#### February 16th, 2023

#### Sent via NYSCEF

Rensselaer County Clerk's Office 105 3<sup>rd</sup> Street Troy, New York 12180

RE: Walker v. Walker

Index Number: 2018-261675

In Re: Notice of Motion, AFC Disqualification

Dear Clerk/Judge McGinty:

Please find enclosed: Notice of Motion, Disqualification of Douglas Broda, Attorney for the Child [AFC] w/Supporting Exhibits.

Copies of the referenced Notice of Motion, have been provided to the parties via electronic service NYSCEF; to Leslie Silva, Esq., Douglas Broda, AFC, and Arthur Dunn, Esq. as required.

Thank you for your courtesy and consideration in this important matter.

Respectfully submitted,

Alisha Clark Walker

Alisha Clark Walker 757 Taborton Road Sand Lake, NY 12153

Cc: Leslie Silva, Esq. sent via NYSCEF Douglas Broda Esq. sent via NYSCEF Arthur Dunn, Esq. sent via NYSCEF

### SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF RENSSELAER

LUKE WALKER,

Plaintiff,

NOTICE OF MOTION [Disqualification of AFC Douglas Broda]

Index No.: 2018-261675

-against-

ALISHA CLARK WALKER,

Defendant,

STATE OF NEW YORK ) ss: COUNTY OF RENSSELAER )

**PLEASE TAKE NOTICE,** that upon the Affidavit in Support of Defendant Mother's Motion to Disqualify and Remove the attorney for the children, Douglas Broda, dated February 16th, 2023, and all other papers submitted in this action, Defendant Mother will move this Court at a term of the Supreme Court, County of Rensselaer, Rensselaer County Courthouse, located at Congress and Second Streets, Troy, NY 12180 on **March 9th, 2023**, or as soon thereafter as respondent/petitioner can be heard, why an order should not be made awarding Alisha Clark Walker the following relief:

- 1. Removal of Attorney for the Child, Douglas Broda, from these and other future case proceedings for cause and for conflict of interest and other specified reasons as stated herein;
- 2. Appointment of a new 'non conflicted and non compromised' Attorney for the Child from the approved Rensselaer County AFC Panel list;
- 3. For such other, further and proper relief as to this court deems just and proper.

**ORDERED**, that service of this Notice of Motion via United States electronic service via

NYSCEF with the supporting papers to plaintiff's attorney, Leslie Silva, and the Attorney for the

Child, Douglas Broda, shall be deemed good and sufficient service.

**ORDERED**, that answering papers, if any, be served upon the parties and the Court at

least seven [7] days before the return date herein above specified, [pursuant to C.P.L.R. Sect.

2214 (b), and that upon failure to serve such papers within the time provided, the undersigned

will object to the consideration of such papers by this Court, pursuant to C.P.L.R. Sect. 2214.

**SIGNED,** this <u>16th day of February, 2023.</u>

Alisha Clark Walker

Alisha Clark Walker 757 Taborton Road Sand Lake, NY 12153

Copies to: Leslie Silva, Esq.

Douglas Broda, Esq. AFC.

Arthur Dunn, Esq.

Office of New York State Attorney for the Child Program

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### SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF RENSSELAER

LUKE WALKER,	
Plaintiff,	
	AFFIDAVIT
	IN SUPPORT OF
	NOTICE OF MOTION
-against-	
	Index No.: 2018-261675
ALISHA CLARK WALKER,	
Defendant,	
STATE OF NEW YORK )	
COUNTY OF RENSSELAER )	
	4.05

#### **Statement of Facts:**

- 1. I am the Petitioner in the above-referenced Supreme Court matter and as such, I am personally familiar with the underlying facts and circumstances in this case and matter.
- 2. The attorney for the child assigned to the case is presently Douglas Broda, Esq. New York State Bar # 2041671
- 3. Douglas Broda currently represents Aurora "Rosie" Walker, 10, and Trey Walker, 7 in this case. The mother was indisputably the primary caregiver before the divorce action which commenced in December of 2018.
- 4. Elijah "Blue" LaPorta, is the almost three year old son of the defendant and he is the half brother of Aurora and Trey Walker. Douglas Broda also represented Elijah Blue LaPorta in the adjudicated custody case of *Walker v. LaPorta*.
- 5. I, the defendant mother, currently have primary physical custody of Elijah Blue LaPorta (2 years old, 11 months) and in which he is thriving in my care.

- 6. The attorney for the child is under the supervision and regulation of the Court, and of the Attorney for the Children Program of the Third Department, and the NYS Bar Association, and subject to certain standards in representation and for the avoidance of conflicts of interest; and the Attorney For Children, is to be zealous, unconflicted and competent in the performance of his/her said duties.
- 7. This case and the AFC representation has certain special considerations for the justice system, for faith in its integrity in fact-finding, for the integrity of the Attorney for the Child Program, and for the Court, as specifically outlined herein.
- 8. Of note, the plaintiff father is a **known convicted previously registered sex offender** who previously served jail time for his 'crimes of moral turpitude', [Exhibit "D"]. Defendant Mother does not have any criminal record or history of mental health.
- 9. Upon information and belief, Attorney Broda has multiple concurrent conflicts of interest and should be disqualified as the attorney for the children in this case due to the following:

#### **Douglas Broda's Bias and Discrimination:**

- 10. Attorney Broda is a member of the NYS Bar Association and as such, he is subject to its Professional Standards and Ethics, especially regarding direct conflicts [and perceived conflicts] of interest in client representation. [Exhibit "A"]
- 11. Mr. Broda expressed to the court his various unsupported and prejudicial suppositions that have resulted in the children being essentially disenfranchised from their mother without cause, and for the drastic unsupported order of supervised visitation [parenting time] to only occur when the plaintiff father deemed it in his best interests, and utilized as a bargaining chip.
- 12. The attorney for the child [AFC] is supposed to be an independent unbiased party, free of bias, and conflicts of interest, in representing minor children in child custody matters being heard before the court; and is subject to standards, guidelines, and ethical responsibilities of a lawyer in the NYS AFC 18B assigned program.
- 13. Under the Rules of the Chief Judge, sect. 7.2 (b) & (d) [Exhibit "A"]:
  - (b) The attorney for the child is subject to the ethical requirements applicable to all attorneys, including but not limited to, constraints on ex parte communication; disclosure of client confidences and work product; conflict of interest; and becoming a witness in the litigation.

(d) In other types of proceedings [other than JD and PINS], where the child is the subject, the attorney for the child must zealously advocate the child's position.

#### 14. A-4. The Use of Substituted Judgement:

"In all circumstances where an attorney is substituting judgment in a manner that is contrary to a child's articulated position or preferences or when the child is not capable of expressing a preference, the attorney must inform the court and the child that substituted judgment is the basis upon which the attorney will be advocating the legal interests of the child.

In formulating substituted judgment, the attorney:

- a. (1) Must conduct a thorough investigation, including interviewing the child, reviewing the evidence, and applying it against the applicable legal standard applicable to the particular stage of the proceeding; and
- b. (2) Should consider the value of consulting a social worker or another mental health professional to assist the attorney in determining whether it is appropriate to override the child's articulated position and/or to assist the attorney in formulating a legal position on behalf of a child who is not competent.
- 15. The children have **expressed on numerous** occasions that they wanted to be with their mother and half-brother, Elijah; and did not want to leave her during the very few and sporadic periods when the plaintiff's father would allow the children to be with and parented by their mother. Douglas Broda has supported the fact the mother has been essentially erased from her children's lives by the stroke of a pen.

### 16. Upon information and belief, AFC Douglas Broda <u>never met with his client Elijah</u> <u>LaPorta</u>, as required under the Attorney for the Child Program [an illegal act].

