) and Destany K. (born in 2008) — all of whom were removed from her care in 2012. James and Jessie were placed in petitioner's custody and Destany, whose father is deceased, was placed in the care of her paternal grandparents. Thereafter, upon consent, respondent and the father of James and Jessie were adjudicated to have neglected the children based upon the father's sexual abuse of Jessie, respondent's excessive corporal punishment of the children and her relapse in her alcohol recovery. In 2013, following a permanency hearing and interviews with the children, Family Court modified the permanency goal from reunification with respondent to permanent placement with fit and willing relatives.

On this appeal, we need only address respondent's contention that the joint representation of the children by the same attorney created a conflict of interest. During the course of the permanency proceedings, it became clear that James and Jessie had divergent interests with regard to where and with whom they preferred to live and that the attorney for the children was ultimately going to have to take a position contrary to that of one of them. Because the children were entitled to appointment of separate attorneys to represent their conflicting interests, the underlying order must be reversed and the matter remitted for further proceedings (*see Corigliano v Corigliano*, 297 A.D.2d 328, 329 [2002]; *Gary D.B. v Elizabeth C.B.*, 281 A.D.2d 969, 971-972 [2001]; *Matter of Brooke D.*, 193 A.D.2d 1100, 1100-1101 [1993], *lv dismissed* 82 N.Y.2d 734 [1993]; *cf. Matter of Chelsea BB.*, 34 A.D.3d 1085, 1088 [2006], *lv denied* 8 N.Y.3d 806 [2007]).

Ordered that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Broome County for further proceedings not inconsistent with this Court's decision.

2011 NY Slip Op 08693 [90 AD3d 1095]

December 1, 2011

Appellate Division, Third Department

In the Matter of Lamarcus E., a Child Alleged to be Neglected. Otsego County Department of Social Services, Respondent; Jonathan E., Appellant.

—[*1] Christopher Hammond, Cooperstown, for appellant.

Steven Ratner, Otsego County Department of Social Services, Cooperstown, for respondent.

Michelle I. Rosien, Philmont, attorney for the child.

Spain, J.P. Appeal from an order of the Family Court of Otsego County (Burns, J.), entered July 28, 2010, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate respondent's child to be neglected.

Respondent is the father of the subject child (born in 2002). In August 2009, while under petitioner's supervision, the father told petitioner that he intended to relocate to Connecticut in October 2009 to work and live with his girlfriend, but that he would not be taking his son with him. Thereafter, petitioner filed a neglect petition against the father alleging that he planned to permanently relocate to Connecticut without his child and without any viable plan for the child's care in his absence, and that the father planned to place the child in foster care. Upon receipt of the petition, Family Court removed the child and placed him in the custody of petitioner. The father relocated to Connecticut the next day. Following a fact-finding hearing, the father was determined to have neglected his child and, after a dispositional hearing, Family Court directed that the child continue his placement with petitioner. The father now appeals. No [*2]appeal has been taken on behalf of the child.

The attorney assigned to represent the child on this appeal is not the same attorney who continues to represent the child in Family Court. Although the child's appellate attorney has taken a position on this appeal that is consistent with that taken by the child's attorney in Family Court, she has reported in her brief that she has not personally met with her client, who is now nine years old. She explains that the child's attorney in the ongoing proceedings in Family Court has been "able to provide me with continuing information on my client, his position and the

status of the [proceedings in Family Court]." The child's appellate attorney has provided this Court with no further explanation.

