Report of the **Family Court Advisory** and **Rules Committee**

to the Chief Administrative Judge of the Courts of the State of New York

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I. Introduction and Executive Summary

The Family Court Advisory and Rules Committee is one of the standing advisory committees established by the Chief Administrative Judge of the Courts pursuant to section 212(1)(q) of the Judiciary Law and section 212(b) of the Family Court Act. The Committee annually recommends to the Chief Administrative Judge proposals in the areas of Family Court procedure and family law that may be incorporated into the Chief Administrative Judge's legislative program. These recommendations are based on the Committee's own studies, examination of decisional law, and suggestions received from bench and bar. In addition to recommending its own annual legislative program, the Committee reviews and comments on other pending legislative measures concerning Family Court and family law.

A. Legislation Enacted in 2018

A significant legislative proposal submitted by the Committee in 2018 regarding educational neglect and Persons in Need of Supervision (PINS) truancy proceedings was enacted into law. *See* L. 2018, c. 362. Effective March 7, 2019, the measure brings educational agencies into efforts to resolve educational problems that trigger educational neglect proceedings against parents and Persons in Need of Supervision (PINS) proceedings against youth. Recognizing the vital role that educators play in resolving both categories of proceedings, this bill enables the active participation of educators both at the diversion and at the petition stages in both PINS and educational neglect proceedings in cases in which their participation would be helpful in resolving children's educational problems.

For PINS proceedings, the bill addresses the fact that, unlike outside New York City, PINS cases in New York City are brought by parents, not truant officers or educational officials, but parents – as well as designated lead PINS diversion agencies -- cannot resolve the educational problems without the aid of educators. By bringing educators to the table, the bill thus brings uniformity to PINS proceedings statewide.

For educational neglect, provisions similar to PINS have been added to create a presumption that diversion efforts will be made to enlist educators in resolving school-related issues to eliminate the need for court intervention. The fact that such efforts were unsuccessful needs to be pled in the petition and proven as an element of the fact-finding, since educational neglect has been redefined to cover failures by the parents to provide educational services, "notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition." Where petitions in both categories of cases are filed in Family Court, education officials must be notified and, where the Family Court "determines that such participation and /or assistance would aid in the resolution of the petition," the officials may be given an opportunity to be heard and to participate in resolving the education issues presented.

B. <u>New and Modified Legislative Proposals</u>

The Committee is proposing a comprehensive legislative agenda, including 14 new and revised proposals and 16 proposals previously recommended. These proposals address all areas of

Family Court practice, thereby providing needed clarification and enhancing the Unified Court System's ability to handle these cases effectively.

The new and revised proposals include the following:

1. Returns on warrants in juvenile delinquency cases when Family Courts are not in session: Among the most salutary features of the "raise the age" legislation enacted as part of the Fiscal Year 2017-2018 New York State budget are the provisions that require accused juvenile delinquents to be brought before available accessible magistrates, designated by the Appellate Division, for pre-petition hearings during evening, weekend and holiday hours when Family Courts are not in session. *See* Family Court Act §§305.2(4), 307.3(4) [L. 2017, c. 59, part www, §§63, 65]. However, the statute lacks a provision similar to Criminal Procedure Law §190.20(5-a), which directs that juvenile and adolescent offenders be brought before accessible magistrates when Youth Parts are closed. This measure would amend Family Court Act §312.2 to require that juvenile delinquents returned on warrants when Family Courts are not in session be brought before "the most accessible magistrate, if any, designated by the appellate division." The magistrates would determine whether the juveniles would be released or detained and would then set a date for the juvenile to appear in Family Court, that is, no later than the next day the Family Court is in session if the juvenile is detained and within ten court days if the juvenile is released. In order that the Family Court would be alerted to expect the case, the order of the magistrate must be immediately transmitted to the Family Court.

2. Eligibility for appearance tickets in adolescent offender cases: While salutary in its emphasis upon evidence-based programming and alternatives to out-of-home care, the "raise the age" statute did not address a significant obstacle to the retention of youth in their communities, that is, the limitations in sections 140.20 and 150.20 of the Criminal Procedure Law on the authority of arresting officers to issue desk appearance tickets. Under those sections, appearance tickets may only be issued in cases in which the charges do not exceed Class E felonies in seriousness, with six Class E felony charges exempted from eligibility. This measure would remedy that gap with respect to 16-year olds and, starting on October 1, 2019, 17-year olds by amending both sections of the Criminal Procedure Law to permit law enforcement to exercise their discretion to issue appearance tickets to adolescent offenders upon arrest, with the exception of those charged with violent felony offenses as defined in subdivision one of section 70.02 of the Penal Law. Issuance of appearance tickets would not be a mandate but would provide a significant addition to the menu of options available to law enforcement in their efforts to address cases involving older adolescents appropriately.

3. Waiver of fees and mandatory surcharges in adolescent offender cases: A central goal of the "raise the age" statute was to infuse an adolescent-oriented approach into the treatment of older youth in the criminal justice system. *See* L. 2017, c. 59, part www. However, the legislation did not address a significant area where the patchwork of existing laws does not take into account the limited financial resources of youth before the courts, that is, in the imposition of fees and surcharges upon youth convicted in Youth Parts. This measure fills that gap by amending section 420.35 of the Criminal Procedure Law to require waiver of the mandatory surcharge, crime victim assistance fee and DNA databank fee for convicted juvenile and adolescent offenders, as

well as those who have had their convictions replaced by a Youthful Offender adjudication. It also amends sections 60.02(3), 60.10(1), 60.10-a and 60.35(10) of the Penal Law to prohibit imposition of the mandatory surcharge, crime victim assistance fee, DNA databank fee, sex offender registration fee and supplemental sex offender victim fee upon convicted juvenile and adolescent offenders, as well as those who have had their convictions replaced by a Youthful Offender adjudication.

4. Pleas of guilty and removal of adolescent offender proceedings to the Family Court: This measure amends the infancy provision of the Penal Law to clarify that an adolescent offender is criminally responsible for pleas to reduced charges unless the matter is removed to Family Court. *See* Penal Law §30.00(3)(d)(ii). Additionally, it adds a new paragraph (g-1) to subdivision five of Criminal Procedure Law §220.10 to require that a plea by an adolescent offender to a charge constituting a misdemeanor must be replaced by an order of fact-finding of juvenile delinquency and must be removed to the Family Court for disposition. Where the plea is to a felony, *e.g.,* a felony for which different criteria for removal are applicable as compared to the original charge, the matter may be considered for removal to Family Court in accordance with section 722.23 and Article 725 of the Criminal Procedure Law.

5. Clarification of where adolescent offenders may be held pending arraignment when neither a Youth Part nor an accessible magistrate is available: The "raise the age" statute ensures prompt arraignments for most youth arrested off-hours or on weekends or holidays when Youth Parts are not in session by providing for accessible magistrates designated by the Appellate Divisions. However, it is not feasible to provide blanket 24-7 coverage by accessible magistrates with defense counsel available throughout the State, creating the dilemma of where to hold youth during times when neither a Youth Part nor an accessible magistrate can issue a securing order. This measure would allow for brief pre-arraignment detention (no more than 24 hours) of juvenile and adolescent offenders in a specialized juvenile secure detention facility, notwithstanding the inability to obtain securing orders. Further, where there is no specialized juvenile secure detention facility nearby, the measure also permits, but does not require, a county to establish one or more temporary pre-appearance secure holding facilities, certified by the New York State Office of Children and Family Services, where a youth could be detained briefly pending arraignment. Such facilities may be co-located with a prison, jail or local lockup for adult offenders provided that appropriate sight and sound separation is maintained and the facility is not "jail-like" in appearance.

6. Jurisdiction, detention and dispositional alternatives for 16- and 17-year olds adjudicated as juvenile delinquents for violations (petty offenses) in Family Court and charged with such offenses in local criminal courts: The recently enacted legislation raising the age of criminal responsibility marks the first time that Family Courts will have jurisdiction over alleged violations (petty offenses), as defined in Penal Law §10.00(3). The Committee's measure reflects the clear legislative intent that the new jurisdiction is limited to 16-year olds, as of October 1, 2018, and 17-year olds, as of October 1, 2019 and is only applicable where the violation arises out of the same transaction or occurrence as an alleged crime. It would contravene the ameliorative goals of the new statute if adolescents in cases resulting in an

adjudication or a plea solely to a violation faced penalties greater than those that they would have faced had they been prosecuted for the violation in a local criminal court. The measure would amend sections 304.1, 350.1, 352.2 and 360.3 of the Family Court Act to provide that adolescents so charged in Family Court may not be securely detained, may not be placed on probation and may not be placed out of their homes as a disposition. If granted a conditional discharge as a disposition in such a case, a youth charged with a violation of the conditional discharge may not be subject to secure detention pending adjudication of the violation or placement upon a finding. Additional conditions, *e.g.*, restitution, community service or participation in a particular program, may be added as conditions, but neither detention nor placement would be permissible consequences. Further, Criminal Procedure Law §510.15 would be amended to preclude secure detention of a 16- or 17-year old whose sole charge is a violation.

7. Notification and engagement of parents in proceedings before the Youth Parts of superior criminal courts: The new statute raising the age of criminal responsibility requires law enforcement, upon the arrests of 16-year olds starting in October, 2018, and 17-year olds starting in October 2019, to notify parents or other persons legally responsible for the adolescents' care both as to where the youth are being held and, if interrogating the youth, as to the youth's *Miranda* rights. *See* Criminal Procedure Law §§1.20(7), 140.20(6), 140.27(5), 140.40(5) [L. 2017, c. 59, Pt. WWW]. This reflects a salutary recognition of the importance of involving parents and legally responsible individuals involved in adolescents' cases, since these youth are still minors who are dependent upon their families both for sustenance and for guidance. The Family Court Advisory and Rules Committee is proposing a measure to build upon this recognition by requiring notification of probation case plan efforts and of details, to the extent available, of when and where the youth will be arraigned in court. Similar to Family Court Act §341.2(3), the proposal also amends section 722.00(1) of the Criminal Procedure Law to require presence of parents or other persons legally responsible at all proceedings in the Youth Part, with the caveat that the court would "not be prevented from proceeding by the absence of such parent or person if reasonable and substantial effort has been made to notify such parent or other person."

8. Video recording of interrogations of juveniles in juvenile delinquency proceedings: Enactment of the video interrogation provisions of chapter 59 of the Laws of 2017 represented a tremendous step forward, consistent with recommendations of the New York State Unified Court System's Justice Task Force and reflective of the rapidly growing national consensus in favor of recording interrogations. Recognizing that the need for recording is particularly acute regarding juveniles, this measure would significantly enhance the new provisions by requiring video recording of entire interrogations of accused juvenile delinquents, including the provision of *Miranda* warnings and the waiver, if any, of rights by the juveniles, where such interrogations take place in law enforcement facilities approved for the questioning of youth. The recordings must conform to regulations of the New York State Division of Criminal Justice Services and must ensure that all persons in the recordings are identifiable and that the speech is intelligible. As is applicable to other statements by juveniles, the recordings would be subject to discovery pursuant to Family Court Act §331.2 and the fact and quality of the recordings would be among the factors comprising the totality of circumstances affecting the admissibility of accused juveniles' statements.

9. Determinations of capacity to stand trial in juvenile delinquency proceedings: When an

issue of capacity to stand trial is raised in a juvenile delinquency proceeding -- that is, an issue regarding the ability of the accused juvenile to understand the proceedings and assist in his or her own defense -- several provisions of the Criminal Procedure Law that would infuse needed flexibility into the proceeding are inapplicable because they have not been incorporated into the Family Court Act. *See* Family Court Act §303.1(1). This proposal thus adapts provisions from the Criminal Procedure Law into the Family Court regarding the settings for both initial evaluations and, where a lack of capacity to stand trial is found, the provision of treatment services. First, similar to Criminal Procedure Law 730.20, the measure amends Family Court Act §322.1 to remove the requirement that examinations be conducted in a hospital setting in order to provide that where a juvenile respondent is in custody, the examination may be conducted at the detention center. Second, similar to an amendment to Criminal Procedure Law §§730.40 and 730.50, enacted in 2012, the proposal amends Family Court Act §322.2 to permit treatment services to be provided on an outpatient basis for youth deemed to lack capacity. Finally, analogous to Criminal Procedure Law §730.40(2), the measure amends subdivision four of section 322.2 of the Family Court Act to provide that a dismissal of a petition upon issuance of an order of commitment "constitute[s] a bar to further prosecution of the charge or charges contained in the petition."

10. Substitution of determinations of parentage for paternity and filiation proceedings in Family Court: With the legalization of same-sex marriage and the broadened concepts of family, this measure would substitute "parentage" for "paternity" and "filiation," as well as incorporate gender neutral terminology, where appropriate, in various provisions of the Family Court Act, Domestic Relations Law, Social Services Law and related statutes. While not addressing surrogacy contracts, which are the subject of separate pending legislation (the "Child and Parent Security Act"), the measure includes provisions relevant to *in vitro* fertilization and other forms of assisted reproductive technology. It leaves intact, however, references to "acknowledgments of paternity," which are required by Federal law, and to the "putative father registry," which exist in virtually every state.

The measure also incorporates the provisions of the Committee's proposal, *infra*, that delineates a procedure to be followed when an individual, who was not a signatory to an acknowledgment of paternity, files a petition for parentage. It also includes the Committee's proposal, *infra*, clarifying determinations regarding alleged parents who are entitled to either consent to an adoption or to receive notice of and an opportunity to be heard regarding an adoption. It substitutes the "time of the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earliest" for the ambiguous references to when the child has been "placed for adoption." The measure further delineates criteria for determining whether an alleged parent is a "notice-only" or "consent" parent, both with respect to children over the age of six months and those under six months of age.

11. Alleged parents entitled to consent to adoptions and to notice of adoption, surrender and termination of parental rights proceedings: The criteria added to the Domestic Relations Law for determining whether unwed putative fathers would be entitled to consent or veto an adoption,

which were added after the United States Supreme Court decision in Caban *v.* Mohammed, 441 US 388 (1979), have led to decades of confusion and litigation. In an effort to provide needed clarity to the point at which an individual's parental status begins to be measured, the Committee is proposing a measure that would substitute the "time of the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earliest" for the ambiguous references to when the child has been "placed for adoption."

With respect to children over six months old at the time of filing, the measure would add a few factors that would support findings that alleged parents are entitled to consent to adoptions: those who have established legal parentage in a timely manner by having been adjudicated as the parent either by a court of competent jurisdiction or by having acknowledged paternity in a form recognized by the jurisdiction in which it was executed to have the force and effect of an order of parentage. For "consent" status, parentage must be legally established within six months of the child's first entry into foster care or be the result of a court action filed within six months of the child's birth, so long as that matter was actively prosecuted. Consent status would be conferred upon an individual who openly lived with (and held himself out as) the father of the child for a period of six months immediately preceding the earlier of the filing of a termination of parental rights or surrender proceeding. Additionally, the criterion regarding contact with the child would be modified to require two visits, rather than one, per month, which is the minimum standard in the regulations of the NYS Office of Children and Family Services.

With respect to infants under six months old at the time of filing, the measure would cure the constitutional infirmity identified by the Court of Appeals 28 years ago in Matter of Raquel Marie X., 76 N.Y.2d 387 (1990), *cert. den. sub nom* Robert C. *v.* Miguel T., 498 U.S. 984 (1990), by using a criterion of cohabitation with the child, rather than the mother. The Committee's measure substitutes the more objective criteria for an unwed alleged parent who would be entitled to receive notice of a judicial proceeding concerning the child under section 111-a of the Domestic Relations Law or section 384-c of the Social Services Law.

Finally, the Committee's proposal amends the criteria for "notice-only" parents in Social Services Law §384-c and Domestic Relations Law §111-a, that is, unwed alleged parents whose consent to a proposed adoption is not required, but who are nonetheless entitled to notice of a termination of parental rights, surrender or adoption proceeding and afforded the opportunity to be heard on the issue of their child's best interests. The measure includes an individual in another state, territory or country who executed an acknowledgment of paternity or was adjudicated as a parent by a court of competent jurisdiction, as well as an individual who filed a parentage or custody petition regarding a foster child that remains pending despite making best efforts to prosecute it and an individual who lived with the child, but not necessarily with the mother. The measure would amend Social Services Law §384-c to add a new section that provides needed clarification regarding the burden of going forward and the burden of persuasion in cases in which a person given a notice of a termination of parental rights proceeding seeks to be given "consent" status. It requires that in such cases, a hearing must be held before the fact-finding hearing in the underlying termination of parental rights or other proceeding. The petitioner in the underlying proceeding would have the burden of going forward and the alleged parent would have the burden of persuasion.

12. Determining parentage in Family Court proceedings after an acknowledgment of paternity has been executed: Section 516-a of the Family Court Act provides for the recognition of signatories to acknowledgments of paternity (AOPs) executed pursuant to section 111-k of the Social Services Law as legal fathers and delineates procedures for vacating AOP's. Its limitation that only the signatories to an AOP have standing to petition for vacatur has led to confusion about whether a non-signatory to the AOP could ever seek a determination of legal parentage. Since AOP's are generally executed in hospitals within days of a child's birth, even a non-signatory petitioner filing right away in Family Court may find that a legal parent in addition to the birth mother already exists. This measure would amend the Family Court Act to clarify that a non-signatory to an AOP who comes forward alleging parentage has standing to file a petition notwithstanding the existence of an AOP signed by another individual. In such a case, the signatory to the AOP is a necessary party and would have to be named as a respondent. If appropriate, the Family Court would be permitted to order the signatory to submit to DNA testing in addition to the petitioner, mother and child. Finally, the court would be required to issue an order vacating the AOP where a non-signatory has been adjudged to be a legal parent, even in the absence of a petition filed by a signatory.

13. Duration of orders of protection in child abuse and neglect proceedings and in permanency planning hearings in Family Court: Contrary to the aims of the child protective statutes, the extremely short duration of orders of protection against family members in such cases -- a period far shorter than applicable periods for orders in family offense, custody, visitation, child support and paternity proceedings -- seriously threatens their safety. Subdivision one of 1056 of the Family Court Act authorizes an order of protection against respondent parents, persons legally responsible for a child's care and such persons' spouses in child neglect and abuse proceedings to last only as long as a child protective dispositional order. Therefore, orders of protection even in the most extreme cases of severe child abuse may only last for six months or one year, subject to equally limited extensions. Similar to orders of protection in family offense cases, this measure provides that orders of protection issued in child protective proceedings against individuals who are related by blood or marriage to the child or who were members of the child's household at the time of the disposition would be authorized to last up to two years or, upon findings of aggravating circumstances or a violation of an order of protection, up to five years.

14. Conditional surrenders: Two decades of experience under the statutes delineating the requirements for enforceability of conditions in surrenders, both judicial and extra-judicial, have revealed all too many cases in which ostensibly plain terms of the statutes have not been followed. Frequently, birth parents have been induced to execute surrenders, particularly extra-judicial surrenders, upon the assumption that informal agreements or side letters of understanding would be enforceable even though they were not presented to the Family or Surrogate's Court for approval and were not incorporated by reference into any written court orders. The Committee's proposal reiterates existing explicit requirements that all conditions accompanying surrenders to authorized child care agencies, both of children in and out of foster care, must be approved by the Family or Surrogate's Court as being in the children's best interests and the approval must be incorporated into a court order in order for the agreement to be enforceable. To underscore the need for judicial oversight, the measure requires extra-judicial surrenders executed on or after the effective date of

the statute (January 1, 2020) to meet two additional criteria, that is, that the surrendering parent submit a sworn affidavit that it would be an undue hardship to attend the court proceeding and that the parent's attorney was present at the time the surrender was executed and explained the requisites for enforceability of the agreement. Where a surrender is approved by a court but an accompanying agreement is not, the parent would have to be advised that the agreement is not enforceable. All parties, including the attorney for the child, must consent to agreements in writing and agreements for post-adoption contact between the surrendered child and birth siblings and half-siblings, where either the child and/or siblings or half-siblings are 14 years of age or older, would require their written consent in order to be enforceable. A copy of the court order incorporating any post-adoption contact agreement or other conditions must be given to all parties to the agreement.

C. Previously Endorsed Measures

The Committee is recommending re-submission of the following 16 proposals:

1. Adjustment of juvenile delinquency cases in Family Court by local departments of probation: One of the major strengths of the juvenile justice system nationally is its mechanism for local probation departments to divert non-serious cases from formal processing before petitions are filed, generally as many as 38% of juvenile delinquency complaints in New York State. However, as recognized by the *Final Report of the Governor's Commission on Youth, Public Safety and Justice* (2015), a sizable number of cases are referred to Family Court that could be successfully adjusted. While not addressing the serious crimes in which adjustment is either precluded or restricted, the Family Court Advisory and Rules Committee is recommending a measure to modify three statutory provisions that pose barriers to adjustment of less serious cases that may lend themselves to successful informal resolution. First, the Committee's proposal would amend Family Court Act §308.1(9) to lengthen the initial period of adjustment from two to three months. Balancing the length of the adjustment period with the need for prompt adjudication of the rare cases where adjustment fails, the measure does not alter the authorization for probation departments to seek a two month extension of the adjustment period. Second, in lieu of according the complainant an absolute right to veto adjustment, the measure would amend Family Court Act §308.1(8) to instead require the probation department to "consider the views of the complainant and the impact of the alleged act or acts of juvenile delinquency upon the complainant and upon the community in determining whether adjustment under this section would be suitable." Many cases, most particularly, nonviolent misdemeanor cases in which the accused juveniles are determined by a risk assessment instrument to pose a low risk of re-offending, are precluded from appropriate adjustment because of the provision in the current law according complainants an absolute right to access the presentment agency for the purpose of filing a petition. Third, the measure amends Family Court Act §320.6 to provide that, notwithstanding the filing of a juvenile delinquency petition, the Family Court may refer a case to the probation department for possible adjustment not simply at the initial appearance but, alternatively, at any subsequent appearance. Sometimes the suitability of a case for adjustment, including the willingness of the accused juvenile and his or her family to engage in the process and cooperate with services, becomes evident at a later point in the proceeding. There is no reason to prevent appropriate diversion efforts in such cases. The complainant would not have an absolute veto over the referral for adjustment but, again, the probation department would be required to "consider the views of the complainant and the impact of the alleged act or acts of juvenile delinquency upon the complainant and upon the community."

2. Restraint of juveniles appearing before the Family Court: Following an escalating national trend, the Committee is proposing a measure to restrict the use of mechanical restraints against children under the age of 18 appearing in all categories of Family Court proceedings. Both the National Council of Juvenile and Family Court Judges and the American Bar Association have adopted resolutions urging states to enact measures similar to the Committee's proposal and at least 30 states have already enacted legislation or promulgated rules in that regard. The Committee's measure provides that restraints must presumptively be removed "upon entry of the juvenile into the courtroom" unless the Family Court determines and explains on the record why restraints are "necessary to prevent: (1) physical injury to the child or another person by the child; (2) physically disruptive courtroom behavior by the child, as evidenced by a recent history of behavior that presented a substantial risk of physical harm to the child or another person, where such behavior indicates a substantial likelihood of current physically disruptive courtroom behavior by the child; or (3) flight from the courtroom by the child, as evidenced by a recent history of absconding from the court." The particular restraints permitted must be the "least restrictive available alternative" and, in order to ensure due process, the child must be given an opportunity to be heard regarding a request to impose restraints.