- 17. It is noteworthy that Mr. Broda has never met before trial or interviewed or called the defendant mother or any of her family members concerning the children's history, their needs and best interests.
- 18. Upon information and belief, Attorney Broda has previously expressed his discrimination and extreme animus towards the mother, stating that the mother was a "bad person" "who had previously sued Judge Cholakis", to Cindy and Bill LaPorta, Sr., grandparents of Elijah Blue LaPorta.
- 19. Upon information and belief, Douglas Broda has had multiple ex-parte communications with the previous attorney for the child, Matt Foley, to try and fix, and remove the

- children's mother from their everyday lives. This is an example of prejudgment in the custody matter.
- 20. Mr. Broda has ignored the mother's pertinent concerns and email communications. Mr. Broda has not been responsive to the important issues raised by the children's mother.
- 21. The Attorney for the child, Mr. Broda has ignored all communication with respect to setting up important sibling bonding time between his clients, Aurora and Trey Walker and their brother Elijah LaPorta. Elijah, Aurora and Trey in which they have only been allowed to see each other twice in almost 3 years, [since the birth of Elijah'.
- 22. In 2022, Attorney Douglas Broda was the subject of a Federal civil rights lawsuit under 42 USC 1983; C.A. No.: 1:22-CV-560 (DNH/TWD), *Douglas Broda, et al v. Walker*; 2022, and an official complaint was filed by defendant mother and on her children's behalf. Accordingly Mr. Broda is in a conflict of interest representing the children of the defendant mother and plaintiff in the federal civil rights action against Mr. Broda in the above-entitled action.
- 23. Upon information and belief, Mr. Walker, a convicted registered sex offender, has previously gone into the children's classroom to film young elementary age students.
- 24. Convicted registered sex offenders, have no place or business going into an elementary school and filming students. Mr. Broda consistently defended registered sex offender Walker's actions in this case, and then falsely claiming the mother was harassing the school, [Exhibit "B"].
- 25. The basis of the federal civil action, *Douglas Broda*, et al v. Walker, 2022, was a gag order issued illegally on mother's social media postings by Judge Kehn. Douglas Broda seems to be more concerned about the mother defending her constitutional rights on social media than over the "X" rated material the live-in girlfriend posts on social media on a regular basis to advertise her business being run out of the children's home.
- 26. Mr. Broda has ignored all previous communications from Defendant mothers maternal mother, Theresa Atchley, about seeing the children.
- 27. Mr. Broda has ignored the various crimes of moral turpitude previously committed by plaintiff husband, has refused to conduct proper investigation, and acted more as chief advocate for the convicted plaintiff husband rather than as advocate for the minor children. [Exhibit "D"]
- 28. On numerous occasions, Mr. Broda has previously acted in the capacity of the father's primary attorney by answering correspondence directly on behalf of Ms. Silva. On February 8th, 2023, Mr. Broda sent Greta Baker an ex parte communication on behalf of the father's attorney.

#### **Lawyer Conflicts Of Interest:**

- 29. Attorney Broda has **inherent concurrent conflicts of interest** [COI] and should be disqualified as the attorney for the child in this case due to the following:
- 30. Due to certain documented unorthodoxies in this case matter, and acting in my role as mother safeguarding the interests of my children and of certain constitutional rights that have been violated, I was forced to file a serious detailed civil rights action against Mr. Broda and others under 42 USC 1983. [Civil Action No.: 1:19-CV-1288 (LEK)(CFH)].
- 31. Notice was provided to Mr. Broda that "As a defendant named in a federal action, I have been advised that you are in a direct conflict of interest in the matter and accordingly need to remove yourself according to specific written Standards of the Appellate Division, AFC manual AFC Ethics Standards, NYS Lawyers Code of Professional Responsibility, American Bar Association Canons and Standards of Ethics, as well as provided in case law. [Table of authorities]
- 32. The court should take note that after examining professional ethics and standards, and the legitimate, and factual issues raised by the defendant mother, the previous judge [Cholakis] and previous attorney for the child [Foley] did the right thing by way of appropriate disqualification, recusal and stepping aside when named in the well documented federal civil rights lawsuit.
- 33. I also note that there was previously a demonstration of a lack of due process in the original temporary custody determination, a fact ignored by Mr. Broda, resulting in the mother being unfairly treated like a pariah. The record was subjectively distorted and the children were never in harm's way. Only perverse hearsay, innuendo, and rhetoric were provided to essentially disenfranchise and otherwise erase the children from their mother
- 34. Mr. Broda did not appropriately inform the court of his direct and indirect perceived conflict of interest in this matter as would be required by any lawyer so situated. As I had previously brought this issue to Mr. Broda's and the court's attention. [Table of Authorities].
- 35. In an article printed by The Times Union, it was reported that attorney for the child, Douglas Broda, was previously the 4th highest paid AFC in New York state. The Times Union reported that AFC Douglas Broda made \$392,194/year. The Times Union also reported that attorneys for the child make \$75/hr. \$392,194 divided by \$75 is \$5,229.25. \$5,299.25 divided into 52 weeks is 101 hours of billing a week. This is an indication of avarice and fraud on the taxpayers.. As reported, all AFCs in New York State have to do

is submit "tickets" to judges to sign off on with lax oversight of the AFC system. **[Exhibit "C"]** 

# Douglas Broda tacitly supported Fathers Paramour's BDSM Advocacy & Sex Work lifestyle around the children:

- 36. The plaintiff father is a previous felony sex offender with a live-in paramour 'solely dedicated to earning her living through pornographic and bestial; BDSM sex work', this is not an appropriate environment, would be harmful to our children, is very concerning and is believed against NYS public policy concerning such purient material.
- 37. Attorney Broda, lied during a court appearance when he expressed that the defendant mother did not give him a binder full of evidence, including sex slaves of Sara Miller Hornick and materials and evidence that Sara Miller-Hornick was working her sex business out of the children's home. Mr. Broda never responded that he reviewed the information so provided in the binder.
- 38. Two forensic evaluations were performed on the defendant's mother. The first court-approved evaluation was performed by clinical psychologist Dr. Avery, and recommended for the defendant mother to continue to have primary custody or for there to be shared parenting with co-parent counseling.
- 39. Upon information and belief, no recommendation by either evaluator was put forward of any 'risk of serious or imminent harm' to the children while in the parental custodial care of the defendant mother. The children claim there never has been any harm done to them, yet this testimony is ignored by Douglas Broda.
- 40. Attorney Broda, has wrongly misused his power, lied to the court, substituted his opinion for fact, in supporting supervised parenting time visitation, with the convicted plaintiff father allowed to be a total gatekeeper; Thereby interfering with and being unfair to the children and their expressed ability to proper normal relationship with their loving mother.
- 41. As noted, Mr. Broda is defendant in a federal lawsuit, and based upon the above conflict of interest and ancillary considerations and pattern of behavior, the current Attorney for the Child, **Douglas Broda should be disqualified and an independent competent and unconflicted attorney for the children be appointed to represent their overall best interests**
- 42. Again, Mr. Broda continues to completely ignore and deny Mother's concerns about Mr. Walker's inappropriate sexual explicitness around the children and particularly concerning his choice of a live-in paramour whose career and stock in trade is devoted

100% to sexual perversions, bondage, sexual dominations, sadomasochism that should not be tolerated as allowed to be in and around innocent children.

### Bizarre and Aggressive Behavior during Trial of Walker v. Walker:

- 43. Douglas Broda chose to ignore the fact that mother was previously the primary caregiver to her children, with no issues occurring with respect to his other client, Elijah Blue LaPorta currently in the custodial care of his mother. [Exhibit "D"].
- 44. The attorney for the child, Douglas Broda, ignored material evidence in trial that Sara Miller-Hornick stated on an amazon video, that she wishes to pass down love letters from her "slaves" to her children one day [Exhibit "D"].
- 45. During the trial of Walker v. Walker, **Douglas Broda objected to the defendant's** mother well over 300 times. **Douglas Broda did not object to the plaintiff father's** case <u>once</u>. This was an order of magnitude more than those put forth by plaintiff husband counsel Ms. Silva. These objections essentially made in a misguided attempt to obstruct key information relating to child custody from getting into the court record.
- 46. During the cross examination of mother, Broda raised his voice and was physically aggressive, pointing his index finger right in the face and near the eyes of the defendant wife/mother, while she was on the stand. At that point, I had to tell Mr. Brodan during the trial, "Do you have to point at me like that, it's really [scary, you're scaring me].", [August 24 2022 Transcript Vol. 6, Page 1342]. [Exhibit "B"]
- 48. Mr. Broda exhibited aggressive behavior during the cross examination of material grandmother Theresa Atchley. Mr. Broda ignored testimony of the grandmother, that the father put in a text message, he hope the children never see their mother again and that the grandmother was afraid of Mr. Walker's threats of police action against her is she "didn't do what he said" and why she stepped down as supervisor of the children.
- 49. On June 29th, 2022, during trial Mr. Broda made the rather unorthodox, arrogant and unlawful statement that "I am allowed to be biased", which was a self admission of his bias towards the defendant mother in the custody portion of the trial. [Transcript Volume 2, page 251]. [Exhibit "E"]

50. When mother became concerned of the children being exposed to the sex work business of Sara Miller-Hornick, including the large topless woman tattoo on her leg, upon cross examination of Sara Miller Hornick, Douglas Broda defended sex worker's decisions, claiming the topless woman tattoo on her leg was an of "art."