Given the foregoing, we find that the child has been denied the meaningful assistance of appellate counsel (*see Matter of Jamie TT.*, 191 AD2d 132, 136-137 [1993]). Counsel's failure to "consult with and advise the child to the extent of and in a manner consistent with the child's capacities" (22 NYCRR 7.2 [d] [1]) constitutes a failure to meet her essential responsibilities as the attorney for the child. Client contact, absent extraordinary circumstances, is a significant component to the meaningful representation of a child. Therefore, given the circumstances herein, and for the reasons clearly articulated in *Matter of Mark T. v Joyanna U.* (64 AD3d 1092, 1093-1095 [2009]) and *Matter of Lewis v Fuller* (69 AD3d 1142 [2010]), "the child's appellate counsel will be relieved of her assignment[.] [T]he decision of this Court will be withheld and a new appellate attorney will be assigned to represent the child to address—after consulting with and advising the child—any issue the record may disclose" (*Matter of Lewis v Fuller*, 69 AD3d at 1143; *see Matter of Dominique A.W.*, 17 AD3d 1038, 1040-1041 [2005], *lv denied* 5 NY3d 706 [2005]).

Rose, Kavanagh, Stein and Garry, JJ., concur. Ordered that the decision is withheld, appellate counsel for the child is relieved of assignment and new counsel to be assigned to represent the child on this appeal.

2009 NY Slip Op 06053 [64 AD3d 1092]

July 30, 2009

Appellate Division, Third Department

In the Matter of Mark T., Appellant, v Joyanna U. et al., Respondents. (And Another Related Proceeding.)

—[*1] Christopher A. Pogson, Binghamton, for appellant.

John D. Cadore, Binghamton, for Joyanna U., respondent.

Teresa C. Mulliken, Harpersfield, for Paul V., respondent.

J. Mark McQuerrey, Law Guardian, Hoosick Falls.

Malone Jr., J. Appeal from an order of the Family Court of Broome County (Pines, J.), entered March 27, 2008, which, among other things, in a proceeding pursuant to Family Ct Act article 5, granted the motion of respondent Joyanna U. to dismiss the petition.

In December 1996, petitioner and respondent Joyanna U. (hereinafter the mother) engaged in a sexual relationship. At that time, the mother was also engaged in a sexual relationship with respondent Paul V. (hereinafter respondent). The following month, petitioner assaulted respondent, was arrested and incarcerated. The mother and respondent were married several days later and the subject child was born in October 1997. After respondent and the mother divorced in 2007, petitioner commenced this paternity proceeding, seeking a DNA test to establish that he was the biological father of the subject child and, in addition, petitioned for visitation. The mother moved to dismiss the paternity petition based on the ground of equitable estoppel. After conducting a hearing, Family Court granted the motion and also dismissed the visitation petition. Petitioner appeals. No appeal has been taken on behalf of the child.

The child is represented by a different attorney on this appeal, who filed a brief in [*2]support of an affirmance of Family Court's order, which is a position counter to that taken by the attorney representing the child in Family Court. While taking a different position on behalf of a child on appeal is not necessarily unusual, the child's appellate attorney appeared at oral argument and, in response to questions from the court, revealed that he had neither met nor spoken with the child. He explained that, while he did not know the child's position on this appeal, he was able to determine his client's position at the time of the trial from his review of the record and decided that supporting an affirmance would be in the 11½-year-old child's best interests.

In establishing a system for providing legal representation to children, the Family Ct Act identifies, as one of the primary obligations of the attorney for the child, helping the child articulate his or her position to the court (*see* Family Ct Act § 241). As with the representation of any client, whether it be at the trial level or at the appellate level, this responsibility requires consulting with and counseling the client. Moreover, expressing the child's position to the court, once it has been determined with the advice of counsel, is generally a straightforward obligation, regardless of the opinion of the attorney. The Rules of the Chief Judge (22 NYCRR 7.2) direct that in all proceedings other than juvenile delinquency and person in need of supervision cases, the child's attorney "must zealously advocate *the child's* position" (22 NYCRR 7.2 [d] [emphasis added]) and that, in order to determine the child's position, the attorney "must consult with and advise the child to the extent of and in a manner consistent with the child's capacities" (22 NYCRR 7.2 [d] [1]). The rule also states that "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 interests" and that 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" (22 NYCRR 7.2 [d] [2]). The rule further advises that the attorney representing the child would be justified in advocating a position that is contrary to the child's wishes when he or she "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" (22 NYCRR 7.2 [d] [3]). In such situations the attorney must still "inform the court of the child's articulated wishes if the child wants the attorney to do so" (22 NYCRR 7.2 [d] [3]; *see Matter of Carballeira v Shumway*, 273 AD2d 753, 754-757 [2000], *lv denied* 95 NY2d 764 [2000]). The New York State Bar Association Standards for representing children strike a similar theme in underscoring the ethical responsibilities of attorneys representing children, including the obligation to consult with and counsel the child and to provide client-directed representation (*see generally* NY St Bar Assn Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings [June 2008]; NY St Bar Assn Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings [June 2007]).

