Family Court Defense Evidentiary Obstacle: Child Witnesses

The purpose of this document is to provide an overview of how to navigate the evidentiary challenges created by "child witnesses" in various Family Court proceedings in New York.

The Child's Right to be Heard:

- In New York, whether a child has the right to be heard or to testify in Family Court is dependent on a combination of the following: **(1) the type of proceeding, (2) the controlling statutory and case law, (3) the child's role in the proceedings, (4) the child's age, (5) the child's maturity, and (6) the child's competency.** These considerations are explored herein.

- It is important to note that in Family Court proceedings, a "child" is not a monolith. In essence, a "child" in New York Family Court is generally a person under the age of 18 years. However, the legal rights and responsibilities of a child can be extended (as in child support) or modified, and what weight to give a child's opinion depends on the type of Family Court proceeding and the child's individual circumstances—such as their age, maturity, competency, and role in the proceedings.

- In some cases, the judge may appoint an **Attorney for the Child** ("AFC") to represent the child as their lawyer. Family Court Act § 249 provides the statutory framework for when an AFC must be assigned. Note that the statutory silence on Article 4, 6 or 8 proceedings renders AFC appointment statutorily discretionary, however, the relevant case law has largely mandated the appointment of an AFC in contested custody cases that require a fact-finding hearing.[1]

- In other cases where the child is an "infant, incompetent person or conservatee," the judge may appoint a **Guardian ad litem** ("GAL") to protect the child's interests. The GAL is a non-legal representative for the child, tasked with investigating the case, assisting the AFC, and making recommendations to the judge. The rules pertaining to the appointment of a GAL are found in CPLR 1201 and 1202.[2]

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[1] *See* *Koppenhoefer v Koppenhoefer*, 159 AD2d 113 [2d Dept 1990] [appointment of AFC in disputed custody/visitation litigation is recognized as appropriate and helpful to the court]; *Anonymous 2011-1 v Anonymous 2011-2*, 102 AD3d 640 [2d Dept 2013] [underscoring importance of appointing AFC in divorce proceeding involving contested custody]; *Matter of Thomas GG. v Bonnie Jean HH.*, 187 AD3d 1355 [3d Dept 2020] [although permissive, the appointment of an AFC in child support matters is sometimes advisable]; *see also* *Matter of Pamela N. v Neil N.*, 93 AD3d 1107 [3d Dept 2012] [finding that the impact of the order of protection on the child's parent-child relationship renders it appropriate to appoint an AFC in a family offense proceeding].

[2] *See* *Matter of Anastasia E. M.*, 146 AD3d 887 [2d Dept 2017] [appointing a GAL to a 17-year-old mother in a proceeding to terminate her parental rights on grounds of intellectual disability, upon application of the mother's attorney].

Specific Areas of Concern:

- **Article 3:** The child in a juvenile delinquency proceeding is a respondent. Meaning, they are the accused party, and their rights are similar to that of an adult in a criminal proceeding. As such, there are Constitutional rights, including the right to confront witnesses against them, that must be protected by their defense attorney, the AFC. In JD proceedings, the law presumes that a 9-year-old child may testify under oath, unless the Family Court finds otherwise. However, children under the age of 9 years may give sworn testimony if the Family Court finds that they understand the nature of an oath, *or* they may provide unsworn testimony if the court is satisfied they possess "sufficient intelligence and capacity" to do so. Family Court Act § 343.1 delineates the rules regarding child witnesses in JD proceedings.

- **Article 6:** The child in a custody/visitation proceeding is not a party, but a subject. Their testimony may be helpful if there are allegations of domestic violence, abuse, neglect, parental alienation, etc., and can also aid the court in its best interests determination if the child can clearly articulate their wishes to the judge. Generally, the older the child, the more weight the court gives to their wishes. Younger children may be deemed unable to form "knowing, voluntary, and considered judgment," could be considered unreliable witnesses, and could be more vulnerable to emotional distress. However, a child's wishes are not dispositive and do not outweigh other factors in custody proceeding *(see Burns v Grandjean*, 210 AD3d 1467 [4th Dept 2022]). Moreover, calling a child to testify as a fact witness in a custody proceeding should be "used sparingly and only when absolutely necessary".[3]

- **Article 8:** The child in a family offense proceeding may be the petitioner or the subject, depending on whether they filed the petition or if they are being included as a protected party in the petition. If the child's parent is accused of committing a family offense against them or in their presence, the child might be called to testify about the alleged offense or to provide information about the other parent's behavior (*see* Family Court Act § 834).

