

Fact Pattern

You have been appointed, by Family Court, to represent Jennifer House (10) and Marcus House (5), in a custody/visitation matter. Jennifer has just started the 5th grade and Marcus is in Kindergarten in the same school as his sister.

Both parents have filed custody petitions seeking sole, legal custody of the children. The father, Patrick House (41) is a pharmacist earning \$ 96,000 per year. This is his first marriage although he has a child, Christian, from a brief fling with a waitress. Christian is now 16 years old. Patrick pays child support for Christian but has had little to do with him or his mother, and does not have a relationship with Christian, never having asked for visitation/parenting time with the child. Christian does not have a relationship with his half-siblings, and neither Jennifer nor Marcus are aware that they have a half-brother. Both Jennifer and Marcus were born after the parents were married.

The mother, Maureen House (38) was a nurse but decided to stay home full-time when Jennifer was born. Maureen has nothing to do with Christian and does not want Patrick to tell the children about his love child. For several years now the relationship between Patrick and Maureen has been deteriorating.

Maureen's custody petition, which was filed one week before Patrick's, alleges that:

1) Patrick has been emotionally and verbally abusive to her. She states he has basically removed himself from his children's lives. When he comes home from work, he barely says two words to her or the children; has his dinner then sits in front of the TV for hours, eating junk food and drinking beer. He generally goes to bed in the guest room, or sometimes goes to sleep on the sofa. He ignores the kids when they try to talk to him or ask for help with homework. Maureen says when she tries to talk to him, to tell him to be more engaged in his kids' lives, he ignores her or tells her she is "crazy" and needs to be in counseling.

2) Maureen states she has been trying to get back to work and has applied at several nearby elementary schools to get a part-time job as a school nurse. She states she is very involved in her children's activities and is an active member of the PTA.

3) Two specific incidents of Patrick's abusive/ bad parenting behavior have been alleged in Maureen's petition:

a) Three months ago, when Patrick came home from work, around 6:30 p.m. or so, Marcus kept asking his dad to help him with his homework. Patrick told Marcus "stop bugging me" and told him "go ask your mother for help". Marcus called Patrick "a big butt". Patrick was so upset he smacked Marcus on his face and screamed "never use language like that again you little shit". Marcus started to cry. Maureen says she tried to soothe Marcus and told Patrick he was being abusive and unreasonable. She says Patrick called her a "crazy bitch" and told her to "get the hell out of the house". Patrick then went into the family room with a beer and a bag of chips and told everyone to "shut the hell up".

b) The second incident is alleged to have happened six and half months ago. Jennifer was in a soft-ball league and she and her team members were trying to raise money for their league by selling baked goods. Maureen had been too busy to bake so Patrick was to take Jennifer to the local market early Saturday morning to get some frozen chocolate chip batter. With supervision from her father, Jennifer was to bake the cookies herself and Patrick was to drive her to Wal-Mart by 10 a.m. Jennifer was part of a group (four in all) who were scheduled to sell cookies from 10 a.m. to noon. Jennifer got up early Saturday, around 6:30 a.m., and tried to wake her father who had fallen asleep the night before on the family room sofa. Patrick yelled at Jennifer to "stop nagging" and didn't wake up until 9:30 a.m. By that time, Jennifer was crying and very upset because there was no time to bake cookies. Maureen says Patrick told Jennifer if she kept screaming and carrying on he wouldn't take her to Wal-Mart. Maureen states Jennifer was so upset she kept crying and the end result was Jennifer didn't go at all. She says Jennifer later quit the softball team.

Patrick's petition denies the allegations in Maureen's petition and alleges the following:

1) Maureen is an unfit parent who is abusing alcohol. Although Maureen has been the parent at home with the children, she has not been providing proper care for her children. He states that she spends most of her time drinking and sleeping, and for several years now, has not been involved in the kids' activities. She doesn't walk with them to the school bus stop, which is two blocks away (and this is an issue because although they live in the suburbs, they live on a busy street); forgets to give them lunch money so the kids are always starving when

they come home from school; she has other parents drive Jennifer to softball practice because she is too drunk to drive. He believes Marcus may have a learning disability and has tried to talk to his wife about getting Marcus evaluated but she refuses to acknowledge he has a problem.

2) Patrick claims he is the primary care-giver as he is the parent who does most of the parenting even though he works full time. He says most nights she calls him to get take out food for dinner, or he ends up cooking for the family. After the meal, he says he gets so tired that he usually ends up sitting in front of the TV to wind down from the day. He alleges that he tries to help Jennifer with her homework when she asks but she is so smart and self-sufficient, she rarely needs help. Patrick states Marcus has a hard time forming words and sentences and this is why he believes Marcus needs to be seen by a specialist.

