



2011

## Representing Children on Appeal: Changed Circumstances, Changed Minds

Judith Waksberg

Follow this and additional works at: <https://lawrepository.ualr.edu/appellatepracticeprocess>



Part of the Family Law Commons, and the Juvenile Law Commons

---

### Recommended Citation

Judith Waksberg, *Representing Children on Appeal: Changed Circumstances, Changed Minds*, 12 J. APP. PRAC. & PROCESS 313 (2011).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol12/iss2/6>

This document is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Journal of Appellate Practice and Process by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## PRACTICE NOTE

---

### REPRESENTING CHILDREN ON APPEAL: CHANGED CIRCUMSTANCES, CHANGED MINDS

Judith Waksberg\*

#### I. INTRODUCTION

There is an inherent tension between appellate practice and the representation of children. An appeal is normally a review of a record that is frozen at the time the record is made. The lives of children, however, are not static and the circumstances and conditions of their lives, and those of their families, are constantly changing. Moreover, the changes that time has wrought, including a change in the child's experience and maturity, can also result in a change in the child's position in the case. Thus, appellate attorneys representing children are not infrequently confronted with situations in which circumstances have changed significantly from the time of the order appealed from or in which the child has changed his or her position.

---

\* The author is the Director of the Appeals Unit of the Juvenile Rights Practice of The Legal Aid Society of New York. The author wishes to thank Claire Merkin, Judith Stern, and Gary Solomon for their inspired and constructive criticism and suggestions; Tamara Steckler for her advice and encouragement; and most importantly, Philip Genty, as always, my best editor.

Rules and Standards for children's attorneys make clear that attorneys for children must "zealously advocate the child's position"<sup>1</sup> and "follow the child's direction throughout the course of litigation."<sup>2</sup> This is true even when the reasons for the child's positions or desires may not be evident, or may perhaps seem unwise, to his or her attorney. Although an attorney may also be skeptical of the wisdom of an adult client's goals, when children are the clients, the attorney's understandable impulse to protect the child may make it difficult to respect the child's choices and decisions.<sup>3</sup> However, only when the attorney is guided by his or her client's desires and advocates zealously for them will the child's perspective be presented to the court.

Although this mandate applies with equal force to appellate attorneys,<sup>4</sup> its application can be problematic. The appellate process, by its nature, is a deliberative one. Its purpose is to provide a review of the record and an impartial determination by a panel of judges as to whether error occurred during the trial and whether that error requires a reversal of the judgment at trial. Appellate lawyers comb through the record and fashion arguments for and against reversal. The appellate judges review

---

1. R.C.J.N.Y. § 7.2(d); see also New York State Bar Association Committee on Children and the Law, *Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings* 2, <http://www.nycourts.gov/ad3/OAC/2008CustodyStandards.pdf> (summarizing, in commentary to § A-1, the provisions of Rule 7.2, which require, among other things that 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").

2. *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, pt. I, § B-4, [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/repstandwhole.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/repstandwhole.authcheckdam.pdf) (ABA 1996) (accessed Feb. 23, 2012; copy on file with Journal of Appellate Practice and Process).

3. For purposes of this article, I am assuming that the attorney has determined that the child client has the capacity to comprehend the nature of the proceeding and the issues raised, and to communicate a preference and comprehensible reasons for it; this may be at age seven for most children and even younger for some. See e.g. *Giving the Children a Meaningful Voice: the Role of the Child's Lawyer in Child Protective, Permanency and Termination of Parental Rights Proceedings* 3, <http://www.legal-aid.org/media/68451/role/%20of%20jrp%20lawyer%2010-08.pdf> (Leg. Aid Socy. of N.Y. Aug. 2010) (noting that "many children have this capacity by the age of seven, eight or nine"); Tamara Steckler & Gary Solomon, *Perspective: New Era in Representing Children*, 240 N.Y. L.J. 2 (Oct. 22, 2008) (discussing the then-new Legal Aid Society policies).

