New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

JULY 23, 2021

Substituting Judgment: Beware, Attorney for the Child

What happens when the AFC believes that the child's wishes are contrary to the child's best interests and finds himself/herself at a crossroads with the child? The AFC must then decide whether it is permissible to use substituted judgment.

BY HARRIET NEWMAN COHEN AND ANKIT KAPOOR

The Hippocratic Oath directs doctors to "do no harm" to their patients. The Codes of Conduct for lawyers direct us to represent our clients zealously, to be chameleons, as it were, changing our colors to blend seamlessly into the needs of our clients. This standard is no different when representing a child client as the Attorney for the Child (AFC).

Questions present themselves: How far can we go in substituting our wishes for the child client's when we think the child's wishes are not in their best interests? What should we do when we can't convince our child clients as to what we think we know is best for them? When is the situation so fraught with danger for the child client as to make it necessary and proper for us to substitute our judgment for that of our child client? Or is that even the standard? Does the Code of Conduct for the AFC oblige us to advocate the expressed wishes of the child client even if the result will not be in the child client's best interests? These and other related issues are what this article explores.

The Role of the AFC

The role of the AFC has been of much discussion since 22 NYCRR §7.2 was promulgated in 2007. While 22 NYCRR §7.2 gives the AFC tremendous power to advocate for minor children, it also places limits on that power. 22 NYCRR §7.2 sets forth that the AFC is a law guardian appointed by the Supreme, Family or Surrogate's Courts, who is subject to the same ethical requirements applicable to all lawyers. This includes ex parte communication, conflicts of interest, and disclosure of client confidences. As importantly, in proceedings where a child is the subject, 22 NYCRR §7.2(d) requires the AFC to zealously advocate the child's position, and the AFC "… 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 (emphasis supplied)." The rule further provides that the AFC should be directed by the child's wishes, *if the child is capable of knowing, voluntary and considered judgment*. In other words, irrespective of what the AFC may believe is in the child's best interests; the AFC must, *unless the child is incapable of knowing, voluntary and considered judgment*, convey the child's wishes.

Photo: Robert Wachholz via Adobe Stock

But what happens when the AFC believes that the child's wishes are contrary to the child's best interests and finds himself/herself at a crossroads with the child? The AFC must then decide whether it is permissible to use substituted judgment.

What Triggers an AFC To Substitute Judgment?

22 NYCRR §7.2(d)(3) states that the AFC can substitute judgment only if 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* (emphasis supplied)." 22 NYCRR §7.2 only requires the child to have "… a basic understanding of the issues in the case and their consequences." Unlike an adult, such as the AFC himself/herself, a child may not—and likely does not—have vast knowledge and

experience that would offer greater insight into the impact of a particular decision on a child's life.

Is Age a Factor?

We turn to our courts for guidance on age as a factor because the rule does not give us an age at which a child may be deemed to have basic understanding of a custody case. In *Matter of Jennifer V.V. v. Lawrence W.W.*, 182 A.D.3d 652 (3d Dep't 2020), the AFC claimed that his clients, two little girls, ages 6 and 10, were too young to voice their own opinions. The court rejected that claim and stated that the AFC should have consulted with his clients. By neglecting to do so, the AFC was deemed to have "wholly failed to fulfill the obligations" of 22 NYCRR §7.2(d)(1). This rule requires the AFC to consult with and advise child clients in a manner consistent with their capacities. At the same time, the AFC failed to claim that either child met either of the two exceptions to 22 NYCRR §7.2(d)(3): first, that they lacked capacity, or second, that there was a risk of imminent harm. This court found that at the age of 10, the older child was old enough to express her wishes. The determination of the younger girl's capacity was not solely dependent on her age, and the AFC should have considered the six-year-old's level of maturity and verbal abilities to properly assess her cognitive capacity, according to the court. Query: If the AFC is required to consult with a six-year-old child, does this mean that at the age of six, the child will be deemed to have a sufficiently basic understanding of the issues in the case as to understand their consequences? In the eyes of this court, the answer was yes.

But at what age is a child too young to understand the far-reaching and profound effects of the words coming out of the mouths of babies? In *Matter of Schenectady County Dept. of Social Servs. v. Joshua BB.*, 168 A.D.3d 1244 (3d Dep't 2019), the Third Department in a decision one year before the decision in *Matter of Jennifer V.V.* once again found the AFC wanting in improperly failing to consult with a child. In that case, the child was only between four-and-a-half- and six years of age during paternity litigation. In *Matter of Ford v. Baldi*, 123 A.D.3d 1399 (3d Dep't 2014), the court held that a seven-year-old child was old enough to have her wishes taken into consideration. In *Matter of Seeley v. Seeley*, 119 A.D.3d 1164 (3d Dep't 2014), the court had a nine-year-old before it when it remitted the matter to Family Court for consideration of that child's wishes regarding visitation with a grandfather. Therefore, it is evident that no particular age qualifies (or disqualifies) a child as being capable of "knowing, voluntary and considered judgment;" the AFC must always be able to report to the court that he or she has advised with and consulted the children in order to fairly assess their ability to understand the issues in the case and their consequences. If the AFC's in these cases had spoken the magic words to the court, "I consulted with them, I explained the ramifications to them, I advised them, and I, thereafter, concluded that the children did not have the capacity to truly understand," would that have made a difference in the outcomes? Should that have made a difference in the outcomes?

