Section 1090-a

Section 1089, in accordance with federal law, requires "age appropriate consultation with the child" in permanency hearings. The prescription, repeated at the outset of newly enacted Section 1090-a, applies across-the-board to all permanency hearings and to all children, regardless of age. Section 1090-a, informally known as the "kids-in-court" statute, details the circumstances and extent of the "age appropriate consultation" provision. The section outlines a three tiered approach geared to the age of the child as of the date of the hearing.

The first tier applies to children who are fourteen years of age or older. "A child age fourteen and older shall be permitted to participate in person at all or any portion of his or her permanency hearing in which he or she chooses to participate." [§1090-a(b)(1)]. The right to participate is hence unequivocal. Waiver by the youngster is possible, but only following consultation with counsel [see subdivision (a)(1)(2)]. The manner of participation is likewise the child's decision, upon consultation with counsel [subdivision (d)(1)]. Ergo, the child may attend in person and participate in the courtroom, elect to participate by telephone or other electronic means, or request an out-of-court conference.

The next tier, in descending chronological age order, applies when the child is ten years or older, but less than 14. For those children, the provisions are more complex. Youths who are age 10 through 13 have an absolute right to participate. However, ". . . the court may, on its own motion or upon the motion of the local social services district, limit the child's in person participation in any portion of a permanency hearing upon a finding that doing so would be in the best interests of the child . . ." [subdivision (b)(2)]. The criteria to determine the generalized "best interests" standard are spelled out in the subdivision. Upon determining that the child's in person participation should be limited, the court is obligated to make "alternative methods of

participation available", such as bifurcating the hearing, telephone participation, or the child issuing a written statement to the court. The right to participate is therefore guaranteed, although the mode and extent of participation may be limited by the court. Any limitation imposed by the Family Court is of course subject to review by an appellate court.

For children less than ten years of age, Section 1090-a commences with the broad statement: "Nothing in the section shall be deemed to limit the ability of a child under the age of ten years old from participating in his or her permanency hearing" (thereby implementing the federal directive, which is not age dependent) [subdivision (a)(3)]. However, the subdivision continues by stipulating that "The court shall have the discretion to determine the manner and extent to which any child under the age of ten may participate in his or her permanency hearing based on the best interests of the child". Participation at some level is hence required, but may be very limited. The mechanism for limiting the under ten year old's right to participate are not prescribed. However, the attorney for the child does not have to move for participation [subdivision (a)(3)]; that right is initially ensured. Presumably, it is incumbent upon the petitioning social services agency, the parents, the foster parents, or the court itself to move for a limitation.

The statute's presumption is that the AFC and the child will engage in "a meaningful consultation" as a prelude to a decision concerning participation (regardless of the child's age). Subdivision (4) lists the exceptions, which must be found by the court to justify the child's non-participation. In summary, the exceptions include situations in which the child lacks the mental capacity to consult meaningfully (presumably a lack of capacity will be documented by relevant evidence), or the child declines to consult, the child has absconded from foster care, or where "other good cause exists and cannot be alleviated in a timely manner." Since any child above the

in a juvenile delinquency proceeding where presence is required regardless of the respondent's serious or even violent behavioral and mental issues. (Equally analogous may be cases involving the adult disturbed criminal defendant and civil commitment and guardianship proceedings.)

As the Denise J. decision notes, the right of a child to participate in a permanency hearing, in accord with the "age appropriate consultation" provision of Section 1089, pre-dates Section 1090-a. The new section essentially clarifies the earlier provision and establishes procedures for its implementation. Thus the body of existing Section 1089 caselaw should be helpful to counsel and the court when applying Section 1090-a. See the original Commentary at pages 216-217 and the supplementary section 1089 commentaries.

Last, permanency hearings constitute but one integral part of the array of child protective proceedings. The principle that children have the right to meaningful participation, including in-court presence, in proceedings which fundamentally affect their lives, is equally applicable across the board, from Article 10 preliminary hearings, through disposition, permanency hearings, and until the achievement of permanency. Several states permit the older child to be present at all phases of the child protective process, unless excluded for valid reason; see, e.g. Cal. Welf. & Inst. Code Section 349. Section 1090-a may represent the initial initiative in accommodating New York's children's need to participate throughout the frequently elongated child protective judicial spectrum.

Citation/Title
NY FAM CT Sec. 1090-a, Participation of children in their permanency hearings

***145664 McKinney's Family Court Act § 1090-a**

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
FAMILY COURT ACT
ARTICLE 10-A. PERMANENCY HEARINGS FOR CHILDREN PLACED OUT OF THEIR HOMES

Current through L.2018, chapters 1 to 3.