4. See e.g. *Matter of Mark T. v. Joyanna U.*, 64 A.D.3d 1092, 1093 (N.Y. App. Div. 3d Dept. 2009) (pointing out that "whether it be at the trial level or at the appellate level," the lawyer's responsibility to a child client "requires consulting with and counseling the client").

their briefs and the records, discuss the issues among themselves, and then issue an opinion. Such a process is—and should be—careful and thoughtful. As a result, the appellate process is usually a relatively lengthy one. However, the length of time involved in an appeal can create difficulties when the lives of children are at stake. It is certainly not surprising that changes can occur in a child's circumstances or that such changes or a child's growing maturity will result in a change in the child's position on appeal. Dealing with these changes in the context of an appeal can pose some of the most thorny challenges for an appellate attorney representing children.

To a certain extent, as will be discussed below, there are a variety of options built into the structure of statutes and case law to deal with a change in the child's circumstances. A change in the child's position from the time of the Family Court order to the time of the appeal can be somewhat trickier. An appellate attorney will have to untangle the reasons and motivations behind the child's change in position. The child's change in position may very well be due to objective changes in the child's circumstances. Or, the change could be due to the child's growth and maturity in the intervening period which lead the child to have a different conception and understanding of the proceedings in which he or she is involved.

This article addresses the dilemmas raised for appellate attorneys by changes in a child's circumstances or changes in a child's position and discusses the ways in which appellate attorneys can both ethically and zealously represent their child clients in such situations.<sup>5</sup> Section II addresses changes in circumstances between the time of the Family Court proceedings and the time the appeal is heard in the appellate court. Section III deals with situations in which the position taken by the attorney for the child has changed between the time of the Family Court proceedings and the appeal. Section IV discusses ways in which the attorney for the child can zealously represent

---

5. Although these issues are discussed here in the context of New York statutory and case law, the same broad themes underlie the relevant law in most jurisdictions, so much of the analysis used in this article should be applicable elsewhere as well. The reader unfamiliar with New York practice should note that the Court of Appeals is New York's highest court; its intermediate appellate courts are the Appellate Divisions of the New York Supreme Court.

the child on appeal as well as some other ethical considerations relevant to these situations.

## II. CHANGED CIRCUMSTANCES

The Court of Appeals addressed the issue of changed circumstances directly in *Matter of Michael B.*,<sup>6</sup> a case in which the appellant was the child's biological father. Michael had been voluntarily placed in foster care, but many years later, after a finding that his father was fit, the Family Court ordered that Michael be returned to his care. By that time, the father also had in his care other children besides Michael. Michael, however, had been in foster care since his birth and there was evidence that he might suffer psychological trauma if removed from his foster home. The Appellate Division found that Michael's lengthy stay in foster care and his psychological bonding with his foster family gave rise to extraordinary circumstances and awarded custody to Michael's foster parents over his biological father.<sup>7</sup>

The Court of Appeals ruled that when there is a fit parent, the state cannot grant custody to a foster parent. The last two paragraphs of the opinion, however, directly addressed the problem of changed circumstances in these types of cases. The opinion noted that the Court was informed that during the pendency of the appeal, the appellant father was charged with, and admitted to, neglect of the other children in his care. Appellant argued that the Court could not take account of these new developments because they were outside the record. The Court's response was that to ignore these new developments "would exalt the procedural rule—important though it is—to a point of absurdity."<sup>8</sup> The Court went on to state that it

would therefore take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining appellant's fitness and

---

6. 604 N.E.2d 122 (N.Y. 1992).

7. *Id.* at 126–27.

8. *Id.* at 133.

right to custody of Michael, and remit the matter to Family Court for a new hearing and determination of those issues.<sup>9</sup>

In the years since *Michael B.* was decided, the Appellate Divisions in all four departments have remanded Family Court cases on appeal when circumstances have so radically changed that the record was no longer sufficient to determine the issue on appeal. An analysis of the kinds of cases that are remitted and the ways in which courts are willing to consider changed circumstances on appeal provides some guidance in determining how to proceed in these situations; these kinds of cases and the various options available to appellate attorneys when circumstances have changed are discussed below.