Substituting Judgment in Cases With Parental Alienation

The courts have accepted the AFC's substitution of judgment in cases with proven parental alienation. In *Matter of Vega v. Delgado*, N.Y. Slip Op. 03956 (4th Dep't 2021), a proceeding involving the custody of a child born in 2009, the court rejected the mother's contention that the AFC improperly substituted judgment where the court found that the mother's persistent and pervasive pattern of alienation of the child from the father would likely result in a substantial risk of imminent, serious harm to the child. There the court held that the AFC properly substituted judgment, even though the AFC advocated for a position contrary to the child's wishes. The AFC had informed the court of the child's wishes, *and only then* took a different position from that of the child.

Similarly, in *Matter of Viscuso v. Viscuso,* 129 A.D.3d 1679 (4th Dep't 2015), the court held that the AFC properly substituted judgment instead of following the child's wishes. *Viscuso* was a custody case in which the court stated that following the child's wishes "would be tantamount to severing her relationship with her father" and not result in what is in the child's best interests. 129 A.D.3d at 1687. The mother in *Viscuso* constantly violated the court's order not to discuss the litigation with the child, tried to make the child fearful of the father, and even went as far as to encourage the child to self-medicate before her visitation with the father. The court, citing to *Amanda B. v. Anthony B.*, 13 A.D.3d 1126 (4th Dep't 2004), stated that a "concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child … as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent." 13 A.D.3d at 1126. Accordingly, the court granted sole custody to the

father with visitation to the mother and ordered the mother to pay the father's counsel fees.

In custody cases where parental alienation exists, such as *Vega* and *Viscuso*, the AFC must navigate the complexity of the alienating parent's potential brainwashing or manipulation of the child. If the AFC decides to substitute judgment because the child is of diminished capacity and unable to formulate an independent position, the AFC should work to advocate for the position that the child would likely take if the child was not affected by the alienating parent. Jamie Rosen, *The Child's Attorney and the Alienated Child: Approaches to Resolving the Ethical Dilemma of Diminished Capacity*, 51 Family Court Review at p. 330 (2013). Although it is crucial that the child feel that his or her voice is heard and valued by the AFC and the court, the child—and the alienating parent who may be manipulating the child—must also understand that ultimately the determination of the child's best interests will be made by the court, not the AFC. To that end, it likely behooves the AFC to ask for a Lincoln Hearing. Its grant or denial may be in the sound discretion of the court, but the request is an important safeguard, both for the AFC and for the welfare of the child.

New York does not recognize the "parental alienation syndrome," a now discredited "disorder" that was coined by Dr. Richard A. Gardner in 1985 that this and other states have rejected. Legitimate questions concerning the alleged syndrome's admissibility and reliability as evidence in family law proceedings made it controversial especially in light of its undeniable negative effect on custody litigation and its anti-mother connotations.

How To Substitute Judgment Properly

If, after consultation with the children, the AFC decides to substitute judgment, they must inform the court as to the basis of that decision and provide evidence as to why it is necessary. This involves the AFC conducting a thorough investigation of the child's case, which can include consultations with the child's therapist, caretakers, schoolteachers, and any other individuals who are knowledgeable about the child's emotional condition and the implications of the court proceedings on the child. These are also the standards for whether the AFC should be a proponent of having the child make court appearances or give testimony. New York State Bar Association Committee on Children and the Law, *Standards for Attorneys Representing Children in Custody, Visitation, and Guardianship Proceedings*, D-5 at p. 19 (2015).

The AFC must demonstrate either that the child is incapable of understanding the issues of the case, or that following the child's wishes would result in imminent harm. In *Matter of Audreanna V.V. v. Nancy W.W.*, 158 A.D.3d 1007, 1011 (3d Dep't 2018), the court found that the AFC had properly substituted judgment for his two young clients. In that case, the Third Department affirmed the decision of the judge below that left custody of the children with the mother and rejected the grandmother's claim that the AFC had improperly substituted judgment. The older child, a nine-year-old boy, was autistic. The younger child, age eight, had developmental delays. Therefore, both children were deemed incapable of knowing, voluntary and considered judgment, and the substituted judgment was proper.

It is also worthy of note that when the child client is too young, or is incapable of knowing, voluntary and considered judgment, even if the child voices a position that the AFC believes is in the child's best interests, the AFC should, nevertheless, declare to the court that she/he is substituting judgment and follow the procedure set forth in 22 NYCRR §7.2.