§ 1090-a. Participation of children in their permanency hearings

(a)(1) As provided for in subdivision (d) of section one thousand eighty-nine of this article, the permanency hearing shall include an age appropriate consultation with the child.

(2) Except as otherwise provided for in this section, children age ten and over have the right to participate in their permanency hearings and a child may only waive such right following consultation with his or her attorney.

(3) Nothing in this section shall be deemed to limit the ability of a child under the age of ten years old from participating in his or her permanency hearing. Additionally, nothing herein shall be deemed to require an attorney for the child to make a motion to allow for such participation. The court shall have the discretion to determine the manner and extent to which any particular child under the age of ten may participate in his or her permanency hearing based on the best interests of the child.

(b)(1) A child age fourteen and older shall be permitted to participate in person in all or any portion of his or her permanency hearing in which he or she chooses to participate.

(2) For children who are at least ten years of age and less than fourteen years of age, the court may, on its own motion or upon the motion of the local social services district, limit the child's participation in any portion of a permanency hearing or limit the child's in person participation in any portion of a permanency hearing upon a finding that doing so would be in the best interests of the child. In making a determination pursuant to this paragraph the court shall consider the child's assertion of his or her right to participate and may also consider factors including, but not limited to, the impact that contact with other persons who may attend the permanency hearing would have on the child, the nature of the content anticipated to be discussed at the permanency hearing, whether attending the hearing would cause emotional detriment to the child, and the child's age and maturity level. If the court determines that limiting a child's in person participation is in his or her best interests, the court shall make alternative methods of participation available, which may include bifurcating the permanency hearing, participation by telephone or other available electronic means, or the issuance of a written statement to the court.

***145665** (c) Except as otherwise provided for in this section, a child who has chosen to participate in his or her permanency hearing shall choose the manner in which he or she shall participate, which may include participation in person, by telephone or available electronic means, or the issuance of a written statement to the court.

(d)(1) For children who are age ten and over, the attorney for the child shall consult with the child regarding whether the child would like to assert his or her right to participate in the permanency hearing and if so, the extent and manner in which he or she would like to participate.

(2) The attorney for the child shall notify the attorneys for all parties and the court at least ten days in advance of the scheduled hearing whether or not the child is asserting his or her right to participate, and if so, the manner in which the child has chosen to

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Section 1089, in accordance with federal law, requires "age appropriate consultation with the child" in permanency hearings. The prescription, repeated at the outset of newly enacted Section 1090-a, applies across-the-board to all permanency hearings and to all children, regardless of age. Section 1090-a, informally known as the "kids-in-court" statute, details the circumstances and extent of the "age appropriate consultation" provision. The section outlines a three tiered approach geared to the age of the child as of the date of the hearing.

The first tier applies to children who are fourteen years of age or older. "A child age fourteen and older shall be permitted to participate in person at all or any portion of his or her permanency hearing in which he or she chooses to participate." [§ 1090-a(b)(1)]. The right to participate is hence unequivocal. Waiver by the youngster is possible, but only following consultation with counsel [see subdivision (a)(1)(2)]. The manner of participation is likewise the child's decision, upon consultation with counsel [subdivision (d)(1)]. Ergo, the child may attend in person and participate in the courtroom, elect to participate by telephone or other electronic means, or request an out-of-court conference.

***145667** The next tier, in descending chronological age order, applies when the child is ten years or older, but less than 14. For those children, the provisions are more complex. Youths who are age 10 through 13 have an absolute right to participate. However, "... the court may, on its own motion or upon the motion of the local social services district, limit the child's in person participation in any portion of a permanency hearing upon a finding that doing so would be in the best interests of the child ..." [subdivision (b)(2)]. The criteria to determine the generalized "best interests" standard are spelled out in the subdivision. Upon determining that the child's in person participation should be limited, the court is obligated to make "alternative methods of participation available", such as bifurcating the hearing, telephone participation, or the child issuing a written statement to the court. The right to participate is therefore guaranteed, although the mode and extent of participation may be limited by the court. Any limitation imposed by the Family Court is of course subject to review by an appellate court.