- **Article 10:** The child in a "child protective" proceeding is a subject of the case, where the State is intervening to protect the child from some alleged harm by their parent. The child may be asked to testify in court by a party's attorney or the state agency. This is seen most frequently when the child's in-court testimony is required to corroborate their out-of-court statements. Additionally, children have the right to participate in their own permanency hearings when placed in foster care. Family Court Act § 1090-A outlines the manner and extent of a child's

[3] *See Matter of John V. v Sarah W.*, 143 AD3d 1069 [3d Dept 2016] [the Third Department finding "no reason for the child to have testified as a fact witness" when there was corroborating testimony and taking the "opportunity to underscore the importance of protecting a child's right to confidentiality, which is paramount and superior to the rights of the parties."]

participation, including considerations as to the child's age and maturity level. Explore Family Court Act §§ 1016 and 1090 for more information regarding the appointment of an AFC in Article 10 and termination of parental rights proceedings.

In Camera Interviews and Lincoln Hearings:

- It is within the court's discretion to conduct a confidential interview of the child in chambers. The First and Second Departments refer to these in chambers interviews as "***in camera*** **interviews**," whereas the Third and Fourth Departments refer to these as "***Lincoln*** **hearings**" [4].

- In Article 6 proceedings, these in chambers interviews take place after, or during, the fact-finding portion of a child custody trial. The judge uses these confidential interviews as a means of assessing the child's actual wishes and to discern the reasoning (or influence) behind it. The parents or their counsel are not present, but the child's AFC is. The judge may ask attorneys to submit questions beforehand. A court stenographer must record the testimony, but it is sealed so the parents cannot access it.

    - Some courts have noted that the purpose of an in-chambers interview is not primarily evidentiary, but to assist in making the best interests of the child determination (*see* *Matter of Heasley v Morse*, 144 AD3d 1405 [3d Dept 2016]).
    - The preferred practice is for the AFC to be present during the in-chambers interview (*see* *Rexford v Rexford*, 270 AD2d 929 [4th Dept 2000]).
    - The in-chambers interview is discretionary, not mandatory (*see* *Leary v. McGowan*, 143 AD3d 1100 [3d Dept 2016]; *Carolyn S. v. Tompkins County Dept. of Social Services*, 80 AD3d 1087 [3d Dept 2011]).
    - The in chambers interview need not be conducted if the child's wishes can be ascertained in some other manner, or if the child does not possess the necessary maturity to make a wise choice regarding custody (*see* *Paul P. v. Tonisha J.*, 149 AD3d 409 [1st Dept 2017]*;* *Flores v. Mark*, 107 AD3d 796 [2d Dept 2013]).
    - Some Third and Fourth Department cases have held that the purpose of the *Lincoln* hearing is to corroborate evidence already presented during the fact-finding portion of the custody trial (*see* *Matter of Rush v Roscoe*, 99 AD3d 1053 [3d Dept 2012]; *see also* *Burns v Grandjean*, 210 AD3d 1467 [4th Dept 2022]).

[4] The *Lincoln* hearing is named after the landmark case of *Lincoln v Lincoln*, 24 NY2d 270 (1969), where the Court of Appeals approved the Family Court's decision to interview the child in chambers, on the record, but without the presence of the parents or their counsel, for the purpose of ascertaining the child's wishes in a custody matter.

- In *Casarotti v Casarotti*, 107 AD3d 1336 (3d Dept 2013), where the court denied the requests of the AFC and petitioner for a *Lincoln* hearing after the respondent refused to consent to it, the Third Department held that it was an abuse of the court's discretion for the 14-year-old subject child to testify in open court during the custody proceeding and that "a *Lincoln* hearing would have limited the risk of harm and 'would have been far more informative and worthwhile than . . . an examination of the child under oath in open court.'"
- In *Matter of Rutland v O'Brien*, 143 AD3d 1060 (3d Dept 2016), the Third Department emphasized in Footnote 1 that the children's testimony should have been confined to a *Lincoln* hearing and expressed surprise at the father's decision to put the children on the stand when there was testimony from other witnesses about the same events.
- Under Family Court Act § 664, a stenographic record of in-camera interviews is required. Further, if an appeal is taken, said interview must be made part of the record and forwarded under seal to the appellate division (*see* CPLR 4019[a]).

➢ In cases where the primary focus is not on the best interests of the child, but rather on someone's misconduct, the accused's due process rights are of paramount concern (*see Matter of Justin CC. (Tina CC.)*, 77 AD3d 207 [3d Dept 2010]).

- In Article 10 proceedings, the Third Department has permitted a **"modified *Lincoln* hearing"** where the child testifies during the fact-finding stage, but the child's testimony is given "outside the presence of the respondent but with all counsel present and afforded a full opportunity to cross-examine the child" (*see Matter of Justin CC. (Tina CC.)*, 77 AD3d 207 [3d Dept 2010] [the Third Department holding that the child's testimony may not be sealed in a "modified *Lincoln* hearing"].)
- In Article 8 proceedings, *Lincoln* hearings are not permitted because the respondent has a fundamental Constitutional right to confront and cross-examine the witnesses against them, even if that witness is a child. NOTE: given the quasi-criminal nature of family offense proceedings, even if the judge credits a child's statement made during a confidential in-chambers interview, it is inadmissible because of the Confrontation Clause (*see* Family Court Act § 834).