3. Sealing and expungement of records in Persons in Need of Supervision proceedings: Passage of the juvenile delinquency statute over three decades ago ironically left youth charged as Persons in Need of Supervision (PINS) with fewer protections than either their juvenile delinquent or adult counterparts. This measure would remedy one of the most glaring disparities by providing sealing and expunction provisions for PINS cases that are comparable to Family Court Act §§375.1 - 375.3 and Criminal Procedure Law §160.50. The measure would amend Family Court Act §783 to provide that court records in actions terminated favorably to the accused -- that is, cases that had been diverted (addressed without the filing of a petition), withdrawn or dismissed -- would automatically be sealed and, in cases involving a PINS adjudication, the juvenile would be permitted to make a motion for sealing of the record in the interests of justice. As in Family Court Act §375.3, the Family Court would retain its inherent authority to expunge, rather than simply seal, its records. Finally, recognizing that PINS behavior consists of conduct that would not be criminal if committed by adults, sections 783 and 784 of the Family Court Act would be amended to preclude use of PINS records in other courts.

4. Permanency planning in juvenile delinquency and persons in need of supervision (PINS) proceedings in Family Court: New York State statutes, as well as both the Federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273, as amended in 2002] and Federal regulations, implementing the Federal *Adoption and Safe Families Act* [Public Law 105-89; L. 1999, c. 7], make clear that the *ASFA* permanency planning mandates apply to all children in foster care, including those in care as a result of juvenile delinquency and PINS petitions. The Committee is proposing a comprehensive measure to implement permanency planning mandates for the juvenile justice population as follows:

• a requirement that non-custodial parents receive notices in juvenile delinquency and PINS proceedings so that they can participate in dispositional and permanency planning;

• a provision, similar to Family Court Act §1016, to ensure that the appointment of an attorney for the child in a juvenile delinquency or PINS case would continue during the life of any dispositional or post-dispositional order;

• full incorporation of the requirements in Article 10-A of the Family Court Act into juvenile delinquency and PINS dispositions and permanency hearings regarding consideration of the services necessary to assist youth 14 and older to make the transition from foster care and, with respect to a juvenile with "another planned permanent living arrangement" as the permanency goal, identification of a "significant connection to an adult willing to be a permanency resource for the child;"

• requirements in both the juvenile delinquency and PINS statutes for agencies in which youth are placed to notify the school districts in which the youth will be attending school upon release not less than 14 days in advance of their release, to promptly transfer records to the school districts and to try to coordinate release dates with school terms so as to minimize disruption to the youths' educational programs;

• a provision in the PINS statute, similar to those applicable to juvenile delinquents and all children subject to permanency hearings under Article 10-A of the Family Court Act, to ensure that the agency with which the child is placed reports to the Court regarding plans for the child's release, in particular with respect to enrollment of the child in a school or vocational program;

• incorporation into juvenile delinquency and PINS dispositions and permanency hearings of the requirements in Article 10-A of the Family Court Act requiring that permanency hearing orders in juvenile delinquency and PINS proceedings include: a description of the visiting plan between the juvenile and his or her parent or legally-responsible adult and siblings; a service plan designed to fulfill the permanency goal for the juvenile; a direction that the parent or other person legally responsible be notified of, and be invited to be present at, any planning conferences convened by the placement agency with respect to the child; and a warning that if the juvenile remains in placement for 15 out of 22 months, the agency may be required to file a petition to terminate parental rights. A copy of the court order and service plan must be provided to the parent or other legally responsible individual.

5. Simplification of the notification to victims of domestic violence in criminal and family court proceedings: Recognizing the high incidence of unrepresented litigants in family law-related matters in New York State courts, the 2010, 2014 and 2015 *Reports to the Chief Judge of the Task Force* [now *Permanent Commission on Access to Justice*] *to Expand Access to Civil Legal Services in New York* included simplification of forms among its recommendations. Utilization of plain English is particularly important for victims of domestic violence, who may be experiencing trauma as a result of the alleged abusive incident or incidents, trauma that itself makes it more difficult for victims to understand their options and to make the often difficult decisions required at the outset of abuse cases. The Family Court Advisory and Rules Committee is thus submitting a measure to amend Family Court Act §812 and Criminal Procedure Law §530.11 by substantially simplifying the language contained in the notice given to alleged victims of domestic violence without compromising the breadth of information it provides. The proposal adds flexibility by providing that the notice use substantially the language provided and that it be made available, at minimum, in plain English, Chinese, Russian and Spanish. Using five generally accepted means of measurement of the grade level of the language used, the proposed notice averages 8.6 (middle school) in grade level compared to the 16.3 (senior college level) average of the existing notice and its readability score is almost twice that of the current notice. *See* www.readability-score.com.

6. Orders for spousal support in family offense proceedings and date of calculation of the spousal maintenance "cap": The *Family Protection and Domestic Violence Intervention Act of 1994* [L. 1994, c. 222] provided a needed life-saver to petitioners in family offense cases by authorizing the Family Court to issue temporary orders of child support in conjunction with temporary orders of protection. However, the statute does not provide a similar emergency safety net to married petitioners in family offense proceedings who do not have minor, dependent children -- often older litigants in long-term marriages, who are victims of domestic violence, frequently including financial abuse, and who lack means of their own to cover expenses as they seek a safe refuge from violence. This measure would fill that gap by amending sections 828 and 842 of the Family Court Act to provide authority for the Family Court, when issuing temporary and final orders of protection, to order that the matter be scheduled for a hearing on temporary spousal maintenance. As is the case with temporary orders of child support, once the spousal support hearing is held, a temporary order of spousal support may be issued "notwithstanding that information with respect to income and assets of the respondent may be unavailable." Additionally, as is the case with orders of child support, the measure provides that the spousal maintenance matter be set down for further proceedings under Article 4 of the Family Court Act. Finally, the proposal would amend Family Court Act §412(10) and Domestic Relations Law §236B(5-a)(b)(5) and §236B(6)(b)(4) to fix the date of the biennial adjustment of the spousal maintenance "cap" at March 1st, rather than January 31st, and would commence the adjustment process in 2020, rather than 2016. This would conform the adjustment date to the date already in effect for the adjustment of the child support income "cap," self-support reserve and poverty level.

7. Adjournments in contemplation of dismissal and suspended judgments in child protective proceedings: Long-standing uncertainty regarding the consequences of adjournments in contemplation of dismissal and suspended judgments in child protective proceedings has hindered the ability of the Family Courts to utilize these important mechanisms for resolving child protective cases without the need for more drastic alternatives, such as out-of-home foster care placements. The Family Court Advisory and Rules Committee is, therefore, submitting a proposal to clarify and fill gaps in the statutory framework with respect to both of these options. The measure would make clear that an adjournment in contemplation of dismissal may be ordered either before the entry of a fact-finding order or after fact-finding but before the entry of a final disposition. While the former requires the consent of the petitioner-child protective agency and child's attorney, the latter does not, except that the agency and child's attorney would have a right to be heard. Restoration of the proceeding to the Family Court calendar following a finding of a violation of a pre-fact-finding adjournment would restore the matter to the pre-fact-finding stage, while violation of an adjournment ordered after fact-finding but before disposition would restore the case to the dispositional stage. During the period both of an adjournment in contemplation of dismissal and of a suspended judgment, the child would not be permitted to be placed, except on a temporary basis under Family Court Act §1024 or 1027.

Additionally, the measure would amend Family Court Act §1053 to require that orders suspending judgment delineate the duration, terms and conditions and provide a warning in conspicuous print that failure to comply may lead to its revocation and to issuance of any other dispositional order that might have been made at the time the judgment was suspended. A copy of the order must be furnished to the respondent. Significantly, in contrast to an adjournment in contemplation of dismissal, once a parent has successfully completed the period of a suspended

judgment, the underlying order of fact-finding would not automatically be vacated; nor would the report on the Statewide Central Register of Child Abuse and Maltreatment automatically be sealed or expunged. Rather, the parent could apply to the Family Court, pursuant to Family Court Act §1061, for an order vacating the order of fact-finding and dismissing the proceeding in accordance with subdivision (c) of section 1051 of the Family Court Act on the ground that the aid of the Court is no longer required and that the dismissal would be in the children's best interests. A suspended judgment may thus be an appropriate disposition in cases in which the Court determines that a full dismissal of the proceedings, including vacatur of the fact-finding, should not be automatic.

8. Requirements for notices of indicated child maltreatment reports and changes in foster care placements: Absolutely essential to the effort to expedite permanency for children in furtherance of the goals of the Federal and State *Adoption and Safe Families Acts* [Public Law 105-89; L. 1999, c. 7] and permanency legislation [L. 2005, c. 3], the Committee is submitting a proposal to ensure that the attorneys for the parties and for the children are promptly informed of any changes in placement that may warrant Court intervention. Equally critical, in an effort to effectuate the *ASFA* precept that safety of the child is paramount, the proposal would also require prompt notice of any indicated child abuse or maltreatment reports regarding the child or, if the subjects of the reports are a person or persons caring for the child, reports regarding other children in the home. Similarly, the proposal would amend Family Court Act §§1055 and 1089, as well as Social Services Law §358-a, to require an agency with which a child has been placed, either voluntarily or as a result of an abuse or neglect finding, or to whom guardianship and custody has been transferred as a result of the child being freed for adoption, to report any change in the child's placement status 10 days in advance of the change (or within one business day after the change if carried out on an emergency basis), as well as any indicated reports of child abuse or maltreatment, to the parties' and children's attorneys.

9. Determinations of willful violations of Family Court orders of protection: Section 846-a of the Family Court Act provides that a willful violation of an order of protection must be proven by "competent evidence," but the statute is silent regarding the quantum of proof required, resulting in disparate standards being applied in different parts of the State. The Family Court Advisory and Rules Committee is proposing a measure to codify Matter of Cori XX, 155 A.D.3d 113(3rd Dept., 2017); Matter of Stuart LL *v.* Amy KK, 123 A.D.3d 218, 995 N.Y.S.2d 317 (3rd Dept., 2014), Matter of Nicola V., 134 A.D.3d 1131, 21 N.Y.S.3d 633 (2nd Dept., 2015) and Matter of Rubackin *v*. Rubackin, 62 A.D.3d 11, 20–21, 875 N.Y.S.2d 90 (2nd Dept., 2009), by requiring that a charge of a willful violation of an order of protection must be proven beyond a reasonable doubt if it is in the nature of a criminal contempt and if it results in a definite sentence including incarceration. This requirement would apply to sentences actually imposed, as well as to sentences that are suspended or that may be served on particular days, rather than continuously. The proposal would also clarify the provision authorizing the Family Court to suspend sentences or direct the days on which sentences must be served.

10. Orders of protection in termination of parental rights proceedings, child protective proceedings and permanency planning hearings in Family Court: While permanency for children in foster care is often achieved with the understanding, agreed-upon by everyone involved, that some contact will continue with the child's birth family, there have been instances in which continuing contact with a birth parent – for example, threatening or stalking behavior by a disturbed birth parent at the child's home or school – has endangered the child and destabilized the child's new family. Since prospective adoptive or foster parents and birth parents do not meet the definition of family contained in Article 8 of the Family

Court Act, the current statutory structure provides no vehicle to protect these children and their new families short of a criminal prosecution for a non-family offense. The Family Court Advisory and Rules Committee is proposing a measure to create a Family Court remedy for this problem by authorizing orders of protection to be issued in conjunction with the disposition of termination of parental rights cases and permanency hearings regarding children freed for adoption, once due process protections have been afforded to the parent against whom the order is issued and upon a determination of good cause and of a family offense having been committed. The Court would be required to inquire as to other orders and to enter the orders of protection onto the statewide domestic violence registry. Additionally, the proposal would permit orders of protection in child protective proceedings to require the respondent parent to stay away, *inter alia*, from a "person with whom the child has been paroled, remanded, placed or released by the court..." Finally, orders of protection in termination of parental rights cases would be permitted for up to five years or the date on which the youngest child turns eighteen, whichever is earlier.

11. Reentry of juvenile delinquents and persons in need of supervision into foster care: Consistent with the decision of the Appellate Division, Second Department, in Matter of Jefry H., 102 A.D.3d 132, 955 N.Y.S.2d 90 (2nd Dept., 2012), as well as the interpretation by the New York State Office of Children and Family Services, the Committee is submitting a measure to clarify an aspect of the foster care reentry statute that has caused some confusion, that is, the categories of former foster care youth to whom the statute applies. "Former foster care youth" is not defined in Family Court Article 10-B and although referenced in the permanency hearing provisions (Family Court Act Article 10-A), no specific cross-references are contained in the juvenile delinquency or Persons in Need of Supervision (PINS) provisions. The Committee's measure would remedy that gap by amending the post-dispositional provisions regarding extensions of placement in the juvenile delinquency and PINS statutes [Family Court Act §§355.3 and 756-a(f)] to include references to Family Court Act §1091. It would further amend Family Court Act §1091 to add a definition of "former foster care youth" that explicitly includes youth outside New York City placed in non-secure and limited secure care with the NYS Office of Children and Family Services, as well as youth throughout New York State placed in foster care with social services districts pursuant to juvenile delinquency, PINS, child protective or destitute child adjudications and voluntary placements. It would also include children freed for adoption but not yet adopted, whose guardianship and custody have been transferred to a social services district or authorized child care agency. Finally, in addition to youth aging out of care at the age of 18, the measure also includes youth discharged prior to the age of 18, who file to reenter care at the age of 18 or older, who are or would be homeless, and who otherwise meet the statutory criteria. The inclusion of this group of youth in the definition of "former foster care youth" is critically important as providers of services to runaway and homeless youth have reported a significant influx of these youth in their shelters – youth who would be better served and for a longer period of time by a return to foster care than by the temporary shelter available from these providers.

12. Stipulations and agreements in child support proceedings: The Committee is submitting a measure to redress the failure of Family Court Act §413(h) and Domestic Relations Law §240(1-b)(h) to address the consequences of violations of the *Child Support Standards Act* (*CSSA*) in support agreements and stipulations. The proposal would provide that if an agreement or stipulation fails to comply with any of the *CSSA* requirements, the non-compliant portion must be deemed void as of the earlier of the date one of the parties alleged the noncompliance in a pleading or motion or the date the Court made a finding of noncompliance. Further, the proposal requires that upon a finding of noncompliance, the Court must hold a hearing to determine an appropriate amount of child support as of the earlier of the date the noncompliance had been asserted in a pleading or a motion or the date of the Court's finding of noncompliance. The proposal would preclude noncompliance with the *CSSA* from being raised as a defense to non-payment of

child support in violation of an agreement or stipulation for a period prior to the assertion of noncompliance in a motion or pleading. Recognizing that there are instances when child support provisions that do not comply with the *CSSA* are so intertwined with a non-child support provision that voiding the child support provisions would also result in the inappropriate invalidation of non-child support provisions, the proposal provides that if the Family Court determines that there are intertwined provisions over which it has no jurisdiction, *e.g*., equitable distribution, it must dismiss the petition in order to allow the parties to return to Supreme Court. Finally, curing the problems noted, *inter alia*, by the Supreme Court, Appellate Divisions, First and Second Departments in Georgette D.W. *v.* Gary N.R., 134 A.D.3d 406, (1st Dept., 2015) and Matter of Savini *v.* Burgaleta, 34 A.D.3d 686 (2d Dept., 2006), respectively, the measure provides that, unless precluded by the Supreme Court, the Family Court would be deemed a court of competent jurisdiction with subject matter jurisdiction to review, determine and, where necessary, vacate or modify, not simply enforce, child support in cases in which a divorce judgment did not conform to the *CSSA*.

13. Family Court reviews of administrative suspensions of driver's licenses for failure to pay child support and eligibility for restricted use licenses: The threat of suspension of a driver's license is effective in motivating many child support obligors to meet their obligations. However, the actual imposition of a license suspension, when done administratively by a local child support collection unit (SCU) or in court by a judge or support magistrate, may have the anomalous effect of impeding the ability of delinquent support obligors to make necessary payments. The Family Court Advisory and Rules Committee is thus submitting a measure designed to mitigate this counterproductive effect by delineating a clear procedure for judicial review of unsuccessful administrative challenges to administrative driver's license suspensions. The measure would also amend the Vehicle and Traffic Law to resolve an apparent contradiction in the statutory restrictions on permissible driving with restricted use licenses.

14. Stays of administrative fair hearings regarding child abuse and neglect reports: The parallel judicial and administrative systems for determining the validity of reports of child abuse and maltreatment at times operate at cross-purposes, under different time constraints and, in an escalating pattern, have produced inconsistent results. Although Social Services Law §422(8)(b) provides that a Family Court finding of abuse or neglect creates an "irrebuttable presumption," binding in the administrative fair hearing process, that a fair preponderance of the evidence supports an abuse or maltreatment report, sometimes the fair hearing process proceeds to a conclusion prior to the outcome of the Family Court child protective proceeding. The Committee is proposing legislation to ensure that in cases in which parallel Family Court and administrative proceedings are in progress, the administrative fair hearing process would not precipitously advance without awaiting the results of the Family Court matter. It would also require local social services districts to notify the New York State Office of Children and Family Services of the outcomes of the Family Court proceedings. The proposal would require that, in a case in which a Family Court child protective proceeding is pending regarding a child named in a child abuse or maltreatment report, the time frames for requesting an administrative amendment of the report or fair hearing, as well as the time frame for the administrative agency to resolve the fair hearing, would not begin to run until the disposition of, or the conclusion of a period of adjournment in contemplation of dismissal in, the Family Court matter.

15. Orders for recoupment of over-payments: Neither the Family Court Act nor the Domestic Relations Law addresses an issue that is frequently presented in both Family and Supreme Court proceedings, that is, the question of whether a support obligor, who has overpaid on a child support order, may recoup all or part of those payments. Since the equities in particular cases often favor court intervention to provide some redress to a party who has overpaid, the Family Court Advisory and Rules Committee is

proposing a measure to fill this substantive and procedural void. First, the Committee's proposal provides that the court that issued or modified the child support order for which an overpayment is alleged possesses continuing jurisdiction over an application for recoupment. Where the order was issued by a Supreme Court without a reservation of exclusive jurisdiction, the Family Court would also be authorized to adjudicate such an application. Second, the measure provides a standard for determining whether recoupment of all or part of the alleged overpayment would be appropriate, that is, "where the interests of justice require," as well as specification of the proof required. The applicant would need to provide proof of the overpayment, as well as proof "that the amount of the recoupment and the method and rate of its collection will not substantially impair the custodial parent's ability to meet the financial needs of the child or children." Finally, the court would be required to state its reasons on the record for any order granting or denying recoupment.

16. Compensation of guardians *ad litem*: In order to fill a significant gap in the statutory structure regarding appointments of guardians *ad litem*, the Committee is re-submitting its proposal to authorize public funding for guardians *ad litem* in those civil proceedings in which private compensation is not available.

* * *

In addition to its legislative efforts, the Committee recommended amendments to the *Uniform Rules of the Family Court* and developed or revised numerous official Family Court forms for pleadings, process and orders. The forms and court rules are posted on the Internet for easy access by attorneys, litigants and the public. *See* http://www.nycourts.gov.

The Committee encourages comments and suggestions concerning legislative proposals and the on-going revision of Family Court rules and forms from interested members of the bench, bar, academic community and public, and invites submission of comments, suggestions and inquiries to:

Hon. Michele Pirro Bailey and Hon. Peter Passidomo, Co-Chairs
Janet R. Fink, Counsel [E-mail: jfink@nycourts.gov]
Family Court Advisory and Rules Committee
New York State Office of Court Administration
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II. New or Modified Measures

1. Returns on warrants in juvenile delinquency cases when Family Courts are not in session [F.C.A. §312.2]

Among the most salutary features of the "raise the age" legislation enacted as part of the Fiscal Year 2017-2018 New York State budget are the provisions that require accused juvenile delinquents to be brought before available accessible magistrates, designated by each Appellate Division, for pre-petition hearings during evening, weekend and holiday hours when Family Courts are not in session. *See* Family Court Act §§305.2(4), 307.3(4) [L. 2017, c. 59, part www, §§63, 65]. These provisions, statewide in scope and including evenings, are an expansion of a long-standing, successful program in New York City in which alleged juvenile delinquents arrested on weekends and holidays are brought before the New York City Criminal Court for pre-petition detention hearings pursuant to Family Court Act §307.4. The hearings have resulted in the pretrial release of vast numbers of youth, thus avoiding unnecessary disruption of the juveniles' family and school life and significantly reducing unnecessary detention costs for New York City.

Recognizing the benefits of these provisions, the Family Court Advisory and Rules Committee is proposing a measure to amend Family Court Act §312.2 to include similar provisions for juvenile delinquents returned on warrants when Family Courts are not in session. The measure would require juveniles in such cases to be brought before "the most accessible magistrate, if any, designated by the appellate division." The magistrates would determine whether the juveniles would be released or detained and would then set a date for the juvenile to appear in Family Court, that is, no later than the next day the Family Court is in session if the juvenile is detained and within ten court days if the juvenile is released. In order that the Family Court would be alerted to expect the case, the order of the magistrate must be immediately transmitted to the Family Court.

Significantly, this measure would provide an avenue for a prompt determination of release or detention analogous to that already provided in the "raise the age" statute for juvenile and adolescent offenders, whose felony cases are prosecuted in Youth Parts of superior courts. *See* Criminal Procedure Law §120.90(5-a) [L. 2017, c. 59, part www, §16]. It will avoid unnecessary detention, thus allowing juveniles in appropriate cases to remain in their homes and schools and, at the same time, saving localities from paying detention costs. There is no justification for ensuring that juveniles between the ages of 13 and 18 charged with felonies in superior courts are brought before judges promptly upon execution of warrants and are given the opportunity for release while denying a comparable benefit to juveniles of all ages who are charged as juvenile delinquents with misdemeanors or whose felony cases have been removed to the Family Court.

The failure to include a provision in the current statute directing juvenile delinquents returned on warrants to be brought before accessible magistrates when Family Courts are not in session violates the fundamental value of fairness permeating the "raise the age" implementation efforts, that is, that outcomes for the 16-year olds and, as of October 1, 2019, 17-year olds who are prosecuted in Family Court should not be worse off after the effective date of the "raise the age" statute than prior to its enactment. The Committee's measure is essential to remedy that failure.

Proposal

AN ACT to amend the family court act, in relation to execution of warrants in juvenile delinquency cases when Family Courts are closed

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 312.2 of the family court act is amended by adding a new subdivision 3 to read as follows:

3. A juvenile who is arrested pursuant to a warrant issued under this section must forthwith and with all reasonable speed be taken directly to the family court located in the county in which the warrant had been issued, or, when the family court is not in session, to the most accessible magistrate, if any, designated by the appellate division of the supreme court in the applicable department. If a juvenile is brought before an accessible magistrate, the magistrate shall set a date for the juvenile to appear in the family court in the county in which the warrant had been issued, which shall be no later than the next day the court is in session if the magistrate orders the juvenile to be detained and within ten court days if the magistrate orders the juvenile to be released. The magistrate shall transmit its order to the family court forthwith.

§2. This act shall take effect on the sixtieth day after it shall have become a law.