In October 2007, the Administrative Board of the Courts of New York issued a policy statement, entitled "Summary of Responsibilities of the Attorney for the Child," which outlines the necessary steps that form the core of effective representation of children. These enumerated responsibilities, which apply equally to appellate counsel, include—but are not limited to—the obligation to: "(1) [c]ommence representation of the child promptly upon being notified of the appointment; (2) [c]ontact, interview and provide initial services to the child at the earliest practical opportunity, and prior to the first court appearance when feasible; (3) [c]onsult with and advise the child regularly concerning the course of the proceeding, maintain contact with the child so as to be aware of and respond to the child's concerns and significant changes in the [*3]child's circumstances, and remain accessible to the child."

Clearly, the child in this proceeding has not received meaningful assistance of appellate counsel (*see Matter of Dominique A.W.*, 17 AD3d 1038, 1040 [2005], *lv denied* 5 NY3d 706 [2005]; *Matter of Jamie TT.*, 191 AD2d 132, 135-137 [1993]). He was, at the least, entitled to consult with and be counseled by his assigned attorney, to have the appellate process explained, to have

his questions answered, to have the opportunity to articulate a position which—with the passage of time—may have changed, and to explore whether to seek an extension of time within which to bring his own appeal of Family Court's order. Likewise the child was entitled to be appraised of the progress of the proceedings throughout. It appears that none of these services was provided to the child (*see Matter of Dominique A.W.*, 17 AD3d at 1040-1041).

Moreover, while the record reflects the position taken by the attorney for the child in Family Court, there is nothing in the record to indicate that the child—who was 11½ years of age at the time of the argument of the appeal—suffered from any infirmity which might limit his ability to make a reasoned decision as to what position his appellate attorney should take on his behalf. Indeed, absent any of the extenuating circumstances set forth in 22 NYCRR 7.2 (d) (3), the appellate attorney herein should have met with the child and should have been directed by the wishes of the child, even if he believed that what the child wanted was not in the child's best interests (*see* 22 NYCRR 7.2 [d] [2]). By proceeding on the appeal without consulting and advising his client, appellate counsel failed to fulfill his essential obligation (*see Matter of Jamie TT.*, 191 AD2d at 136-138).

Accordingly, the child's appellate counsel will be relieved of his assignment, a new appellate attorney will be assigned to represent the child to address any issue that the record may disclose, and the decision of this Court will be withheld.

Spain, J.P., Lahtinen, Stein and Garry, JJ., concur. Ordered that the decision is withheld, appellate counsel for the child is relieved of assignment and new counsel to be assigned to represent the child on this appeal.

115 A.D.3d 1237 (2014)
982 N.Y.S.2d 640
2014 NY Slip Op 1914

In the Matter of WILFREDO LOPEZ et al., Respondents,
v.
JENNIFER LUGO, Appellant.
In the Matter of WILFREDO LOPEZ, Respondent,
v.
JENNIFER LUGO, Appellant.
In the Matter of JENNIFER LUGO, Appellant,
v.
WILFREDO LOPEZ et al., Respondents.

277 CAF 13-00215

Appellate Division of the Supreme Court of New York, Fourth Department.

Decided March 21, 2014.