#### **Not Representing Children's Expressed Interests:**

- 51. Based upon the **above grounds, Conflict of Interest [COI] ethical considerations, and improper practice and behaviors** as exhibited, the current Attorney for the Child, Douglas Broda, should be disqualified.
- 52. Since Mr. Walker has had full custody, I have seen my children approximately five times in 2020, zero parenting time was confirmed or scheduled in 2023 or 2023, I have not seen my children in almost two years at the time of this filing.
- 53. I realize that it is a seemingly rare remedy for the dismissal and substitution of an Attorney for the Child [AFC], but an accurate analysis of the totality of the facts and circumstances of this custody case, as documented herein, requires that this step be taken as being in the interests of justice, the children's interests and per facts and the reviewed referenced table of authorities.
- 54. An independent attorney for the child, free of such conflicts and loyalties and unprofessional conduct, should be appointed; And that this is believed to be in the children's best interests, for our children and their needs; to have unbiased, unconflicted and independent legal representation in the matter. [Preferably the appointment of someone with the sensitivities toward motherhood].

#### **Collusion – Animus:**

55. According to my research, as contained in the authorities reviewed [Attachment - Table of Authorities], and other reviewed source documents, the Attorney for the Child is supposed to be an independent party, free of political loyalties and personal bias or prejudice in child custody matters being heard before the court.

#### 56. Section 7.2 of the Rules of the Chief Judge; states:

(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. [Exhibit "A"]

- 57. I have personally witnessed numerous personal conversations and meetings occurring between Mr. Broda, and plaintiff Luke Walker's attorney(s), Ms. Silva, and Luke Walker, to the obvious exclusion of the Defendant Mother, thereby creating new questions of collusion and conflict of interest in the matter before the court.
- 58. Attorney Broda has substituted his voice for that of my two children, without expressly stating this to the court as required, and he has not provided the children's voices to be properly expressed in regards to our children's expressed positions involving their relationship and parenting by their mother.
- 59. I have taken care of our children without any problem since their birth and thereafter, until a series of misstatements and seemingly choreographed 'slander and smearing' by Ms. Silva, Mr. Broda and plaintiff Luke Walker, in this divorce action filed by the plaintiff father.
- 60. Attorney Broda has inserted himself as a biased voice for my 7-year old son and that of my 10-year old daughter with his various false claims, damaging renditions and speculations.
- 61. Further, as previously stated, Attorney Broda did not previously bothered to interview me, my family or my other daughter or those knowledgeable of the family parental dynamics before trial, as would be normal practice under the AFC guidelines.
- 62. Attorney Broda, has behaved towards me and our children in a very unprofessional way; as further indication of his bias and record of spoken animus directed towards me as established in the court record.
- 63. Due to the above factors, I have strongly requested to the court and to Mr. Broda in multiple filings and correspondences that Mr. Broda does the right thing in stepping away, and allowing an impartial lawyer to take over the important and solemn role of attorney for the children in this child custody case. Every request for Mr. Broda to disqualify himself put forth to the court has been ignored by Mr. Broda, forcing me to file this motion. This is especially relevant going forward and as new post divorce issues arise.

WHEREFORE, I respectfully request that an Order be made disqualifying the current attorney for the child from this case, as well as any other ancillary case involving my child(ren), due to the various reasons, conflicts of interest, and for cause, and for the appointment of an independent attorney for the child in any present or future litigation, Appellate filings, etc., and for such other and further relief as to this court may deem just and proper.

Alisha Clark Walker 757 Taborton Road Sand Lake, NY 12153

Sworn to before me this 6 day of February, 2023

AAKASH CHOHAN
Notary Public - State of New York

No. 01CH6354946
Qualified in Albany

My Commission Exp. 02/21/2015

Copies to: Leslie Silva, Esq. [attorney for plaintiff]

Douglas Broda, Esq. [attorney for child]

Arthur Dunn, Esq.

### **Table of Authorities:**

- 1. New York State Bar Association Code of Professional Standards
- 2. NYS Ethics of Attorney for Children
- 3. American Bar Association Model Rules of Conduct
- 4. Attorney for Children Law Guardian Manual
- 5. NYSBA Committee on Children and the Law, Standards for Attorneys Representing Children 2015
- 6. Attorney for the Child Rule of the Chief Judge and Summary Responsibilities
- 7. Third Department Office of Attorneys for Children Administrative Handbook
- 8. Touro Law Review Article 'Defining the Role of Law Guardian in New York State by Statue, Standards and Case Law. [2002]

## EXHIBIT "A"

#### NEW YORK STATE SUPREME COURT APPELLATE DIVISION, FOURTH DEPARTMENT ATTORNEYS FOR CHILDREN PROGRAM

### HONORABLE GERALD J. WHALEN PRESIDING JUSTICE

# ETHICS FOR ATTORNEYS FOR CHILDREN



January 2017

# GENERAL POLICY CONSIDERATIONS SECTION 7.2 OF THE RULES OF THE CHIEF JUDGE SUMMARY OF RESPONSIBILITIES OF ATTORNEY FOR THE CHILD

Westlaw

64 A.D.3d 1092, 882 N.Y.S.2d 773, 2009 N.Y. Slip Op. 06053 (Cite as: 64 A.D.3d 1092, 882 N.Y.S.2d 773)

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H

Supreme Court, Appellate Division, Third Department, New York.
In the Matter of MARK T., Appellant,
v.
JOYANNA U. et al., Respondents.

JOYANNA U. et al., Respondents. (And Another Related Proceeding.).

July 30, 2009.

Background: Putative father commenced paternity proceeding. The Family Court, Broome County, Pines, J., granted mother's motion to dismiss the petition. Putative father appealed.

Holding: The Supreme Court, Appellate Division, Malone Jr., J., held that the child had not received meaningful assistance of appellate counsel.

Ordered accordingly.

West Headnotes

#### [1] Children Out-Of-Wedlock 76H 57

76H Children Out-Of-Wedlock 76HV Paternity Proceedings 76Hk 56 Trial

76Hk57 k. In general. Most Cited Cases Child did not receive meaningful assistance of appellate counsel in paternity proceeding; counsel did not meet or speak with the child, counsel did not know the child's position on appeal, and nothing indicated that child, who was eleven and a half years old, suffered any infirmity which might have limited his ability to make a reasoned decision as to what position counsel should have taken on his behalf. McKinney's Family Court Act § 241; N.Y.Ct.Rules, § 7.2(d).

[2] Infants 211 @ 90

211 Infants 211 VII Actions 211k90 k. Appearance and representation by attorney. Most Cited Cases

As with the representation of any client, whether it be at the trial level or at the appellate level, the responsibility under the Family Court Act of a child's attorney to help the child articulate his or her position to the court requires consulting with and counseling the client. McKinney's Family Court Act § 241.

#### [3] Infants 211 5 90

211 Infants

211 VII Actions

211k90 k. Appearance and representation by attorney. Most Cited Cases

Expressing the child's position to the court, once it has been determined with the advice of counsel, is generally a straightforward obligation of the child's attorney, regardless of the opinion of the attorney. McKinney's Family Court Act § 241; N.Y.Ct.Rules, § 7.2(d).

\*\*774 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.

Before: SPAIN, J.P., LAHTINEN, MALONE JR., STEIN and GARRY, JJ.