For children less than ten years of age, Section 1090-a commences with the broad statement: "Nothing in the section shall be deemed to limit the ability of a child under the age of ten years old from participating in his or her permanency hearing" (thereby implementing the federal directive, which is not age dependent) [subdivision (a)(3)]. However, the subdivision continues by stipulating that "The court shall have the discretion to determine the manner and extent to which any child under the age of ten may participate in his or her permanency hearing based on the best interests of the child". Participation at some level is hence required, but may be very limited. The mechanism for limiting the under ten year old's right to participate are not prescribed. However, the attorney for the child does not have to move for participation [subdivision (a)(3)]; that right is initially ensured. Presumably, it is incumbent upon the petitioning social services agency, the parents, the foster parents, or the court itself to move for a limitation.

The statute's presumption is that the AFC and the child will engage in "a meaningful consultation" as a prelude to a decision concerning participation (regardless of the child's age). Subdivision (4) lists the exceptions, which must be found by the court to justify the child's non-participation. In summary, the exceptions include situations in which the child lacks the mental capacity to consult meaningfully (presumably a lack of capacity will be documented by relevant evidence), or the child declines to consult, the child has absconded from foster care, or where "other good cause exists and cannot be alleviated in a timely manner." Since any child above the age of ten will have received notice of the hearing pursuant to Section 1089, and the AFC will have received and may share the permanency report with the child, the materials upon which an intelligent discussion can be predicated should have been distributed at an earlier date.

One provision which may prove difficult to implement requires the AFC to notify the attorneys for all the parties and the court at least 10 days prior to the hearing as to whether the child is asserting his right to participate and, if so, the manner the child has chosen to participate [subdivision 2]. However, meaningful consultation between the attorney and the child may be impossible before the relevant permanency report is served (often less than 10 days prior to the hearing), the child has had an opportunity to receive and read the report, and a meeting with the attorney can be arranged. Given the time constraints, the requirement "... shall not be grounds to prevent such child from participating in his or her permanency hearing ..." The "saving clause" may be applied in more cases then the largely unworkable ten day notice provision.

***145668** Adjournments may of course be needed in light of the procedures delineated in Section 1090-a. They are available, but only within the confines of the requirement that the hearing be completed within 30 days of the originally scheduled date. Neither the court nor the parties have much "wiggle room" in conducting permanency hearings.

The first reported Section 1090-a case is Matter of Denise J. (Latonia J.), 52 Misc.3d 799, 32 N.Y.S.3d 876 (Fam. Court West. Co. 2016). Denise was 16 years old at the time of the hearing, and accordingly had an absolute right to attend in person. However, she had complex significant cognitive and behavioral problems. Further, she resided at a residential center in New Hampshire. In light of Section 1090-a's strict provision concerning children above the age of 14, the court denied an application to limit her participation and ordered that she be transported to New York for participation at the hearing. The court analogized the situation to a youth involved in a juvenile delinquency proceeding where presence is required regardless of the respondent's serious or even violent behavioral and mental issues. (Equally analogous may be cases involving the adult disturbed criminal defendant and civil commitment and guardianship

Citation/Title
NY FAM CT Sec. 1091, Motion to return to foster care placement

***145670 McKinney's Family Court Act § 1091**

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
FAMILY COURT ACT
ARTICLE 10-B. FORMER FOSTER CARE YOUTH RE-ENTRY PROCEEDINGS

Current through L.2018, chapters 1 to 3.

§ 1091. Motion to return to foster care placement

A motion to return a former foster care youth under the age of twenty-one, who was discharged from foster care due to a failure to consent to continuation of placement, to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges, may be made by such former foster care youth, or by a local social services official upon the consent of such former foster care youth, if there is a compelling reason for such former foster care youth to return to foster care; provided however, that the court shall not entertain a motion filed after twenty-four months from the date of the first final discharge that occurred on or after the former foster care youth's eighteenth birthday.

(a) A motion made pursuant to this section by a social services official shall be made by order to show cause. Such motion shall show by affidavit or other evidence that:

(1) the former foster care youth has no reasonable alternative to foster care;

(2) the former foster care youth consents to enrollment in and attendance at an appropriate educational or vocational program, unless evidence is submitted that such enrollment or attendance is unnecessary or inappropriate, given the particular circumstances of the youth;

(3) re-entry into foster care is in the best interests of the former foster care youth; and

(4) the former foster care youth consents to the re-entry into foster care.

(b) A motion made pursuant to this section by a former foster care youth shall be made by order to show cause or ten days notice to the social services official. Such motion shall show by affidavit or other evidence that:

(1) the requirements outlined in paragraphs one, two and three of subdivision (a) of this section are met; and

(2) the applicable local social services district consents to the re-entry of such former foster care youth, or if the applicable local social services district refuses to consent to the re-entry of such former foster care youth and that such refusal is unreasonable.