Present — Smith, J.P., Fahey, Lindley, Sconiers and Valentino, JJ.

1239*1239 Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered January 14, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded sole custody of the subject children to Sandro Lopez.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent-petitioner (mother) appeals, as limited by her notice of appeal, from an order that, inter alia, granted sole custody of the subject children to petitioner-respondent Sandro Lopez (father). Initially, we note that the mother's contentions with respect to Family Court's denial of a motion by the Attorney for the Child (AFC) to withdraw from representing one of the subject children are not before us on this appeal. The appeal is limited by the mother's notice of appeal to the issues of custody, parenting time, contact with the mother's husband and a grandparent's visitation, and thus the mother's contentions regarding the court's resolution of the AFC's motion to withdraw are not properly before this Court (*see* *Gray v Williams*, 108 AD3d 1085, 1087 [2013]). In addition, the record on appeal does not contain the AFC's motion to withdraw from representing the subject child. "It is the obligation of the appellant to assemble a proper record on appeal" (*Gaffney v Gaffney*, 29 AD3d 857, 857 [2006]), which must include all of the relevant papers that were before the motion court (*see* *Aurora Indus., Inc. v Halwani*, 102 AD3d 900, 901 [2013]). The mother, "as the appellant, submitted this appeal on an incomplete record and must suffer the consequences" (*Matter of Santoshia L.*, 202 AD2d 1027, 1028 [1994]; *see Matter of* *Rodriguez v Ward*, 43 AD3d 640, 641 [2007]; *LeRoi & Assoc. v Bryant*, 309 AD2d 1144, 1145 [2003]).

The mother failed to preserve for our review her contention 1238*1238 that the AFC representing the other subject child "failed to advocate for the [child's] position regarding

custody and visitation and thus failed to provide [him] with effective representation" (*Matter of Brown v Wolfgram*, 109 AD3d 1144, 1145 [2013]; *see Matter of Mason v Mason*, 103 AD3d 1207, 1207-1208 [2013]). In any event, the mother's contention that both AFCs failed to provide the subject children with effective representation is without merit. Although an AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]), an exception exists where, as here, the AFC "is convinced ... that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]; *see Mason*, 103 AD3d at 1208; *Matter of Swinson v Dobson*, 101 AD3d 1686, 1687 [2012], *lv denied* 20 NY3d 862 [2013]). Both AFCs noted for the court that they were advocating contrary to their respective clients' wishes, and both amply demonstrated the "substantial risk of imminent, serious harm" (22 NYCRR 7.2 [d] [3]), including the mother's arrest for possession of drugs in the children's presence, the numerous weapons that had been seized from the mother's house, and the credible evidence establishing that the mother's husband assaulted one of the subject children who attempted to intervene when the husband attacked the mother with an electrical cord.

Finally, we reject the mother's further contention that there is insufficient evidence supporting the court's determination awarding custody of the subject children to the father, with limited visitation to the mother, and directing that all contact between the mother's husband and the subject children be supervised. "The court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Samuel L.J. v Sherry H.*, 206 AD2d 886, 886 [1994], *lv denied* 84 NY2d 810 [1994]). Here, the record supports the court's conclusion that the mother repeatedly violated the court's orders directing her not to discuss the litigation with the subject children, as well as the orders awarding temporary custody of the subject children to their paternal grandfather. Based on those violations and the dangers to the subject children discussed above, we conclude that the court's determination with respect to custody, limited visitation and supervised contact is in the best interests of the children (*see generally Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

526

CAF 15-00314

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF BRIAN S., KATIE S., AND ALYSSA S.

CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

SCOTT S., RESPONDENT, AND TANYA S., RESPONDENT-APPELLANT.

SUSAN JAMES, ESQ., ATTORNEY FOR THE CHILD KATIE S., APPELLANT.

MARYBETH D. BARNET, ESQ., ATTORNEY FOR THE CHILD ALYSSA S., APPELLANT.