MALONE JR., J.

\*1092 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 pe-

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64 A.D.3d 1092, 882 N.Y.S.2d 773, 2009 N.Y. Slip Op. 06053 (Cite as: 64 A.D.3d 1092, 882 N.Y.S.2d 773)

tition.

In December 1996, petitioner and respondent Joyanna U. (hereinafter the mother) engaged in a sexual relationship. At \*1093 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.

[1] The child is represented by a different attorney on this appeal, who filed a brief in support of an affirmance of Family Court's order, which is a position counter \*\*775 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 11 1/2 -year-old child's best interests.

[2][3] 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 \*1094 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 A.D.2d 753, 754-757, 710 N.Y.S.2d 149 [2000], bv. denied 95 N.Y.2d 764, 716 N.Y.S.2d 38, 739 N.E.2d 294 [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 New York State Bar Association Standards for Attorneys Representing Children in Custody, Visit-

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64 A.D.3d 1092, 882 N.Y.S.2d 773, 2009 N.Y. Slip Op. 06053 (Cite as: 64 A.D.3d 1092, 882 N.Y.S.2d 773)

ation and Guardianship Proceedings [June 2008]; New York State Bar Association 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\*\*776 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 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 A.D.3d 1038, 1040, 794 N.Y.S.2d 195 [2005], *lv. denied* 5 N.Y.3d 706, 801 N.Y.S.2d 799, 835 N.E.2d 659 [2005]; Matter of Jamie TT., 191 A.D.2d 132, 135-137, 599 N.Y.S.2d 892 [1993] ). He was, at \*1095 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 A.D.3d at 1040-1041, 794 N.Y.S.2d 195).

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 11 1/2 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 A.D.2d at 136-138, 599 N.Y.S.2d 892).

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.

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.

SPAIN, J.P., LAHTINEN, STEIN and GARRY, JJ., concur.

N.Y.A.D. 3 Dept.,2009. Mark T. v. Joyanna U. 64 A.D.3d 1092, 882 N.Y.S.2d 773, 2009 N.Y. Slip Op. 06053

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#### SUPREME COURT OF THE STATE OF NEW YORK

# APPELLATE DIVISION, FIRST DEPARTMENT 41 MADISON AVENUE - 39th FLOOR NEW YORK, NEW YORK 10010

TO:

Members of the Panel of Attorneys for Children

FROM:

Jane Schreiber, Esq.

Director of the Office of Attorneys for Children

RE:

ADMINISTRATIVE HANDBOOK

The Office of Attorneys for Children of the Appellate Division, First Department has prepared this Administrative Handbook to describe the operation of its Program.

The Office of Attorneys for Children works to provide high quality legal services to children and parents involved in Family Court proceedings. There are approximately 150 members on the Panel of Attorneys for Children. Attorneys who represent children and parents are compensated for their work and reimbursed for reasonable expenses associated with the representation of their clients.

Included in this Handbook are statutory provisions, court rules, guidelines and forms for Attorneys for the Child and Assigned Counsel Plan attorneys in the Family Courts of New York and Bronx Counties. Members of the Panel of Attorneys for Children in the First Judicial Department may be permitted to select an area of practice expertise. When certification upon appointment to the Panel is limited to an area of expertise, attorneys may only accept assignments in that specialty.

Please review the information contained in this Handbook and retain it for future reference. The Appellate Division, First Department, Office of Attorneys for Children, and the courts in which you will be serving, thank you for your work on behalf of children and parents.

#### A. RULES OF THE CHIEF JUDGE

#### Part 7

#### **Attorneys for Children**

#### § 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 family court pursuant to § 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 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.

[PROMULGATED by order of the Chief Judge, Dated October 17, 2007]

#### B. STATEWIDE ATTORNEY FOR CHILD ADVISORY COMMITTEE

#### SUMMARY OF RESPONSIBILITIES OF THE ATTORNEY FOR THE CHILD

While the activities of the attorney for the child will vary with the circumstances of each client and proceeding, in general those activities will include, but not be limited to, the following:

- (1) Commence representation of the child promptly upon being notified of the appointment;
- (2) Contact, interview and provide initial services to the child at the earliest practical opportunity, and prior to the first court appearance when feasible;
- (3) Consult 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 child's circumstances, and remain accessible to the child;
- (4) Conduct a full factual investigation and become familiar with all information and documents relevant to representation of the child. To that end, the lawyer for the child shall retain and consult with all experts necessary to assist in the representation of the child.
- (5) Evaluate the legal remedies and services available to the child and pursue appropriate strategies for achieving case objectives;
- (6) Appear at and participate actively in proceedings pertaining to the child;
- (7) Remain accessible to the child and other appropriate individuals and agencies to monitor implementation of the dispositional and permanency orders, and seek intervention of the court to assure compliance with those orders or otherwise protect the interests of the child, while those orders are in effect; and
- (8) Evaluate and pursue appellate remedies available to the child, including the expedited relief provided by statute, and participate actively in any appellate litigation pertaining to the child that is initiated by another party, unless the Appellate Division grants the application of the attorney for the child for appointment of a different attorney to represent the child on appeal.

[APPROVED by the Administrative Board of the Unified Court System October 4, 2007]

#### C. RESPONSIBILITIES REGARDING APPEALS

- 1. Attorneys who represent children or adults in the Family Court are responsible for advising their clients as to their right to appeal. As with all aspects of representation, you are expected to have a meaningful discussion with your client regarding appeal.
- 2. If your client indicates that they wish to appeal the Family Court ruling, you must file a Notice of Appeal. If you are NOT ON THE APPELLATE PANEL, you must comply with Family Court Act §1118. Thereafter, you must confirm that Appellate Counsel has been appointed, and make yourself and your file available to appellate counsel for consultation.
- 3. If you are on the Trial and Appellate panels, you must determine whether there is a conflict that prevents you from representing your client on appeal. If there is a conflict you must follow (2) above. If there is no conflict, you must comply with Family Court Act §1121.

### II. STATUTORY PROVISIONS RELATING TO REPRESENTATION BY THE PANEL OF ATTORNEYS FOR CHILDREN

#### A. FAMILY COURT ACT

a. Article 2, Part 4

#### **Attorneys for Children**

#### § 241. Findings and purpose

This act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by an attorney for the child. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of attorneys for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court. Nothing in this act is intended to preclude any other interested person from appearing by counsel.

#### § 242. Attorney for the Child

As used in this act, "attorney for the child" refers to an attorney admitted to practice law in the state of New York and designated under this part to represent minors pursuant to § 249 of this act

#### § 243. Designation

(a) The office of court administration may enter into an agreement with a legal aid society for

### Rule 1.7: Conflict of Interest: Current Clients

Share this:

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Client-Lawyer Relationship

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- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

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ABA American Bar Association

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#### **GENERAL POLICY CONSIDERATIONS**

#### Role of the Attorney for the Child

Historically, the definition of the role of the attorney for the child has engendered a great deal of confusion. Many attorneys, and indeed many Judges, have viewed the role of the attorney for the child to be in the nature of a guardian ad litem. It is clear, however, that the role of the attorney for the child is very different from that of a guardian ad litem. A guardian ad litem, who need not be an attorney, is appointed as an arm of the Court to protect the best interests of a person under a legal disability. In contrast, the role of the attorney for the child is to serve as a child's lawyer. The attorney for the child has the responsibility to represent and advocate the child's wishes and interests in the proceeding or action.

With regard to the role of the attorney for the child please carefully review the Rule of the Chief Judge § 7.2 and the Summary of Responsibilities of the Attorney for the Child that follows on pages 3-4 of this document.

#### **Protocols**

In view of the age of your clients and the sensitive nature of the cases in which you are appointed, you are presented with unique challenges. As an attorney for children, however, you always should act in a manner consistent with proper legal practice and should not assume the role of social worker, psychologist or advocate for one of the parties. Although it may be tempting to step outside the role of counsel for the child, particularly when the circumstances of the case are especially tragic, the rules of good lawyering are as applicable to you as to any attorney in a civil proceeding or action.