Corroboration Requirement for Child's Out-of-Court Statements:

➢ **In Article 10 proceedings,** a child's hearsay (out-of-court statements made by the child to someone else) about abuse or neglect are admissible but are insufficient to prove abuse or neglect *unless* those statements are corroborated by other nonhearsay, relevant evidence tending to support the reliability of the statements (*see* Family Court Act § 1046[a][vi]).

- Mere repetition of an accusation by a child does not corroborate the child's prior account of the accusation (*see* *Matter of Nicole V.*, 71 NY2d 112 [1987]).
- Out-of-court statements made by multiple children can cross-corroborate one another to satisfy the corroboration requirement (*id.*).
- However, in *Matter of Clamar G. (Dana G.)*, 238 AD3d 749 (2d Dept 2025), the Second Department held that there was insufficient corroboration to support neglect where the corroborating evidence was the testimony of the child's sibling, and both children had "denied the allegations in the petition on multiple occasions."

➢ All four Appellate Division Departments have extended this hearsay exception to apply in **Article 6 proceedings**.[5]

- Note: It appears that the Third Department does have a corroboration requirement for admissibility of a child's hearsay regarding abuse or neglect in custody cases.
    - *See* *Heather B. v Daniel B.*, 125 AD3d 1157 (3d Dept 2015) – The court did not abuse its discretion (in a divorce matter involving a custody dispute) by admitting a child's hearsay statements about the mother's emotional abuse because that testimony was sufficiently corroborated.
    - *See* *Matter of John V. v Sarah W.*, 143 AD3d 1069 (3d Dept 2016) – There was no reason for the child to testify as a fact witness in a custody proceeding where "the mother corroborated the father's hearsay account of the incident that occurred between the child and the fiancé," and where "such a practice should be used sparingly and only when absolutely necessary."

➢ The Second Department has accepted this hearsay exception in **Article 4 proceedings** (*see* *Alberto G. v Denise B.*, 181 AD2d 732 [2d Dept 1992]).

➢ Most of the Appellate Departments have held that this exception is NOT applicable in **Article 8 proceedings.**[6]

- The respondent has the right to confront the witnesses against them and to have only "competent, material, and relevant evidence" admitted during the fact-finding portion of these quasi-criminal proceedings (*see* Family Court Act § 834).

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[5] *See* *Matter of Mildred S.G. v Mark G.*, 62 AD3d 460 (1st Dept 2009); *Matter of Linda P. v Thomas P.*, 240 AD2d 583 (2d Dept 1997); *Matter of John V. v Sarah W.*, 143 AD3d 1069 (3d Dept 2016); and *Matter of Mateo v Tuttle*, 26 AD3d 731 (4th Dept 2006).

[6] *See* *Matter of Dhanmatie G. v Zamin B.*., 146 AD3d 495 [1st Dept 2017]; *Matter of Godfrey v Bahadeur*, 187 AD3 909 [2d Dept 2020]; and *Matter of Kristie GG. v Sean GG.*, 168 AD3d 25 [3d Dept 2018]).

But Should I Call a Child to Testify?

- It depends. Calling a child to the witness stand is a risky move. Especially in child custody proceedings, judges frown upon it and prefer to avoid it whenever possible due to concerns over preserving parent/child bonds and traumatizing a child (*see* Lincoln v. Lincoln, 24 NY2d 270 [1969]; *see also* Battin v Battin, 130 AD3d 1265 [3d Dept 2015] [calling a child to testify in Article 6 proceedings is generally neither necessary nor appropriate, irrespective of the child's age, and the preferred manner of ascertaining the child's wishes is through an in-chambers interview]).
- If you decide to call the child as your witness, keep their trial prep to a minimum. You do not want their testimony to look rehearsed. Prepare them for what to expect when they get to court, and make sure they understand the difference between telling the truth and lying.
- NOTE: If you are the child witness's AFC or GAL, you will have additional obligations to the child, and you may need to move the court for an in-chambers inquiry of your client.
- Ultimately, you may wish to call a child to testify if their testimony is necessary or useful to the case and if the rewards have a substantial likelihood of outweighing any risks.

Key Considerations Before Calling a Child Witness:

► *Will the child's testimony help or hurt my client's case?*

► *Is the child a reliable witness capable of providing credible testimony?*

► *Is there any other way to get in the same evidence without putting the child on the witness stand?*

- Proceed with caution if the child has made consistent statements against your client's position.
- You may need additional expert testimony to explain the child's position or conduct, or to support (or undermine) their credibility (e.g., to provide additional support for any arguments based on improper influence of the child's position, trauma response, or child development).

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