2. Eligibility for appearance tickets in adolescent offender cases [C.P.L. §§140.20, 150.20]

A critical impetus for enactment of the "raise the age" statute was the recognition of the need to extricate youth from adult jails and prisons and to provide more developmentally- and age-appropriate interventions at every stage of proceedings involving adolescents. The statute provides for night, weekend and holiday arraignments before accessible magistrates, increases the likelihood of pretrial diversion through provision of probation case-planning services in the newly created Youth Parts, prohibits youth from detention in county jails and Rikers Island and specifically provides for a "presumption against custody" in removals of adolescent offender cases to Family Court. *See* Criminal Procedure Law §§722.00, 722.23(1)(f), 140.20(8), 140.27(3-a), 180.75(1), 510.15(1); Corrections Law 500-p [L. 2017, c. 59, part www].

However, the statute did not address a significant obstacle to the retention of youth in their communities, that is, the limitations in sections 140.20 and 150.20 of the Criminal Procedure Law on the authority of arresting officers to issue desk appearance tickets. Under those sections, appearance tickets may only be issued in cases in which the charges do not exceed Class E felonies in seriousness, with six Class E felony charges exempted from eligibility.[1] The Family Court Advisory and Rules Committee is proposing a measure to remedy that gap with respect to 16-year olds and, starting on October 1, 2019, 17-year olds. It would amend both sections of the Criminal Procedure Law to permit law enforcement to exercise their discretion to issue appearance tickets to adolescent offenders upon arrest, with the exception of those charged with violent felony offenses as defined in subdivision one of section 70.02 of the Penal Law. Issuance of appearance tickets would not be a mandate but would provide a significant addition to the menu of options available to law enforcement in their efforts to address cases involving older adolescents appropriately.

Peter Preiser, in the Practice Commentary to Criminal Procedure Law §150.20, characterized the authority of law enforcement to issue appearance tickets as "particularly useful, because it contemplates a post arrest evaluation of the necessity for continuing with the costly and liberty restricting physical arrest procedures." Reducing unnecessary detention through issuance of appearance tickets is arguably even more critical in cases involving youth, since research has demonstrated that pretrial detention, even of just a few days, can have long-standing harmful consequences. The Final Report of the Governor's Commission on Youth, Public Safety and Justice in 2015, which provided the underpinning for the "raise the age" statute, indicated that incarceration of youth in jails undermined public safety and exacerbated the risk to the youth of both physical and sexual abuse.[2] Further, as reported by the Justice Policy Institute in a report in 2017, pretrial detention of youth actually heightens the likelihood of re-offending, increases

[1] Charges of Class E felonies involving certain sex offenses, escape, absconding and bail-jumping are not eligible for appearance tickets. *See* Penal Law §§130.25, 130.40, 205.10, 205.17, 205.19, 215.56.

[2] The Commission reported that youth under 18 are five times more likely than adults to be victims of sexual assault in jails, often within the first two days; while comprising only one percent of the jail population, youth comprise twenty-one percent of sexual abuse victims. *See* Final Report of the Governor's Commission on Youth, Public Safety and Justice 78-81 (2015).

the probability of conviction and out-of-home commitment, exacerbates mental and physical health problems and creates challenges for youth in reconnecting to school and to jobs.[3]

While commencing in a Youth Part of a superior court, an adolescent offender case charging non-violent felonies is presumed to be removable to Family Court unless the Youth Part judge finds that the prosecution has sustained its burden of demonstrating extraordinary circumstances as to why the case should not be transferred and, as noted, a presumption against custody applies. *See* Criminal Procedure Law §722.23. Logic dictates that in such cases, law enforcement should be able to exercise discretion, in appropriate cases, to issue appearance tickets to enable youth to remain with their families in their communities pending their appearances before the Youth Part.

Proposal

AN ACT to amend the criminal procedure law, in relation to issuance of appearance tickets to adolescent offenders pending appearances before youth parts of superior courts of criminal jurisdiction

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The opening paragraphs of subdivisions 2 and 6 and subdivision 8 of section 140.20 of the criminal procedure law, subdivision 6 as amended by section 20 and subdivision 8 as added by section 19 of part www of chapter 59 of the laws of 2017, are amended to read as follows:

2. If the arrest is for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or if, in the case of an adolescent offender, the arrest is for an offense other than a violent felony offense as defined in subdivision one of section 70.02 of the penal law, the arrested person need not be brought before a local criminal court as provided in subdivision one, and the procedure may instead be as follows:

6. Upon arresting a juvenile offender or a person sixteen or commencing October first, two thousand nineteen, seventeen years of age without a warrant, the police officer shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that such offender or person has been arrested, and the location of the facility where he or she is being detained or the place and date an appearance

[3] Justice Policy Institute, *Raise the Age: Shifting to a Safer and More effective Juvenile Justice System* (2017) at 29-30. *See also* National Juvenile Defender Center, *The Harms of Juvenile Detention* (2016).

ticket is returnable if the adolescent offender has been given an appearance ticket. If the officer determines that it is necessary to question a juvenile offender or such person, the officer must take him or her to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the juvenile or such person, to his or her residence and there question him or her for a reasonable period of time. A juvenile or such person shall not be questioned pursuant to this section unless he or she and a person required to be notified pursuant to this subdivision, if present, have been advised:

8. [If] Except as provided in subdivision two of this section, if the arrest is for a juvenile offender or adolescent offender other than an arrest for a violation or a traffic infraction, such offender shall be brought before the youth part of the superior court. If the youth part is not in session, such offender shall be brought before the most accessible magistrate designated by the appellate division of the supreme court in the applicable department to act as a youth part.

§2. Section 150.20 of the criminal procedure law, as amended by chapter 550 of the laws of 1987, is amended to read as follows:

§150.20. Appearance tickets; when and by whom issued.

1. Whenever a police officer is authorized pursuant to section 140.10 to arrest a person without a warrant for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or if, in the case of an adolescent offender, the arrest is for an offense other than a violent felony offense as defined in subdivision one of section 70.02 of the penal law, he or she may, subject to the provisions of subdivisions three and four of section 150.40, instead issue to and serve upon such person an appearance ticket.

2. (a) Whenever a police officer has arrested a person without a warrant for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law pursuant to section 140.10, or if, in the case of an adolescent offender, the arrest is for an offense other than a violent felony offense as defined in subdivision one of section 70.02 of the penal law, or (b) whenever a peace officer, who is not authorized by law to issue an appearance ticket, has arrested a person for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law pursuant to section 140.25 or if, in the case of an adolescent offender, the arrest is for

an offense other than a violent felony offense as defined in subdivision one of section 70.02 of the penal law, and has requested a police officer to issue and serve upon such arrested person an appearance ticket pursuant to subdivision four of section 140.27, or (c) whenever a person has been arrested for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or if, in the case of an adolescent offender, the arrest is for an offense other than a violent felony offense as defined in subdivision one of section 70.02 of the penal law and has been delivered to the custody of an appropriate police officer pursuant to section 140.40, such police officer may, instead of bringing such person before a local criminal court and promptly filing or causing the arresting peace officer or arresting person to file a local criminal court accusatory instrument therewith or, in the case of an adolescent offender, instead of bringing such offender before a youth part or if the youth part is not in session, an accessible magistrate, may issue to and serve upon such person an appearance ticket. The issuance and service of an appearance ticket under such circumstances may be conditioned upon a deposit of pre-arraignment bail, as provided in section 150.30.

3. A public servant other than a police officer, who is specially authorized by state law or local law enacted pursuant to the provisions of the municipal home rule law to issue and serve appearance tickets with respect to designated offenses other than class A, B, C or D felonies or violations of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or, in the case of an adolescent offender, with respect to an offense other than a violent felony offense as defined in subdivision one of section 70.02 of the penal law, may in such cases issue and serve upon a person an appearance ticket when he or she has reasonable cause to believe that such person has committed a crime, or has committed a petty offense in his or her presence.

§3. This act shall take effect on the ninetieth day after it shall have become a law.

3. Waiver of fees and mandatory surcharges in adolescent offender cases [C.P.L. §420.35; P.L. §§60.02, 60.10, 60.10-a, 60.35(10)]

One of the defining tenets of the "raise the age" statute enacted in 2017 is its emphasis upon a recognition that older adolescents are not fully developed and that they are dependent upon their families. Requirements for law enforcement to notify parents upon arrest, offer service plans in the newly established Youth Parts of superior courts, include opportunities for cases to be transferred from the Youth Parts to Family Court, provide adolescent-focused detention and commitment facilities and consider age as a factor in sentencing combine to infuse an adolescent-oriented approach to the treatment of older youth in the criminal justice system. *See* L. 2017, c. 59, part www. However, the legislation did not address a significant area where the patchwork of existing laws does not take into account the limited financial resources of youth before the courts.

The Family Court Advisory and Rules Committee is proposing a measure to fill that gap. It amends section 420.35 of the Criminal Procedure Law to require waiver of the mandatory surcharge, crime victim assistance fee and DNA databank fee for convicted juvenile and adolescent offenders, as well as those who have had their convictions replaced by a Youthful Offender adjudication. Likewise, sections 60.02(3), 60.10(1), 60.10-a and 60.35(10) of the Penal Law are amended to prohibit imposition of the mandatory surcharge, crime victim assistance fee, DNA databank fee, sex offender registration fee and supplemental sex offender victim fee upon convicted juvenile and adolescent offenders, as well as those who have had their convictions replaced by a Youthful Offender adjudication.

Research has demonstrated that imposition of fees upon youthful defendants provides minimal benefit to the public fisc, while imposing significant hardships upon youth and their families. A national study by the Juvenile Law Center highlighted juveniles' lack of ability to pay due to lack of employment and employability, strains upon their often already financially stressed families and disproportionate impact upon minorities.[4] It cited research in Alameda County, California that demonstrated that the County expended almost as much money upon collection efforts as it received, as well as a study by criminologists indicating that the debts incurred actually increased recidivism, especially among minority youth.[5] The Juvenile Law Center study concluded that:

> It is time to re-focus the juvenile justice system on approaches that work: eliminating costs, fines and fees placed upon youth who are not old enough either to enter into contracts or take on full time work ...[6]

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[4] J. Feierman, *Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System* 7-9 (Juvenile Law Center, Phila., Pa., 2016).

[5] A. Piquero and W.G. Jennings, "Research Note: Justice System -Imposed Financial Penalties Increase the Likelihood of recivism in a Sample of Adolescent offenders," 1 *Youth Violence and Juvenile Justice* 16:1 (2016.

[6] J. Feierman, *supra,* at 25.

See also E. Eckholm, "Court Costs Entrap Nonwhite, Poor Juvenile Offenders," *NY Times*, Aug. 31, 2016.

National organizations as well have weighed in on this issue. Noting the disparate impact of fees upon youth in poor communities and, in particular, upon minority youth, the National Conference of Juvenile and Family Court Judges passed a resolution in March, 2018, recommending sharp limitations on the imposition of costs and fees upon juveniles and their families.[7] The resolution, *inter alia*, recommends that "courts work towards reducing and eliminating fines, fees and costs by considering a youth and their family's ability to pay prior to imposing such financial obligations." It further recommends that youth be presumed to be indigent and to lack independent means to pay fees if they had assigned counsel. Additionally, the Conference of Chief Justices and Conference of State Court Administrators established the National Task Force on Fines, Fees and Bail Practices, which issued a set of principles in August, 2018.[8] Emphasizing the need for fairness, the principles provide that courts should consider parties' ability to pay and should have discretion to waive fees.

The Committee's proposal is essential in order for the court system to accord full recognition that adolescents are not simply little adults. They require specialized treatment, including a recognition that, in light of their ages and dependent status, they lack independent means with which to satisfy the financial costs imposed upon those who are convicted in the criminal justice system.

Proposal

AN ACT to amend the criminal procedure law and the penal law, in relation to mandatory surcharges and fees in juvenile offender and adolescent offender cases

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 420.35 of the criminal procedure law, as amended by chapter 189 of the laws of 2018, is amended to read as follows:

2. Under no circumstances shall the mandatory surcharge, sex offender registration fee, DNA databank fee or the crime victim assistance fee be waived provided, however, that a court may waive the crime victim assistance fee if such defendant is an eligible youth as defined in subdivision two of section 720.10 of this chapter, and the imposition of such fee would work an unreasonable hardship on the defendant, his or her immediate family, or any other person who is dependent on such defendant for financial support. A court shall waive any mandatory surcharge, DNA databank fee

[7] *See* Resolution Addressing Fines, Fees and Costs in Juvenile Court Proceedings (Mar., 2018), available at: https://www.ncjfcj.org/sites/default/files/FinesFeesCosts_Resolution_FNL_3-17-18.pdf

[8] *See* "Principles on Fines, Fees and Bail Practices," Principles 2.3 and 6.2 (Aug., 2018), available at: https://www.ncsc.org/~/media/Files/PDF/Topics/Fines%20and%20Fees/Principles%20shaded%209%2024%2018asd.ashx

and crime victim assistance fee when: (i) the defendant is convicted of loitering for the purpose of engaging in prostitution under section 240.37 of the penal law (provided that the defendant was not convicted of loitering for the purpose of patronizing a person for prostitution); (ii) the defendant is convicted of prostitution under section 230.00 of the penal law; (iii) the defendant is convicted of a violation in the event such conviction is in lieu of a plea to or conviction for loitering for the purpose of engaging in prostitution under section 240.37 of the penal law (provided that the defendant was not alleged to be loitering for the purpose of patronizing a person for prostitution) or prostitution under section 230.00 of the penal law; or (iv) the court finds that a defendant is a victim of sex trafficking under section 230.34 of the penal law or a victim of trafficking in persons under the trafficking victims protection act (United States Code, Title 22, Chapter 78); [or] (v) the court finds that the defendant is a victim of sex trafficking of a child under section 230.34-a of the penal law; or (vi) the defendant is convicted as a juvenile offender or an adolescent offender, as defined in subdivisions forty-two and forty-four of section 1.20 of this chapter, or has had a juvenile offender or adolescent offender conviction replaced by a youthful offender adjudication, as defined in subdivision six of section 720.10 of this chapter.

§2. Subdivision 3 of section 60.02 of the penal law, as amended by part y of chapter 56 of the laws of 2008, is amended to read as follows:

(3) The provisions of section 60.35 of this article shall apply to a sentence imposed upon a youthful offender finding [and the amount of the mandatory surcharge and crime victim assistance fee which shall be levied at sentencing shall be equal to the amount specified in such section for the offense of conviction for which the youthful offender finding was substituted]; provided, however that the court shall not impose the mandatory surcharge, crime victim assistance fee, sex offender registration fee, DNA databank fee or supplemental sex offender victim fee, as defined in [subparagraphs (iv) and (v) of paragraph] paragraphs (a) and [paragraph] (b) of subdivision one of section 60.35 of this article, for an offense in which the conviction was substituted with a youthful offender finding.

§3. Subdivision 1 of section 60.10 of the penal law, as amended by chapter 411 of the laws of 1979, is amended to read as follows:

1. When a juvenile offender is convicted of a crime, the court shall sentence the defendant to imprisonment in accordance with section 70.05 or sentence him or her upon a youthful offender finding in accordance with section 60.02 of this chapter; provided, however, that the

court shall not impose the mandatory surcharge, crime victim assistance fee, DNA databank fee, sex offender registration fee or supplemental sex offender victim fee, as defined in paragraphs (a) and (b) of subdivision one of section 60.35 of this chapter.

§4. Section 60.10-a of the penal law, as added by section 41 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

§60.10-a. Authorized disposition; adolescent offender. When an adolescent offender is convicted of an offense, the court shall sentence the defendant to any sentence authorized to be imposed on a person who committed such offense at age eighteen or older; provided, however, that the court shall not impose the mandatory surcharge, crime victim assistance fee, DNA databank fee, sex offender registration fee or supplemental sex offender victim fee, as defined in paragraphs (a) and (b) of subdivision one of section 60.35 of this chapter. When a sentence is imposed, the court shall consider the age of the defendant in exercising its discretion at sentencing.

§5. Subdivision 10 of section 60.35 of the penal law, as amended by chapter 56, part Y, §2, of the laws of 2008, is amended to read as follows:

10. The provisions of this section shall apply to sentences imposed upon a youthful offender finding; provided, however that the court shall not impose the mandatory surcharge, crime victim assistance fee, sex offender registration fee, DNA databank fee or supplemental sex offender victim fee, as defined in [subparagraphs (iv) and (v) of paragraph] paragraphs (a) and [paragraph] (b) of subdivision one of this section, for an offense in which the conviction was [substituted with] replaced by a youthful offender finding; nor shall such fees be imposed upon a person convicted as a juvenile offender or an adolescent offender, as defined in subdivision eighteen of section 10.00 of this chapter and subdivisions forty-two and forty-four of section 1.20 of the criminal procedure law, or who has had a juvenile offender or adolescent offender conviction replaced by a youthful offender adjudication, as defined in subdivision six of section 720.10 of the criminal procedure law.

§6. This act shall take effect on the ninetieth day after it shall have become a law.

4. Pleas of guilty and removal of adolescent offender proceedings to the family court [Penal Law §30.00(3); C.P.L. §§220.10; 725.05(7), 725.10(1)]

Enactment in New York State of the "raise the age" statute has resulted in a long-sought transformation of the treatment of older adolescents in the justice system. *See* L. 2017, c.59, part www. Its provisions for removing cases from the Youth Parts of superior courts to Family Court provide an essential safety valve for 16-year olds (and, starting October 1, 2019 17-year olds), who are charged with felonies as adolescent offenders in the adult criminal justice system but who would more appropriately be afforded the opportunity either for diversion (adjustment) without prosecution or for treatment as juvenile delinquents. However, two aspects of the removal provisions have caused confusion as the first phase of implementation of the statute has been underway. The Family Court Advisory and Rules Committee is thus proposing a measure to address these problems.

First, pleas of guilty in adolescent offender cases to reduced charges constituting misdemeanors are deemed to be an exception to the infancy defense and no explicit authority exists for these cases to be removed to Family Court, notwithstanding the fact that all other misdemeanor cases are treated as juvenile delinquency matters. *See* Penal Law §30.00(3)(d)(ii). In contrast, verdicts for charges for which youth are not criminally responsible in both adolescent and juvenile offender cases must be removed to Family Court and pleas in juvenile offender cases to such crimes may be subject to removal upon recommendation of the district attorney. *See* Criminal Procedure Law §§220.10((5)(g)(iii), 310.85(3), 330.25. No justification exists for precluding removal solely for pleas in adolescent offender cases and for automatically deeming such youth to be criminally responsible.

The Committee's measure amends the infancy provision of the Penal Law to clarify that an adolescent offender is criminally responsible for pleas to reduced charges unless the matter is removed to Family Court. *See* Penal Law §30.00(3)(d)(ii). Additionally, it adds a new paragraph (g-1) to subdivision five of Criminal Procedure Law §220.10 to require that a plea by an adolescent offender to a charge constituting a misdemeanor must be replaced by an order of fact-finding of juvenile delinquency and must be removed to the Family Court for disposition. Where the plea is to a felony, *e.g.,* a felony for which different criteria for removal are applicable as compared to the original charge, the matter may be considered for removal to Family Court in accordance with section 722.23 and Article 725 of the Criminal Procedure Law.

Second, there has been considerable confusion over the apparent contradiction between the eligibility of adolescent offenders, whose cases have been removed to Family Court for consideration for adjustment, and the mandates in sections 725.05 and 725.10 of the Criminal Procedure Law for such youth to appear before the Family Court within ten days and for a Family Court juvenile delinquency proceeding to be commenced. Although the "raise the age" statute provides that "notwithstanding any other provision of law," eligible offenders are entitled to be considered for their suitability for adjustment services after removal from Youth Part (*see* Criminal Procedure Law §§722.21(4); 722.23(1)(g)), there is no corresponding amendment recognizing this entitlement in the removal provisions of the Criminal Procedure Law that are cross-referenced in sections 722.21(2)(b) and 722.23(1)(a) of the Criminal Procedure Law. *Cf.,* Criminal Procedure Law §§725.05(7), 725.10(1).

In order to effectuate the clear legislative intent of the "raise the age" statute, the measure makes technical, clarifying amendments to both sections 725.05 and 725.10 of the Criminal Procedure Law. This measure reconciles the various provisions by clarifying that, in removing an adolescent offender case to the Family Court, where the offender is statutorily eligible for consideration for adjustment, the Youth Part judge should direct the youth to the intake office of the local probation department for an assessment of adjustment suitability without an appearance in Family Court and without an actual Family Court juvenile delinquency case being commenced. Youth who are in detention or in a sheriff's custody would be required to appear before a Family Court judge "not later than the next day the court is in session," but would nonetheless be brought to probation for adjustment consideration if statutorily eligible. The measure leaves intact, however, the provision requiring youths, including, among others, juvenile offenders, who are ineligible for adjustment, to appear in Family Court within ten days of removal. Likewise, it retains the requirement for a detained youth to appear in Family Court not later than the next day such court is in session, while nonetheless underscoring that the fact that a juvenile is in detention "shall not preclude the probation service from adjusting the case if the [juvenile] is otherwise eligible for adjustment. Nor does it affect the need for a Family Court appearance by a juvenile, against whom a temporary, pre-petition order of protection has been issued pursuant to Family Court Act §304.2(1).

Other than in a detention or temporary order of protection case, therefore, the Committee's measure will, obviate the need for an appearance by the juvenile in Family Court unless and until it is necessary on the ground that the juvenile's case has not been adjusted successfully and the presentment agency has elected to go forward with a juvenile delinquency proceeding.

Proposal

AN ACT to amend the penal law and the criminal procedure law, in relation to pleas of guilty and removal of adolescent offender proceedings to the family court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subparagraph (ii) of paragraph (d) of subdivision 3 of section 30.00 of the penal law, as amended by section 38 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

(ii) results from reduction or dismissal in satisfaction of a charge for a felony offense, in accordance with a plea of guilty pursuant to subdivision four of section 220.10 of the criminal procedure law, unless the proceeding is removed to the family court pursuant to paragraph (g-1) of subdivision five of section 220.10 the criminal procedure law; or

§2. Subdivision 5 of section 220.10 of the criminal procedure law is amended by adding a new paragraph (g-1) to read as follows:

(g-1) Where a defendant is an adolescent offender, the provisions of paragraphs (a), (b), (c) and (d) of this subdivision shall not apply. Where the plea is to an offense constituting a misdemeanor, the plea shall be deemed replaced by an order of fact-finding in a juvenile delinquency proceeding, pursuant to section 346.1 of the family court act, and the action shall be removed to the family court in accordance with article seven hundred twenty-five of this chapter . Where the plea is to an offense constituting a felony, the court may remove the action to the family court in accordance with section 722.23 and article seven hundred twenty-five of this chapter.

§3. Subdivision 7 of section 725.05, as amended by chapter 223 of the laws of 1990, is amended to read as follows:

7. Whether or not a securing order has been made, the order of removal must specify a date certain within ten days from the date of the order of removal for the defendant's appearance in the family court and where the defendant is in detention or in the custody of the sheriff that date must be not later than the next day the family court is in session. Unless the defendant is in detention or is in the custody of the sheriff or unless the order of removal specifies a juvenile or adolescent offense for which the defendant is not eligible for consideration for adjustment under subdivision 13 of section 308.1 of the family court act, the order of removal shall direct the defendant to appear at the family court intake office of the county department of probation for adjustment consideration; provided, however, that pursuant to subdivision three of section 308.1 of the family court act, the fact that the defendant is in detention or is in the custody of the sheriff shall not preclude the probation service from adjusting the case if the defendant is otherwise eligible for adjustment.