*A. The Appropriate Forum for Changed Circumstances  
Is Usually the Family Court.*

First of all, it is important to note that an acknowledgement of the changing nature of children's lives and its impact on court cases is, for the most part, incorporated into the statutes and case law dealing with these kinds of cases. Thus, for example, a change in circumstances can give rise to a modification of custody.<sup>10</sup> In cases involving abuse or neglect, the Family Court Act permits the Family Court to modify or vacate a prior order "for good cause shown,"<sup>11</sup> and certainly, a change of circumstances should constitute good cause.<sup>12</sup> Moreover, permanency hearings, which are held every six months while a child remains in foster care, also provide a forum in which changes in circumstances can result in a change in status of the

---

9. *Id.*

10. N.Y.F.C.A. §§ 467, 652 (requiring a showing of changed circumstances). The official text of the New York Family Court Act is available at <http://public.leginfo.state.ny.us>. (Click on "Laws of New York," scroll down to "Court Acts," click on "FCT," click on the subdivision containing the desired provision.)

11. N.Y.F.C.A. § 1061.

12. *Matter of Angelina AA*, 322 A.D.2d 967, 968–69 (N.Y. App. Div. 3d Dept. 1995) (noting that N.Y.F.C.A. §1061 indicates that the court's power to modify an order for good cause shown "expresses the strong Legislative policy in favor of continuing Family Court jurisdiction over the child and family so that the court can do what is necessary in the furtherance of the child's welfare"); see also *Matter of Sarah S.*, 2005 WL 2254083 at 2 (N.Y. Fam. Ct. Monroe Co. 2005) ("It seems clear that 'good cause shown' would mean a 'change of circumstances' to the Fourth Department").

child, such as the child's return home or some other change in placement.<sup>13</sup>

Therefore, when circumstances have changed significantly enough from the time the order on appeal was rendered, and there is a statutory means of re-opening the matter, the parties should attempt to do so before the trial court. Whether the changed circumstances are indeed significant and whether they warrant a change of the original order are matters best decided by the trial court. If a new order is issued, that generally will moot out the appeal. If the trial court decides that the change of circumstances does not warrant a change in its order, the movant can usually appeal from that determination as well. By moving to consolidate both appeals, the record reflecting the change in circumstances will be brought to the appellate court's attention.

However, although Article Ten proceedings<sup>14</sup> involving abuse and neglect provide statutory options in the Family Court to revisit prior decisions, until recently, no such option existed in cases involving termination of parental rights.<sup>15</sup> In these kinds of cases, therefore, appellate courts have shown themselves to be particularly hospitable to arguments that significant changes in circumstances require remanding the case for a new hearing on the best interests of the child.<sup>16</sup> Before the passage of a law permitting restoration of parental rights, there had been no clear means of re-opening cases involving termination of parental rights—even when circumstances had changed drastically.<sup>17</sup>

---

13. N.Y.F.C.A. § 1089 (a), (d).

14. "Article Ten proceedings" are those covered by article 10 of the N.Y.F.C.A., which addresses child-protective proceedings involving abuse or neglect.

15. Upon a showing of good cause, a Family Court may "set aside, modify or vacate any order issued in the course of a proceeding" under Article Ten. N.Y.F.C.A. § 1061. In addition, the permanency hearings, which must be held every six months when a child is in foster care, N.Y.F.C.A. § 1089(a), also allow a court to terminate the placement of the child in foster care, return the child to the parent, place the child with a relative, or place the child for adoption among a variety of permissible orders, N.Y.F.C.A. § 1089 (d). A series of provisions that took effect in 2010 permit restoration of parental rights after their termination, but only under very limited circumstances. See F.C.A §§ 635–637.

16. See e.g. nn. 24, 25 & 27, *infra*.

17. Prior to the enactment of statutory authority to restore parental rights, the ability of a lower court to change the result of a termination-of-parental-rights case, even when the circumstances cried out for it, was murky at best. See *Theresa O. v. Arthur P.*, 11 Misc. 3d 736 (Fam. Ct. Ulster Co. 2006) (allowing adoption petition by biological mother who had voluntarily surrendered child after adoptive parents refused to allow child to return to their home); *Matter of Frederick S.*, 178 Misc. 2d 152 (Fam. Ct. Kings Co. 1998) (finding that

Such radical events as the death of an adoptive parent, or the refusal of a child over the age of fourteen to consent to the adoption (which would make the child a legal orphan) could only be taken into account on appeal.

