

Recent Evidentiary Issues in Permanency Hearings
6/2017

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Matter of Rebecca KK, 61 AD3d 1035 (3rd Dept. 2009) – error for court to not consult with 14 year old child or to ask AFC specifically what child’s position on goal is; see also Matter of Dakota F., 92 AD3d 1097 (3rd Dept. 2012) – error to not ask AFC about 6 year old child’s position; Matter of Julian P., 106 AD3d 1383 (3rd Dept. 2013) – error to not ask AFC what children’s position was where oldest child is 6 year old – Matter of Alexis SS, 125 AD3d 1141 (3rd Dept. 2015) – court should have directly consulted with children who were “mature enough” and not just the AFC, Matter of Desirea F., 137 AD3d 1074 (3rd Dept. 2016), error to not speak with children who were 8 and 10 - same case later reported at 137 AD3d 1519(3rd Dept. 2016) re no “absolute right” of a respondent to be present when court speaks to the children; Matter of Denise J., dec’d 6/2/16 (Westchester County Family Court 2016) - 16 year old to be brought to court if she wants to be there for her PH regardless of DSs’ concern over her behavior

Matter of Ayela S., 80 AD3d 767 (2nd Dept. 2011) – foster mother cannot be subject to contempt for failing to bring children to visitation with birth mother, agency is responsible

Matter of Jacelyn TT., 80 AD3d 1119 (3rd Dept. 2011) - family court has authority to change child’s goal even if no party asks for it

Matter of Christopher G., 82 AD3d 1549 (3rd Dept. 2011) – if court did not give agency permission in last order to do a final discharge of the child upon 10 days notice, then any discharge done by the agency was a trial discharge

Matter of Sean S., 85 AD3d 1575 (4th Dept. 2011) – family court erred in changing goals of 16 and 15 year olds to adoption when they did not want to be adopted; youth and foster parents were not present in court to say this but AFC was and had advised the court, the goal should be APPLA; see also Matter of Jose T., 87 AD3d 1335 (4th Dept. 2011); Matter of Lavelle W., 88 AD3d 1300 (4th Dept. 2011)

Matter of Thurston v Skellington, 89 AD3d 1520 (4th Dept. 2011) - minimally fit grandmother not a proper placement for child in foster care, test is best interests

Matter of Dakota F., 92 AD3d 1097 (3rd Dept. 2012) – court cannot order two goals for child, a concurrent plan can be described but not ordered as a 2nd goal; Matter of Julian P., 106 AD3d 1383 (3rd Dept. 2013) – cannot order separate goals for a mother and a father, particulars where one is reunification and one is TPR – does not even make sense

Matter of Carlos G., 96 AD3d 632 (1st Dept. 2012) – mother never signed the consent to have Referee “hear and determine” but she implicitly agreed as she participated in the hearing with no objection; also court should not delay perm hearing for one sib to put matter with other sibs when cases are at different stages in any event.

Matter of John B. v Patrice S. NYLJ 7/27/12 (Nassau County Family Court 2012) – cannot give children goal of guardianship to foster parents over parental objection – would defeat whole purpose of foster care

Matter of Gloria DD., 99 AD3d 1044 93rd Dept. 2012) – after adjudication of neglect, placement and retention of child in care is based on best interests and not imminent risk as per FCA §§ 1072 (a), 1052 (a) (iii) and 1055 (a)(i) – also see Matter of Bobby J.C., 124 AD3d 648 (2nd Dept. 2015)

Matter of Angel P., 39 Misc3d 264 (Clinton County Family Court 2013) – court ordered DSS to give father a SCRAM device as father hoped it would help with his sobriety. DSS had argued that they only had 20 devices and they were all being used – court ruled that the DSS cannot put arbitrary limits on available services

Matter of Nicole A., 40 Misc 3d 254 (Bronx Family Court 2013) – ACS argued that the court did not have authority to order a trial discharge over ACS objection but court ruled otherwise

Matter of John H., 56 AD3d 1024 and 60 AD3d 1168 (3rd Dept. 2009) – discovery in a permanency hearing situation; can make discover demands at any time as permanency hearings mean court has ongoing jurisdiction; all CPLR Art. 31 discovery devices are available; FCA § 1038 says Art. 31 applies and these are not “special proceedings” under CPLR § 408; contract agency for the foster care placement is not a party with whom discovery can be sought

Matter of Tiana G., 84 AD3d 1375 (2nd Dept. 2011) – family court does not need to adjourn an Art. 10 because a criminal case is pending, also DA is not a necessary party

Matter of Roselyn S. 82 AD3d 1249 (2nd Dept. 2011) – family court does not have authority to compel respondent to attend a dispo hearing

Matter of Kevin MH., 102 AD3d 690 (2nd Dept. 2013) – court erred in dismissing DSS petition for extension of supervision without holding a hearing

Matter of Alazaya I.B. 109 AD3d 1147 (4th Dept. 2013) –family court should not leave issue of mods of visitation to be decided by DSS, counselor’s and AFCs