§4. Subdivision 1 of section 725.10 of the criminal procedure law, as amended by chapter 920 of the laws of 1982, is amended to read as follows:

1. [When] Unless the defendant is an adolescent offender who has been directed to appear at the family court intake office of the county department of probation for adjustment consideration in accordance with subdivision seven of section 725.05 of this chapter, when an order of removal is filed with the family court, a proceeding pursuant to article three of the family court act must be originated. The family court thereupon must assume jurisdiction and proceed to render such judgment as the circumstances require, in the manner and to the extent provided by law.

§5. This act shall take effect immediately.

5. Clarification of where adolescent offenders may be held pending arraignment when neither a Youth Part nor an accessible magistrate is available [C.P.L. §§120.90, 140.20(8), 140.27(3-a), 410.40(2); Exec. L. 502(3), 503-b; County Law§218-a]

This measure would address an urgent problem that surfaced as the Judiciary and executive agencies planned for implementation of the first phase of the "Raise the Age" legislation, which became effective with respect to sixteen year olds on October 1, 2018 (L. 2017, c. 59, part www, hereinafter "RTA"). The measure would allow for the temporary pre-arraignment detention of juvenile and adolescent offenders in a specialized juvenile secure detention facility where there is no court available to arraign and issue a securing order for those offenders. Further, where there is no specialized juvenile secure detention facility nearby, the measure also authorizes a county to establish one or more temporary pre-appearance secure holding facilities where a youth could be detained pending arraignment.

Although the RTA legislation ensures prompt arraignments for most youth arrested off-hours or on weekends or holidays by providing for a system of appearances before accessible magistrates designated by the Appellate Divisions when Youth Parts are not in session, it is not feasible to provide blanket 24-7 coverage throughout the State. While section 722.10(2) of the Criminal Procedure Law requires that "all areas of a county are within a reasonable distance of a designated magistrate," it does not, and in practical terms, could not require that every location in the State have an accessible magistrate with defense counsel available at absolutely all hours of the night. Currently, RTA requires police agencies to bring an arrested offender to the Youth Part for arraignment or, if the Youth Part is not in session, to the nearest available accessible magistrate. However, even where an accessible magistrate is available, an arraignment cannot proceed where defense counsel is unavailable, and a delay of at least several hours before arraignment is inevitable in many jurisdictions.

Both Federal and State law prohibit the detention of youth in a jail or local lockup alongside adult prisoners. The Federal *Juvenile Justice Reform Act of 2018* [Public Law 115-__; H.R. 6964], which was signed by the President on December 21, 2018, re-authorized the *Juvenile Justice and Delinquency Prevention Act of 1974* [34 U.S.C. §11103] and, *inter alia*, extended the "sight and sound separation" mandates formerly applicable only to juvenile delinquents in Family Court to youth prosecuted in the adult criminal justice system, thus including the Youth Parts established pursuant to RTA. "Sight and sound contact" is defined as "any physical, clear visual, or verbal contact that is not brief and inadvertent." [9] The State Plan requirements in the *Act* [H.R. 6964, §205], which are prerequisites to New York State's receipt of significant Federal juvenile justice funding, provide only limited circumstances for departures from the requirements in the interests of justice. Those limited circumstances do not resolve the pre-arraignment holding area problem since judges would not be available to make the comprehensive findings detailed in the statute. The U.S. Department of Justice includes court holding facilities in the detention and lock-up facilities that they audit periodically for compliance and in New York State, the State Commission on Corrections, through an agreement

[9] Existing Federal regulations, as well as the Federal auditing manual, further delineate the criteria. *See* 28 C.F.R. §31.303; *Guidance Manual for Monitoring Facilities Under the Juvenile Justice and Delinquency Prevention Act* (U.S. Dept. Of Justice, Office of Justice Programs, 2007).

with the Division of Criminal Justice Services, has taken on the responsibility of regular audits of court holding facilities in between the Federal audits. Likewise, New York State law and regulations, including provisions in the raise the age statute, prohibit commingling of juvenile and adolescent offenders with adults. *See* Criminal Procedure Law §510.15(1); Corrections Law §500-b(4); 9 N.Y.C.R.R. §§180-1.3(b)(2), 180-3.3(c)(2). The court rule authorizing designation by the judiciary of law enforcement rooms suitable for the questioning of juveniles, which were made applicable to juvenile and adolescent offenders by RTA, requires the rooms to be "office-like," rather than "jail-like," and requires separate entrances for juveniles or procedures to "avoid mingling with adult detainees." *See* 22 N.Y.C.R.R. §§205.20(d)(1), (6).

During hours when neither a Youth Part nor an accessible magistrate are available to issue a securing order, law enforcement officials in the many locations in the State that lack adequate separate facilities for holding juvenile and adolescent offenders prior to arraignment are left in a quandary. For lack of alternatives, they have been compelled to hold arrested juvenile and adolescent offenders for periods of time, sometimes overnight, in interrogation rooms not equipped for sleeping, or handcuffed to chairs in squad rooms or even held in the rear seat of police cars as understaffed police continue to patrol their communities or respond to emergencies. This problem does not arise for juvenile delinquents because the Family Court Act expressly provides that where the Family Court or an accessible magistrate is unavailable, a youth arrested as a juvenile delinquent may be detained in a place certified by the State Office of Children and Family Services (*see* FCA 305.2(4)(c)) prior to the issuance of a detention order. Unfortunately, there is no parallel authority in cases involving juvenile or adolescent offenders, and police are not permitted to bring a youth to a specialized juvenile secure detention facility until the youth is arraigned and the court issues a securing order.

This measure solves this problem by providing that where a youth, who cannot be released, is being held for arraignment and where the Youth Part or an accessible magistrate is unavailable, the officer must bring the youth to a specialized juvenile secure detention facility pending the next session of the Youth Part or the availability of an accessible magistrate, whichever is sooner. To ensure there will be no excessive pre-arraignment detention, the measure provides that in no event may a youth be held for more than twenty-four hours. The measure also recognizes that specialized secure detention facilities are not necessarily located within a reasonable distance of many counties. Therefore, the measure also permits, but does not require, a county to establish one or more temporary pre-appearance secure holding facilities that must be certified by the State Office of Children and Family Services. Such facilities may be co-located with a prison, jail or local lockup for adult offenders provided that appropriate sight and sound separation is maintained and the facility is not "jail-like" in appearance.

Proposal

AN ACT to amend the criminal procedure law, executive law and county law, in relation to temporary holding facilities for adolescent offenders and removal of certain cases to family court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 5-a of section 120.90 of the criminal procedure law, as added by section 16 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

5-a. Whenever a police officer is required, pursuant to this section, to bring an arrested defendant before a youth part of a superior court in which a warrant of arrest is returnable, and if such court is not in session, such officer must bring such defendant before the most accessible magistrate designated by the appellate division of the supreme court in the applicable department to act as a youth part. If no such magistrate is available and defendant is being held for arraignment, such officer must bring the defendant to a specialized secure detention facility for older youth certified in accordance with section 510.15 of this chapter or, if such a facility is not reasonably available, to a temporary pre-appearance secure holding facility. The defendant may be held in such detention or holding facility pending the next session of the youth part or the availability of a magistrate designated hereunder, whichever is sooner, but in no event to exceed twenty-four hours.

§2. Subdivision 8 of section 140.20 of the criminal procedure law, as added by section 19 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

8. If the arrest is for a juvenile offender or adolescent offender other than an arrest for a violation or a traffic infraction, such offender shall be brought before the youth part of the superior court. If the youth part is not in session, such offender shall be brought before the most accessible magistrate designated by the appellate division of the supreme court in the applicable department to act as a youth part. If no such magistrate is available and the offender is being held for arraignment, such officer must bring the offender to a specialized secure detention facility for older youth certified in accordance with section 510.15 of this chapter or, if such a facility is not reasonably available, to a temporary pre-appearance secure holding facility. The offender may be held in such detention or holding facility pending the next session of the youth part or the availability of a magistrate designated hereunder, whichever is sooner, but in no event to exceed twenty-four hours.

§3. Subdivision 3-a of section 140.27 of the criminal procedure law, as added by section 22 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

3-a. If the arrest is for a juvenile offender or adolescent offender other than an arrest for violations or traffic infractions, such offender shall be brought before the youth part of the superior court. If the youth part is not in session, such offender shall be brought before the most accessible magistrate designated by the appellate division of the supreme court in the applicable

department to act as a youth part. If no such magistrate is available and the offender is being held for arraignment, such officer must bring the offender to a specialized secure detention facility for older youth certified in accordance with section 510.15 of this chapter or, if such a facility is not reasonably available, to a temporary pre-appearance secure holding facility. The offender may be held in such detention or holding facility pending the next session of the youth part or the availability of a magistrate designated hereunder, whichever is sooner, but in no event to exceed twenty-four hours.

§4. Paragraph (b) of subdivision 2 of section 410.40 of the criminal procedure law, as added by section 32 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

(b) If the court in which the warrant is returnable is a superior court, and such court is not available, and the warrant is addressed to a police officer or appropriate probation officer certified as a peace officer, such executing officer shall, where a defendant is sixteen years of age or younger who allegedly commits an offense or a violation of his or her probation or conditional discharge imposed for an offense on or after October first, two thousand eighteen, or where a defendant is seventeen years of age or younger who allegedly commits an offense or a violation of his or her probation or conditional discharge imposed for an offense on or after October first, two thousand nineteen, bring the defendant without unnecessary delay before the youth part, provided, however that if the youth part is not in session, the defendant shall be brought before the most accessible magistrate designated by the appellate division. If no such magistrate is available and the offender is being held for arraignment, such officer must bring the offender to a specialized secure detention facility for older youth certified in accordance with section 510.15 of this chapter or, if such a facility is not reasonably available, to a temporary pre-appearance secure holding facility. The offender may be held in such detention or holding facility pending the next session of the youth part or the availability of a magistrate designated hereunder, whichever is sooner, but in no event to exceed twenty-four hours.

§5. Subdivision 3 of section 502 of the executive law, as amended by section 79 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

3. "Detention" means the temporary care and maintenance of youth held away from their homes pursuant to article three or seven of the family court act, or held pending a hearing for alleged violation of the conditions of release from an office of children and family services facility or authorized agency, or held pending a hearing for alleged violation of the condition of

parole as a juvenile offender, youthful offender or adolescent offender or held pending return to a jurisdiction other than the one in which the youth is held, or held pursuant to a securing order of a criminal court if the youth named therein as principal is charged as a juvenile offender, youthful offender or adolescent offender or held pending issuance of a securing order if the youth is charged as a juvenile offender or adolescent offender or held pending a hearing on an extension of placement or held pending transfer to a facility upon commitment or placement by a court. Only alleged or convicted juvenile offenders, youthful offenders or adolescent offenders who have not attained their eighteenth or, commencing October first, two thousand eighteen, their twenty-first birthday shall be subject to detention in a detention facility. Commencing October first, two thousand eighteen, a youth who on or after such date [committed] is charged with committing an offense when the youth was sixteen years of age; or commencing October first, two thousand nineteen, a youth who [committed] is charged with committing an offense on or after such date when the youth was seventeen years of age held pursuant to a securing order of a criminal court if the youth is charged as an adolescent offender or held pending a hearing for alleged violation of the condition of parole as an adolescent offender, must be held in a specialized secure juvenile detention facility for older youth certified by the state office of children and family services in conjunction with the state commission of correction, or pending issuance of a securing order held for no longer than twenty-four hours in a specialized secure detention facility for older youth or a temporary pre-appearance secure holding facility for adolescent youth.

§6. Title 2 of article 19-G of the executive law is amended by adding a new section 503-b to read as follows:

§503-b. Temporary pre-appearance secure holding facilities for adolescent offenders.

1. The office of children and family services shall establish regulations for the operation of temporary pre-appearance secure holding facilities for adolescent offenders pursuant to this article and subdivision six of section two hundred eighteen-a of the county law. Notwithstanding any other provision of law, the office, in consultation with the state commission of correction, shall jointly regulate, certify, visit, inspect and supervise temporary pre-appearance secure holding facilities for adolescent offenders. The office shall maintain a list on-line of all facilities certified for the temporary pre-appearance holding of adolescent offenders and shall file a copy of that list periodically with the clerk of the youth part established in each county in accordance with article 722 of the criminal procedure law.

2. The holding facilities shall temporarily accommodate adolescent offenders, as defined in subdivision forty-four of section 1.20 of the criminal procedure law, who are awaiting an appearance before a youth part of a superior court or an available designated magistrate, whichever is earlier, and who may neither be released nor reasonably held temporarily in a specialized secure detention facility for older youth pending such appearance. No adolescent offender may be held in a holding facility under this section more than twenty-four hours.

3. No adolescent offenders may be held in a holding facility established pursuant to this section unless the facility has been certified by the office of children and family services. The regulations of the office shall set forth procedures and requirements for such certification, including requirements for a maximum capacity that may not be exceeded and for background checks of all employees. The regulations shall also delineate procedures for the renewal of the certification and, upon good cause, for the suspension and revocation of the certification, including a right to a pre-revocation hearing.

4. The facilities shall be appropriate for the care of adolescents and shall not be jail-like in appearance. If such facilities are co-located with any prison, jail, lockup or other place used for adults convicted of or under arrest for a crime, there must be sight and sound separation between the adolescent offenders held in such facilities and any adults in such prison, jail, lockup or other place. The holding facilities shall be supervised at all times by staff trained in the care of adolescents and shall contain clean, well-maintained facilities.

§7. Section 218-a of the county law, as amended by section 82-b of part www of chapter 59 of the laws of 2017, is amended to read as follows:

§ 218-a. County detention facilities for juvenile delinquents, adolescent offenders and persons in need of supervision.

A. [To] The office of children and family services shall promulgate regulations to assure that suitable and conveniently accessible accommodations and proper and adequate detention in secure, specialized secure and non-secure detention facilities, as defined in section five hundred two of the executive law and the regulations of [the division for youth] such office, will be available when required for the temporary care, maintenance and security of alleged and convicted juvenile offenders, alleged and adjudicated juvenile delinquents, alleged and convicted adolescent offenders and alleged and adjudicated persons in need of supervision. Such regulations shall not require any county to provide temporary care in a secure detention facility for residents of any other county except upon a space available basis. The county executive, if

there be one, otherwise the board of supervisors shall designate the agency of county government responsible for the administration of the county juvenile detention program and shall so advise the New York state [division for youth] office of children and family services, and may make provisions therefor as follows:

1. Provide for the continued operation of the county's established detention facility, so long as it complies with regulations of the [division for youth] office of children and family services, and is certified by [that division] such office.

2. Authorize a contract between its county and one or more other counties, which is or are operating a conveniently accessible detention facility certified by the [division for youth] office of children and family services and in compliance with regulations of [the division for youth] such office, providing for the reception, temporary accommodation and care in such facility of alleged or adjudicated juvenile delinquents and persons in need of supervision held for or at the direction of its family court, for and in consideration of the payments to be made therefor, on a per capita basis, pursuant to the terms of such contract.

3. Authorize a contract between its county and one or more other counties providing for the joint operation and maintenance by them of an already established county detention facility certified by the state [division for youth] office of children and family services and operated and maintained in compliance with the regulations of [the division for youth] such office, which is conveniently accessible to the counties concerned. Such authorization and contract may include provisions for remodeling or enlarging the building of such facility.

4. Authorize a contract between its county and one or more other counties providing for the joint establishment, operation and maintenance by such counties of a new joint county detention facility which shall be located on a site conveniently accessible to the counties concerned and which shall be certified by the state [division for youth] office of children and family services and which shall be established, operated and maintained in compliance with the regulations of [the division for youth] such office.

5. The resolution providing for joint action under subdivision three or four above shall be adopted by the board of supervisors of each of the several counties affected, and a committee composed of at least one member of each of such boards shall be created to acquire the necessary real property in the name of the counties affected, and as the joint agent of such counties such committee shall have charge of the construction, equipment, maintenance and operation of such joint county detention facility and, with the advice of an advisory committee consisting of the

judge of the family court and the commissioner of social services of each of said counties, shall supervise and control the maintenance and operation of such joint county detention facility. The said resolution may specify the matters as to which the action of such committee shall require the joint approval of the boards of supervisors of all the counties affected and shall prescribe the proportions to be borne by each of the several counties affected of the costs of acquisition of the site and of construction of a new joint county detention facility and the proportions to be borne by each of the several counties affected of the costs of operation of such joint county detention facility, whether established by new joint acquisition and construction or by utilization of an existing county detention facility. The moneys to pay the share to be borne by each county affected shall be provided by appropriation in such amounts and at such times as may be agreed upon.

6. Notwithstanding any other provision of law, commencing October first, two thousand eighteen, a county must provide for adequate detention of alleged or convicted adolescent offenders in a specialized secure detention facility for older youth who are alleged or convicted of committing an offense when they were sixteen years of age and commencing October first, two thousand nineteen, a county must provide for adequate detention of alleged or convicted adolescent offenders in a specialized secure detention facility for older youth who are alleged or convicted of committing an offense when they were sixteen or seventeen years of age. Such facility shall be certified and regulated by the office of children and family services in conjunction with the state commission of correction. Such facility shall: (i) have enhanced security features and specially trained staff; and (ii) be jointly administered by the agency of county government designated in accordance with subdivision A of this section and the applicable county sheriff, which both shall have the power to perform all acts necessary to carry out their duties. The county sheriff shall be subject to the same laws that apply to the designated county agency regarding the protection and confidentiality of the information about the youth in such facility and shall prevent access thereto by, or the distribution thereof to, persons not authorized by law. Where a county is not located in proximity to a specialized secure detention facility for older youth, it may establish, on an as-needed basis, one or more temporary pre-appearance secure holding facilities for adolescent offenders in accordance with section 503-b of the executive law. Such holding facilities shall be certified and regulated by the office of children and family services in conjunction with the state commission of correction and shall be available to hold for no more than twenty-four hours adolescent offenders, who cannot be released or held

in a specialized secure detention facility for older youth pending an appearance before a youth part or accessible magistrate, whichever is sooner.

B. Notwithstanding any other provision of law, each board of supervisors shall provide or assure the availability of conveniently accessible and adequate non-secure detention facilities, certified by the state [division for youth] office of children and family services, as resources for the family court in the county pursuant to articles seven and three of the family court act, to be operated in compliance with the regulations of [the division for youth] such office for the temporary care and maintenance of alleged and adjudicated juvenile delinquents and persons in need of supervision held for or at the direction of a family court.

C. Each county shall offer diversion services to children who are at risk of being the subject of a petition under [article] articles three and seven of the family court act. Such services shall be designed to provide an immediate response to families in crisis and to identify and utilize appropriate alternatives to juvenile detention.

§8. This act shall take effect on the ninetieth day after it shall have become a law; provided, however, when the applicability of the provisions of this act is based upon the charge or conviction of a crime or an act alleged to have been committed by a person who was seventeen years of age at the time of such crime or act, such provisions shall take effect with respect to such person on October 1, 2019.

6. Jurisdiction, detention and dispositional alternatives for 16- and 17-year olds adjudicated as juvenile delinquents for violations (petty offenses) in Family Court and charged with such offenses in local criminal courts
[F.C.A. §§301.2(1), 302.1(3), 304.1, 350.1, 352.2, 360.3; C.P.L. §510.15]

The recently enacted legislation raising the age of criminal responsibility in New York State amends the definition of juvenile delinquency in Family Court Act §301.2(1), marking the first time that Family Courts will have jurisdiction over alleged violations (petty offenses), as defined in subdivision three of section 10.00 of the Penal Law. *See* L.2017, c. 59, Pt. www. Prior to the new statute, an act of juvenile delinquency was defined as an act that would be a crime if committed by an adult. The new jurisdiction is limited to 16-year olds, as of October 1, 2018, and 17-year olds, as of October 1, 2019 and is only applicable where the violation arises out of the same transaction or occurrence as an alleged crime, that is, a misdemeanor commencing in Family Court or a felony removed to Family Court. Where an adolescent offender case is prosecuted in the Youth Part under Article 722 of the Criminal Procedure Law, a violation that is part of the same transaction or occurrence as a criminal charge may be heard with that charge. In all other cases, violations will continue to be heard by local criminal courts.

Some cases of older adolescents in Family Court that involve crimes and violations charged together may result in an adjudication or in a plea only to the violation. It would contravene the ameliorative goals of the statute raising the age of criminal responsibility if adolescents in such cases faced penalties greater than those that they would have faced had they been prosecuted in a local criminal court. The Family Court Advisory and Rules Committee is thus proposing a measure that would amend sections 304.1, 350.1, 352.2 and 360.3 of the Family Court Act to provide that these adolescents may not be securely detained, may not be placed on probation and may not be placed out of their homes as a disposition. If granted a conditional discharge as a disposition in such a case, a youth charged with a violation of the conditional discharge may not be subject to secure detention pending adjudication of the violation or placement upon a finding. Additional conditions, *e.g.*, restitution, community service or participation in a particular program may be added as conditions, but neither detention nor placement would be permissible consequences. It also amends subdivision one of section 301.2 and subdivision three of section 302.1 of the Family Court Act to eliminate any possible ambiguity regarding the fact that the jurisdiction over petty offenses in juvenile delinquency cases applies only to sixteen year olds and, starting October 1, 2019, seventeen year olds who were charged as juvenile delinquents in Family Court or were originally charged as adolescent offenders and had their cases removed from the Youth Part to Family Court. Further, Criminal Procedure Law §510.15 would be amended to preclude secure detention of a 16- or 17-year old whose sole charge is a violation.

The Committee's measure would ensure that adolescents adjudicated for violations (petty offenses) or charged with, or adjudicated for, violations of conditional discharges would not be adversely affected by chapter 59 of the Laws of 2017. Prior to the effective date of the new statute, 16- and 17-year old offenders convicted of violations are subject only to sentences of conditional or unconditional discharge, jail up to 15 days and/or a fine of up to $250. Subdivision three of section 10.00 of the Penal Law defines a "violation" as "an offense, other than a 'traffic infraction,' for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed." Penal Law §65.00(1)(a) requires conviction of a "crime," not merely a "violation," for

imposition of a probation sentence and Penal Law §65.05(1)(a) authorizes sentences of conditional discharge for up to one year for violations.

By not imposing penalties greater than those which are warranted by the level of adjudication, the Committee's proposal would be consistent with widely accepted research in the juvenile justice field. The "risk principle" delineated in the *Final Report of the Governor's Commission on Youth, Public Safety and Justice* (2015) at 20, provides that:

> [S]ervices and supervision should be provided in direct proportion to an offender's risk of reoffending, with lower-risk youth receiving less-intensive interventions and higher-risk youth receiving interventions of higher intensity. It also warns against placing youth in settings that are more restrictive than necessary for their actual level of risk, which can yield counterproductive results in terms of increased recidivism. [Footnote omitted]. According to this principle, more restrictive programming and supervision should be concentrated on higher-risk youth.

Enactment of the Committee's proposal is thus warranted, not only by the need to not cause greater punishment than is possible under current law, but also from a purely practical vantage-point, that is, to protect the public from the recidivism that may result from over-intervention in cases of adjudications for conduct that does not rise to the level of a crime.

Proposal

AN ACT to amend the family court act, in relation to juvenile delinquency charges of violations in the family court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 301.2 of the family court act, as amended by section 56 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

1. "Juvenile delinquent" means a person over seven and less than sixteen years of age, or commencing on October first, two thousand eighteen a person over seven and less than seventeen years of age, and commencing October first, two thousand nineteen a person over seven and less than eighteen years of age, who, having committed an act that would constitute a crime if committed by an adult, or (with respect to a person over sixteen and less than seventeen years of age commencing October first two thousand eighteen or a person over sixteen and less than eighteen years of age commencing October first two thousand nineteen) a violation if committed by an adult, where such violation is alleged to have occurred in the same transaction or occurrence of the alleged criminal act[, if committed by an adult], and where such person: (a) is not criminally responsible for such conduct by reason of infancy, or (b)

is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law.