THEODORE W. STENUF, ESQ., ATTORNEY FOR THE CHILD BRIAN S., APPELLANT.

MEMORANDUM AND ORDER

KARPINSKI, STAPLETON & TEHAN, P.C., AUBURN (ADAM H. VANBUSKIRK OF COUNSEL), FOR RESPONDENT-APPELLANT.

SUSAN JAMES, ATTORNEY FOR THE CHILD, WATERLOO, APPELLANT PRO SE.

MARYBETH D. BARNET, ATTORNEY FOR THE CHILD, CANANDAIGUA, APPELLANT PRO SE.

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA, APPELLANT PRO SE.

HARRIS BEACH PLLC, BUFFALO (ALLISON A. BOSWORTH OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered March 2, 2015 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent Tanya S. had neglected the subject children.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the matter is remitted to Family Court, Cayuga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother and each Attorney for the Child assigned to the three subject children (appellate AFC) appeal from an order that, inter alia, determined that the mother neglected the children and placed the children in the custody of petitioner. Initially, we

reject the contentions of the mother and the appellate AFCs that petitioner failed to meet its burden of establishing neglect by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). Although the evidence of neglect at the fact-finding hearing consisted largely of hearsay statements made by the children to a caseworker employed by petitioner, those statements were adequately corroborated by other evidence tending to establish their reliability (*see* § 1046 [a] [vi]; *Matter of Gabriel J. [Stacey J.]*, 127 AD3d 667, 667; *Matter of Tristan R.*, 63 AD3d 1075, 1076-1077). Moreover, the children's out-of-court statements to the caseworker cross-corroborated each other (*see Gabriel J.*, 127 AD3d at 667; *Tristan R.*, 63 AD3d at 1076-1077). In sum, we conclude that the children's statements, "together with [the] negative inference drawn from the [mother's] failure to testify, [were] sufficient to support [Family Court's] finding of neglect" (*Matter of Imman H.*, 49 AD3d 879, 880).

The mother failed to preserve her further contention that her attorney was improperly excluded from an in camera examination of two of the subject children (*see Matter of Jennifer WW.*, 274 AD2d 778, 779, *lv denied* 95 NY2d 764). In any event, it appears that the limited purpose of the examination was for the court to determine where the children would live during the pendency of the proceeding, and the court did not consider the children's statements at the examination as evidence of the mother's neglect.

Children in a neglect proceeding are entitled to effective assistance of counsel (*see Matter of Jamie TT.*, 191 AD2d 132, 136-137). Here, the appellate AFC for Katie and the appellate AFC for Brian contend that Katie and Brian were deprived of effective assistance of counsel by the Attorney for the Children who jointly represented them as well as their sister Alyssa during the proceeding (trial AFC). Katie's appellate AFC contends that the trial AFC never met with or spoke to Katie. Although an AFC is obligated to "consult with and advise the child to the extent of and in a manner consistent with the child's capacities" (22 NYCRR 7.2 [d] [1]; *see Matter of Lamarcus E. [Jonathan E.]*, 90 AD3d 1095, 1096), there is no indication in the record whether the trial AFC consulted with Katie. The contention of Katie's appellate AFC is therefore based on matters outside the record and is not properly before us (*see Matter of Gridley v Syrko*, 50 AD3d 1560, 1561; *Matter of Harry P. v Cindy W.*, 48 AD3d 1100, 1100).