Examples of improper practices include:

- engaging in ex parte communications with the Judge without the express approval of all parties
- communicating with the parties in the absence of their counsel
- requesting confidential documents without the proper authorization of a party
- disclosing client confidences without the approval of the client. The
  attorney for the child should avoid attributing to the child any
  statements or recommendations regarding the ultimate disposition
  of the case, unless the child has specifically authorized the attorney
  for the child to do so and understands the possible implications

 the attorney for the child should not be a witness at any time during the proceeding or action in any subsequent proceeding by the same parties

Because trial courts vary with regard to their expectations of the attorney for the child, you should define your role and ensure that your role is understood by your client(s), the parties and their attorneys, as well as the Judge. We recognize that some trial courts are not fully aware of the proper role of the attorney for the child and, in some instances, may expect the attorney for the child to assume an improper role. Presiding Justice Whalen, the Fourth Department Attorneys for Children Advisory Committee, and the Attorneys for Children Program Office work to educate the bench about the proper role of the attorney for the child.

#### Section 7.2 of the Rules of the Chief Judge

#### Section 7.2 Function of the attorney for the child.

- (a) As used in this part, "attorney for the child" means a[n attorney] appointed by 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 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.

(effective October 17, 2007)

#### Summary of Responsibilities of the Attorney for the Child

While the activities of the attorney for the child will vary with the circumstances of each client and proceeding, in general those activities will include, but not be limited to, the following:

- (1) Commence representation of the child promptly upon being notified of the appointment;
- (2) Contact, interview and provide initial services to the child at the earliest practical opportunity, and prior to the first court appearance when feasible;
- (3) Consult 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 child's circumstances, and remain accessible to the child;
- (4) Conduct a full factual investigation and become familiar with all information and documents relevant to representation of the child. To that end, the lawyer for the child shall retain and consult with all experts necessary to assist in the representation of the child.
- (5) Evaluate the legal remedies and services available to the child and pursue appropriate strategies for achieving case objectives;
- (6) Appear at and participate actively in proceedings pertaining to the child;
- (7) Remain accessible to the child and other appropriate individuals and agencies to monitor implementation of the dispositional and permanency orders, and seek intervention of the court to assure compliance with those orders or otherwise protect the interests of the child, while those orders are in effect; and
- (8) Evaluate and pursue appellate remedies available to the child, including the expedited relief provided by statute, and participate actively in any appellate litigation pertaining to the child that is initiated by another party, unless the Appellate Division grants the application of the attorney for the child for appointment of a different attorney to represent the child on appeal.

# **NYSBA**

### Committee on Children and the Law

Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings

2015

Approved by the Executive Committee of the New York State Bar Association, January 2015.

### NEW YORK STATE BAR ASSOCIATION COMMITTEE ON CHILDREN AND THE LAW

### STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CUSTODY, VISITATION AND GUARDIANSHIP PROCEEDINGS

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### NEW YORK STATE BAR ASSOCIATION COMMITTEE ON CHILDREN AND THE LAW

### STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CUSTODY, VISITATION AND GUARDIANSHIP PROCEEDINGS (2014)

#### **PREFACE**

Standards for Attorneys Representing Children in New York Custody, Visitation and Guardianship Proceedings (2014) is a revised fifth edition of the child custody standards and commentaries first adopted and published by the New York State Bar Association in 1992.

These Standards apply to all attorneys representing children in custody, visitation and guardianship proceedings between private persons, whether in supreme court, surrogates court, or family court. These Standards are not meant to apply to actions in which the government or a child care agency is a party, although many of the principles set forth here are relevant to both public and private custody proceedings.

Attorneys and judges who are familiar with earlier editions of the Standards will find many similarities with the fourth edition. A major difference is that this edition changes the structure and formatting to conform more closely to other representation standards adopted by the New York State Bar Association's Committee on Children and the Law.

The Standards for Attorneys Representing Children in New York Custody, Visitation and Guardianship Proceedings (2014) are intended to define what constitutes effective representation.

The Committee welcomes comments and suggestions to improve this edition of the Standards. These should be sent to the Committee through the NYSBA.

# STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CUSTODY, VISITATION AND GUARDIANSHIP PROCEEDINGS (2014)

#### A. THE CHILD'S ATTORNEY

#### A-1. The Attorney-Client Relationship

Whether retained or assigned, and whether called "counsel" or "law guardian," the attorney for the child shall, to the greatest possible extent, maintain a traditional attorney-client relationship with the child. The attorney owes a duty of undivided loyalty to the child, shall keep client confidences, and shall advocate the child's position. In determining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances. Ethics rules require an attorney "to abide by a client's decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued." (NY Rules of Professional Conduct [22 NYCRR 1200.0], rule 1.2[a]). In addition, the attorney must "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Rule 1.4(a)(2). In 2007 the Chief Judge of the New York State Court of Appeals made it clear that unless a child is not capable of expressing a preference or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions, or the child's articulated position would place the child at imminent risk of serious harm, the attorney must not "substitute judgment" in determining and advocating the child's position, even if the attorney believes that what the child wants is not in the child's best interests. Rules of the Chief Judge, § 7.2.

#### Commentary

*Under the Rules of the Chief Judge, § 7.2 (b) & (d):* 

- (b) The attorney for the child is subject to the ethical requirements applicable to all attorneys, 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.
- (d) In other types of proceedings [other than JD and PINS], where the child is the subject, the attorney for the child must zealously advocate the child's position.

<sup>&</sup>lt;sup>1</sup> "Law Guardian" is an outdated term for the child's legal advocate. It has been replaced in the relevant statutes by the term "Attorney for the Child."

- (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.

Case law makes plain that children are entitled to more than the mere presence of an attorney; they deserve effective representation, and the failure to provide effective representation constitutes reversible error. See <u>Matter of Elizabeth.</u>, 155 A.D.2d 666 (3d Dept, 1989); <u>Matter of Jamie TT.</u>, 191 A.D.2d 132, 599 N.Y.S.2d 892 (3d Dept, 1993).

#### A-2. Counseling and Advising the Child

The attorney has a duty to explain to the child, in a developmentally appropriate manner, all information that will help the child to understand the proceedings, make decisions, and otherwise provide the attorney with meaningful input and guidance. Because a child may be more susceptible to intimidation and manipulation than an adult client, the attorney should ensure that the child's decisions reflect his/her actual position. The attorney has a duty not to overbear the will of the child.

The attorney's duties as counselor and advisor include:

- Developing a thorough knowledge of the child's circumstances and needs;
- (2) Informing the child of the relevant facts and applicable laws;
- (3) Explaining the practical effects of taking various positions, which may include the impact of such decisions on the child and other family members or on future legal proceedings;

- (4) Expressing an opinion concerning the likelihood that the court will accept particular arguments;
- (5) Providing an assessment of the case and the best position for the child to take and the reasons for such assessment;
- (6) Counseling against or in favor of pursuing a particular position and emphasizing the entire spectrum of consequences that might result from assertion of that position.

#### Commentary

The attorney's responsibility to adhere to the client's directions refers primarily to the child's authority to make certain fundamental decisions when the attorney and the child disagree. However, representation is also "attorney-directed" in the sense that, particularly when representing a young child, an attorney has the responsibility to bring his/her knowledge and expertise to bear in counseling the client to make sound decisions.

The child's attorney, like any attorney, must perform the vital role of being an advisor and counselor. In that role, the attorney may attempt to persuade the child to adopt a course of action that, in the attorney's view, will promote the child's legal interests, even when this course of action differs from the client's initial position. To do so effectively, the attorney needs to determine what factors have been most influential in the child's thinking, what the child does not know, and what may be confusing to the child, and then work diligently to help the child understand the attorney's perspective and thinking.

While explaining why the attorney believes a different outcome, or route to the outcome, may be preferable, the attorney must take care not to overwhelm the child's will and thus override the child's actual wishes. The attorney must remain aware of the power dynamics inherent in adult/child relationships and remind the child that the attorney's role is to assist clients in achieving their wishes and protecting their legal interests. Ultimately, the child must understand that unless the attorney has factual grounds to believe that the child's articulated position will place the child at substantial risk of imminent, serious harm, the attorney will advocate the child's position in court, even if the attorney does not personally agree with that position.