§2. Subdivision 3 of section 302.1, as added by section 56-a of part www of chapter 59 of the laws of 2017, is amended to read as follows:

3. [Whenever] With respect to a youth over sixteen and less than seventeen years of age commencing October first two thousand eighteen or a person over sixteen and less than eighteen years of age commencing October first two thousand nineteen), whenever a crime and a violation arise out of the same transaction or occurrence, a charge alleging both offenses shall be made returnable before the court having jurisdiction over the crime. Nothing herein provided shall be construed to prevent a court, having jurisdiction over a violation relating to a criminal act from lawfully entering an order in accordance with section 345.1 of this article where such order is not based upon the count or counts of the petition alleging such criminal act.

§3. Subdivision 3 of section 304.1, as added by chapter 419 of the laws of 1987, is amended to read as follows:

3. The detention of a child under ten years of age in a secure detention facility shall not be directed, nor shall the detention of a child adjudicated solely for an act that would constitute a violation as defined in subdivision three of section 10.00 of the penal law be directed, under any of the provisions of this article.

§4. Subdivision 1 of section 350.1 of the family court act, as amended by chapter 398 of the laws of 1983, is amended to read as follows:

1. If the respondent is detained and has not been found to have committed a designated felony act, the dispositional hearing shall commence not more than ten days after the entry of an order pursuant to subdivision one of section 345.1, except as provided in subdivision three; provided, however, that if the respondent has been found to have committed solely a violation as defined in subdivision three of section 10.00 of the penal law, the respondent shall not be detained pending disposition.

§5. Subdivision 4 of section 352.2 of the family court act, as added by section 56-b of part www of chapter 59 of the laws of 2017, is amended to read as follows:

4. Where a youth receives a juvenile delinquency adjudication for conduct committed when the youth was age sixteen or older that would solely constitute a violation as defined in subdivision three of section 10.00 of the penal law, the court shall have the power to enter an

order of disposition in accordance with [paragraphs] paragraph (a) **[**and (b)**]** of subdivision one of this section. The court shall not order detention or placement of a youth solely adjudicated under this subdivision.

§6. Subdivision 6 of section 360.3 of the family court act, as added by chapter 920 of the laws of 1982, is amended to read as follows:

6. At the conclusion of the hearing the court may revoke, continue or modify the order of probation or conditional discharge. If the court revokes the order, it shall order a different disposition pursuant to section 352.2 provided, however, that if the court finds a violation of an order of conditional discharge where the underlying finding had been for an act solely constituting a violation as defined in subdivision three of section 10.00 of the penal law, the court may modify the conditions of the conditional discharge but may not order any other disposition under section 352.2 of this act. If the court continues the order of probation or conditional discharge, it shall dismiss the petition of violation.

§7. Subdivision 1 of section 510.15 of the criminal procedure law, as amended by section 36 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

1. When a principal who is under the age of sixteen is committed to the custody of the sheriff the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services as a juvenile detention facility for the reception of children. When a principal who (a) commencing October first, two thousand eighteen, is sixteen years of age; or (b) commencing October first, two thousand nineteen, is sixteen or seventeen years of age, is committed to the custody of the sheriff, the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services in conjunction with the state commission of correction as a specialized secure juvenile detention facility for older youth. Where such a direction is made the sheriff shall deliver the principal in accordance therewith and such person shall although lodged and cared for in a juvenile detention facility continue to be deemed to be in the custody of the sheriff. No principal under the age specified to whom the provisions of this section may apply shall be detained in any prison, jail, lockup, or other place used for adults convicted of a crime or under arrest and charged with the commission of a crime without the approval of the office of children and family services which shall consult with the commission of correction if the principal is sixteen years of age or older in the case of each principal and the statement of its reasons therefor; nor shall a principal under the age

specified who is charged solely with a violation as defined in subdivision three of section 10.00 of the penal law be subject to detention. The sheriff shall not be liable for any acts done to or by such principal resulting from negligence in the detention of and care for such principal, when the principal is not in the actual custody of the sheriff.

§8. This act shall take effect immediately.

7. Notification and engagement of parents in proceedings before the Youth Parts of superior criminal courts [C.P.L. §§120.90, 140.20, 140.27, 140.40, 722.00, 722.10]

The new statute raising the age of criminal responsibility requires law enforcement, upon the arrests of 16-year olds starting in October, 2018, and 17-year olds starting in October 2019, to notify parents or other persons legally responsible for the adolescents' care both as to where the youth are being held and, if interrogating the youth, as to the youth's *Miranda* rights. *See* Criminal Procedure Law §§1.20(7), 140.20(6), 140.27(5), 140.40(5) [L. 2017, c. 59, Pt. WWW]. This reflects a salutary recognition of the importance of involving parents and legally responsible individuals involved in adolescents' cases, since these youth are still minors who are dependent upon their families both for sustenance and for guidance.

The Family Court Advisory and Rules Committee is proposing a measure to build upon this recognition by requiring notification of probation case plan efforts and of details to the extent available of when and where the youth will be arraigned in court. Similar to Family Court Act §341.2(3), the proposal also amends section 722.00(1) to require the presence of parents or other persons legally responsible at all proceedings in the Youth Part, with the caveat that the court would "not be prevented from proceeding by the absence of such parent or person if reasonable and substantial effort has been made to notify such parent or other person."

The *Final Report of the Governor's Commission on Youth, Public Safety and Justice* (2015) at 53, 56, noted how critical it is for parents and family members to be engaged in the adjustment process, to assist youth when they are interrogated and to be made aware of their arrests. The Commission noted that current criminal procedures do not include parents or legally responsible adults:

> Because these proceedings follow adult criminal procedures, the youth's parents are not formally involved in proceedings at arraignment, or at any point in the court process. *Id*, at 56.

The *Enhanced Juvenile Justice Guidelines* issued by the National Council of Juvenile and Family Court Judges in January, 2019 included as a "Guiding Principle" that:

> Juvenile justice system staff should engage parents and families at all stages of the juvenile justice court process to encourage family members to participate fully in the development and implementation of the youth's intervention plan. *Id.*, at p. 3.

The *Guidelines* explained that "[d]ispositions will only be effective if the juvenile delinquency court ensures that the youth and parents, probation, and service providers follow through with court orders." *Id*. The *Guidelines* include notification and inclusion of parents and guardians at every stage of the process from arrest, through probation diversion, detention,

disposition and post-disposition proceedings. *Id.*[10] Likewise, the *Juvenile Justice Standards* promulgated by the American Bar Association and Institute for Judicial Administration almost 40 years ago emphasize the need to notify parents and guardians and include them at every stage. *See* IJA-ABA *Standards Relating to*: *Adjudication* §§1.4, 3.7, 4.5; *Disposition Procedures* §3.1; *Interim Status* §§5.3, 6.5; *Juvenile Probation Function* §2.4(E).[11]

In construing Family Court Act §340.2(3), appellate courts in New York State have repeatedly underscored the importance of involving parents and legally responsible adults in their children's court proceedings, reversing Family Court delinquency plea allocutions and dispositions where insufficient efforts had been made to notify them or, where notified, to give them a reasonable opportunity to appear in court. *See, e.g.,* Matter of Nikim M., 144 A.D.3d 424 (1st Dept., 2016); Matter of Alexander B., 126 A.D.3d 533 (1st Dept., 2015); Matter of John L., 125 A.D.2d 472 (2nd Dept., 1986); Matter of John D., 104 A.D.2d 885 (2nd Dept., 1984); Matter of Tracy B., 80 A.D.2d 792 (1st Dept., 1981); Matter of Smith, 21 A.D.2d 737 (4th Dept., 1964).

Incorporation of provisions similar to those applicable in Family Court regarding parental notification and engagement both in the adjustment and in the court process would significantly enhance the capacity of the newly created Youth Parts to meet their statutory goals of providing specialized treatment tailored to the needs and to the still-nascent capacities of adolescents.

Proposal

AN ACT to amend the criminal procedure law, in relation to notification to, and engagement of, parents in proceedings involving sixteen and seventeen year old defendants in youth parts in superior courts

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 7 of section 120.90 of the criminal procedure law, as amended by section 16 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

7. Upon arresting a juvenile offender or adolescent offender, the police officer shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that the juvenile offender or adolescent offender has been arrested, [and] the location of the facility where he or she is being detained or questioned and the location of the court where he or she will be arraigned or appear, as well as the date and approximate time if known.

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[10] *Enhanced Juvenile Justice Guidelines: Improving Court Practice in Juvenile Justice Cases* (National Council of Juvenile and Family Court Judges, Jan., 2019) at ch. 2,p. 7, 33; ch. 3, p. 9,12; ch. 4, p. 3,6,9; ch. 5, p. 12; ch. 6, p. 4, 6,7; ch. 7, p. 2,9.16,18,22; ch. 8, p.7; ch. 9, p. 3,6,7; ch. 10, p. 8, 16, 17; ch. 11, p. 7.

[11] American Bar Association, *IJA-ABA Juvenile Justice Standards Annotated: A Balanced Approach* 2, 7, 9, 104, 122, 127, 130, 157 (1996).

§2. The opening paragraph of subdivision 6 of section 140.20 of the criminal procedure law, as amended by section 20 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

6. Upon arresting a juvenile offender or a person sixteen or commencing October first, two thousand nineteen, seventeen years of age without a warrant, the police officer shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that such offender or person has been arrested, and the location of the facility where he or she is being detained or questioned and the location of the court where he or she will be arraigned or appear, as well as the date and approximate time if known. If the officer determines that it is necessary to question a juvenile offender or such person, the officer must take him or her to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the juvenile or such person, to his or her residence and there question him or her for a reasonable period of time. A juvenile or such person shall not be questioned pursuant to this section unless he or she and a person required to be notified pursuant to this subdivision, if present, have been advised:

§3. The opening paragraph of subdivision 5 of section 140.27 of the criminal procedure law, as amended by section 23 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

5. Upon arresting a juvenile offender or a person sixteen or commencing October first, two thousand nineteen, seventeen years of age without a warrant, the peace officer shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that such offender or person has been arrested, and the location of the facility where he or she is being detained or questioned and the location of the court where he or she will be arraigned or appear, as well as the date and approximate time if known. If the officer determines that it is necessary to question a juvenile offender or such person, the officer must take him or her to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of a juvenile offender or such person, to his or her residence and there question him or her for a reasonable period of time. A juvenile offender or such person shall not be questioned pursuant to this section unless the juvenile offender or such

person and a person required to be notified pursuant to this subdivision, if present, have been advised:

§4. The opening paragraph of subdivision 5 of section 140.40 of the criminal procedure law, as amended by section 24 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

If a police officer takes an arrested juvenile offender or a person sixteen or commencing October first, two thousand nineteen, seventeen years of age into custody, the police officer shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that such offender or person has been arrested, and the location of the facility where he or she is being detained or questioned and the location of the court where he or she will be arraigned or appear, as well as the date and approximate time if known. If the officer determines that it is necessary to question a juvenile offender or such person the officer must take him or her to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the juvenile offender or such person, to his or her residence and there question him or her for a reasonable period of time. A juvenile offender or such person shall not be questioned pursuant to this section unless he or she and a person required to be notified pursuant to this subdivision, if present, have been advised:

§5. Subdivision 1 of section 722.00 of the criminal procedure law, as added by section 1-a of part www of chapter 59 of the laws of 2017, is amended to read as follows:

1. All juvenile offenders and adolescent offenders shall be notified of the availability of services through the local probation department. Such services shall include the ability of the probation department to conduct a risk and needs assessment, utilizing a validated risk assessment tool, in order to help determine suitable and individualized programming and referrals. Participation in such risk and needs assessment shall be voluntary and the adolescent offender or juvenile offender may be accompanied by counsel during any such assessment. The local probation department shall make reasonable and substantial efforts to secure the participation of the parent or other person responsible for the care of the juvenile offender or adolescent offender in the risk and needs assessment but shall not be prevented from proceeding by the absence of such parent or person. Based upon the assessment findings, the probation department shall refer the adolescent offender or juvenile offender to available and appropriate

services.

§6. Section 722.10 of the criminal procedure law is amended by adding a new subdivision 3 is added to read as follows:

3. In all proceedings under this article, the parent or other person responsible for the care of the juvenile offender or adolescent offender shall be present. However, the court shall not be prevented from proceeding by the absence of such parent or person if reasonable and substantial effort has been made to notify such parent or other person.

§7. This act shall take effect immediately.

8. Video recording of interrogations of juveniles in juvenile delinquency proceedings in Family Court [F.C.A. §§305.2, 344.2]

The enactment of a requirement for video recording of interrogations of suspects in certain cases, both adult and juvenile, as part of the FY 2017-2018 budget was a major step forward, consistent with the New York State Unified Court System's Justice Task Force and reflective of the increasing national recognition of the value of video recording of statements of the accused in enhancing the accuracy of criminal proceedings. With the proliferation of inexpensive recording technology, there has been a growing national consensus in favor of recording interrogations. Coupled with the advancing knowledge regarding the still-developing adolescent brain, the consensus has been particularly strong with respect to interrogations of youth. However, because of the severe limitations of the enumerated crimes requiring recording and the numerous exceptions to the recording mandate even for those cases, the new statute has almost no applicability to suspects who need it most, that is, those accused of juvenile delinquency whose cases are prosecuted in Family Court. The new law only applies to Class A-1 felonies (not including controlled substances offenses), predatory sex offenses [Penal Law §§130.95 and 130.96] and Class B violent felony homicide and sex offenses [Penal Law Articles 125 and 130 defined in Penal Law §70.02], rare crimes by juveniles, almost all of which are prosecuted in adult criminal courts as juvenile offenses. *See* Penal Law §10.00(18); Criminal Procedure Law §1.20(42). The Family Court Advisory and Rules Committee, therefore, is proposing a measure requiring video recording of all interrogations of accused juvenile delinquents where such interrogations take place in law enforcement facilities approved for the questioning of youth.

The Committee's measure amends sections 305.2 and 344.2 of the Family Court Act to require video recording in all cases in which juveniles are interrogated and must cover the entire interrogations, including the provision of *Miranda* warnings and the waiver, if any, of rights by the juveniles. As in chapter 59 of the Laws of 2017, the measure requires that recording procedures be consistent with regulations to be promulgated by the New York State Division of Criminal Justice Services (DCJS).[12] The measure is applicable to interrogations that take place in law enforcement facilities, which, pursuant to Family Court Act §305.2(4) and section 205.20 of the Uniform Rules of the Family Court, must be in rooms that have been inspected and approved by the Chief Administrator of the Courts for the questioning of youth. All persons in the recording must be identifiable and the speech must be intelligible. As is applicable to other statements by juveniles, the recording would be subject to discovery pursuant to Family Court Act §331.2. Further, like other factors in juvenile delinquency *Huntley* hearings, including the presence or absence of parents, location of questioning and the validity of any waiver of rights, the fact and quality of the recording would be among the factors comprising the totality of circumstances affecting the admissibility of accused juveniles' statements. As provided in chapter 59, the failure to record would not, by itself, be a ground for granting a suppression

[12] Although new regulations have not been promulgated to date, the Municipal Police Training Council of the NYS DCJS published *Recording of Custodial Interrogations: Model Policy* in 2013, which is available at the following link: http://www.criminaljustice.ny.gov/ofpa/pdfdocs/2017-18_video_recording_statements_rfp.pdf

motion.

The widespread recognition of the value of recording interrogations reflects its advantages in enhancing the accuracy of the criminal process, advantages that may be even more compelling in juvenile cases. The Justice Task Force, established by former Chief Judge Jonathan Lippman and formerly chaired by current Chief Judge Janet DiFiore, in January, 2012, issued "Recommendations Regarding Electronic Recording of Custodial Interrogations" as one means of ameliorating the problem of false confessions that has led to wrongful convictions:

> The reform most universally urged by academics and others and most commonly adopted in other jurisdictions to identify and prevent false confessions is electronic recording of interrogations. Indeed, there was unanimous agreement on the Task Force about the many benefits of recording interrogations. The Task Force agreed that recording can aid not only the innocent, the defense and the prosecution, but also enhances public confidence in the criminal justice system by increasing transparency as to what was said and done during the interrogation.
>
> Indeed, among its many benefits, recording helps identify false confessions; provides an objective and reliable record of what occurred during an interrogation; assists the judge and jury in determining a statement's voluntariness and reliability; prevents disputes about how an officer conducted himself or treated a suspect, and serves as a useful training tool to police officers.

Id. at p. 2.

While urging that recording be mandatory at least in certain circumstances, the Task Force acknowledged the voluntary guidelines adopted in December, 2010, by the New York State District Attorneys Association that were developed in conjunction with the New York City Police Department, the New York State Police, the New York State Chiefs of Police Association, and the New York State Sheriffs' Association. *Id*. at p. 2, note 2. These *New York State Guidelines for Recording Custodial Interrogations of Suspects, inter alia*, at pps 6-7, noted that questioning of accused juvenile delinquents should be recorded in court-approved juvenile questioning rooms upon compliance with parental notification requirements and suggested that simplified *Miranda* warnings be used.

Significant State and Federal funds have already been invested in equipment to enable law enforcement agencies statewide to record interrogations, both of adults and of juveniles. Since 2007, State funds have been made available to assist prosecutors and law enforcement in communities both large and small to expand their capacities to record interrogations. *See* T. Sullivan, "Arguing for Statewide Uniformity in Recording Custodial Interrogations," 29 Criminal Justice 21 (Spring, 2014); K. Hamann, "Outside Counsel: Police and District Attorneys Endorse Video Recording of Interrogations," N.Y.L.J., Aug. 8, 2011. In a July, 2013 press release, announcing one million dollars in State funds to expand video recording throughout the State, Governor Cuomo indicated that 345 police agencies in 58 of the 62 counties were already video

recording interrogations.[13] In a July, 2016 press release, characterizing video recording as "widely recognized as a best practice for enhancing the fairness and effectiveness of the criminal justice system," Governor Cuomo and Manhattan District Attorney Cyrus Vance, Jr., announced a $500,000 grant to expand the program, with preference accorded to agencies that had not received funds in 2013.[14] Over one million dollars in State funds have thus been expended to date, resulting in at least one law enforcement facility in every one of the State's 62 counties equipped to record interrogations.[15]

The factors favoring video recording of interrogations of adults are magnified when applied to juveniles accused of acts of delinquency. The International Association of Chiefs of Police, in its publication, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation* (IACP, Sept., 2012; www.iacp.org), recommended video recording of juvenile interrogations on the ground that the lack of full development of the pre-frontal cortex in adolescents, which governs judgment, decision-making and understanding of consequences, makes them more vulnerable to giving false confessions.[16] These adolescent development factors were central to the decisions of the United States Supreme Court in the cases outlawing the juvenile death penalty, limiting life without parole and requiring age to be considered a factor in determining whether a school-based police interrogation was custodial for purposes of assessing the voluntariness of the juvenile's waiver of the right to counsel. *See* Roper *v.* Simmons, 543 U.S. 551 (2005); Miller *v.* Alabama, 132 S.Ct. 2455 (2012); J.D.B. *v.* North Carolina, 131 S.Ct. 2394 (2011); Graham *v.* Florida, 130 S.Ct. 2011 (2010).

Significantly, the juvenile justice chapter of the comprehensive report, *Reforming Criminal Justice*, recently issued by the Academy for Justice, noted the consensus in favor of recording juvenile interrogations that has been reached by "legal scholars, psychologists, law enforcement, and justice-system personnel," noting that it "reduces coercion, diminishes dangers

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[13] Press release, "Governor Cuomo Announces One Million Dollars to Help Law Enforcement Purchase Equipment to Video Record Interrogations " (July 15, 2013). Also, the New York State District Attorneys Association indicated that as of June, 2013, there were already more than 380 video recording facilities in counties throughout the State. *See* Letter in support of S 4484-a/A 6800, dated June 21, 2013, from Cyrus Vance, then-President, New York State District Attorneys Association.

[14] Press release, "Governor Cuomo, Manhattan DA Vance Announce $500,000 for Law Enforcement to Purchase Equipment to Video Record Interrogations" (July 6, 2016). *See also*, "Editorial: Interrogation Tapings are About Fairness," *Schenectady Daily Gazette*, July 11, 2016; "Police Get Funds to Record Suspect Interviews," *Journal News*, Oct. 25, 2016; "Police Get $250G to Record Interrogations," *Newsday,* Oct. 25, 2016 (Nassau County).

[15] *Id.*

[16] The report cited three studies: a study of 340 wrongful convictions in which 42% of the juveniles falsely confessed, as compared to 13% of the adults; a study of 125 proven false confessions, in which 32% involved youth under 18; and a study of juvenile wrongful convictions that found that youth "were almost twice as likely as adults to falsely confess." IACP, *supra,* p. 6, notes 7-9 [citing S. Gross, *et al*, "Exonerations in the United States 1989-2003," 95 *J. Of Crim. Law & Criminology* 2:523-560 (2005); S. Drizin and R. Leo, "The Problem of False Confessions in a post-DNA World," 82 N.C.L.Rev. 891 (2004); J. Tepler, L. Nirider and L.Tricarico, "Arresting Development: Convictions of Innocent Youth," 62 *Rutgers L.Rev.* 4:887 (2010)].

of false confessions and increases reliability:"[17]

> Recording creates an objective record and provides an independent basis to resolve credibility disputes about *Miranda* warnings, waivers, or statements. It enables a judge to decide whether a statement contained facts known to a guilty perpetrator or whether police supplied them to an innocent suspect. Recording protects police from false claims of abuse, enhances professionalism and reduces coercion. It enables police to focus on suspects' responses, to review details of an interview not captured in written notes, and to test them against subsequently discovered facts. Recording avoids distortions that occur when interviewers rely on memory or notes to summarize a statement.

The movement toward requiring video recording of interrogations of juveniles has been advancing nationally. By 2012, when the IACP report was issued, there were 16 States that mandated recording by statute or case law, in addition to the many states with legislation pending. Particularly noteworthy among these statutes are those in Illinois and North Carolina .[18] Additionally, the Wisconsin Supreme Court, in In Re Jerrell C.J., 699 N.W. 2d 110 (Wis., 2005), used its supervisory authority to require video recording of juvenile interrogations.

The benefits not only to the juveniles, but also to the justice system, of enhancing the requirements established in chapter 59 for video recording of interrogations of juveniles in New York are substantial. Requiring a transparent interrogation process will not only assist in preventing false confessions and wrongful adjudications but will provide an objective basis for the Family Court to evaluate the validity of a juveniles' waivers of rights as well as the substance of the statements themselves. Judges have reported frequent cases involving disparities in testimony between witnesses to the interrogation, *e.g.*, parents and police officers. Having an objective basis upon which the Court can determine the accuracy of witnesses' testimony will be invaluable. It protects the juveniles' statutory and constitutional rights, while at the same time protecting law enforcement by providing a reliable record of the circumstances surrounding interrogations and their compliance with statutory requirements and protocols. Further, it is likely to reduce the number of contested suppression hearings, thus facilitating expeditious resolution and timely adjudication of juvenile delinquency cases. Finally, enactment of the Committee's proposal would not only be beneficial; it would also be practical and non-burdensome, as inexpensive and unobtrusive recording equipment is already widely available to law enforcement and prosecutors' agencies.