(c)(1) If at any time during the pendency of a proceeding brought pursuant to this section the court finds a compelling reason that it is in the best interests of the former foster care youth to be returned immediately to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges pending a final decision on the motion, the court may issue a temporary order returning the youth to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges.

***145671** (2) Where the local social services district has refused to consent to the re-entry of a former foster care youth, and where it is alleged pursuant to paragraph two of subdivision (b) of this section, that such refusal by such social services district is

newly enacted Article 10-B. Although the new article bears the numeral "10", that may be misleading since the Legislature apparently intended to enact a separate and distinct article (hence the "B").

A large majority of foster care children were initially placed pursuant to Article 10. However, a significant number achieved that status as a result of an Article 7, an Article 3, or, most likely, a Social Services Law Section 358-a proceeding. Is Article 10-B applicable to those children?

In Matter of Jairy R. v. Jeffrey H., 34 Misc.3d 448. 934 N.Y.S.2d 688 (Fam. Ct. Queens Co. 2011), the court concluded that Article 10-B is not applicable. Hence the court denied the re-entry application of a foster child who had been placed in foster care pursuant to Article 7 (PINS). The decision cited the fact that Section 1091 and its legislative history "... are completely silent as to [Section 1091's] applicability to juveniles who enter foster care under other articles of the Family Court Act ..." Actually, Jairy R. should have never left foster care. A petition to extend his placement had been filed, but only after the existing order had expired. Re-entry was his fallback option.

It would have been preferable if Article 10-B had been drafted to explicitly apply to non-Article 10 placements. (See, by comparison, Section 1087(a), which enumerates the placements for which Article 10-A applies.) But the lack of an explicit provision is not necessarily dispositive. It's difficult to conceive that the Legislature intended to differentiate or discriminate between similarly situated "former foster care youth", or that the legislative decision to craft a separate article excludes non-Article 10 children (if Section 1091 was intended to be limited to Article 10 placements, it would have presumably been added to that Article). The issue will probably be raised and determined at the Appellate Division level (unless the Legislature quickly amends Section 1091).

*145673 PRACTICE COMMENTARIES

by Prof. Merril Sobie

2010

Newly enacted Section 1091 [L.2010, c. 342] is the lynchpin of a series of amendments to implement the ability of a child between the ages of eighteen and twenty-one to re-enter the foster care system and thereby reap foster care benefits, even though he had earlier been discharged or "aged out" from foster care. New York, unlike most states, has long permitted foster care to be extended from age eighteen (the age of majority) to 21, provided the child consents to the extension. Until now, a decision had to be made at age eighteen. If consent was declined at that point, there was no turning back. However, youngsters who have refused consent, perhaps impetuously, or perhaps because they have been counseled to "age out" by peers, often have second thoughts. Confronting the world alone at age eighteen is neither easy nor wise. The new provisions, which reflect, in part, the congressional enactment of federal subsidies for older adolescent foster children, provide a remedy.

Section 1091 commences with the provision that the motion to return to foster care may be made by the former foster care child, or by the relevant social services agency or official with the consent of the child. Several prerequisites must be pled as part of the motion to show cause (and subsequently found by the court when granting a motion), including the fact that "the former foster care youth has no reasonable alternative to foster care", that he consents to appropriate and necessary educational or vocational programs, and "re-entry into foster care is in the best interests of the former foster care youth". The Social Services agency may consent to the restoration of foster care status (and may have filed the petition). If not, the Court may order restoration over the objections of the Social Services agency upon finding that its refusal to consent is "unreasonable". In every case and regardless of consent, the Court must find a compelling reason to permit restoration. Temporary orders are permitted. However, a motion cannot be entertained unless filed within two years from the date of the first final discharge, e.g., a child who does not consent to an extension of foster care upon reaching the age of eighteen is foreclosed from re-entry upon attaining the age of twenty.

The Act also amends Section 1090 to provide that: "the attorney [who had represented the child in an earlier Article 10 or 10-A proceeding] shall also represent the child without further order or appointment in any proceedings under article ten-B of this Act [i.e. § 1091]". The provision will be easy to apply when the Social Services Agency files a Section 1091 motion, or the youth files a pro se motion. However, Social Services departments may be reluctant to file a Section 1091 motion; after all, restoring foster care benefits is not in their financial interest. And one can hardly assume that most eighteen year olds possess the capability to file pro se. Attorneys for children who have been discharged from foster care prior to attaining the age of 21 should, as a matter of effective representation, periodically communicate with their client (or ex-client) and provide ongoing advice regarding the Section 1091 alternative. ***145674**

REFERENCES