3) Patrick alleges Maureen is an alcoholic. He states Maureen drinks to excess pretty much every day and when drunk, starts yelling at him for no reason and putting him down in front of the kids.

a) Specifically , he states on one occasion a few months ago, she was supposed to help bake cookies for Jennifer's softball team's bake sale. However Maureen got drunk that night and didn't do it. Saturdays were the only days he could really sleep in so he didn't get up until 9:00 a.m. or so, by which time Jennifer was so upset her mom hadn't baked anything she refused to go help sell cookies with the other girls. He says he feels sad that Jennifer no longer wants to play softball.

4) Patrick says Maureen drives drunk and has been drunk during those times she has driven the kids to various play-dates and activities. He says her breath always smells of alcohol. He states he has been trying to get her to see her doctor and thinks she may be depressed and using alcohol as a crutch.

5) Patrick says on a few occasions when Maureen has been really drunk, she has told him that Jennifer is not his biological daughter.

Both Maureen and Patrick have obtained lawyers. Patrick left the home the day Maureen filed her petition and is renting an apartment near their home. He sees the kids twice weekly for dinner visits, and spends every other Saturday with them. Jennifer doesn't want to see him but Marcus likes going to "daddy's apartment".

Issues for Discussion

- 1) Mother's lawyer recently had a meeting with his client and the children after the filing of the custody petitions by the parties.

- 2) Mother and father's lawyers want you to meet with the parents to help mediate the issues. You haven't had a chance to meet with your clients, and the meeting with the parents is scheduled for later in the day. You have spoken briefly with Jennifer on the telephone just to introduce yourself, but you do not have the time to see the children before the meeting.

- 3) Your client Jennifer tells you that her mother does drink a lot of alcohol during the day. Jennifer also admits that her mother has driven her and her brother after she had drunk alcohol. Jennifer says she knows when her mother is drunk because she slurs her words and repeats herself when she drinks a lot; and she has seen her mother slur her words while driving them. Jennifer tells you all this "in secret" and asks you to promise not to tell anyone. She also tells you that her "daddy yells at mom" and, "when he gets really angry he hits". Jennifer says she has seen daddy hit her little brother. Jennifer wants to stay with mom, but she says Marcus wants to be with dad.

- 4) Before your case is called into court, you are in the attorneys' room with counsel for father and mother, discussing the case. Father's counsel states his client has said mother drives drunk with the kids in the car. You respond "off the record" that your client has said the same thing. When you go into court, father's attorney tells the court that both his client and the children have alleged that the mother drives drunk with the children in the car and requests the court to order a FCA § 1034 investigation.

- 5) The matter is set down for a hearing one month from now. You want mother's medical history. You serve interrogatories on the parents counsel, and you give mother's lawyer a HIPAA form for mother to complete.

- 6) The court provides you all with an order directing discovery. You now seek to depose the parents and serve notice on counsel with demands for examination of the parents.

- 7) Father's counsel serves a subpoena on you calling your client, Jennifer, to testify.

- 8) Father's lawyer files a paternity petition before the Support Magistrate, requesting a DNA test with regard to both Jennifer and Marcus.
- 9) The Judge finds out that father has a child by another woman and asks you to file a sibling visitation petition on behalf of your clients. Your clients don't know that they have a half brother.
- 10) Christian's mother, Kelly Proforma has been served with a summons to appear in court on your sibling visitation petition. Christian knows he has half siblings. Christian is aware that Patrick is his biological father but has no relationship with him. Kelly does not want to go to court and does not want to be involved in this legal matter. Nor does she want to take a day off from work and lose money.
- 11) The court enters an order granting father sole custody, suspending mother's parenting time and contact with the children, and directs mother to engage in substance abuse counseling. Upon successful completion of the program or upon recommendation by the therapist, the court orders that mother can petition the court to have parenting time with the children.
- 12) Your client, Jennifer, calls you six months after the case is closed to complain about her father and tells you she is really unhappy with the custody arrangement. She also tells you that her dad has let her miss school and stay home for two weeks because she has told him she doesn't feel well. She has been home watching TV all day. She tells you to keep this secret.

Panel Notes

1. **Communication with person represented by counsel:**

In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law. (Rules of Professional Conduct 4.2)

Attorney for parent in child custody proceeding may not communicate with child for whom court has appointed a law guardian without law guardian's consent. (Code of Professional Responsibility, Committee on Professional Ethics, Opinion #656)

2. Attorney-Client relationship - Whether retained or assigned, and whether called "counsel" or "law guardian", the child's attorney shall, to the greatest possible extent, maintain a traditional attorney-client relationship with the child. (Section A-1, NYSBA Standards for Attorneys Representing Children in NY Custody, Visitation & Guardianship Proceedings, 2008);

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 with the child's capacities, and have a thorough knowledge of the child's circumstances. (Section 7.2(d) Rules of the Chief Judge.)