We agree with Brian's appellate AFC, however, that Brian was deprived of effective assistance of counsel because the trial AFC failed to advocate his position. The Rules of the Chief Judge provide that an AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]), even if the AFC "believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]; *see Matter of Mark T. v Joyanna U.*, 64 AD3d 1092, 1093-1094). There are two exceptions to this rule: (1) where the AFC is convinced that the "child lacks the capacity for knowing, voluntary and considered judgment"; or (2) where the AFC is convinced that "following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]; *see Matter of*

Viscuso v Viscuso, 129 AD3d 1679, 1680; *Matter of Lopez v Lugo*, 115 AD3d 1237, 1238). Here, there is no dispute that the trial AFC took a position contrary to the position of two of the subject children, Brian and Alyssa, both of whom maintained that Katie was lying with respect to her allegations against the mother. Alyssa expressed a strong desire to continue living with the mother, while Brian said that he wanted to live with either the mother or his father, who entered an admission of neglect prior to the hearing and was thus not a custodial option. Nevertheless, when the mother moved to dismiss the petition at the close of petitioner's case based on insufficient evidence of neglect, the trial AFC opposed the motion, stating that, although this was "probably not a very strong case," petitioner had met its burden of proof. Also, during his "cross-examination" of petitioner's sole witness, the trial AFC asked questions designed to elicit unfavorable testimony regarding the mother, thus undercutting Brian and Alyssa's position.

Inasmuch as the trial AFC failed to advocate Brian and Alyssa's position at the fact-finding hearing, he was required to determine that one of the two exceptions to the Rules of the Chief Judge applied, as well as "[to] inform the court of the child[ren]'s articulated wishes" (22 NYCRR 7.2 [d] [3]). Here, the trial AFC did not fulfill either obligation (*cf. Matter of Alyson J. [Laurie J.]*, 88 AD3d 1201, 1203). Indeed, the record establishes that neither of the two exceptions applied. Because all three children were teenagers at the time of the hearing, there was no basis for the trial AFC to conclude that they lacked the capacity for knowing, voluntary and considered judgment, and there is no evidence in the record that following the children's wishes was "likely to result in a substantial risk of imminent, serious harm to the child[ren]" (22 NYCRR 7.2 [d] [3]). According to the trial AFC, the most serious concern he had about the children was that they frequently skipped school which, although certainly not in their long-term best interests, did not pose a substantial risk of *imminent* and serious harm to them. Similarly, the fact that the mother may have occasionally used drugs in the house, and was thus unable to care for the children, does not establish a substantial risk of imminent and serious harm to Brian or Alyssa. Finally, the fact that the mother, on a single occasion, may have struck Katie on the arm with a belt, leaving a small mark, did not establish a substantial risk of imminent and serious harm to Brian or Alyssa if they continued living with the mother.

We note that, although the record does not reveal whether the trial AFC consulted with Katie, it is clear that Katie's position with respect to the neglect proceeding differed from that of her siblings. Under the circumstances, it was impossible for the trial AFC to advocate zealously the children's unharmonious positions and, thus, "the children were entitled to appointment of separate attorneys to represent their conflicting interests" (*Matter of James I. [Jennifer I.]*, 128 AD3d 1285, 1286; *see Corigliano v Corigliano*, 297 AD2d 328, 329; *Gary D.B. v Elizabeth C.B.*, 281 AD2d 969, 971-972). We therefore remit the matter to Family Court for appointment of new counsel for the children and a new fact-finding hearing.

Finally, the contention of Brian's appellate AFC that there was insufficient evidence of neglect against respondent father is not reviewable on appeal because, among other reasons, the father entered an admission of neglect, and the resulting order was thereby entered upon consent of the parties (*see Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497; *Matter of Violette K. [Sheila E.K.]*, 96 AD3d 1499, 1499; *Matter of Carmella J.*, 254 AD2d 70, 70).

All concur except CENTRA, J.P., and NEMOYER, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent because, in our view, the children received effective assistance of counsel, and we would therefore affirm the order. Respondent mother and respondent father are the parents of Alyssa, Brian, and Katie, who were 15, 13, and 12 years old at the time petitioner filed the neglect petition herein against the parents. The parents lived in separate homes and, at the time of the filing of the petition, the girls lived with the mother and Brian lived with the father. One attorney was assigned to represent the children as Attorney for the Children (trial AFC), as he had done in prior proceedings involving the parents. On this appeal, the three children are each represented by a different attorney (appellate AFC), and only the appellate AFCs for Brian and Katie contend that they were denied the effective assistance of counsel by the trial AFC.

