McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 10-a. Permanency Hearings for Children Placed Out of Their Homes

McKinney's Family Court Act § 1090-a

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

Effective: March 21, 2016
Currentness

(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.

(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 participate.

(3)(i) The court shall grant an adjournment whenever necessary to accommodate the right of a child to participate in his or her permanency hearing in accordance with the provisions of this section.

(ii) Notwithstanding paragraph two of this subdivision, the failure of an attorney for the child to notify the court of the request of a child age ten or older to participate in his or her permanency hearing shall not be grounds to prevent such child from participating in his or her permanency hearing unless a finding to limit the child's participation is made in accordance with paragraph two of subdivision (b) of this section.

(4) Notwithstanding any other provision of law to the contrary, upon the consent of the attorney for the child, the court may proceed to conduct a permanency hearing if the attorney for the child has not conducted a meaningful consultation with the child regarding his or her participation in the permanency hearing if the court finds that:

(i) The child lacks the mental capacity to consult meaningfully with his or her attorney and cannot understand the nature and consequences of the permanency hearing as a result of a significant cognitive limitation as determined by a health or mental health professional or educational professional as part of a committee on special education and such limitation is documented in the court record or the permanency hearing report;

(ii) The attorney for the child has made diligent and repeated efforts to consult with the child and the child was either unresponsive, unreachable, or declined to consult with his or her attorney; provided, however that the failure of a foster parent or agency to cooperate in making the child reachable or available shall not be grounds to proceed without consulting with the child;

(iii) At the time consultation was attempted, the child was absent without leave from foster care; or

(iv) Demonstrative evidence that other good cause exists and cannot be alleviated in a timely manner.

(e) If an adjournment is granted pursuant to paragraph three of subdivision (d) of this section, the court may, upon its own motion or upon the motion of any party or the attorney for the child, make a finding that reasonable efforts have been made to effectuate the child's approved permanency plan as set forth in subparagraph (iii) of paragraph two of subdivision (d) of section one thousand eighty-nine of this article; such finding shall be made in a written order.

(f) Nothing in this section shall contravene the requirements contained in subparagraph (ii) of paragraph one of subdivision (a) of section one thousand eighty-nine of this article that the permanency hearing be completed within thirty days of the scheduled date certain.

(g) Nothing in this section shall be construed to compel a child who does not wish to participate in his or her permanency hearing to do so.

Credits
(Added L.2016, c. 14, § 2, eff. March 21, 2016.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Prof. Merril Sobie

2019

A Section 1090-a violation by the Family Court may not necessarily be appealable. In *Denise V.E.J. v. Westchester County Department of Social Services*, 163 A.D.3d 667, 82 N.Y.S.3d 140 (2d Dept. 2018), the child moved to participate in person at her permanency hearing. The court denied the motion and, instead, the child attended the hearing via video conferencing. At the hearing's conclusion, the court issued an order which was consistent with the child's position, as she articulated during the video conference. Holding that "... the child was not aggrieved by the dispositional order since she received the dispositional outcome that she was seeking at the permanency hearing ...", the Second Department dismissed the appeal.

2018

The older child has an absolute right to be present and participate at a permanency hearing (see the 2016 Practice Commentary to Section 1090-a); hence the court cannot exclude the youngster, regardless of the circumstances. See, for example, *Matter of Denise V.E.J. (Latonia J.)*, 163 A.D.3d 667, 82 N.Y.S.3d 140 (3d Dept. 2018), where the appellate court concluded that:

Where a dispositional order has been issued after a permanency hearing and a child was erroneously deprived of his or her statutory right to participate in person at that hearing, the remedy for such error would be to vacate the dispositional order, grant the motion to participate in person at the hearing, and remit the matter for a new permanency hearing at which the child must be permitted to participate in person (see generally Family Court Act § 1090-a) [163 A.D.3d at 669]

Under Section 1090-a the child may also waive her right to participate. When waived, may the court nevertheless order the child to be present? No, in accord with a Fourth Department decision; *Matter of Shawn S.*, 163 A.D.3d 31, 77 N.Y.S.3d 824 (4th Dept. 2018). The court cannot compel presence or, conversely, exclude presence. The decision is made solely by the older child. In *Shawn S.* the Family Court reviewed the circumstances and concluded that the child's interests would be best served by non-presence; See *Matter of Shawn S.*, 59 Misc.3d 277, 67 N.Y.S.3d 389 (Fam. Ct. Oswego Co. 2017). The decision was nevertheless reversed by the Fourth Department: "We therefore conclude that the court erred in ordering the subject child to be present at the permanency hearing." [163 A.D.3d at 32]

PRACTICE COMMENTARIES

by Prof. Merril Sobie

2016

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 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.

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 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.

Notes of Decisions (6)

McKinney's Family Court Act § 1090-a, NY FAM CT § 1090-a
Current through L.2023, chapters 1 to 135. Some statute sections may be more current, see credits for details.

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