Proposal:

AN ACT to amend the family court act, in relation to video recording of interrogations of juveniles in juvenile delinquency proceedings in family court

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[17] B.C. Feld, "Juvenile Justice," in Academy for Justice, *Reforming Criminal Justice*, vol. 1, page 356 (2017) [http://academyforjustice.org/wp-content/uploads/2017/10/14_Reforming-Criminal-Justice_Vol_1_Juvenile-Justice.pdf].

[18] West's Smith-Hurd Illinois Compiled Stats. Ann., ch. 705 §5-5-401.5 (effective July 16, 2014); West's N.C. Stats. Ann. §15A-211 (effective Dec, 1, 2011).

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 8 of section 305.2 of the family court act, as amended by chapter 398 of the laws of 1983, is amended and a new subdivision 5-a is added to read as follows:

5-a. Where a child is subject to interrogation at a facility designated by the chief administrator of the courts as a suitable place for the questioning of juveniles pursuant to subdivision four of this section, the entire interrogation, including the giving of any required notice to the child as to his or her rights and the child's waiver of any rights, shall be video recorded in a manner consistent with standards established by rule of the division of criminal justice services pursuant to paragraph (e) of subdivision three of section 60.45 of the criminal procedure law. The interrogation shall be recorded in a manner such that the persons in the recording are identifiable and the speech is intelligible. A copy of the recording shall be subject to discovery pursuant to section 331.2 of this article.

8. In determining the suitability of questioning and determining the reasonable period of time for questioning such a child, the child's age, the presence or absence of his or her parents or other persons legally responsible for his or her care [and], notification pursuant to subdivision three and, where the child has been interrogated at a facility designated by the chief administrator of the courts as a suitable place for the questioning of juveniles, whether the interrogation was in compliance with the video-recording and disclosure requirements of subdivision five-a of this section shall be included among relevant considerations.

§ 2. Subdivision 3 of section 344.2 of the family court act, as amended by section 2 of part vvv of chapter 59 of the laws of 2017, is amended to read as follows:

3. Where a respondent is subject to [custodial] interrogation by a public servant at a facility specified in subdivision four of section 305.2 of this article, the entire [custodial] interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded [and governed] in [accordance] a manner consistent with [the provisions of paragraphs (a), (b), (c), (d) and] standards established by rule of the division of criminal justice services pursuant to paragraph (e) of subdivision three of section 60.45 of the criminal procedure law. The interrogation shall be recorded in a manner such that the persons in the recording are identifiable and the speech is

intelligible. A copy of the recording shall be subject to discovery pursuant to section 331.2 of this article.

§ 3. This act shall take effect on the first of November in the year next succeeding the year in which this act shall have become a law and shall apply only to confessions, admissions or other statements made on or after such effective date; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed by the division of criminal justice services on or before such effective date.

9. Determinations of capacity to stand trial in juvenile delinquency proceedings [F.C.A. §§322.1, 322.2]

Family Court Act §303.1(1) provides that the Criminal Procedure Law is not applicable in juvenile delinquency proceedings unless a similar provision is included in the Family Court Act or unless it is incorporated by reference. Therefore, in order to apply in Family Court, amendments to the Criminal Procedure Law must be reflected in a specific reference or similar provision in the Family Court Act. When an issue of capacity to stand trial is raised -- that is, an issue regarding the ability of the accused juvenile to understand the proceedings and assist in his or her own defense[19] -- several provisions of the Criminal Procedure Law, including an amendment enacted in 2012, have not been referenced in the Family Court Act. The Family Court Advisory and Rules Committee is submitting a measure to adapt provisions from the Criminal Procedure Law into the Family Court regarding the settings for both initial evaluations and, where a lack of capacity to stand trial is found, the provision of treatment services.

First, Criminal Procedure Law 730.20 provides that where a criminal defendant is in custody, the examination should be conducted at the detention center or jail in which he or she is being held unless hospitalization is required. Where a defendant is not in custody, the evaluation may be conducted on an outpatient basis. The Committee's measure thus amends Family Court Act §322.1 to remove the requirement that examinations be conducted in a hospital setting in order to provide that, where a juvenile respondent is in custody, the examination may be conducted at the detention center. This is consistent with the decision of the Family Court in Matter of Justin L., 56 Misc.3d 1167 (Fam. Ct., Kings Co., 2017), in which the Court's Mental Health Service Clinic was ordered to send evaluators to the juvenile detention center since Bellevue Hospital maintained that its clinicians were not trained to perform capacity examinations for juveniles.

A national guide for drafting juvenile competency statutes, compiled by a panel of leading national experts under the auspices of the MacArthur Foundation's "Models for Change" project, advocates flexibility in the location of capacity evaluations, noting that hospitalization is not required:

> Mental health examiners are able to perform competency evaluations of juveniles in their offices in the community or in pretrial detention centers. Therefore, drafters are encouraged to include in the statute a "least restrictive alternative" provision. ...
>
> If juveniles do not need psychiatric hospitalization (*i.e.*, do not meet a state's criteria for civil commitment), there is no reason to hospitalize them for a competency evaluation, and many reasons to avoid it. First, competency evaluations can be performed well without hospitalization. Second, while many youth who are not mentally ill have special needs

[19] Family Court Act §301.2(13) defines an "incapacitated person" as an accused juvenile "who, as a result of mental illness, or intellectual or developmental disability as defined in sudivisions twenty and twenty-two of section 1.03 of the mental hygiene law, lacks capacity to understand the proceedings against him or her or to assist in his or her own defense."

> (e.g., youth with developmental disabilities or less serious mental illnesses), psychiatric hospitals are not designed to meet those youths' needs. Third, psychiatric hospitalization is very expensive, with estimates of the daily cost of treating one patient in an inpatient psychiatric unit ranging from $700 to over $1,000 per day. [Footnote omitted.] Moreover, many states have only a handful of psychiatric hospital beds for children at any given time, and they are almost always occupied.
>
> When juveniles do not require psychiatric treatment, courts in some cases will decide that they need a secure setting because they might otherwise endanger themselves or endanger others. This may lead to placement in a detention center or jail. Competency evaluations can be conducted effectively in such facilities.
>
> If neither inpatient psychiatric hospitalization nor a secure, non-psychiatric facility is required, the juvenile can be evaluated in a community-based setting, such as the evaluator's office, at a community outpatient mental health center, or within the courthouse. This community-based option not only respects the juveniles' liberty interests by keeping them within the least restrictive setting when possible, but it is also much more cost effective and is associated with better outcomes for these juveniles.

K. Larson and T. Grisso, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers* 55 -56 (Models for Change, National Youth Screening and Assessment Project, MacArthur Foundation, Nov., 2011). The experts thus recommended that

> Evaluations for juveniles' competence to stand trial should occur in the least restrictive setting appropriate for their psychological needs, typically while residing in the community or in pretrial detention. Specifically, psychiatric hospitalization for evaluations should be allowed only when the youth's psychiatric condition requires inpatient psychiatric care.

Id., at 57.

Second, the Committee's proposal amends Family Court Act §322.2 to permit treatment services to be provided on an outpatient basis for youth deemed to lack capacity. As the Family Court noted, in Matter of Justin L., *supra*, that, whereas sections 730.40 and 730.50 of the Criminal Procedure Law had been amended in 2012 to permit treatment to be provided in felony cases on an outpatient basis with the prosecutors' consent [L.2012, c. 56, pt. Q], the Family Court Act appeared to allow no such flexibility. Faced with inadequate options for treatment of a juvenile with multiple diagnoses, the Court was constrained to commit the youth to the Office of Mental Health but indicated that, had a similar amendment been made to the Family Court Act, she might have been able to explore whether appropriate outpatient options might have been available.

Importantly, the Committee's proposal brings the Family Court Act into harmony with

existing provisions of the Mental Hygiene Law. Both sections 7.09(e) and 13.09(c) of the Mental Hygiene Law, addressing commitments by Family Court to the Commissioners of Mental Health and the Office of People with Disabilities, respectively, state that upon commitment, the Commissioner "may place the juvenile in any appropriate facility or program under his jurisdiction, but he [or she] shall comply with any order requiring treatment in a residential facility made pursuant to paragraph (c) of subdivision five of section 322.2 of the family court act." Clearly, if all commitments were to residential facilities, there would be no need for the phrase "or program" and the last clause about complying with an order specifying residential care would be redundant.

Just as flexibility is appropriate regarding the location of the evaluation, so, too, flexibility is warranted in the location of treatment services needed to bring the juvenile to competence. As the Models for Change experts indicated:

> If a juvenile is found incompetent to stand trial and is considered to be capable of remediation, the remediation can be accomplished either in an inpatient or a community-based setting. It is difficult to identify specific settings for all communities, since communities vary in the availability of various types of inpatient or community-based services.Therefore, we offer some basic principles that a state might consider in determining the proper placement for youth who require remediation of incompetence.
>
> First, *the setting should match the level of clinical treatment needs of the youth.* Thus, youth whose incompetence is related to a serious mental disorder that ordinarily would require inpatient treatment are appropriate for competence remediation in an inpatient psychiatric setting designed for children. This is appropriate because psychiatric treatment is likely to be needed in order to reduce the symptoms of disorder that are likely to be at the root of the youth's incompetence. *No other incompetent youth, however, should require placement in inpatient psychiatric treatment programs for competence remediation* — for example, youth whose incompetence is related to intellectual disability or developmental immaturity and for whom mental disorder is absent (or present only in a form that typically does not require hospitalization for treatment).
>
> Second, for youth not requiring inpatient psychiatric treatment, *remediation should be accomplished in community based settings that match the level of security required for community safety or for assuring that the youth will be available for later trial*. Youth presenting security issues can be remediated while in juvenile detention centers or staff-secure shelters. Youth not requiring those levels of security can be considered for remediation while living at home or other non-secure settings.
>
> Third, *some youth who do not need psychiatric hospitalization may nevertheless have special needs that warrant special community-based arrangements during the time of their remediation*. Examples include: (a) youth who might need temporary placement in residential programs for youth with intellectual disabilities, if their own homes do not provide adequate care and supervision, or (b) youth who have less acute mental disorders

> who may need community based mental health center contact while living at home or in some other protected residential program.

Larson and Grisso, *supra*, at p. 71.

Third, similar to Criminal Procedure Law §730.40(2), the measure amends subdivision four of section 322.2 of the Family Court Act to provide that a dismissal of a petition upon issuance of an order of commitment "constitute[s] a bar to further prosecution of the charge or charges contained in the petition." If prosecution of criminal charges regarding adults are barred, there is no justification for not providing a similar bar in analogous juvenile delinquency cases.

There is no justification to deny to juveniles the legal options available in adult criminal cases regarding the evaluation of competency to stand trial and, for those found to lack capacity, provision of treatment services needed to achieve it. Enactment of the Committee's proposal will fill a needed gap in the statutory framework for these rare but challenging cases and will incorporate the flexible approaches recognized as national models. As the Court stated, in Matter of Justin L., *supra*:

> The lack of flexibility in a statute that governs children who have been found to lack capacity to understand the proceedings appears inconsistent with the general purpose of the Family Court Act, which is "to empower the Family Court to intervene and positively impact the lives of troubled young people while protecting the public." Matter of Robert J., 2 N.Y.3d 339 (2004); *See also* Family Court Act §301.1. The purpose is not punishment. The Family Court is "given a wide range of powers for dealing with the complexities of family life so that its action may fit the particular needs of those before it." F.C.A. §141.

Proposal

AN ACT to amend the family court act, in relation to the determination of capacity to stand trial in juvenile delinquency proceedings in family court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 322.1 of the family court act, as amended by chapter 566 of the laws of 1994, is amended to read as follows:

1. At any proceeding under this article, the court must issue an order that the respondent be examined as provided herein when it is of the opinion that the respondent may be an incapacitated person. Notwithstanding the provisions of this or any other law, the court may direct that the examination be conducted on an outpatient basis [when]. If the respondent is [not] in custody at the time the court issues an order of examination, the examination may be conducted at the place where the respondent is being held in custody. The court shall order that two qualified

psychiatric examiners as defined in subdivision seven of section 730.10 of the criminal procedure law examine the respondent to determine if he or she is mentally ill[, mentally retarded] or intellectually or developmentally disabled.

§2. Subdivision 4, paragraphs (a), (c) and (d) of subdivision 5 and subdivisions 6 and 7 of section 322.2 of the family court act, paragraph (a) of subdivision 5 as amended by section 106(b) of part www of chapter 59 of the laws of 2017 and subdivision 4, paragraphs (c) and (d) of subdivision 5 and subdivisions 6 and 7 as added by chapter 920 of the laws of 1982, are amended to read as follows:

4. If the court finds that there is probable cause to believe that the respondent committed a misdemeanor, the respondent shall be committed to the custody of the appropriate commissioner for a reasonable period not to exceed ninety days. The court shall dismiss the petition on the issuance of the order of commitment and such dismissal shall constitute a bar to further prosecution of the charge or charges contained in the petition.

5. (a) If the court finds that there is probable cause to believe that the respondent committed a felony, it shall order the respondent committed to the custody of the commissioner of mental health or the commissioner of the office for people with developmental disabilities for an initial period not to exceed one year from the date of such order. Unless the court specifies that such commitment shall be in a residential facility, such commissioner may arrange for treatment in an appropriate facility or program, including an outpatient program, in accordance with subdivision (e) of section 7.09 or subdivision (c) of section 13.09, respectively, of the mental hygiene law. Such period may be extended annually upon further application to the court by the commissioner having custody or his or her designee. Such application must be made not more than sixty days prior to the expiration of such period on forms that have been prescribed by the chief administrator of the courts. At that time, the commissioner must give written notice of the application to the respondent, the counsel representing the respondent and the mental hygiene legal service if the respondent is at a residential facility. Upon receipt of such application, the court must conduct a hearing to determine the issue of capacity. If, at the conclusion of a hearing conducted pursuant to this subdivision, the court finds that the respondent is no longer incapacitated, he or she shall be returned to the family court for further proceedings pursuant to this article. If the court is satisfied that the respondent continues to be incapacitated, the court shall authorize continued custody of the respondent by the commissioner in a facility or program

for a period not to exceed one year. Such extensions shall not continue beyond a reasonable period of time necessary to determine whether the respondent will attain the capacity to proceed to a fact finding hearing in the foreseeable future but in no event shall continue beyond the respondent's eighteenth birthday or, if the respondent was at least sixteen years of age when the act was committed, beyond the respondent's twenty-first birthday.

(c) [If the court finds that there is probable cause to believe that the respondent has committed a designated felony act, the court shall require that treatment be provided in a residential facility within the appropriate office of the department of mental hygiene.

(d)] The commissioner shall review the condition of the respondent within forty-five days after the respondent is committed to the custody of the commissioner. He or she shall make a second review within ninety days after the respondent is committed to his or her custody. Thereafter, he or she shall review the condition of the respondent every ninety days. The respondent and the counsel for the respondent, shall be notified of any such review and afforded an opportunity to be heard. The commissioner having custody shall apply to the court for an order dismissing the petition whenever he or she determines that there is a substantial probability that the respondent will continue to be incapacitated for the foreseeable future. At the time of such application the commissioner must give written notice of the application to the respondent, the presentment agency and the mental hygiene legal service if the respondent is at a residential facility. Upon receipt of such application, the court may on its own motion conduct a hearing to determine whether there is substantial probability that the respondent will continue to be incapacitated for the foreseeable future, and it must conduct such hearing if a demand therefor is made by the respondent or the mental hygiene legal service within ten days from the date that notice of the application was given to them. The respondent may apply to the court for an order of dismissal on the same ground.

6. Any order pursuant to this section dismissing a petition shall not preclude an application for voluntary or involuntary care and treatment in a facility <u>or program</u> of the appropriate office of the department of mental hygiene pursuant to the provisions of the mental hygiene law. Unless the respondent is admitted pursuant to such an application he <u>or she</u> shall be released.

7. If the commissioner having custody of a child committed to a residential facility <u>pursuant to subdivision four or paragraph (a) of subdivision five of this section</u> determines at any

time that such child may be more appropriately treated in a non-residential facility or on an outpatient basis, he or she may arrange for such treatment. If the commissioner having custody of a child committed to a residential facility pursuant to paragraph (c) of subdivision five of this section determines at any time that such child may be more appropriately treated in a non-residential facility or on an outpatient basis, he or she may petition the family court for a hearing. If the court finds after a hearing that treatment in a non-residential facility or on an outpatient basis would be more appropriate for such child, the court shall modify its order of commitment to [authorize] direct the commissioner to transfer [of such] the child to a non-residential facility or arrange outpatient treatment. Application for [such] a hearing to determine whether any child committed to a residential facility under subdivisions four or five of this section may be more appropriately treated in a non-residential facility or on an outpatient basis may be made by the respondent.

§3. This act shall take effect on the ninetieth day after it shall have become a law.

10. Substitution of determinations of parentage for paternity and filiation in proceedings in Family Court
[F.C.A. §§115, 154, 262, 418, 439, 511, 512, 514, 516-a-519, 521-525, 531-545, 548-a, 548-b, 548-c, 549, 551, 561-564, 571, 817, 1084[CPLR 4518; DRL. §§73, 75-a, 111, 111-a, 111-b; Pub. Health .L. §§51345, 4135-b, 4138; S.S.L. §§110-a, 111-b, 111-n, 111-d, 111-g, 111-k, 111-p, 111-r, 111-v, 131, 349, 349-b, 352-b, 372-c, 384-c; Ed. L. §6509-c; E.P.T.L. §4-1.2]

Notions of parenthood have shifted dramatically in recent years. Couples are increasingly conceiving children through assisted reproduction, often utilizing donated embryos or sperm. Other than Article 5 of the Family Court Act, which was designed solely to adjudicate biological paternity, only section 73 of the Domestic Relations Law confers parentage upon individuals who agree to conceive a child together through less traditional means. And Domestic Relations Law §73 is limited to children born to married couples utilizing artificial insemination performed by physicians. For the parents of children conceived in ways not contemplated by Article 5 or DRL § 73, there is currently no statutory framework for formally and affirmatively conferring parenthood upon the non-biological participant in the child's conception.

The Committee is proposing a measure to fill this gap and to modernize New York's statutory structure. The measure amends Article 5 of the Family Court Act to expand the determination of parentage beyond traditional paternity determinations, substituting the more encompassing term "parentage" for "paternity" and "filiation." It also incorporates gender neutral terminology, where appropriate, in various provisions of the Family Court Act, Domestic Relations Law, Social Services Law, Civil Practice Law and Rules, Public Health Law, Estates, Powers and Trusts Law and Education Law. It leaves intact, however, references to two terms that have significant ramifications under Federal law, as well as in the laws of other states, that is, "acknowledgments of paternity" and the "putative father registry." The establishment of a system of "acknowledgments of paternity," as provided in Public Health Law §4135-b and Social Services law §111-k, is required by Federal law and regulations. *See* 42 U.S.C.A. §666(a)(5) and 45 C.F.R. 302.70(a)(50(iii), respectively. Likewise, virtually every state has a "putative father registry," as defined in Social Services Law §372-c, which is utilized in both child welfare and child support proceedings.

While not addressing surrogacy contracts, which are the subject of separate pending legislation (the "Child and Parent Security Act"), the measure includes provisions relevant to *in vitro* fertilization and other forms of assisted reproductive technology. The proposal defines assisted and collaborative reproduction and specifies the required contents of a petition. It states the requirements of a record acknowledging that gametes or embryos have been donated and a procedure for determinating donative intent in the absence of such a record. Likewise, it details the requirements of an agreement by the intended parents consenting to assisted reproduction and that even in the absence of a record, a court may find that an agreement existed if proven by clear and convincing evidence. Because the presumption of legitimacy afforded to married couples under Domestic Relations Law §24(1) may be rebutted in a case of assisted reproduction, married persons who conceive of a child through assisted reproduction may nonetheless obtain an order of parentage. However, the measure generally limits the ability of spouses to dispute parentage in cases of assisted reproduction to two years.

This proposal also incorporates two separate proposals, *infra*, by the Family Court Advisory and Rules Committee. First, it would amend the Family Court Act to clarify that a non-signatory to an acknowledgment of paternity (AOP) who comes forward alleging that he is the father has standing to file a parentage petition, notwithstanding the existence of an AOP signed by another individual. In such a case, the signatory to the AOP is a necessary party and would have to be named as a respondent. If appropriate, the Family Court would have discretion to order the signatory to submit to DNA testing, in addition to the petitioner, mother and child. The court would be required to issue an order vacating the AOP where a non-signatory has been found to be the father, even in the absence of a petition filed by the AOP signatory.

Second, the measure would modify the provisions in the Social Services Law and Domestic Relations Law to reflect that the authority to either consent to, or receive notice of and be heard with respect to, adoptions may not be restricted to alleged fathers. It substitutes the "time of the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earliest" for the ambiguous references to when the child has been "placed for adoption." The measure further delineates criteria for determining whether an alleged parent is a "notice-only" or "consent" parent, both with respect to children over the age of six months and those under six months of age:

■ Children over six months old at the time of filing: Additional factors supporting a finding that an alleged parent would have authority to consent to an adoption would include: those who have established legal parentage in a timely manner by having been adjudicated as the parent either by a court of competent jurisdiction or by having acknowledged paternity in a form recognized by the jurisdiction in which it was executed to have the force and effect of an order of parentage. For "consent" status, parentage must be legally established within six months of the child's first entry into foster care or be the result of a court action filed within six months of the child's birth, so long as that matter was actively prosecuted. The criterion regarding contact with the child would be modified to require two visits, rather than one, per month, which is the minimum standard in the regulations of the NYS Office of Children and Family Services. Additionally, in one context in which current law compels retention of gender-specific language, consent status would be conferred upon an individual who openly lived with (and held himself out as) the father of the child for a period of six months immediately preceding the earlier of the filing of a termination of parental rights or surrender proceeding.

■ Children under six months old at the time of filing: Curing the constitutional infirmity identified by the Court of Appeals almost 30 years ago in Matter of Raquel Marie X., 76 N.Y.2d 387 (1990), *cert. den. sub nom* Robert C. *v.* Miguel T., 498 U.S. 984 (1990), the measure uses the criterion of cohabitation with the child, rather than with the mother. It incorporates the more objective criteria for an unwed alleged parent who would be entitled to receive notice of a judicial proceeding concerning a child under section 111-a of the Domestic Relations Law or section 384-c of the Social Services Law.

■ Criteria and process for determining "notice-only" parents: The measure amends Social Services Law §384-c and Domestic Relations Law §111-a to include among those entitled to notice an individual in another state, territory or country who executed an acknowledgment of

paternity or was adjudicated as a parent by a court of competent jurisdiction, as well as an individual who filed a parentage or custody petition regarding a foster child that remains pending despite making best efforts to prosecute it and an individual who lived with the child, but not necessarily with the mother. Additionally, in cases in which a person given a notice of a termination of parental rights proceeding seeks to be given "consent," rather than "notice-only"status, the measure adds a new subdivision eight to Social Services Law §384-c requiring a hearing prior to the fact-finding hearing at which the petitioner in the underlying proceeding would have the burden of going forward and the alleged parent would then bear the ultimate burden of persuasion.