### A-3. Overcoming the Presumption of Adherence to the Client's Directions

An attorney must not substitute judgment and advocate in a manner that is contrary to a child's articulated preferences, except in the following circumstances:

(1) The attorney has concluded that the court's adoption of the child's expressed preference would expose the child to substantial risk of imminent, serious harm and that this danger could not be avoided by removing one or more individuals from the home, or by the provision of court-ordered services and/or supervision; or (2) The attorney is convinced that the child is not competent due to an inability to understand the factual issues involved in the case, undue influence or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions.

In these circumstances, the child's attorney must inform the court of the child's articulated wishes, unless the child has expressly instructed the attorney not to do so.

#### Commentary

When considering whether the child has "capacity to perceive and comprehend the consequences of his or her decisions," the attorney should not make judgments that turn on the level of maturity, sophistication, or "good judgment" reflected in the child's decision-making. All that is required is that the child has a basic understanding of the issues in the case and their consequences. The attorney may not use substituted judgment merely because the attorney believes that another course of action would be "better" for the child. Thus, each child should be assessed individually to determine if he or she has the capacity to make decisions that bind the attorney with respect to fundamental issues such as where the child wishes to live. In certain complex cases, when evaluating whether the use of substituted judgment is permissible, the attorney may wish to consult a social worker or other mental health professional, keeping faithful to attorney-client confidentiality, for assistance in evaluating the child's developmental status and capability. (see A-5).

While section A-2 (see above) explores the nuances of the attorney's responsibility to counsel his or her client, there is no question that this responsibility is tested most acutely when after counseling the child, the attorney disagrees with the child's position. In such situations, the attorney must be especially careful when evaluating whether the extraordinary step of implementing substituted judgment is warranted. It is critical to remember that although an attorney has the responsibility to bring his/her knowledge and expertise to bear in counseling the client to make sound decisions, ultimately the child must understand that unless the attorney has factual grounds to believe that the child's articulated position will place the child at substantial risk of imminent, serious harm, the attorney will represent the child's position, even if the attorney does not personally agree with that position. This is the case no matter what the reasons are for the attorney's disagreement with the child's articulated position. Even when the attorney believes that the child has been influenced by a third party to take his or her position, the child's articulated position must govern unless that position places the child at substantial risk of imminent, serious harm.

The Rules of the Chief Judge properly contemplate that extraordinary circumstances must be present before the child's attorney overrides a child's expressed position. Rules of the Chief Judge, § 7.2 (2007); see Merril Sobie, Representing Child Clients: Role of Counsel or Law Guardian, NYLJ, 10/6/92, p. 1, col. 1 (while opining that a law guardian may refuse to argue for a result that would place child in "imminent danger", author notes that those words "connote a grave immediate danger"); American Bar Association Standard B-4(3). The language of § 7.2 is consistent with the prevailing view that the attorney for the child should only consider overriding the child's expressed position when a substantial risk of imminent serious physical harm is present. Therefore, although it is conceivable that there might be circumstances where an

attorney would consider overriding the child's expressed position due to the imminent risk of serious emotional harm, such situations should be extremely rare.

#### A-4. The Use of Substituted Judgment

In all circumstances where an attorney is substituting judgment in a manner that is contrary to a child's articulated position or preferences or when the child is not capable of expressing a preference, the attorney must inform the court and the child that substituted judgment is the basis upon which the attorney will be advocating the legal interests of the child. The attorney should be prepared to introduce evidence to support the attorney's position. The attorney also is required to inform the court of the child's articulated position, unless the child has expressly instructed the attorney not to do so. In formulating substituted judgment, the attorney:

- (1) Must conduct a thorough investigation, including interviewing the child, reviewing the evidence, and applying it against the applicable legal standard applicable to the particular stage of the proceeding; and
- (2) Should consider the value of consulting a social worker or other mental health professional to assist the attorney in determining whether it is appropriate to override the child's articulated position and/or to assist the attorney in formulating a legal position on behalf of a child who is not competent (see A-3).

#### Commentary

In those cases in which the attorney has properly decided to substitute judgment for the child, the attorney should be guided by his/her objective analysis of the legal issues governing the proceeding. The attorney properly advances the client's interests only by ensuring that the child's legal interests are protected and that the legal position advanced by the child's attorney conforms to the applicable legal standard governing the proceeding.

Some controversies related to parenting time<sup>2</sup> or the choice of a custodian will require the court, and thus the attorney for the child (when using substituted judgment), to consider the child's best interests. In those instances, the attorney's formulation of a position should be accomplished through the use of objective criteria, rather than the life experience or instinct of the attorney. The attorney should take into account the full context in which the client lives, including the importance of the child's family, race, ethnicity, language, culture, schooling, and other matters outside the discipline of law. When using substituted judgment and formulating a best interests position, the attorney may wish to consult a social worker or other mental health professional for assistance.

It is important to note that if a child affirmatively chooses not to take a position in the litigation, this is not automatically cause for the use of substituted judgment. In such circumstances, the attorney should represent this position to the court and represent the child's legal interests in this context. Substituted judgment should only be used when the child clearly lacks capacity pursuant to the criteria set forth in section A-3 (see above), or if the attorney has

<sup>&</sup>lt;sup>2</sup> From time to time, the term "parenting time" is used in these standards instead of the term "visitation." The intent is to recognize an emerging statewide and national trend toward this less polarizing, more child-focused nomenclature.

# EXHIBIT "B"

1	motion for, you know, Dr. O'Connor as bias
2	in this trial and I just feel like
3	Mr. Broda, kind of, like, wants it both
4	ways. They're avoiding service on the
5	federal lawsuit. If she's is here for
6	testimony in Walker versus Walker, I think
7	her address, her correct address, should be
8	subject to not to avoid service in a federal
9	lawsuit.
10	MR. BRODA: I don't know what the
11	discussion is in regard to avoiding service.
12	MS. WALKER: Why would you take the
13	address out?
14	MR. BRODA: Because the concern is
15	that, frankly, somebody might go to her home
16	and harass her similar to the manner the
17	children were harassed on the first day of
18	school.
19	MS. WALKER: That is biased by
20	Mr. Broda.
21	MR. BRODA: I'm allowed to be
22	biased.
23	MS. SILVA: Dr. O'Connor had
24	directed my client to send his payment to
25	her business address, so perhaps we can use

Camille Robbins, Rensselaer County Court Reporter

## EXHIBIT "C"

INDEX NO. EF2018-261675

NYSCEF DOC. NO. 175

RECEIVED NYSCEF: 02/13/2023

			Y ex-Chancellor Jim stras confirms new	5 Where has news anchor Lydla Kulbida been on
abandoned Albany	school	despite warning	gig at nonprofit	WTEN?

Albany police seek missing 20-year-old woman

#### CAPITAL REGION

## Rules aim at law guardians and conflicts of interest

Rules aim at law guardians and conflicts of interest

#### **Robert Gavin**

Updated: Oct. 30, 2012 2:27 p.m.





1 of 9

....

The Family Court building in Albany, N.Y., on Oct 24, 2012. (Skip Dickstein/Times Union) Skip Dickstein

 $ALBANY-Law\ guardians\ in\ the\ Capital\ Region\ can\ no\ longer\ easily\ moonlight\ as\ separate\ full-time\ public\ employees.$ 

Several lawyers who hold taxpayer-funded jobs have been working as law guardians on selective lists kept by judges - but that is about to end.

NYSCEF DOC. NO. 175

RECEIVED NYSCEF: 02/13/2023

On Oct. 17, Karen Peters, the new presiding justice of the Appellate Division's Third Department, ordered restrictions that prohibit the law guardians from holding full-time jobs with "any government agency" within the 23-county department unless they receive special written permission from the lawyer's employer, Family Court and the Appellate Division.

The law guardians can complete any assignment previously given so long as they get that written permission and there are no additional conflicts of interest. The change comes in the wake of a  $\underline{\text{Times Union}}$  investigation into public money doled out to law guardians and the potential conflict of interests that may arise.

#### **More Information**

"Obviously, if someone works for a governmental agency, the governmental agency can say, 'If you want another job, you need permission from
me.' That's not my concern and nor would I be addressing that. What I'm addressing are full-time government employees who are also serving
as attorneys for children."