As a preliminary matter, we agree with the majority that petitioner established by a preponderance of the evidence that the children were neglected by the parents. The evidence established educational neglect by the mother inasmuch as Brian's and Alyssa's school attendance was poor while they were in the mother's custody (*see* Family Ct Act § 1012 [f] [i] [A]; *Matter of Cunntrel A. [Jermaine D.A.]*, 70 AD3d 1308, 1308, *lv dismissed* 14 NY3d 866). In fact, the school made a PINS referral for Alyssa based on her excessive absences, but the mother did not follow through with the referral. The evidence also established that the mother inadequately supervised the children inasmuch as she remained in her bedroom for excessive periods of time and was oblivious to the fact that the children were leaving the home to drink alcohol and smoke marihuana (*see* § 1012 [f] [i] [B]). Finally, there was evidence that the mother snorted crushed "hydros, oxies," thus supporting the determination that the mother neglected the children by misusing drugs (*see id.*; *Matter of Edward J. Mc. [Edward J. Mc.]*, 92 AD3d 887, 887-888). With respect to the father, he admitted that he inappropriately abused alcohol, which was sufficient to establish that he repeatedly misused alcohol "to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of . . . intoxication" (§ 1046 [a] [iii]), and that he thereby neglected the children (*see* § 1012 [f] [i] [B]; *Matter of Samantha R. [Laurie R.]*, 116 AD3d 867, 868, *lv denied* 23 NY3d 909; *Matter of Tyler J. [David M.]*, 111 AD3d 1361, 1362).

Children who are the subject of a Family Court Act article 10 proceeding are entitled to the assignment of counsel to represent them (§ 249 [a]; § 1016), and the children are entitled to the effective assistance of counsel, or meaningful representation (*see Matter of*

Dwayne G., 264 AD2d 522, 523; *Matter of Jamie TT.*, 191 AD2d 132, 135-136). As the above evidence shows, the children were neglected by the parents, and the trial AFC understandably argued in summation that petitioner had proven its case. Although the trial AFC did not set forth the wishes of the children, Family Court was aware that Alyssa wanted to live with the mother, that Brian wanted to live with the mother or the father, and that Katie wanted to live with an aunt. Nevertheless, the appellate AFCs for Brian and Katie contend that Brian and Katie were denied effective assistance of counsel because the trial AFC advocated a finding of neglect, which was against the apparent wishes of his clients.

The appellate AFCs and the majority rely on 22 NYCRR 7.2 (d), which provides that the AFC "must zealously advocate the child's position," and 22 NYCRR 7.2 (d) (2), which provides that, "[i]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests." If an AFC is convinced, however, "that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the [AFC] would be justified in advocating a position that is contrary to the child's wishes" (22 NYCRR 7.2 [d] [3]). We conclude that the trial AFC was reasonably of the view, in light of the evidence supporting a finding of neglect, that there was a substantial risk of imminent, serious harm to the children if they remained in the custody of the parents, and was not ineffective for advocating a finding of neglect (*see generally Matter of Lopez v Lugo*, 115 AD3d 1237, 1238). Indeed, we note that in cases where an AFC has been found to have rendered ineffective assistance of counsel to his or her client in a Family Court Act article 10 proceeding, the reason is that the AFC did not do *enough* to establish that the child had been abused or neglected (*see Matter of Colleen CC.*, 232 AD2d 787, 788-789; *Jamie TT.*, 191 AD2d at 137). In addition, even assuming, arguendo, that the exception set forth in 22 NYCRR 7.2 (d) (3) does not apply to the circumstances of this case, we nevertheless would conclude, under all the circumstances presented, that Brian and Katie received meaningful representation (*cf. Jamie TT.*, 191 AD2d at 137; *see generally People v Baldi*, 54 NY2d 137, 147).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court