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. (Section 7.2 (b) Rules of the Chief Judge)

3. Divulging Confidences/Substituted Judgment- The attorney-client privilege attaches to communication between the child and his or her attorney, including advice given by the attorney. Statements made by the child to a social worker, an investigator, a paralegal, or another person employed by the attorney also are protected by the privilege. The Child's Attorney may only disclose information protected by the attorney-client privilege under the following circumstances: ...the attorney has determined that substituted judgement is required....or that disclosure is necessary to protect the child from an imminent risk of physical abuse or death. (Section A-5, NYSBA Standards for Attorneys Representing Children in NY Custody, Visitation & Guardianship Proceedings, 2008).

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". (Section 7.2 (d)(2)&(3) Rules of the Chief Judge);

Conflict of Interest- "If a lawyer is appointed to represent siblings, the attorney should determine if there is a conflict of interest, which could require that the lawyer decline representation or withdraw from representing some or all of the children."

"An attorney should not accept assignment for siblings if the exercise of independent professional judgment on behalf of one would be or is likely to be adversely affected by the attorney's representation of the other OR if so doing would be likely to involve the lawyer in representing differing interests. Depending on the circumstances and the stage of the proceeding, if such a conflict arises the attorney may not be able to continue to represent any or all of the siblings." (Section B-2, NYSBA Representation Standards for Attorneys Representing Children in Custody, Visitation & Guardianship Proceedings, 2008); Lawyers's Code of Professional Responsibility, D.R. 5-105.

4. See #3

5. **Disclosure** (CPLR § 408) - " Leave of court shall be required for disclosure..."; *Matter of Dominick R. v Jean R.*, 7 Misc. 3d 1027(A) (Fam. Ct. Kings County, 2005) (custody proceedings are "special proceedings" under CPLR 408 and thus discovery requires court leave);

6. See above.

7. **Motion to quash Subpoena-** CPLR § 384; **Protective Orders-** CPLR § 3103; **Position of child in custody/visitation matters:** *Lincoln v Lincoln*, 24 NY2d 270 (1969); *Matter of Justin CC.*, 77 AD3d 207 (3rd Dept 2010).

8. **Equitable Estoppel-** In proceedings involving paternity, it is a *child's* justifiable reliance on paternity that is considered and, in determining whether equitable estoppel should be applied to a particular case, the court's conclusion must be based on the child's best interest. *Matter of Shondel J. v Mark D.*, 7 NY 3d 320 (2006).

9. **Sibling Visitation-** Where circumstances show that conditions exist which equity would see fit to intervene, a brother or sister or, if he or she be a minor, a proper person on his or her behalf of a child, whether by half or whole blood, may apply to the supreme court by commencing a special proceeding or for a writ of

habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) or section 651 of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such brother or sister in respect to such child." DRL § 21.

Definition of "proper person"- Any person authorized to make an appearance on behalf of an infant. Interference with the right of a sibling to visit with an infant brother or sister may give rise to a cause of action for loss of "sibling consortium". 45 N.Y. Jur. 2d Domestic Relations § 403;

Forced visitation sought by foster child with bio siblings who had been adopted would not serve the adopted siblings best interests. *Keenan R. v Julie L.*, 72 AD3d 542 (1st Dept 2010). No visitation ordered for half sibling who had an Order of Protection issued against him on behalf of his siblings. *Ariola v De Laura*, 51 AD3d 1389 (4th Dept. 2008).

However, the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one. *Matter of ES v PD*, 8 NY 3d 150 (2007)

10) See above

11) Orders Imposing Condition Precedent- Court lacks authority to impose condition precedent that parent complete drug/alcohol or mental health assessment prior to resumption of contact with child. A parent can however, be directed to obtain counseling or therapy as one of the aspects of a custody or visitation order, if such intervention serves the child's best interest.

Cases: *Dennison v Short*, 229 Ad2d 676 (3d Dept 1996); *Marchand v Nazzaro*, 55 AD3d 968 (3d Dept 2008); *Bray v Destevens*, 78 AD3d 1564 (4th Dept 2010); *Matter of Davenport v Ouweleen*, 5 AD3d 1079 (4th Dept 2004).

12) Role of AFC After Disposition- Continuity of representation is of great importance, and whenever possible, the child's attorney should represent the child in any proceeding subsequent to the initial custody determination. The child's attorney also has standing to initiate a post-dispositional motion seeking a modification of the original order or the enforcement of the order. The attorney should not hesitate to do so whenever appropriate in the child's interest. The

child's attorney should also maintain communication with the child and may initiate inquiries or otherwise stay abreast of the situation. (Section E-4, NYSBA Representation Standards for Attorneys Representing Children in Custody, Visitation & Guardianship Proceedings, 2008).

Attorney for child has interest in welfare of child sufficient to confer standing to seek custody. *Matter of Renee B.*, 227 AD2d 315 (1996); AFC's representation continues on any appeal. *See, Mark T. v Joyanna U.*, 64 AD3d 1092 (3d Dept 2009)- Appellate AFC failed to consult with client and therefore did not provide meaningful representation;