- Karen Peters, the new presiding justice

of the Appellate Division's 3rd Department

INDEX NO. EF2018-261675

NYSCEF DOC. NO. 175

RECEIVED NYSCEF: 02/13/2023

SEE MORE

Peters, who succeeded the late  $\underline{Presiding Justice Anthony Cardona}$  atop the Appellate Division in April, scheduled the rule change to take effect Nov. 8. She described it as a preventative measure.

"It came to my attention that this was a potential concern and my goal in life is to prevent continuing problems," Peters said in a phone interview from her Kingston-based chambers Thursday. "The rule seemed to be the best method of doing so."

Several attorneys already being paid by taxpayers — including an Albany police lieutenant — have become law guardians within the region, according to the list of law guardians and their financial filings for Albany, Rensselaer, Schenectady and Saratoga counties obtained by the Times Union. It covers 2007 to 2011.

Full-time Albany County Assistant Public Defenders Shauna Collins and Rylan Richie and Assistant Albany County Attorneys Kara Frank and Catherine Brown were all 2011 Albany County law guardians, as was John Spath, an assistant attorney for the Town of Colonie and Michael Barone, an Albany police lieutenant. So were Sandra McCarthy. the part-time conflict defender for Rensselaer County and David Rynkowski, a part-time assistant public defender in Rensselaer County.

The Times Union reviewed earnings of Capital Region law guardians between April 1, 2008 and Aug. 30, 2011, under a Freedom of Information Law request to the Appellate Division. Over that span, Collins earned \$120,490 as a law guardian, McCarthy \$111,842. Barone \$63,324, Rynkowski \$62,990, Richie \$15,032, Spath \$11,018, Brown \$53 and Frank \$23.

When asked if there has been an existing problem with law guardians working in other full-time public jobs, Peters replied: "I can't answer whether there's been a problem. I can tell you that the subject matter has been discussed. And in order to avoid a

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NYSCEF DOC. NO. 175

RECEIVED NYSCEF: 02/13/2023

 $problem, the court decided \ to issue this rule so that \ all \ of the individuals involved - the employer, the employee \ and the court - are aware if there's a potential conflict."$ 

Peters' new rule applies only to full-time employees, which means McCarthy and Rynkowski would not be affected.

"Obviously, if someone works for a governmental agency, the governmental agency can say, 'If you want another job, you need permission from me,'" Peters said. "That's not my concern and nor would I be addressing that. What I'm addressing are full-time government employees who are also serving as attorneys for children.

Known officially as "attorneys for children," law guardians belong to selective lists that allow them to earn \$75-an-hour from the state, whether in court or at home. Collectively, they earn hundreds of thousands of taxpayer-funded dollars to legally represent children in custody cases or matters such as juvenile delinquency or Persons in Need of Supervision (PINS) cases.

To become law guardians, attorneys must first apply to be certified by the Appellate Division. But judges have influence over appointments; in Albany County, for example the three sitting Family Court judges make the final decision. To hear many attorneys tell it, getting on the lists is no easy task.

"I know it's difficult," said one law guardian in the Capital Region, who declined to give his name for fear it could hurt his income. "I (initially) applied to every county in the area and didn't have any success. I received form letters saying they weren't accepting any new applications at this time. I took them at their word."

Another law guardian said it was "very, very tough" and could take two to three years to get onto the panels.

The lawyer, who also did not want to be identified, questioned the ethics of a law guardians being paid for work from two employer at the same time — and possibly a third employer if the lawyers is working for private clients. "Why would judges allow this?" the law guardian said. "Why would they sign off on this?"

INDEX NO. EF2018-261675

NYSCEF DOC. NO. 175

RECEIVED NYSCEF: 02/13/2023

Albany County Family Court W. Dennis Duggan, when asked, said judges approved the vouchers from such law guardians because they were assured by county officials that policies would be put in place to ensure time was properly accounted for.

"I'm pleased that the presiding judge has addressed this issue because the appearance is wrong to the public and taxpayers and, over time, the chances that it would lead to abuse were too high," the judge said.

While it varies, being a law guardian can be highly lucrative. The Times Union review showed the top-earning law guardian across the immediate four-county area to be Sharon McNulty, who earned \$593,546 as law guardian in Albany. Second came Heather Corey-Mongue, who earned \$524,776 mostly in Saratoga County. Third was James McSparron, who earned \$478,097 as a law guardian in Albany County. Fourth was Douglas Broda who earned \$392,194 in Rensselaer County. Fifth was William O'Leary, who earned \$374,985 over the period.

Peters, when asked, said the law guardian program was working well within the Third Department.

"We have an incredible cadre of dedicated attorneys who represent children — both in Family Court and in Supreme Court in matrimonial actions — who really go above and beyond to make sure that the children's needs are met," she said. "I have enormous respect for them."

Peters' Oct. 17 order came two weeks after she met with Albany Family Court Judge <u>Gerard Maney</u>, who is the supervisory judge for all family courts in the seven-county Third Judicial District, Albany County Public Defender James Milstein and others.

"I think what stirred the pot was the amount of hours some of the assistants were working may have raised red flags," said Albany County Attorney Thomas Marcelle, who issued his own rule banning assistant county attorneys, who prosecute juvenile delinquents, from being law guardians. "What the concern always is, I think the taxpayers have a right to know that they're getting the hours for which they paid for their attorneys. To the extent that you have an extensive outside practice, there's always issues about, how can you serve two masters at the same time?"

Times Union Director of News Research Sarah Hinman-Ryan contributed

## EXHIBIT "D"



OFFICE OF COURT ADMINISTRATION 25 Beaver Street New York, New York 10004 (212) 428-2810

#### Division of Administrative Services Criminal History Record Search (CHRS) Program

### Criminal Disposition Information

Bill To Information Job No Delivery Type Order Date Order Time

Alisha Clark
125 Meadows Drive
Melrose, NY 12121

Alisha Clark
125 Meadows Drive
Melrose, NY 12121

Name (A.K.A.)				OCA Remarks
County	D.O.B.			
WALKER,LUKE (WALKER,LUKE J)		08/07/2001	Cortland City Court	
CORTLAND	03/09/1983		Docket/Case/Serial Number: 2001-31929 Court Control Number: 28309545Q Adjourned To: 09/21/2001	
			Charge: PL 130.20 01 AM - SEXUAL MISCONDUCT Disposition/Status: PLED GUILTY Sentenced to: IMPRISONMENT 60 DAYS, PROBATION 3 YEARS	
			Cortland City Court	
			Docket/Case/Serial Number: 2001-31930 Court Control Number: 28309545Q Adjourned To: 09/21/2001	
			Charge: PL 130.60 01 AM 2ND DEGREE - SEXUAL ABUSE Disposition/Status: PLED GUILTY Sentenced to: IMPRISONMENT 60 DAYS, PROBATION 3 YEARS	
			Cortland City Court	
			Docket/Case/Serial Number: 2001-31931 Court Control Number: 28309545Q Adjourned To: 09/21/2001	
			Charge: PL 130.60 01 AM 2ND DEGREE - SEXUAL ABUSE Disposition/Status: PLED GUILTY Sentenced to: IMPRISONMENT 60 DAYS, PROBATION 3	

		YEARS  Cortland City Court  Docket/Case/Serial Number: 2001-31932  Court Control Number: 28309545Q  Adjourned To: 09/21/2001  Charge: PL 130.60 01 AM 2ND DEGREE - SEXUAL ABUSE Disposition/Status: PLED GUILTY  Sentenced to: IMPRISONMENT 60 DAYS, PROBATION 6  YEARS	
Name (A.K.A.)		Adjourn/Disposition Date, Charge, Disposition, and Sentence Information	OCA Remarks
County D.O.B.			
WALKER,LUKE (WALKER,LUKE J)	02/25/2001	Cortland County Court  Docket/Case/Serial Number: 2001-0041	
03/09/1983	3	Court Control Number: 30530676L Adjourned To: 07/18/2001	
	II.		
		Charge: PL 130.65 02 DF 1ST DEGREE - SEXUAL ABUSE Disposition/Status: PLED GUILTY Sentenced to: IMPRISONMENT 6 MONTHS, FINAL ORDER OF PROTECTION, PROBATION 10 YEARS	

Sentence Terms:
All sentences for a misdemeanor with a term of incarceration of "one year" or "365 days" are, by operation of law, interpreted to mean and be applied as a sentence of 364 days. Any CHRS report that displays a sentence of one year for such misdemeanors should be read to mean a sentence of 364 days.

