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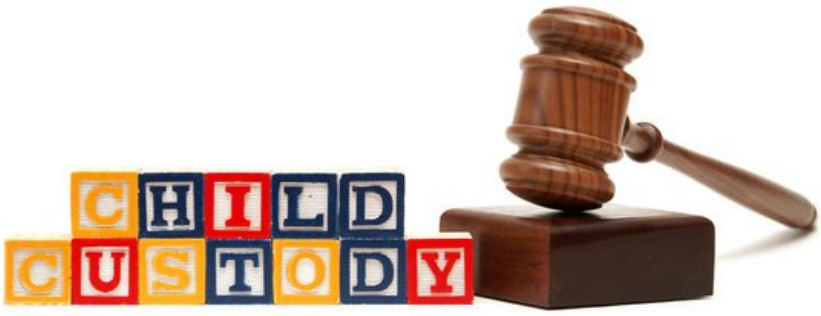
What Is the Status of the Child in a Custody Case?

Does the child have standing to ask for affirmative relief awarding custody to a particular parent? Does the child ha full-party status? The paucity of case law reveals disagreement among the Appellate Division Departments.

By **Joel R. Brandes** | July 08, 2019 at 11:45 AM



The best interests of the child are the objective of custody and visitation proceedings, which are governed by statute. Domestic Relations Law §70(a) specifically grants standing to "either parent" to "apply to the Supreme Court for a writ of habeas corpus" regarding adjudication of custody and visitation matters. Domestic Relations Law §240 is silent as to who may petition the court for custody, but the focus is on "parents." Family Court Act §651(b) is also silent as to who has standing to petition the Family Court for custody.

The U.S. Supreme Court has defined standing as follows: "Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy, as to

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ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972).

In this article we will attempt to answer two questions: Does the child have standing to ask for affirmative relief awarding custody to a particular parent? Does the child have full-party status? The paucity of case law reveals disagreement among the Appellate Division Departments.

In *Matter of Rebecca B.*, 227 A.D.2d 315 (1st Dep't 1996), the Appellate Division, First Department affirmed an order which denied respondent's motion to dismiss the proceeding on the ground that the child's Law Guardian (now known as Attorney for the Child or AFC) lacked standing to bring it. It held that in its dual role as advocate for and guardian of the child, the Law Guardian had an interest in the welfare of the child sufficient to give it standing to seek a change of custody.

In *Figueroa v. Lopez*, 48 A.D.3d 906 (3d Dep't 2008), petitioner father filed a modification petition seeking custody. At the commencement of a hearing the parties stipulated on the record to joint custody, with the mother having primary physical custody and the father receiving visitation. The Law Guardian stated that he did not consent to the terms of the stipulation and, when he attempted to explain his reasons, he was cut off by Family Court and not permitted to give his reasons. The Law Guardian and the mother appealed to the Third Department, which held that although appointing a Law Guardian is not statutorily required in contested custody proceedings, such an appointment was important in this proceeding to protect the interests of the child. Having made the appointment, Family Court could not thereafter relegate the Law Guardian to a meaningless role. It pointed out that it had previously observed that "a Law Guardian must be afforded the same opportunity as any other party to fully participate in a proceeding." As the sparse record was inadequate to permit appellate review, reversal was required.

The Rules of the Chief Judge dealing with the appointment of an attorney for the child (AFC) refer to the child as the "subject" of a custody proceeding, rather than an interested party. 22 NYCRR Rule 7.2.

While the decisions of the First and Third Departments appear to grant the child status to seek affirmative relief in a custody case, and standing to appeal, the Fourth Department has taken a different approach. In *McDermott v. Bale*, 94 A.D.3d 1542 (4th Dep't 2012), the AFC appealed from an order granting the parties joint custody of their two children, with primary physical residence to petitioner-respondent mother and liberal visitation to respondent-petitioner father. The order incorporated

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the terms of a written stipulation executed by the parties on the eve of trial. The AFC refused to join in the stipulation. The court gave the AFC a full and fair opportunity to be heard, and the AFC stated in detail all of the reasons that he opposed the stipulation. Family Court approved the stipulation over the AFC's objection. The Appellate Division rejected the AFC's contention that the court erred in approving the stipulation. Although it agreed with the AFC that he "must be afforded the same opportunity as any other party to fully participate in [the] proceeding," and that the court may not "relegate the [AFC] to a meaningless role," it held the children represented by the AFC were not permitted to "veto" a proposed settlement reached by their parents and force a trial. The Appellate Division could not agree with the AFC that children in custody cases should be given full-party status such that their consent is necessary to effectuate a settlement. The purpose of an AFC is "to help protect their interests and to help them express their wishes to the court." There is a significant difference between allowing children to express their wishes to the court and allowing their wishes to scuttle a proposed settlement. The court noted that the court is not required to appoint an attorney for the children in contested custody proceedings. Thus, there was no support for the AFC's contention that children in a custody proceeding have the same legal status as their parents, inasmuch as it is well settled that parents have the right to the assistance of counsel in such proceedings. It concluded that, where the court in a custody case appoints an attorney for the children, he or she has the right to be heard with respect to a proposed settlement and to object to the settlement but not the right to preclude the court from approving the settlement in the event that the court determines that the terms of the settlement are in the children's best interests.