Despite the enactment of a statutory procedure enabling the restoration of parental rights for a very limited set of parents whose rights had previously been terminated,<sup>18</sup> the need for flexible appellate review in these cases continues. The finality entailed in termination of parental rights proceedings makes them fundamentally different from neglect and abuse proceedings. Even after a finding of neglect or abuse and placement in foster care, children may still be returned eventually to their parents.<sup>19</sup> Terminating parental rights completely cuts off the legal relationship between children and their parents forever. Therefore, when events have changed from the time that an order terminating parental rights was issued, and those events affect the children's lives, the appellate court must take those events into consideration in order to fulfill its *parens patriae* duty to ensure that the best interests of the child are met. Appropriately, therefore, appellate courts have generally taken into consideration arguments that changed circumstances after parental rights have been terminated require a remittal to the Family Court for a new hearing on the best interests of the child.<sup>20</sup>

---

Family Court Act does not give court power to vacate a termination-of-parental-rights order, but such order can be vacated under New York's Civil Procedure Law and Rules because a child's decision to refuse to consent to adoption may be considered "newly discovered evidence," yet nevertheless denying vacatur); *Matter of Anthony S.*, 178 Misc. 2d 1 (Fam. Ct. Kings Co. 1998) (finding that law guardian (i.e., the lawyer representing the child) has no standing to bring motion and further finding no statutory authority for court to vacate order terminating parental rights); *Matter of Tiffany A.*, 171 Misc. 2d 786 (Fam. Ct. Kings Co. 1996) (dismissing petition for custody by biological mother whose rights were terminated for lack of standing even though adoptive parent and child-care agency did not oppose); *Matter of Female S.*, 111 Misc. 2d 313 (Fam. Ct. N.Y. Co. 1981) (finding that Family Court has power to vacate prior termination of parental rights under its *parens patriae* function); *Matter of Rasheed A.*, 238 N.Y.L.J. 27 (Fam. Ct. Referee, King Co. Aug. 3, 2007).

18. N.Y.F.C.A. §§ 635–37.

19. N.Y.F.C.A. § 1052(a); see also n. 15, *supra*.

20. See nn. 24, 25 & 27, *infra*.



*B. Alerting the Appellate Court to Changed Circumstances*

Circumstances may change significantly from the time of the order appealed from in any case involving children, not just cases involving termination of parental rights. When circumstances have changed significantly since the time the original order was issued, an appellate attorney representing a child is faced with the question of whether and how such circumstances, which are not part of the record below, can be made known to the appellate court. Although, as noted above, most changes of circumstances are best handled by moving to reopen in the lower court, there are situations where such a motion may not be available or appropriate. In such cases, attorneys sometimes have formally moved to enlarge the record on appeal to include the new information. Such motions are tricky, however. The information sought to be included must be reliable, it must be relevant to the issue before the court, and it must be clear why moving to enlarge the record, rather than moving in Family Court, is the proper procedure.<sup>21</sup>

As a general rule, if the circumstances can be described as controversial or contested, they should not be drawn to the attention of the appellate court. For example, that a parent is not “cooperating” or that the parent’s relationship with the child has “improved,” are assertions that might very well be contested by another party. In contrast, information of which the court can take judicial notice, even if it is not part of the record below, is acceptable.<sup>22</sup> Examples of such information would be the fact that a parent has made a subsequent admission to neglect or has subsequently been found to have committed neglect or abuse of other children, or that the parent has made an admission in

---

21. Attorneys are often caught in a difficult position in these cases. It might be better in some situations to move in Family Court for a re-evaluation of the case due to a change in the child’s circumstances. But some Family Court judges are disinclined to entertain such motions when an appeal is pending, and will often tell the attorneys that they will not re-evaluate the order until after the appeal is resolved. In such situations, an attorney may have no option but to attempt to bring the new information before the appellate court.