The need to update New York's statutory framework for determinations regarding parentage is beyond cavil. Even before New York State enacted the Marriage Equality Act (L.2011, c. 95), New York's courts recognized that parenthood was not necessarily limited to the definitions contained within the Family Court Act and the Domestic Relations Law. For instance, courts recognized that the best interests of a child may dictate that a man who is not the biological father may still be equitably estopped from denying paternity. Shondel J. *v* Mark D., 7 N.Y.3d 320 (2006). Courts also recognized that spouses in same-sex unions performed in other states or countries may be considered to be the parents of children born during the marriage notwithstanding the lack of a biological relationship. Debra H. *v.* Janice R. 14 N.Y.3d 576 (2010); H.M. *v.* E.T., 14 N.Y.3d 521 (2010). Since the Marriage Equality Act and the United States Supreme Court's decision in Obergefell *v.* Hodges, 135 S.Ct. 2584 (2015), recognition of non-traditional parentage has increased. Most significantly, the Court of Appeals held in Brooke S.B. *v.* Elizabeth A.C.C., 28 NY3d 1 (2016), that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing, as a parent, to seek visitation and custody. More recently, two appellate courts found that the marriage presumption in DRL § 24 may be used to recognize a same-sex spouse of a biological parent as a parent of the child while at the same time estopping the donor from asserting parental rights. Joseph O. v. Danielle B., 158 A.D.3d 767 (2nd Dept., 2018); Christopher YY *v.* Jessica ZZ, 159 A.D.3d 18 (3rd Dept., 2017).

In the absence of a framework for affirmatively establishing parenthood resulting from non-traditional conception, courts generally have only been able to establish it in connection with a related proceeding, such as a custody or support case. Not only is this unnecessarily confrontational and costly, it also denies parents and their children, who are not involved in such a proceeding, the opportunity to enjoy the security that an order of parentage provides. In addition, absent court intervention, the non-biological participant's name is not generally placed on the birth certificate, leading to the possibility that the parental relationship may never be formally recognized. Further, in child welfare and other contexts, many of the gender-specific limitations in the laws are inconsistent with current, expanded concepts of parenthood and thus fail to fully meet children's best interests. It is time for New York State statutes to catch up with evolving definitions of family, as well as advancing science. Enactment of the Committee's measure would fulfill that goal.

Proposal

AN ACT to amend the family court act, domestic relations law, social services law, civil practice law and rules, public health law, education law, and estates, powers and trust law, in relation to substituting parentage for paternity and filiation

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (iii) of subdivision (a) of section 115 of the family court act, as added by chapter 686 of the laws of 1962, is amended to read as follows:

(iii) proceedings to determine [paternity] parentage and for the support of children born out-of-wedlock, as set forth in article five;

§2. Subdivision (b) of section 154 of the family court act, as amended by chapter 214 of the laws of 1998, is amended to read as follows:

(b) In a proceeding to establish [paternity] parentage or to establish, modify or enforce support, the court may send process without the state in the same manner and with the same effect as process sent within the state in the exercise of personal jurisdiction over any person subject to the jurisdiction of the court under section three hundred one or three hundred two of the civil practice law and rules or under section 580-201 of article five-B of the family court act, notwithstanding that such person is not a resident or domiciliary of the state.

§3. Paragraph (viii) of subdivision (a) of section 262 of the family court act, as added by chapter 682 of the laws of 1975, is amended to read as follows:

(viii) the respondent in any proceeding under article five of this act in relation to the establishment of [paternity] parentage.

§4. Subdivision (a) of section 418 of the family court act, as amended in chapter 214 of the laws of 1998, is amended to read as follows:

(a) The court, on its own motion or motion of any party, when [paternity] parentage is contested, shall order the [mother,] parties and the child [and the alleged father] to submit to one or more genetic marker or DNA marker tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether the alleged [father] parent is or is not the [father] parent of the child. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the

basis of res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married [woman] couple. The record or report of the results of any such genetic marker or DNA test shall be received in evidence, pursuant to subdivision (e) of rule forty-five hundred eighteen of the civil practice law and rules where no timely objection in writing has been made thereto. Any order pursuant to this section shall state in plain language that the results of such test shall be admitted into evidence, pursuant to rule forty-five hundred eighteen of the civil practice law and rules absent timely objections thereto and that if such timely objections are not made, they shall be deemed waived and shall not be heard by the court. If the record or report of results of any such genetic marker or DNA test or tests indicate at least a ninety-five percent probability of [paternity] parentage, the admission of such record or report shall create a rebuttable presumption of [paternity] parentage, and, if unrebutted, shall establish the [paternity] parentage of and liability for the support of a child pursuant to this article and article five of this act.

§5. Subdivisions (a), (b) and (c) of section 439 of the family court act, subdivision (a) as amended by chapter 468 of the laws of 2012 and subdivisions (b) and (c) as amended by chapter 336 of the laws of 2004, are amended to read as follows:

(a) The chief administrator of the courts shall provide, in accordance with subdivision (f) of this section, for the appointment of a sufficient number of support magistrates to hear and determine support proceedings. Except as hereinafter provided, support magistrates shall be empowered to hear, determine and grant any relief within the powers of the court in any proceeding under this article, articles five, five-A, and five-B and sections two hundred thirty-four and two hundred thirty-five of this act, and objections raised pursuant to section five thousand two hundred forty-one of the civil practice law and rules. Support magistrates shall not be empowered to hear, determine and grant any relief with respect to issues specified in section four hundred fifty-five of this article, issues of contested [paternity] parentage involving claims of equitable estoppel, custody, visitation including visitation as a defense, and orders of protection or exclusive possession of the home, which shall be referred to a judge as provided in subdivision (b) or (c) of this section. Where an order of [filiation] parentage is issued by a judge in a [paternity] parentage proceeding and child support is in issue, the judge, or support magistrate upon referral from the judge, shall be authorized to immediately make a temporary or final order of support, as applicable. A support magistrate shall have the authority to hear and decide motions and issue summonses and subpoenas to produce persons pursuant to section one hundred fifty-

three of this act, hear and decide proceedings and issue any order authorized by subdivision (g) of section five thousand two hundred forty-one of the civil practice law and rules, issue subpoenas to produce prisoners pursuant to section two thousand three hundred two of the civil practice law and rules and make a determination that any person before the support magistrate is in violation of an order of the court as authorized by section one hundred fifty-six of this act subject to confirmation by a judge of the court who shall impose any punishment for such violation as provided by law. A determination by a support magistrate that a person is in willful violation of an order under subdivision three of section four hundred fifty-four of this article and that recommends commitment shall be transmitted to the parties, accompanied by findings of fact, but the determination shall have no force and effect until confirmed by a judge of the court.

(b) In any proceeding to establish [paternity] parentage which is heard by a support magistrate, the support magistrate shall advise the [mother and putative father] parties of the right to be represented by counsel and [shall advise the mother and putative father] of their right to blood grouping or other genetic marker or DNA tests in accordance with section five hundred thirty-two of this act. The support magistrate shall order that such tests be conducted in accordance with section five hundred thirty-two of this act. The support magistrate shall be empowered to hear and determine all matters related to the proceeding including the making of an order of [filiation] parentage pursuant to section five hundred forty-two of this act, provided, however, that where the respondent denies [paternity] parentage and [paternity] parentage is contested on the grounds of equitable estoppel, the support magistrate shall not be empowered to determine the issue of [paternity] parentage, but shall transfer the proceeding to a judge of the court for a determination of the issue of [paternity] parentage. Where an order of [filiation] parentage is issued by a judge in a [paternity] parentage proceeding and child support is in issue, the judge, or support magistrate upon referral from the judge, shall be authorized to immediately make a temporary or final order of support, as applicable. Whenever an order of [filiation] parentage is made by a support magistrate, the support magistrate also shall make a final or temporary order of support.

(c) The support magistrate, in any proceeding in which issues specified in section four hundred fifty-five of this act, or issues of custody, visitation, including visitation as a defense, orders of protection or exclusive possession of the home are present or in which [paternity] parentage is contested on the grounds of equitable estoppel, shall make a temporary order of

support and refer the proceeding to a judge. Upon determination of such issue by a judge, the judge may make a final determination of the issue of support, or immediately refer the proceeding to a support magistrate for further proceedings regarding child support or other matters within the authority of the support magistrate.

§6. The title of article 5 and section 511 of the family court act, section 511 as amended by chapter 533 of the laws of 1999, are amended to read as follows:

ARTICLE 5. [PATERNITY] PARENTAGE PROCEEDINGS

§511. Jurisdiction. Except as otherwise provided, the family court has exclusive original jurisdiction in proceedings to establish [paternity] parentage. and, in any such proceedings in which it makes a finding of [paternity] parentage, to order support and to make orders of custody or of visitation, as set forth in this article. On its own motion, the court may at any time in the proceedings also direct the filing of a neglect petition in accord with the provisions of article ten of this act. In accordance with the provisions of section one hundred eleven-b of the domestic relations law, the surrogate's court has original jurisdiction concurrent with the family court to determine the issues relating to the establishment of [paternity] parentage.

§7. Section 512 of the family court act, as amended by chapter 665 of the laws of 1976, is amended to read as follows:

§512. Definitions. When used in this article,

(a) The phrase "child born out of wedlock" refers to a child who is begotten and born out of lawful matrimony.

(b) The word "child" refers to a [child born out of wedlock] live-born individual of any age whose parentage may be determined under this act or other law.

(c) [the word “mother” refers to the mother of a child born out of wedlock. (d) The word “father” refers to the father of a child born out of wedlock] “Parentage” means a determination that a person is the legal parent of the child.

(d) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse and includes but is not limited, to:

(i). Intrauterine or vaginal insemination;

(ii). Donation of gametes;

(iii) Donation of embryos;

(iv) In vitro fertilization and transfer of embryos; and

(v). Intracytoplasmic sperm injection.

(e) "Collaborative reproduction" means artificial insemination with donor sperm and any assisted reproduction in which an individual other than the intended parent provides genetic material.

(f) "Compensation" means payment of any valuable consideration for time, effort, pain and/or risk to health in excess of reasonable medical and ancillary costs.

(g) "Donor" means an individual who produces gametes and provides them to another person other than the individual's spouse for use in assisted reproduction, whether or not for compensation, and who does not intend to be a parent. Donor also includes an individual with dispositional control of an embryo who provides it to another person for the purpose of gestation and relinquishes all present and future parental and inheritance rights and obligations to a resulting child.

(h) "embryo" means a cell or group of cells containing a diploid complement of chromosomes or group of such cells, not a gamete or gametes, that has the potential to develop into a live born human being if transferred into the body of a woman under conditions in which gestation may be reasonably expected to occur.

(i) "Embryo transfer" means all medical and laboratory procedures that are necessary to effectuate the transfer of an embryo into the uterine cavity.

(j) "Gamete" means a cell containing a haploid complement of DNA that has the potential to form an embryo when combined with another gamete. Sperm and eggs are gametes. A gamete may consist of nuclear DNA from one human being combined with the cytoplasm, including cytoplasmic DNA, of another human being.

(k) "Health care practitioner" means an individual licensed or certified under title eight of the education law acting within his or her scope of practice.

(l) "Intended parent" is an individual who manifests the intent as provided in this act to be legally bound as the parent of a child resulting from assisted reproduction or collaborative reproduction.

(m) "In vitro fertilization" means the formation of a human embryo outside the human body.

(n)"Parent" means an individual who has established a parent-child relationship under this act or other law and includes, but is not limited to:

(i) a child's genetic parent who is not the donor;

(ii) an individual who has legally adopted the child;

(iii) an individual who is a parent of the child pursuant to a legal presumption; and

(iv) an individual who is a parent of the child pursuant to an acknowledgment of paternity or order of parentage;

(o) “Alleged parent” means an individual who has not established a parentage but either seeks to establish parentage of, or is alleged by another, to be the parent of a child who is the subject of a proceeding under this article.

(p) "Record" means information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form.

(q) "Retrieval" means the procurement of eggs or sperm from a gamete provider.

(r) "Spouse" means an individual married to another, or who has a legal relationship entered into under the laws of the United States or of any state, local or foreign jurisdiction, which is substantially equivalent to a marriage, including a civil union or domestic partnership.

(s) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

§8. Section 514 of the family court act, as amended by chapter 215 of the laws of 2009, is amended to read as follows:

§ 514. Liability [of father to mother] for expenses of pregnancy, confinement and recovery. The [father] court may determine which parent is liable for the reasonable expenses of the mother's confinement and recovery and such reasonable expenses in connection with her pregnancy as determined by the court; provided, however, where the mother's confinement, recovery and expenses in connection with her pregnancy were paid under the medical assistance program on the mother's behalf, the [father] other parent may be liable to the social services district furnishing such medical assistance and to the state department of health for medical assistance so expended. Such expenses, including such expenses paid by the medical assistance program on the mother's behalf, shall be deemed cash medical support and the court shall determine the obligation of the parties to contribute to the cost thereof pursuant to subparagraph five of paragraph (c) of subdivision one of section four hundred thirteen of this act.

§9. Subdivisions (a), (c) and (d) and paragraphs (iii), (iv) and (v) of subdivision (b) of

section 516-a of the family court act, subdivision (a) as amended by chapter 462 of the laws of 2007, subdivisions (b) and (c) as amended by chapter 402 of the laws of 2013 and subdivision (d) as amended by chapter 343 of the laws of 2009, are amended to read as follows:

(a) An acknowledgment of paternity executed pursuant to section one hundred eleven-k of the social services law or section four thousand one hundred thirty-five-b of the public health law shall establish the [paternity] parentage of and liability for the support, pursuant to this act, of a child [pursuant to this act] born out of wedlock. Such acknowledgment must be reduced to writing and filed pursuant to section four thousand one hundred thirty-five-b of the public health law with the registrar of the district in which the birth occurred and in which the birth certificate has been filed. No further judicial or administrative proceedings are required to ratify an unchallenged acknowledgment of paternity.

(iii) Where a petition to vacate an acknowledgment of paternity has been filed in accordance with paragraph (i) or (ii) of this subdivision, the court shall order genetic marker tests or DNA tests for the determination of the child's [paternity] parentage. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married [woman] person. If the court determines, following the test, that the person who signed the acknowledgment is the [father] parent of the child, the court shall make a finding [of paternity] and enter an order of [filiation] parentage. If the court determines that the person who signed the acknowledgment is not the [father] parent of the child, the acknowledgment shall be vacated.

(iv) After the expiration of the time limits set forth in paragraphs (i) and (ii) of this subdivision, any of the signatories to an acknowledgment of paternity may challenge the acknowledgment in court by alleging and proving fraud, duress, or material mistake of fact. If the petitioner proves to the court that the acknowledgment of paternity was signed under fraud, duress, or due to a material mistake of fact, the court shall then order genetic marker tests or DNA tests for the determination of the child's paternity] parentage. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married [woman] person. If the court determines, following the test, that the person who signed the acknowledgment is the [father] parent of the child, the court shall make a finding [of

paternity] and enter an order of [filiation] parentage. If the court determines that the person who signed the acknowledgment is not the [father] parent of the child, the acknowledgment shall be vacated.

(v) If, at any time before or after a signatory has filed a petition to vacate an acknowledgment of paternity pursuant to this subdivision, the signatory dies or becomes mentally ill or cannot be found within the state, neither the proceeding nor the right to commence the proceeding shall abate but may be commenced or continued by any of the persons authorized by this article to commence a [paternity] parentage proceeding.

(c) Neither signatory's legal obligations, including the obligation for child support arising from the acknowledgment, may be suspended during the challenge to the acknowledgment except for good cause as the court may find. If the court vacates the acknowledgment of paternity, the court shall immediately provide a copy of the order to the registrar of the district in which the child's birth certificate is filed and also to the putative father registry operated by the department of social services pursuant to section three hundred seventy-two-c of the social services law. In addition, if [the mother] a parent of the child who is the subject of the acknowledgment is in receipt of child support services pursuant to title six-A of article three of the social services law, the court shall immediately provide a copy of the order to the child support enforcement unit of the social services district that provides the [mother] parent with such services.

(d) A determination of [paternity] parentage made by any other state, whether established through an administrative or judicial process or through an acknowledgment of paternity signed in accordance with that state's laws, must be accorded full faith and credit pursuant to section 466(a)(11) of title IV-D of the social security act (42 U.S.C. S 666(a)(11)).

§10. Section 517 of the family court act, as amended by chapter 809 of the laws of 1985, is amended to read as follows:

§ 517. Time for instituting proceedings. Proceedings to establish the [paternity] parentage of a child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the child reaches the age of twenty-one years, unless [paternity] parentage has been acknowledged by the [father] parent in writing or by furnishing support.

§11. Section 518 of the family court act, as amended by chapter 310 of the laws of 1983, is amended to read as follows:

§ 518. Effect of death, absence, or mental illness of [mother] established parent. If, at any

time before or after a petition is filed, the [mother] other parent dies or becomes mentally ill or cannot be found within the state, neither the proceeding nor the right to commence the proceeding shall abate but may be commenced or continued by any of the persons authorized by this article to commence a [paternity] parentage proceeding.

§12. Section 519 of the family court act, as added by chapter 533 of the laws of 1999, is amended to read as follows:

§ 519. Effect of death, absence or mental illness of [father] alleged parent.

(a) If, at any time before or after a petition if filed, the [putative father] alleged parent dies, or becomes mentally ill or cannot be found within the state, neither the proceeding nor the right to commence the proceeding shall necessarily abate but may be commenced or continued by any of the persons authorized by this article to commence a [paternity] parentage proceeding where:

[(a)] (1) the [putative father] alleged parent was the petitioner in the [paternity]parentage proceeding; or[,]

[(b)] (2) the [putative father] alleged parent acknowledged [paternity] parentage of the child in open court; or[,]

[(c)] (3) a genetic marker or DNA test had been administered to the [putative father] alleged parent prior to his or her death; or[,]

[(d)] (4) the [putative father] alleged parent has openly and notoriously acknowledged the child as his or her own.

(b) If an individual, who consented in a record in accordance with section five hundred thirty-eight of this article to be a parent by assisted reproduction, dies before the transfer of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a signed record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

§13. Section 521 of the family court act is amended to read as follows:

§ 521. Venue. Proceedings to establish [paternity] parentage may be originated in the county where [the mother] a parent or child resides or is found or in the county where the [putative father] alleged parent resides or is found. The fact that the child was born outside of the state of New York does not bar a proceeding to establish [paternity] parentage in the county where the [putative father] alleged parent resides or is found or in the county where the [mother] established parent resides or the child is found.

§14. Section 522 of the family court act, as amended by chapter 892 of the laws of 1986, is amended to read as follows:

§522. Person who may originate proceedings.

(a) Proceedings to establish the [paternity] parentage of [the] a child and to compel support under this article may be commenced by [the mother]:

(1) a parent or an alleged parent, whether a minor or not, [by a person alleging to be the father, whether a minor or not, by the]

(2) a child or child's guardian or other person standing in a parental relation or being the next of kin of the child,

(3) an individual who provided a biological or genetic component of assisted reproduction, an intended parent, and the spouse of an intended parent.

(4) an authorized representative of a support enforcement agency or other governmental agency authorized to maintain a parentage proceeding,

(5) a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor, in order to legally establish the child-parent relationship of a child, or [by]

(6) any authorized representative of an incorporated society doing charitable or philanthropic work, or if the [mother] other parent or child is or is likely to become a public charge on a county, city or town, by a public welfare official of the county, city or town where the [mother] other parent resides or the child is found.

(b) An alleged parent may file a petition to establish parentage notwithstanding an acknowledgment of paternity signed by the mother and an alleged father.

(c) If a proceeding is originated by a [public welfare official] support enforcement agency, other governmental agency or authorized representative of an incorporated society doing charitable or philanthropic work and thereafter withdrawn or dismissed without consideration on the merits, such withdrawal or dismissal shall be without prejudice to other persons.

§15. Section 523 of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

§ 523. Petition to establish parentage.

(a). Proceedings are commenced by the filing of a verified petition, alleging that the person named as respondent, or the petitioner if the petitioner is a person alleging to be the

[child's father] parent of a child born out of wedlock, is the [father]parent of the child and petitioning the court to issue a summons or a warrant, requiring the respondent to show cause why the court should not enter a declaration of [paternity] parentage, an order of support, and such other and further relief as may be appropriate under the circumstances.

(b). The petition shall be in writing and verified by the petitioner.

(c). Any such petition for the establishment of [paternity] parentage or the establishment, modification and/or enforcement of a child support obligation for persons not in receipt of family assistance, which contains a request for child support enforcement services completed in a manner as specified in section one hundred eleven-g of the social services law, shall constitute an application for such services.

(d). In the event that the mother signed an acknowledgment of paternity with a person other than the alleged parent, the signatory to the acknowledgment of paternity is a necessary party and must be named as a respondent.

(e). A proceeding to establish parentage through assisted reproduction is commenced by the filing of a verified petition which must include the following:

(1) a statement that the gestating parent became pregnant as a result of the donation of the gamete or embryo and a representation of non-access during the time of conception; and

(2) a statement that the non-gestating intended parent consented to assisted reproduction, pursuant to section five hundred thirty-eight of this article.

(3) a statement of the donor's donative intent.

§16. Section 524 of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

§524, Issuance of summons

(a) On receiving a petition sufficient in law [commencing] to commence a [paternity] parentage proceeding, the court shall cause a summons to be issued, requiring the respondent to show cause why the [declaration of paternity,] order of [filiation] parentage, order of support and other and further relief [prayed for by] requested in the petition should not be made.

(b) The summons shall contain or have attached thereto a notice stating: (i) that the respondent's failure to appear shall result in the default entry of an order of [filiation] parentage by the court upon proof of a respondent's actual notice of the commencement of the proceeding; and (ii) that a respondent's failure to appear may result in the suspension of his or her driving

privileges; state professional, occupational and business licenses; and sporting licenses and permits.

§17. Subdivision (c) of section 525 of the family court act, as amended by chapter 59 of the laws of 1993, is amended to read as follows:

(c) In any case, whether or not service is attempted under subdivision (a) or (b) of this section, service of a summons and petition under this section may be effected by mail alone to the last known address of the person to be served. Service by mail alone shall be made at least eight days before the time stated in the summons for appearance. If service is by mail alone, the court will enter an order of [filiation] parentage by default if there is proof satisfactory to the court that the respondent had actual notice of the commencement of the proceeding, which may be established upon sufficient proof that the summons and petition were in fact mailed by certified mail and signed for at the respondent's correct street address or signed for at the post office. If service by certified mail at the respondent's correct street address cannot be accomplished, service pursuant to subdivision one, two, three or four of section three hundred eight of the civil practice law and rules shall be deemed good and sufficient service. Upon failure of the respondent to obey a summons served in accordance with the provisions of this section by means other than mail alone, the court will enter an order of [filiation] parentage by default. The respondent shall have the right to make a motion for relief from such default order within one year from the date such order was entered.

§18. Section 531 of the family court act, as amended by chapter 665 of the laws of 1976, is amended to read as follows:

§ 531. Hearing. The trial shall be by the court without a jury. The [mother or the alleged father] parent and the alleged parent shall be competent to testify but the respondent shall not be compelled to testify. If the [mother is] parties are married, they both [she and her husband] may testify to nonaccess. If the respondent shall offer testimony of access by others at or about the time charged in the complaint, such testimony shall not be competent or admissible in evidence except when corroborated by other facts and circumstances tending to prove such access. The court may exclude the general public from the room where the proceedings are heard and may admit only persons directly interested in the case, including officers of the court and witnesses.