In *Matter of Kessler v. Fancher*, 112 A.D.3d 1323 (4th Dep't 2013), the mother did not appeal from an order which dismissed her petition seeking modification of a custody order. The Appellate Division affirmed the order. Quoting its opinion in *McDermott v. Bale*, it held that the children, while dissatisfied with the order, could not force the mother to litigate a petition that she had since abandoned. And in *Lawrence v. Lawrence*, 151 A.D.3d 1879 (4th Dep't 2017), the same court dismissed an appeal taken by the attorney for the parties' oldest child from an order dismissing the mother's petition seeking modification of a custody order. It held that since the mother had not taken an appeal from that order, the child, while dissatisfied with the order, could not force the mother to litigate a petition that she had since abandoned. It held that a child in a custody matter does not have "full-party status" and it declined to permit the child's desires to chart the course of litigation.

The recent decision of the Second Department in *Matter of Newton v. McFarlane*, 2019 WL 2363541 (2d Dep't 2019), muddies the already murky waters. There, the court held, among other things, that: "(a) the attorney for the child has the authority to pursue an appeal on behalf of the child from an order determining the custody of the child; (b) the child is aggrieved, for appellate purposes, by an order determining custody."

After commencing two prior unsuccessful custody modification proceedings, the mother commenced a third modification proceeding seeking sole legal and physical custody of the child. The Family Court, over the objection of the AFC, held a hearing without first addressing whether the mother had alleged a sufficient change in circumstances to warrant an inquiry into whether the child's best interests were

served by the existing custodial arrangement. After the hearing, the Family Court found that the mother had established the existence of sufficiently changed circumstances and that awarding sole custody to the mother was in the child's best interests. The court failed to explain the bases for these conclusions in its order. The child, by her court-appointed attorney, appealed.

The mother contended on appeal that the attorney for the child lacked authority to take this appeal on behalf of the child. The court (specifically excluding an attorney hired by one of the parties) observed that when an attorney is appointed by the court to represent a child in a contested custody proceeding, that attorney must be afforded the same opportunity as the attorneys for the parents and other contestants to fully participate in the proceeding. An attorney appointed to represent a child in a custody proceeding has the right, equal to the right of the attorneys for the litigants, to fully appear and participate in the litigation, and the right to advance arguments on behalf of the child. It observed that these rights may be protected and enforced by the taking of an appeal on behalf of the child. The right of an attorney appointed to represent a child to take an appeal on behalf of the child is confirmed by Family Court Act §1120(b) which provides that whenever an attorney has been appointed by the Family Court to represent a child, the appointment continues without the necessity of a further court order where the attorney files a notice of appeal on behalf of the child or where one of the parties files a notice of appeal. This statute recognizes that an attorney appointed by the Family Court to represent a child has the right to pursue an appeal on behalf of the child.

The Second Department reasoned that the Fourth Department's decision in *Matter of McDermott v. Bale*, 94 A.D.3d 1542 (4th Dep't 2012), supported its conclusion that the attorney for the child has authority to appeal on the child's behalf. In *McDermott*, while the Appellate Division ruled that the attorney for the child could not unilaterally scuttle a proposed settlement by withholding consent, the court entertained the appeal that was taken by the attorney on the child's behalf, and considered the arguments advanced by that attorney in opposition to the settlement. The court distinguished *Matter of Lawrence v. Lawrence*, 151 A.D.3d 1879 (4th Dep't 2017) and *Matter of Kessler v. Fancher*, 112 A.D.3d 1323 (4th Dep't, 2013), on the ground that the parent whose petition was dismissed did not appeal, and the court reasoned that children could not compel their parents to litigate positions that the parents had elected to abandon. While the Second Department did not agree with that rationale, it agreed that it may be inappropriate to entertain litigation by a child for a change in custody where the parent to whom the custody of the child would be transferred is unwilling to accept the transfer. Likewise, it may be inappropriate to entertain litigation by a child to prevent a change in custody where the parent who has had custody is no longer opposed to the change. This case did not present these issues since the father urged reversal of the order the child had appealed, and the child was not attempting to compel a custody award in favor of an unwilling parent.

The Appellate Division rejected the mother's argument that the child was not aggrieved by the order changing custody and that, therefore, the child's appeal should be dismissed. It noted that a person is aggrieved when someone asks for relief against him or her, which the person opposes, and the relief is granted in

whole or in part. Here, during the hearing, the attorney for the child opposed the mother's petition and advocated for the father's continued custody, based in large part on the child's clearly expressed preference to remain living with the father. Having sought and been denied different relief by the Family Court and having opposed the relief that was granted to the mother, it held that the child should be considered aggrieved by the determination by the Family Court.

Conclusion

It appears that children have standing to seek affirmative relief in the First Department. In the Second and Third Departments, they can appeal from a custody order, to the extent those courts addressed the issue. In the Fourth Department children do not have "full party" status, and may not appeal on issues their parents abandoned. Until the Court of Appeals speaks, their status is uncertain.

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