22. See e.g. *Matter of Chloe Q.*, 68 A.D.3d 1370 (N.Y. App. Div. 3d Dept. 2009) (taking into consideration fact that subsequent to filing of appeal, appellant father consented to an order granting custody of child to grandparents, thus rendering appeal moot).

criminal court to the abuse of a child.<sup>23</sup> Appellate courts have also accepted other kinds of information that are generally non-controversial, such as the death of a foster parent<sup>24</sup> or the fact that there is no longer an adoptive resource available to the child.<sup>25</sup> Or, in the case of a child who is fourteen or near to fourteen years old, appellate courts have accepted information that the child will not consent to be adopted. The consent of a child fourteen years or older must be sought for an adoption.<sup>26</sup> If the child will not consent, it is unlikely that an adoption will be granted, and an affirmance of an order terminating parental rights could result in the creation of a legal orphan. The information that a child will not consent to an adoption, even if that decision comes subsequent to the proceedings involving termination of parental rights, is thus crucial information on an appeal, and, as an officer of the court, the attorney for the child may make such a representation to the appellate court on appeal.<sup>27</sup>

The practice of appellate attorneys representing children at The Legal Aid Society is to include an “update” section in the brief after the statement of facts. This section is very short, and, as described above, includes only non-controversial or non-contested facts. If the child has decided that he or she will not

---

23. *Michael B.*, 604 N.E.2d at 133 (taking notice of subsequent orders of neglect involving other children based on father’s admission to substance abuse, and remitting matter to Family Court for a new hearing); see also *Chow v. Holmes*, 63 A.D.3d 925 (2d Dept. 2009) (holding record no longer sufficient to determine child’s best interests in light of new facts indicating that father was awaiting sentencing for attempted assault, and remitting matter to Family Court).

24. See e.g. *Matter of Kayshaw E.*, 56 A.D.3d 471 (2d Dept. 2008) (considering new facts, including that prospective adoptive mother has died and that children over fourteen wish to be reunited with biological mother); *Matter of Antonette Alasha E.*, 8 A.D. 3d 375 (2d Dept. 2004) (holding that significant change in circumstances, including death of proposed adoptive mother and biological mother’s progress, warrant remittitur to Family Court for new dispositional hearing).

25. *Matter of Samuel Fabien G.*, 52 A.D.3d 713 (2d Dept. 2008); *Matter of Eugene L.*, 22 A.D.3d 348 (1st Dept. 2005); *Matter of Christina Janian E.*, 260 A.D.2d 300 (1st Dept. 1999).

26. N.Y. Dom. Rel. L. §111(a) (providing that “consent to adoption shall be required . . . [o]f the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent”).

27. See e.g. *Matter of Shad S.*, 67 A.D.3d 1359 (N.Y. App. Div. 4th Dept. 2009); *Matter of Danielle Joy K.*, 60 A.D.3d 948 (N.Y. App. Div. 2d Dept. 2009); *Matter of Londel Chavis C.*, 41 A.D.3d 843 (2d Dept. 2007); *Matter of Marc David D.*, 20 A.D.3d 565 (2d Dept. 2005).

consent to adoption, this information will be provided to the court. Including this updated information can also be important even when the circumstances have not changed. Since, at the time the appeal is considered, a year or more may have passed from the issuance of the order being appealed, it is understandable that the appellate court would want to be assured that, for instance, the child is still being cared for in the same foster home and that that foster parent intends to adopt the child. Moreover, in cases where a child was removed from his or her parent pending ongoing neglect or abuse proceedings and the attorney for the child is advocating that the Family Court order be reversed and the child be sent home, the reviewing appellate court would want to know that there have been no significant changes in circumstances since the Family Court's order so that, if there is a reversal, the parent is capable of resuming care of the child.

It is worth noting that an attorney is not obligated to report changed circumstances to a court if the change in circumstances is adverse to the client's position.<sup>28</sup> However, if the attorney appears at oral argument and is specifically questioned about current circumstances, the attorney may not dissemble: New York Rules of Professional Conduct mandate that an attorney may not "make a false statement of fact or law to a tribunal."<sup>29</sup>

### III. CHANGED POSITION

Sometimes the difficulty in representing children on appeal arises not from, or not only from, changed circumstances, but also from the child's change in position. The passage of time,

---

28. There is no general affirmative duty to disclose adverse facts on appeal. N.Y. R. Prof. Conduct 4.1 cmt.1 ("A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."); see also N.Y. R. Prof. Conduct 3.3 cmt. 14 (pointing out that "[o]rdinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party" and also noting that a lawyer has a greater duty in ex parte proceedings). However, the attorney must always and in every case "disclose to the tribunal controlling *legal authority* known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." N.Y. R. Prof. Conduct 3.3(a)(2) (emphasis added).