Questions Answered

We can substitute our judgment for the child client's when the criteria set forth in 22 NYCRR §7.2 are met. When we can't convince our child clients as to what is best for them and they do not meet the criteria in 22 NYCRR §7.2, we must speak with the child's voice or resign if we cannot tolerate the potential result from such a requirement. When we believe that the situation is so fraught with danger for the child that following the child's wishes would likely result in imminent harm, we have met one of the criteria of 22 NYCRR §7.2 and can substitute our judgment for that of the child—but only if we articulate fully to the court the client's own wishes and describe persuasively what we see the imminent harm to be. The Code of Conduct for the AFC does oblige us to advocate the expressed wishes of the child client even if the result will not be in the child client's best interests—absent meeting the criteria of 22 NYCRR §7.2. And we should substitute judgment when the child client is too young, or is incapable of knowing, voluntary and considered judgment, even if the child voices a position with which we concur.

Dangers in Improperly Substituting Judgment

In *Matter of Jennifer V.V. v. Lawrence W.W.*, 182 A.D.3d 652 (3d Dep't 2020),

where the AFC did not consider the children's wishes as required under 22 NYCRR §7.2(d), or conduct an analysis of the children's capacities that could justify the AFC's advocating a position contrary to the children's wishes when the AFC did not agree with the children, the court remonstrated with the AFC, explaining that it is not the AFC's role to determine what constitutes the children's best interests. Such determination is made by the court. The AFC is solely responsible for conveying the children's wishes.

Matter of Jennifer V.V. exemplifies the danger in substituting judgment instead of following the procedure outlined in 22 NYCRR §7.2(d). The AFC in *Matter of Kleinbach v. Cullerton*, 251 A.D.3d 1686 (4th Dep't 2017), who declared during the first court appearance and before speaking with the child, that he would be substituting judgment, was similarly found to have failed to fulfill his ethical duties by not conducting the comprehensive analysis required by 22 NYCRR §7.2(d). He "should not have [had] a particular position or decision in mind at the outset of the case before the gathering of evidence." *Matter of Carballeira v. Shumway*, 273 A.D.2d 753 (3d Dep't 2000). The decisions of the Third and Fourth Departments provide a cautionary tale for AFCs who attempt to substitute judgment without following the Rules.

The important Second Department case of *Silverman v. Silverman*, 186 A.D.3d 123, 3d (2d Dep't 2020), authored by Justice Christopher and concurred in by Justices Scheinkman, Rivera and Roman, further illustrates the pitfalls for the AFC who improperly substitutes judgment. In *Silverman*, the Second Department reversed Justice James F. Quinn who changed custody from the mother to the father over the wishes of two daughters, ages 11 and 13. The girls did not suffer from a mental, physical, or emotional disability to such an extent that their ability to make a knowing, voluntary, and considered judgment was impaired, they were high honor roll students and involved in extracurricular activities, who wanted residential custody to be with their mother. The AFC disagreed.

The *Silverman* court reversed. The children did not receive meaningful assistance of counsel in the opinion of the court, as the AFC improperly substituted judgment (in both Suffolk County Supreme and in the Second Department). The AFC had consistently supported the father's position, opposing the introduction of evidence that would have supported the mother's position, including evidence that potentially substantiated one child's claim that the father attempted to strangle her. The AFC failed to zealously advocate for her clients' best interests, including by not calling the forensic evaluator who had prepared a report recommending custody to the mother. The court removed the AFC from the case when the AFC failed to fulfill her ethical duties as an attorney. It also reversed the amended order which had awarded residential custody to the father, reinstated the mother's residential custody, and remitted the matter to the Supreme Court in Suffolk County, with instructions to appoint a new AFC and hold a de novo hearing to address the father's motion to modify the custody arrangement in the parties' settlement agreement. Not to be overlooked is the always present danger of being taken to the Disciplinary Committee for the improper substitution of judgment. A one-page complaint from a disgruntled parent will require a 20-page response from the AFC and may result in an admonition, a censure, or worse.

Conclusion

This article has discussed the substitution of judgment—proper and improper. It has told a cautionary tale about the pitfalls for the AFC who substitutes judgment without strictly adhering to the rules set forth by 22 NYCRR §7.2—in form as well as substance. It has revisited the controversial nature of claims of parental alienation and the rejection of the parental alienation syndrome, while, nevertheless, recognizing that children found to have been influenced by their mothers are not infrequently deemed incapable of exercising knowing judgment, thereby justifying the substitution of judgment. When all is said and done, representing children can be incredibly rewarding and should not be eschewed. However, attorneys who represent child clients need to be wary and should not rush in where angels fear to tread.

Harriet Newman Cohen *and* ***Ankit Kapoor*** *are partners in Cohen Stine Kapoor, a matrimonial and family law firm.* *They acknowledge the assistance of* ***Rachel Rutstein****, an intern in the firm, in the preparation of this article.*

Reprinted with permission from the July 23, 2021 edition of the NEW YORK LAW JOURNAL © 2021 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited.
For information, contact 877-256-2472 or reprints@alm.com. # NYLJ-07262021-499170