#### Law Codes:

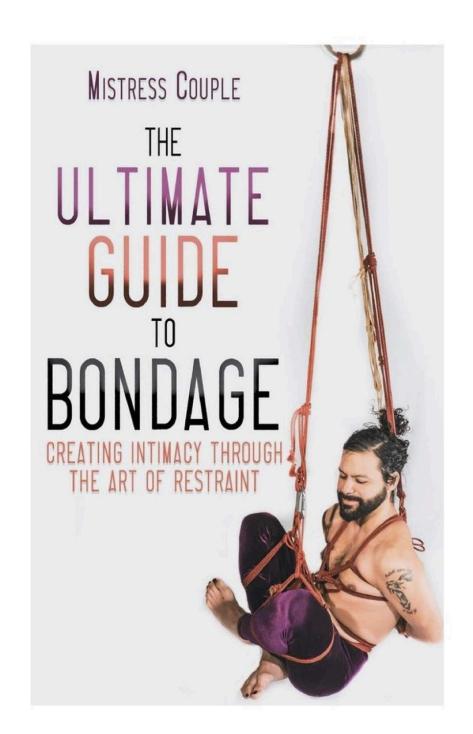
AC	Administrative Code	CPL	Criminal Procedure Law	LOC	Local Law	RP	Real Property Law
ABC	Alcoholic Beverage Control Law	ECL	Environmental Conservation Law	MD	Multiple Dwelling Law	RR	Railroad Law
BL	Banking Law	GB	General Business Law	MHY	Mental Hygiene Law	SW	Social Services Law
CON	Conservation Law	GML	General Municipal Law	PHL	Public Health Law	TL	Transportation Law
COR	Correction Law	LAB	Labor Law	PL	Penal Law	VTL	Vehicle and Traffic Lav

Charge Nomenclature: Example: PL 220.03.00 AM

PL (Penal Law) = NYS Law 220.03 = Section 00 = Subsection AM = Severity 'A' Misdemeanor

 $\begin{tabular}{lll} \hline \textbf{Charge Severity:} \\ \hline \textbf{I} = \textbf{Infraction} & \textbf{V} = \textbf{Violation} & \textbf{M} = \textbf{Misdemeanor} & \textbf{F} = \textbf{Felony} \\ \hline \end{tabular}$ 

Court Control Number:
This is preprinted on the NYS Fingerprint Card and used to match court dispositions to the arrest. This arrest specific numeric identifier can be used for contacting courts for case information when a docket (lower court) or case number (Supreme/County Court) is not available (e.g. case data reflects lower court dispositions as Grand Jury, Indicted, or Supreme Court Transfer but no related case number.)



SEXUALITY / SELF-HELP

"This exceptional resource inspires deeper thinking about bondage—and deeper thinking leads to better bondage scenes!"

 Evie Vane, author of Better Bondage for Every Body and The Little Guide to Getting Tied Up

Whether you are looking for an introduction to bondage or seeking new heights of erotic delights, *The Ultimate Guide to Bondage* is the perfect addition to your dungeon's bookshelf!

The Ultimate Guide to Bondage is a comprehensive reference guide for any Mistress, Master, or lover of BDSM. Mistress Couple's original and insightful approach to bondage invites curious kinksters to consider and explore a myriad of practical and psychological bondage methods. Going far beyond any BDSM "starter kit," the book shows how bondage truly extends past the rope and chain restraint of your partner.

From decorative applications such as wedding rings and corsets, to invisible yet potent mental bondage, to fetish applications such as balloon or nylon encasement, this book provides historical context, powerful insights, tutorials, examples, and activities for every type of bondage enthusiast.

Mistress Couple is the Head Mistress of La Domaine Esemar, the world's oldest BDSM training chateau, where she hosts and educates bondage practitioners from all over the globe. Known for her psychological approach to BDSM, Mistress Couple has been



interviewed as an authority in the field by media outlets including Cosmopolitan, VICE, The Daily Beast, Huffington Post, and Racked.

CLEIS



Cleis Press (212) 431-5455 www.cleispress.com Photo: Kiki Vassilakis Design: Allyson Fields Type of Work: Text

Registration Number / Date: TX0008755257 / 2019-05-01

Application Title: The Ultimate Guide to Bondage: Creating Intimacy Through the Art of Restraint.

The Ultimate Guide to Bondage: Creating Intimacy Through the Art of Restraint. Title:

Description: Book, 294 p.

Copyright Claimant:

Sara Miller-Hornick.

Date of Creation: 2018

Date of Publication:

2018-12-11

Nation of First Publication:
United States

Authorship on Application:

Mistress Couple, pseud. (author of pseudonymous work); Citizenship: United States. Authorship: text.

Pre-existing Material:

artwork, Cover art and design.

Basis of Claim: text, text by author.

Rights and Permissions:

Meghan Kilduff, Start Midnight LLC, 101 Hudson St., 37th Floor, Suite 3705, Jersey City, NJ, 07302, United States, (212) 431-5455, kilduff@start-media.com

Mistress Couple, pseud. Miller-Hornick, Sara Names:

La Domaine Esemar @L... · Jan 18, 2018 ··· Ride into the New Year in style!





**La Domaine Esemar** @L... · Jan 3, 2018 ··· Thank you for a wonderful 2017!

Join us in celebrating 2018 for our 25th anniversary!

#happynewyear #BestOf2017 #instagram









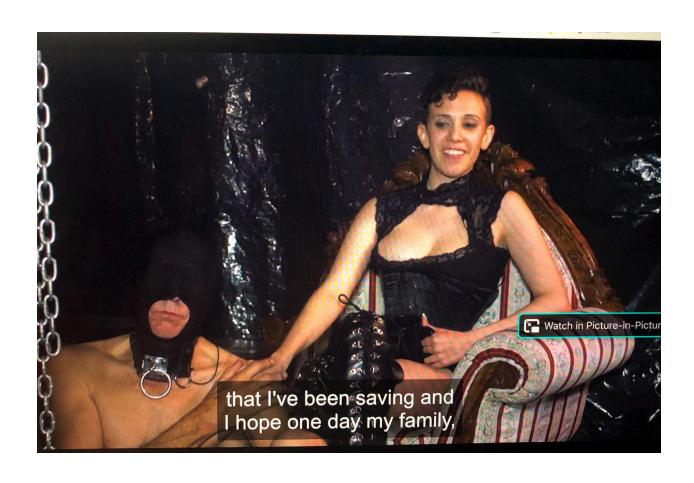




## 83 likes

petofmisscouple At times Mistress/slave relationships are difficult to maintain, fortunately this slave is able to have an open and honest conversation with my Mistress. Thank you Mistress for our talk today deepening slave's commitment, love and devotion to a caring Mistress Couple 👯 🔒

March 11, 2019



# EXHIBIT "E"

Cross - A. Walker - Broda

1		court, any higher court in the state or any
2		federal court made an order or decision saying
3		that Supreme Court has made any invalid
4		orders?
5 -	A	No, but I did
6	Q	Yes or no, ma'am?
7	А	Do you have to point at me like that? It's
8		really
9	Q	Ma'am, please answer the questions as the
10		Court has directed you.
11	A	Okay. Not that I'm aware.
12	Q	Okay. Are you aware that orders of a court
13		have to be followed unless some higher court
14		says they're illegal?
15.	A	I don't understand the question.
16	Q	Okay. Do you understand when a judge makes an
17		order you have to follow it?
18	А	Yes.
19	Q	Do you understand that no court having the
20		power to do so has said any Supreme Court
21		orders of this divorce are invalid?
22	А	Yes.
23	Q	Hence, you have to follow the Court's orders,
24		correct?
25 .	A	Yes.

Camille Robbins, Renssleaer County Court Reporter