29. N.Y. R. Prof. Conduct 3.3(a)(1).

maturity, or a new environment may mean that by the time an appeal is perfected, the child's position is different from the one the child's attorney advocated at the hearing below. Obviously, if the child is the appellant but no longer disagrees with the result below, the attorney may move to withdraw the appeal. Representing the child client who is not the appellant, but who has changed her or his position can be extremely challenging. If neither the petitioner nor the respondent wishes to settle the case, the child's ability to obtain or influence a settlement may be minimal. In those situations, the appellate attorney for the child may find herself in the awkward position of being forced to advocate for a result different from the one that was advocated below on the record. Changing position on appeal raises a host of questions, not the least of which is the application of the doctrine of judicial estoppel.

Judicial estoppel is used to prevent a party who has assumed a certain position in a legal proceeding from assuming a contrary position in another proceeding<sup>30</sup> or to prevent "a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."<sup>31</sup> This doctrine "rests upon the principle that a litigant 'should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.'"<sup>32</sup> However, as the Supreme Court has noted, "this estoppel doctrine is equitable and thus cannot be reduced to a precise formula or test."<sup>33</sup> The unusual position of a child in an appeal from Family Court litigation means that this doctrine must be very carefully applied in cases of this type and overly technical applications of the doctrine have no place in an appeal in which a child has changed position because of changed circumstances or his or her evolving maturity.

For example, judicial estoppel seems completely inappropriate when the change in the child's position is due to

---

30. *N.H. v. Me.*, 532 U.S. 742, 749 (2001).

31. *Pegram v. Hedrich*, 530 U.S. 211, 227, n. 8 (2000).

32. *Environmental Concern, Inc. v. Larchwood Constr. Corp.*, 101 A.D.2d 591, 593 (N.Y. App. Div. 2d Dept. 1984) (quoting Student Author, *The Doctrine of Preclusion against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132 (1946)).

33. *Zedner v. U.S.*, 547 U.S. 489, 504 (2006).

the fact that the child has reached an age at which he or she can express his or her wishes. There are cases in which the attorney for the child at the Family Court proceedings had to formulate a position because the child was too young to express his or her wishes or was incapable of understanding the proceeding, but at the time of the appeal, the child has matured enough to have the capacity to make an informed decision about his or her position in the litigation. At the time of the appeal then, the child's position may differ from the one taken by his or her attorney at the Family Court proceedings. Technically, the position of the child has changed during the course of the litigation, yet one cannot really say that the child himself or herself has changed position. In these kinds of cases, it would not be fair to hold those children to the original position advocated by their attorney and judicial estoppel should not be used to prevent an appellate attorney from representing the child's current position on appeal.

Other considerations as well make the application of the doctrine of judicial estoppel inappropriate for children.<sup>34</sup> Time alone can have a significant impact on a child's position in a case, as the child matures and becomes capable of a more sophisticated understanding of acts and consequences. That a growing maturity may change the child's position in a case should not be surprising as it is part of what we all understand to be the process of growing up. A child's changing of position in the course of a Family Court proceeding will therefore likely have nothing to do with attempting to "derive an unfair advantage or impose an unfair detriment on the opposing party"<sup>35</sup> Rather, it is reflective of a greater maturity, understanding, and ability of the child. The "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings" that underlie the doctrine of preclusion of inconsistent positions<sup>36</sup> are not violated

---

34. Indeed, the author has been unable to find any cases in New York that specifically apply this doctrine to a change of position by a child in a Family Court or custody proceeding.

35. *Zedner*, 547 U.S. at 504 (quoting *N.H. v. Me.*, 532 U.S. at 751).

36. *Environmental Concern*, 101 A.D.2d at 593 (quoting *Ariz. v. Shamrock Foods Co.*, 29 F.2d 1208, 1215 (9th Cir. 1984)).

when a child—due to greater maturity, or perhaps changes in his or her circumstances—changes position on appeal.