Matter of V.P., 41 Misc 3d 926 (Family Court, Kings County 2013) – a foster care agency has no standing – they are a “non-party” and cannot bring a motion to request that the court order ACS to do something – here agency wanted ACS to be ordered to do an ICPC referral for an out of state relative

Matter of Kenneth S., 115 AD3d 961 (2nd Dept. 2014) - cannot give “final order of custody “to a non respondent father in an Art. 10 proceeding if he did not file an Art. 6 custody petition

Matter of Gunner T., 44 Misc3d 539 (Clinton County Family Court 2014) -child had been in a foster home for approximately five months on a pending Art. 10 petition, DSS provided the foster parents with a the required ten day notice that they would be moving the child to a great uncle’s home. The uncle had become certified as a foster parent. The Family Court ruled that it did have authority to designate a specific foster home for a child in care under FCA §1017 (2) (b) where the language says that the court can order that the child “reside in a specific certified foster home”. Although the court must give preference to a relative, the court need not place with a relative if in the court’s decision, this is not in the child’s best interests. Note: also see Adrienne M 201 AD2d 938 (4th Dept. 1994)and Damien A. 195 Misc 2d 661 (Suffolk County Family Court 2003)

Matter of Alexis SS 125 AD3d 1141 (3rd Dept. 2015) – reversed lower court for ordering goal of adoption when all parties wanted goal to be a relative placement; said lower court should have spoken to the children even though appeared that AFC did state their position

Matter of Damian D 126 AD3d 12 (3rd Dept. 2015) – (although in an Art. 10 dispo still relevant for PHs) – reversed lower court for modifying prior visitation order of the NRP in the dispo of the respondent parents’ neglect

Matter of Dashawn N. 127 AD3d 976 (2nd Dept. 2015) – family court ruled that ruling that a 18 and 17 could decide if they wanted to visit the mother, mother appealed saying DSS should be ordered to make diligent efforts to encourage the visitation – not necessary to so order, the kids can ask for contact if they want it and the mother knows how to reach the kids

Matter of James I. 128 AD3d 1285 (3rd Dept. 2015) - reversed family court as there was a conflict of interest for AFC – two of the children had divergent interests with regard to where they wanted to live and the AFC would have has to take a position contrary to one of them

Matter of Duane FF., 135 AD3d 1093 (3rd Dept. 2016) – AD said it was okay for family court to change goal to adoption re infant had only been in care less than 4 months as mother and father were in prison with long sentences and had no other placement options for the child and foster parents were interested in being long term resources

Matter of Desirea F., 137 AD3d 1074 (3rd Dept. 2016) – AD critical of family court’s perm hearing – said record was “meager”, said cw had only “very limited knowledge” of services for children or mother, did not know about children’s counseling, could not name mother’s counselor and had not talked to her, court did not inquire into mother’s situation or efforts to correct her problems, report had info in it about another child that was not the subject of the proceeding, court changed the goal but really has not evidence to support the goal change, reversed and remitted for new hearing

Matter of Angel R.R., 145 AD3d 1136 (3rd Dept. 2016)- NRP father was incarcerated and appealed complaining that he was not allowed full participation in the PH – app div says that a NRP has a limited role and narrow rights at a PH – can really only ask custody and this father really couldn’t seek custody as he was incarcerated

Matter of Izora W., 146 AD3d 569 (1st Dept. 2017) – AD agreed with appointment of a teenager’s grandmother as a subsidized kinship guardian over the mother’s objection - extraordinary circumstances in that the child had been placed in foster care with the grandmother 2 years earlier after her mother severely beat her. The mother had since failed to engage in services, did not communicate with the agency and did not visit the child. There was no indication that the mother intended to change her behavior. The grandmother gave the child a safe and stable home and the child was in high school and thriving. It was in the child’s best

interest to be placed in the guardianship of the grandmother as neither adoption nor return home were appropriate for this older youth. The child's attorney had met with the child and took the position that the child fully supported the plan with the grandmother. The child signed a notarized preference form.

Matter of Kaylub T., 150 AD3d 862 (2nd Dept. 2017) - maternal aunt and uncle given guardianship of their nephew. The child had been placed in foster care with these relatives in 2009 – in 2014 the foster parent relatives filed a petition to be guardians of the child - mother opposed the petition but extraordinary circumstances in that the mother suffered from mental illness - child had been with the relatives for 5 years and was closely bonded to them.

Matter of Dawn M., ___ AD3d ___, dec'd 6/29/17 (3rd Dept. 2017)- 4 children needed to remain in foster care and goal should be changed to adoption, but the AFC for the 3 younger children had not made the court aware of the children's specific position in the matter. - personal meeting with the children is not mandated by law but the court must find some means of ascertaining the children's wishes. The oldest child's AFC clearly informed the court in his closing statement that the child wanted to be adopted and reminded the court that the child had told the mother specifically that during the most recent service plan review. However the AFC for the younger children (who would have been approximately 8,7, and 6 years old at the time) did not indicate in his closing what their wishes were and although such desires by the children are "not dispositive" they "carry significance and cannot be lightly overlooked" .