Indeed, it is almost impossible to untangle the changes in circumstances in a child's life from the changes in a child's position. A child who may have originally supported a finding and removal from the home, may, by the time the case is appealed, be unhappy in foster care and very much want to return home. In such a case, it is reasonable for that child's attorney to argue that the best interests of the child no longer require removal.

Moreover, a child may have many reasons for changing position, including, as discussed above, a more mature attitude about the events, or about the child's own circumstances. In any event, assuming the child has been properly counseled, and there is a reasonable basis for the child's change of position, there is no reason that the attorney for the child should not be representing that child's position on appeal. A court's receptivity to such a change in position should therefore depend on a number of factors. The reason for the child's change in position, if it can be revealed, will be pertinent. If, on appeal, the child is adopting an argument made by another party below, then there is no strong reason to apply judicial estoppel on the grounds that the child's argument would constitute a disregard for the "orderly administration of justice" or "the dignity of judicial proceedings,"<sup>37</sup> for both sides of the case are already being presented to the appellate court. Certainly in no case in which the child's position has changed because the child's attorney initially took a position on the child's behalf due to the child's age, and the now-older child has taken a different position, should judicial estoppel be applied. If a party raises the doctrine of judicial estoppel, the court will have to determine whether, in that particular case, its application would be appropriate.

Because children's positions, and their circumstances, may change during the time between the Family Court proceedings and the appeal, and because the purpose of any Family Court proceeding is the best interest of the child, it would seem the better course for appellate courts to be as liberal as possible in

---

37. *Id.*

allowing the child to present his or her position on appeal. A rigid approach can even result in the denial of appellate relief to children. In *Matter of Zanna E.*,<sup>38</sup> the court dismissed the appeal of the respondent-father's stepdaughter, stating that because the child had testified at the fact-finding hearing that she was abused, she could not be "aggrieved" by the order determining that the abuse had occurred and therefore could not urge reversal on appeal.<sup>39</sup> It is not clear from the opinion, however, whether the child was supporting a finding below or even on whose behalf she had testified below. If the child did not support a finding, but testified because she was called as a witness, it would be unfair to conclude that she could not be aggrieved by the finding. Certainly a child could testify as to the existence of certain facts and assert at the same time that those facts do not legally constitute abuse or neglect.<sup>40</sup>

In sum, restricting the appellate attorney to the arguments made in the trial court may very well mean that the interests and wishes of the child will not be represented on appeal. The expectation that a party maintain a consistent position during the course of the litigation—an expectation that is inconsistent with the reality of the representation of children—cannot be reconciled with the zealous representation of a child at every juncture of the litigation.

---

38. 77 A.D.3d 1364 (N.Y. App. Div. 4th Dept. 2010).

39. *Id.* at 1364.

40. In *Zanna E.*, the court also denied the father's biological daughter the opportunity to appeal the finding of derivative neglect as to her, stating that this child could not "seek affirmative relief" from the finding because she did not file a notice of appeal—this despite the fact that the father himself was appealing the finding. *See id.* at 1364. Given that circumstances may change, or the child's position may change, it seems too restrictive to require the child to file a notice of appeal in order to participate in an appeal filed by another party. Indeed, it appears that the Appellate Division's First and Second Departments have never required that the child file a notice of appeal in order to take a position urging reversal on appeal. This seems to be the better stance, as it provides appropriate flexibility for the attorney to represent the child's position on appeal. However, if the child does not file a notice of appeal and no other party appeals, then of course no appeal can be perfected. If a child is aggrieved by an order of the Family Court, the only way to ensure that the order is appealed is for the child's attorney to file a notice of appeal.

#### IV. FINDING THE PATH TO ZEALOUS REPRESENTATION ON APPEAL

Each individual case poses its unique challenges, and the appellate attorney, in every case, must be working with the client to determine the most efficient route to achieving the client's goals in the litigation. For example, if there has been a finding of abuse or neglect below resulting in the child's placement in foster care and the child's objective at the time of the appeal is to return home, the appellate attorney should investigate whether this may be accomplished through avenues other than obtaining a reversal on appeal, which is always a rare event. If the parent has completed or is involved in services addressing the original problem, it may be appropriate, and more desirable, to move in the Family Court to advocate for the child's return home.

Clearly, effective and sensitive counseling of the client is just as important a component of representing a child on appeal as it is in the Family Court. The appellate attorney has to explain the ramifications of the appeal and review the possible options available for the child. For example, the client might want the attorney to advocate for the child's return home, yet also understand that the existence of a finding of neglect means that the child's parent has to comply with services and that there will be oversight of the home—which might be to the child's advantage. If so, on appeal, the attorney could be advocating that the dispositional order placing the child in foster care was not in the child's best interest and should be reversed or remanded, but that the finding of neglect was proper and based on a preponderance of the evidence.

Because the issue for the court in the dispositional phase of the case is always the best interests of the child, it is not logically inconsistent to argue on appeal that, given the time that has passed since the entry of the original order, the best interests of the child are no longer served by the dispositional order on appeal. Although the passage of time alone will not usually be sufficient to make such an argument, counsel may be able to rely on evidence presented below that would support such a conclusion, or there may be changed circumstances which



indicate that the record below is no longer sufficient to determine the issue on appeal.

Situations in which a child changes his or her position between the trial and appeal may require serious counseling of the client. Suppose, for example, that a twelve-year-old female client made allegations of sexual abuse against her father. A year later, at the time of the appeal, she tells her attorney that the allegations were not true and that she wants her father to come home. There may be many reasons for the child's recantation, and these must be explored with the child before determining a legal strategy.<sup>41</sup> A lawyer may not knowingly use false evidence, but the commentary to the applicable rule advises that the prohibition applies "only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that the evidence is false does not preclude its presentation to the trier of fact."<sup>42</sup> If the client is insisting that the events upon which the finding below is based are not true, and the attorney does not *know* that the child's statements are false, then the attorney's duty to the client is to advocate her position zealously to the court. Again, because the recantation creates a change in circumstances, this may be a situation where moving in Family Court to reopen the hearing below should be contemplated.

Another important ethical consideration is that a client's confidences or secrets may not be revealed unless the client has consented to such disclosure.<sup>43</sup> There are exceptions to this rule, but its application can be particularly tricky with young clients. For example, a fifteen-year-old female client may tell her attorney that she prefers to remain in foster care and not return to the care of her mother. However, the client does not want this wish revealed; she still loves her mother and wants a continued relationship with her, and does not want to hurt her mother's feelings and further damage their already fragile relationship. This client may direct her attorney not to file a brief on appeal: To file a brief challenging the neglect finding and her placement in foster care would not represent her position; on the other

---

41. The Juvenile Rights Practice is an interdisciplinary practice involving attorneys, social workers, and paralegals. The advantages of working with social workers in counseling clients on these very difficult issues cannot be overstated.

42. N.Y. R. Prof. Conduct 3.3 cmt. 8.

43. N.Y. R. Prof. Conduct 1.6(a)(1).

hand, to file a brief supporting the finding and the placement in foster care would be disclosing information she does not want revealed. The appellate attorney must evaluate in each situation how best to accomplish the goals of the child client.

## V. CONCLUSION

Changed circumstances are almost always a legitimate basis for seeking renewed review in the Family Court or arguing on appeal that the matter should be remanded so that the Family Court can take account of the new circumstances. A change in the child's position, although it may be uncomfortable for the appellate attorney, must also be analyzed carefully to determine whether such a change is necessary in order to zealously represent the child on appeal. In representing children, whose lives—and whose minds—change more quickly than the legal process can proceed, it is important that the child's attorney be flexible in considering how to advocate for the client. Whether to move in Family Court to reopen a case, to reveal the reason for the change of position on appeal, or to argue that the evidence is now insufficient to determine the child's best interests are all strategic questions for the attorney in determining how best to represent his or her client. The important thing to keep in mind is not the attorney's discomfort with the position, but how tactically to act in order to achieve the client's goal. Appellate courts are well aware of the tension between a traditional appellate review of a record on appeal and the need for an order on appeal to reflect the current reality of the lives of children involved in a particular case. In their struggle to reconcile and balance these tensions, New York courts and lawyers have cobbled together a practice that attempts to respect the construct of appellate review and, at the same time, to ensure that appellate review is meaningful to the lives of the children it is meant to protect.