§19. Subdivisions (a) and (c) of section 532 of the family court act, subdivision (a) as amended by chapter 214 of the laws of 1998 and subdivision (c) as amended by chapter 170 of

the laws of 19994, are amended to read as follows:

(a) The court shall advise the parties of their right to one or more genetic marker tests or DNA tests and, on the court's own motion or the motion of any party, shall order the [mother, her] parties, the child [and the alleged father], and, if appropriate, the signatory to an acknowledgment of paternity to submit to one or more genetic marker or DNA tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether the alleged [father] parent is or is not the [father] parent of the child. No such test shall be ordered, however, upon a written finding by the court, after due inquiry, that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married [woman] couple. The record or report of the results of any such genetic marker or DNA test ordered pursuant to this section or pursuant to section one hundred eleven-k of the social services law shall be received in evidence by the court pursuant to subdivision (e) of rule forty-five hundred eighteen of the civil practice law and rules where no timely objection in writing has been made thereto and that if such timely objections are not made, they shall be deemed waived and shall not be heard by the court. If the record or report of the results of any such genetic marker or DNA test or tests indicate at least a ninety-five percent probability of [paternity] parentage, the admission of such record or report shall create a rebuttable presumption of [paternity] parentage, and shall establish, if unrebutted, the [paternity] parentage of and liability for the support of a child pursuant to this article and article four of this act.

(c) The cost of any test ordered pursuant to subdivision (a) of this section shall be, in the first instance, paid by the moving party. If the moving party is financially unable to pay such cost, the court may direct any qualified public health officer to conduct such test, if practicable; otherwise, the court may direct payment from the funds of the appropriate local social services district. In its order of disposition, however, the court may direct that the cost of any such test be apportioned between the parties according to their respective abilities to pay or be assessed against the party who does not prevail on the issue of [paternity] parentage, unless such party is financially unable to pay.

§20. Section 534 of the family court act, as amended by chapter 665 of the laws of 1976,

is amended to read as follows:

§ 534. Adjournment on motion of court. On its own motion, the court may adjourn the hearing after it has made a finding of [paternity] parentage to enable it to make inquiry into the surroundings, conditions and capacities of the child, into the financial abilities and responsibilities of both parents or for other proper cause. If the court so adjourns the hearing, it may require the respondent to give an undertaking to appear.

§21. Section 536 of the family court act, as amended by chapter 892 of the laws of 1986, is amended to read as follows:

§ 536. Counsel fees. Once an order of [filiation] parentage is made, the court in its discretion may allow counsel fees to the attorney for the prevailing party, if he or she is unable to pay such counsel fees. Representation by an attorney pursuant to paragraph (b) of subdivision nine of section one hundred eleven-b of the social services law shall not preclude an award of counsel fees to an applicant which would otherwise be allowed under this section.

§22. The family court act is amended by adding a new section 537 to read as follows:

§ 537. Proof of donative intent in cases of assisted reproduction. The following shall be deemed sufficient proof of a donor's donative intent for purposes of this section:

(a) in the case of an anonymous donor or where gametes or embryos have previously been relinquished to a gamete or embryo storage facility, a statement from the gamete or embryo storage facility with custody of the gametes or embryos that the donor does not retain any parental or proprietary interest in the gametes or embryos; or

(b) in the case of a donation from a known donor, a record from the gamete or embryo donor acknowledging the donation and confirming that the donor has no parental or proprietary interest in the gametes or embryos. The record shall be signed by the gamete or embryo donor:

(1) before a notary public, or

(2) before two witnesses who are not the intended parents, or

(3) before the health care provider, who supervised the donation.

(c) in the absence of a record pursuant to paragraph two of this subdivision, notice shall be given to the donor at least twenty days prior to the proceeding by delivery of a copy of the petition and notice. Upon a showing to the court, by affidavit or otherwise, on or before the date of the proceeding or within such further time as the court may allow, that personal service cannot be effected at the donor's last known address with reasonable effort, notice may be given, without

prior court order therefore, at least twenty days prior to the proceeding by registered or certified mail directed to the donor's last known address. Notice by publication shall not be required to be given to a donor entitled to notice pursuant to the provisions of this section.

(d) notwithstanding the above, where sperm is provided under the supervision of a health care provider to someone other than the sperm provider's intimate partner or spouse without a record of the sperm provider's intent to parent, the sperm provider is presumed to be a donor and notice is not required.

§23. The family court act is amended by adding a new section 538 to read as follows:

§ 538. Consent to assisted reproduction.

(a) Where the intended parent who gives birth to a child by means of assisted reproduction is a spouse, the consent of both spouses to the assisted reproduction is presumed and neither spouse may challenge the parentage of the child, except as provided in section §539 of this article.

(b) Where the intended parent who gives birth to a child by means of assisted reproduction is not a spouse, the consent to the assisted reproduction must be in a record in such a manner as to indicate the mutual agreement of the intended parents to conceive and parent a child together.

(c) The absence of a record described in subdivision (b) of this section shall not preclude a finding that such consent existed if the court finds by clear and convincing evidence that at the time of the assisted reproduction the intended parents agreed to conceive and parent the child together.

§24. The family court act is amended by adding a new section 539 to read as follows:

§ 539. Limitation on spouses' dispute of parentage of child of assisted reproduction.

(a) Except as otherwise provided in subdivision (b) of this section, neither spouse may challenge the presumption of parentage of the child unless:

(1) within two years after learning of the birth of the child a proceeding is commenced to adjudicate parentage; and

(2) the court finds by clear and convincing evidence that either spouse did not consent for the non-gestating spouse to be a parent of the child.

(b) A proceeding for an order of parentage may be maintained at any time if the court finds by clear and convincing evidence that:

(1) the spouse did not consent to assisted reproduction by the individual who gave birth; and

(2) the spouse and the individual who gave birth have not cohabited since the spouse knew or had reason to know of the pregnancy; and

(3) the spouse never openly held out the child as his or her own.

(c) The limitation provided in this section applies to a spousal relationship that has been declared invalid after assisted reproduction or artificial insemination.

§25. The family court act is amended by adding a new section 540 to read as follows:

§540. Effect of embryo disposition agreement between intended parents which transfers custody and control to one intended parent in assisted reproduction cases.

(a) An embryo disposition agreement between intended parents with joint custody and control of an embryo shall be binding under the following circumstances:

(1) it is in writing;

(2) each intended parent had the advice of counsel prior to its execution; and

(3) where the intended parents are married, transfer of custody and control occurs only upon divorce.

(b) The intended parent who transfers custody and control of the embryo is not a parent of any child born from the embryo unless the agreement states that he or she consents to be a parent.

(c) If the intended parent transferring custody and control consents to be a parent, he or she may withdraw his or her consent to be a parent upon notice to the embryo storage facility and to the other intended parent prior to transfer of the embryo. If he or she timely withdraws consent to parent he or she is not a parent for any purpose including support obligations but the embryo transfer may still proceed.

(d) An embryo disposition agreement or advance directive that is not in compliance with subdivision (a) of this section may still be found to be enforceable by the court after balancing the respective interests of the parties except that under no circumstances may the intended parent who divested him or herself of custody and control be declared to be a parent for any purpose without his or her consent. The parent awarded custody and control of the embryos shall, in this instance, be declared to be the only parent of the child.

§26. Section 541 of the family court act, as amended by chapter 665 of the laws of 1976, is amended to read as follows:

§ 541. Order dismissing petition. If the court finds [the male party is not the father] that the alleged parent is not a parent of the child, it shall dismiss the petition. If a neglect petition was

filed in the [paternity] parentage proceeding, the court retains jurisdiction over the neglect petition whether or not it dismisses the [paternity] parentage petition.

§27. Section 542 of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

§ 542. Order of [filiation] parentage.

(a) If the court finds that the [male party] alleged parent is the [father] parent of the child, it shall make an order of [filiation, declaring paternity. Such order shall contain the social security number of the declared father] parentage.

(b) If the respondent willfully fails to appear before the court subsequent to the administration and analysis of a genetic marker test or DNA test administered pursuant to sections four hundred eighteen and five hundred thirty-two of this act or section one hundred eleven-k of the social services law, and if such test does not exclude the respondent as being the [father] parent of the child or the court determines that there exists clear and convincing evidence of [paternity] parentage, the court shall enter an order of temporary support notwithstanding that [paternity] parentage of such child has [not] neither been established nor has an order of [filiation] parentage been entered against the respondent. The respondent shall be prospectively relieved from liability for support under such order of temporary support upon the respondent's appearance before the court.

(c) If the respondent willfully fails to comply with an order made by either the court pursuant to sections four hundred eighteen and five hundred thirty-two of this act or by a social services official or designee pursuant to section one hundred eleven-k of the social services law, and willfully fails to appear before the court when otherwise required, the court shall enter an order of temporary support notwithstanding that [paternity] parentage of the subject child has [not] neither been established nor has an order of [filiation] parentage been entered against the respondent. The respondent shall be prospectively relieved from liability for support under such order of temporary support upon the respondent's compliance with such order and subsequent appearance before the court.

(d) If the mother signed an acknowledgment of paternity with another person whom the court has determined is not the parent of the child, the court shall make an order vacating the acknowledgment of paternity at the same time that it makes the order of parentage.

(e) Notwithstanding any presumptions of parentage that may apply in cases involving

assisted reproduction, an order of parentage may be obtained under this article by intended parents who are married to each other.

§28. Section 543 of the family court act is amended to read as follows:

§ 543. Transmission of order of [filiation] parentage. When an order of [filiation] parentage is made, the clerk of the court shall forthwith transmit to the state commissioner of health on a form prescribed by [him] the commissioner a written notification as to such order, together with such other facts as may assist in identifying the birth record of the person whose [paternity] parentage was in issue. When it appears to the clerk that the person whose [paternity] parentage was established was born in New York city, [he] the clerk shall forthwith transmit the written notification aforesaid to the commissioner of health of the city of New York instead of to the state commissioner of health.

§29. Section 544 of the family court act is amended to read as follows:

§ 544. Transmission of abrogation of [filiation] parentage order. If an order of [filiation] parentage is abrogated by a later judgment or order of the court that originally made the order or by another court on appeal, that fact shall be immediately communicated in writing by the clerk of the court that originally made the order of [filiation] parentage to the state commissioner of health on a form prescribed by [him] the commissioner. If notice of the order was given to the commissioner of health of New York city, notice of abrogation shall be transmitted to [him] the commissioner of health of the city of New York.

§30. Section 545 of the family court act, as amended by chapter 215 of the laws of 2009, is added to read as follows:

§ 545. Order of support by parents.

1. In a proceeding in which the court has made an order of [filiation] parentage, the court shall direct the parent or parents possessed of sufficient means or able to earn such means to pay weekly or at other fixed periods a fair and reasonable sum according to their respective means as the court may determine and apportion for such child's support and education, until the child is twenty-one. The order shall be effective as of the earlier of the date of the application for an order of [filiation] parentage, or, if the children for whom support is sought are in receipt of public assistance, the date for which their eligibility for public assistance was effective. Any retroactive amount of child support shall be support arrears/past-due support and shall be paid in one sum or periodic sums as the court shall direct, taking into account any amount of temporary support

which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. The court shall direct such parent to make his or her residence known at all times should he or she move from the address last known to the court by reporting such change to the support collection unit designated by the appropriate social services district. The order shall contain the social security numbers of the named parents as required by section 440 of this act. The order may also direct each parent to pay an amount as the court may determine and apportion for the support of the child prior to the making of the order of [filiation] parentage, and may direct each parent to pay an amount as the court may determine and apportion for the funeral expenses if the child has died. The necessary expenses incurred by or for the mother in connection with her confinement and recovery and such expenses in connection with the pregnancy of the mother shall be deemed cash medical support, and the court shall determine the obligation of either or both parents to contribute to the cost thereof pursuant to subparagraph five of paragraph (c) of subdivision one of section four hundred thirteen of this act. In addition, the court shall make provisions for health insurance benefits in accordance with the requirements of section four hundred sixteen of this act.

2. The court, in its discretion, taking into consideration the means of the [father] respondent and his or her ability to pay and the needs of the child, may direct the payment of a reasonable sum or periodic sums to the [mother] other parent as reimbursement for the needs of the child accruing from the date of the birth of the child to the date of the application for an order of [filiation] parentage.

§31. Section 548-a of the family court act, as amended by chapter 398 of the laws of 1997, is added to read as follows:

§ 548-a . [Paternity] Parentage or child support proceedings; suspension of driving privileges.

(a) If the respondent, after receiving appropriate notice, fails to comply with a summons, subpoena or warrant relating to a [paternity] parentage or child support proceeding, the court may order the department of motor vehicles to suspend the respondent's driving privileges.

(b) The court may subsequently order the department of motor vehicles to terminate the suspension of the respondent's driving privileges; however, the court shall order the termination

of such suspension when the court is satisfied that the respondent has fully complied with the requirements of all summonses, subpoenas and warrants relating to a [paternity] parentage or child support proceeding.

§32. Section 548-b of the family court act, as added by chapter 398 of the laws of 1997, is amended to read as follows:

§ 548-b. [Paternity] Parentage or child support proceedings; suspension of state professional, occupational and business licenses.

(a) If the respondent, after receiving appropriate notice, fails to comply with a summons, subpoena or warrant relating to a [paternity] parentage or child support proceeding, and the court has determined that the respondent is licensed, permitted or registered by or with a board, department, authority or office of this state or one of its political subdivisions or instrumentalities to conduct a trade, business, profession or occupation, the court may order such board, department, authority or office to commence proceedings as required by law regarding the suspension of such license, permit, registration or authority to practice and to inform the court of the actions it has taken pursuant to such proceeding.

(b) The court may subsequently order such board, department, authority or office to terminate the suspension of the respondent's license, permit, registration or authority to practice; however, the court shall order the termination of such suspension when the court is satisfied that the respondent has fully complied with all summons, subpoenas and warrants relating to a [paternity] parentage or child support proceeding.

§33. Section 548-c of the family court act, as added by chapter 398 of the laws of 1997, is amended to read as follows:

§ 548-c. [Paternity] Parentage or child support proceedings; suspension of recreational licenses. If the respondent, after receiving appropriate notice, fails to comply with a summons, subpoena, or warrant relating to a [paternity] parentage or child support proceeding, the court may order any agency responsible for the issuance of a recreational license to suspend or to refuse to reissue a license to the respondent or to deny application for such license by the respondent. The court may subsequently order such agency to terminate the adverse action regarding the respondent's license; however, the court shall order the termination of such suspension or other adverse action when the court is satisfied that the respondent has fully complied with the requirements of all summons, subpoenas, and warrants relating to a [paternity] parentage or child

support proceeding.

§34. Subdivision (a) of section 549 of the family court act, as amended by chapter 85 of the laws of 1996, is amended to read as follows:

§ 549. Order of visitation.

(a) If an order of [filiation] parentage is made [or if a paternity agreement or compromise is approved by the court], in the absence of an order of custody or of visitation entered by the supreme court, the family court may make an order of custody or of visitation, in accordance with subdivision one of section two hundred forty of the domestic relations law, requiring one parent to permit the other to visit the child or children at stated periods.

§35. Subdivision (h) of section 551 of the family court act, as amended by chapter 526 of the laws of 2013, is amended to read as follows:

(h) to pay the reasonable counsel fees and disbursements involved in obtaining or enforcing the order of the person who is protected by such order if such order is issued or enforced, whether or not an order of [filiation] parentage is made;

§36. Section 561 of the family court act, as amended by chapter 686 of the laws of 1962, is amended to read as follows:

§ 561. Proceedings to compel support by [mother] parents. Proceedings may be initiated under article four of this act to compel a [mother] parent who fails to support his or her child to do so in accord with the provisions of article four of this act.

§37. Section 562 of the family court act is REPEALED.

§38. Section 563 of the family court act is amended to read as follows:

§ 563. [Paternity] Parentage and support proceedings combined; apportionment. When a proceeding to establish [paternity] parentage is initiated under this article, the court on its own motion or on motion of any person qualified under article four of this act to file a support petition may direct the filing of a petition under article four to compel the [mother] parent to support his or her child. If the court enters an order of [filiation] parentage, it may apportion the costs of the support and education of the child between the parents according to their respective means and responsibilities.

§39. Section 564 of the family court act, as added by chapter 440 of the laws of 1978, is amended to read as follows:

§ 564. Order of [filiation] parentage in other proceedings.

(a) In any proceeding in the family court, whether under this act or under any other law, if there is an allegation or statement in a petition that a person is the [father] parent of a child who is a party to the proceeding or also is a subject of the proceeding and if it shall appear that the child is a child born out-of-wedlock, the court may make an order of [filiation] parentage declaring the [paternity] parentage of the child in accordance with the provisions of this section.

(b) The court may make such an order of [filiation] parentage if (1) both parents are before the court, (2) the [father] alleged parent waives both the filing of a petition under section five hundred twenty-three of this act and the right to a hearing under section five hundred thirty-three of this act, and (3) the court is satisfied as to the [paternity] parentage of the child from the testimony or sworn statements of the parents.

(c) The court may in any such proceeding in its discretion direct [either the mother or] any [~~other~~] person empowered under section five hundred twenty-two of this act to file a verified petition under section five hundred twenty-three of this act.

(d) The provisions of part four of this article five shall apply to any order of [filiation] parentage made under this section. The court may in its discretion direct a severance of proceedings upon such order of [filiation] parentage from the proceeding upon the petition referred to in subdivision (a) of this section.

(e) For the purposes of this section the term "petition" shall include a complaint in a civil action, an accusatory instrument under the criminal procedure law, a writ of habeas corpus, a petition for supplemental relief, and any amendment in writing of any of the foregoing.

§40. The title of article 5-A and the title and subdivisions 1 and 8 of section 571 of the family court act, as amended by chapter 436 of the laws of 1997, are amended to read as follows:

ARTICLE 5-A

SPECIAL PROVISIONS RELATING TO ENFORCEMENT OF SUPPORT AND ESTABLISHMENT OF [PATERNITY] PARENTAGE

§ 571. Enforcement of support and establishment of [paternity] parentage.

1. Any inconsistent provision of this law or any other law notwithstanding, in cases where a social services official has accepted, on behalf of the state and a social services district, an assignment of support rights from a person applying for or receiving family assistance in accordance with the provisions of the social services law, the social services official or an authorized representative of the state is authorized to bring a proceeding or proceedings in the

family court pursuant to article four of this act to enforce such support rights and, when appropriate or necessary, to establish the [paternity] parentage of a child pursuant to article five of this act.

8. Any other inconsistent provision of law notwithstanding, if an applicant for or recipient of family assistance is pregnant, and a proceeding to establish [paternity] parentage has been filed, and the allegation of [paternity] parentage is denied by the respondent there shall be a stay of all [paternity] parentage proceedings until sixty days after the birth of the child.

§41. Section 817 of the family court act, as amended by chapter 628 of the laws of 1978, is amended to read as follows:

§817. Support, [paternity] parentage and child protection. On its own motion and at any time in proceedings under this article, the court may direct the filing of a child protective petition under article ten of this chapter, a support petition under article four, or a [paternity] parentage petition under article five of this act and consolidate the proceedings.

§42. Section 1084 of the family court act, as added by chapter 457 of the laws of 1988, is amended to read as follows:

§ 1084. Out-of-wedlock children; [paternity] parentage. No visitation right shall be enforceable under this part concerning any legal parent or any person claiming to be a parent of an out-of-wedlock child without an adjudication of the [paternity] parentage of such person by a court of competent jurisdiction, or without an [acknowledgement] acknowledgment of the paternity of such person executed pursuant to applicable provisions of law.

§43. Subdivisions (d) and (g) of rule 4518 of the civil practice law and rules, as amended by chapter 398 of the laws of 1997, are amended to read as follows:

(d) Any records or reports relating to the administration and analysis of a genetic marker or DNA test, including records or reports of the costs of such tests, administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law are admissible in evidence under this rule and are prima facie evidence of the facts contained therein provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee delegated for that purpose, or by a qualified physician. If such record or report relating to the administration and analysis of a genetic marker test or DNA test or tests administered pursuant to sections four hundred eighteen and five hundred

thirty-two of the family court act or section one hundred eleven-k of the social services law indicates at least a ninety-five percent probability of [paternity] parentage, the admission of such record or report shall create a rebuttable presumption of [paternity] parentage, and shall, if unrebutted, establish the [paternity] parentage of and liability for the support of a child pursuant to articles four and five of the family court act.

(g) Pregnancy and childbirth costs. Any hospital bills or records relating to the costs of pregnancy or birth of a child for whom proceedings to establish [paternity] parentage, pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law have been or are being undertaken, are admissible in evidence under this rule and are prima facie evidence of the facts contained therein, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee designated for that purpose, or by a qualified physician.

§44. Section 73 of the domestic relations law, as amended by chapter 305 of the laws of 2008, is amended to read as follows:

§ 73. Legitimacy of children born by artificial insemination

1. Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her [husband] spouse, shall be deemed the legitimate, birth child of the [husband and his wife] couple for all purposes.

2. The aforesaid written consent shall be executed and acknowledged by both [the husband and wife] spouses and the physician who performs the technique shall certify that he or she had rendered the service.

§45. Subdivision 4 of section 75-a of the domestic relations law, as added by chapter 386 of the laws of 2001, is amended to read as follows:

4. “Child custody proceeding” means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, parentage or paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, person in need of supervision, contractual emancipation, or enforcement under title three of this article.

§46. Paragraphs (d) and (e) of subdivision 1 of section 111 of the domestic relations law, as amended by chapter 575 of the laws of 1980, are amended to read as follows:

(d) Of the [father] other parent, whether adult or infant, of a child born out-of-wedlock and [placed with the adoptive parents] more than six months [after birth] old at the time of the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earliest, but only if such [father shall have] other parent has

(i) established legal parentage by having been adjudicated as the parent by a court of competent jurisdiction or by having acknowledged paternity in a form duly executed pursuant to section four thousand one hundred thirty-five-b of the public health law or in a form recognized by the state, territory or country in which it was executed to have the force and effect of an order of parentage, so long as said legal parentage:

A. was established within six months of the child's first entry into foster care, or

B. was the result of a court action filed within six months of the child's birth that was actively prosecuted until the order was entered; or

(ii) openly lived with the child and openly held himself out to be the parent of such child for a period of six months immediately preceding the earlier of the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption; or

(iii) maintained substantial and continuous or repeated contact with the child as manifested by: [(i)] the payment by the [father] parent toward the support of the child of a fair and reasonable sum, according to [the father's] his or her means, and either [(ii) the father's]

A. visiting the child at least [monthly] twice per month when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or [(iii)]

B. [the father's regular communication] regularly communicating with the child or with the person or agency having the care or custody of the child, when physically [and] or financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child.

[The] For purposes of this subparagraph, the subjective intent of the [father] parent, whether expressed or otherwise, unsupported by evidence of acts specified in this [paragraph]

subparagraph manifesting such intent, shall not preclude a determination that the [father] parent failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the [father] parent to perform the acts specified in this [paragraph] subparagraph. [A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained substantial and continuous contact with the child for the purpose of this subdivision.]

(e) Of the [father] other parent, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time [he is placed for] of the filing of a petition to terminate parental rights, application to execute a judicial surrender, a petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or a petition for adoption, whichever is earliest, but only if: (i) such [father] parent [openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption] is a person entitled to notice pursuant to subdivision two of section one hundred eleven-a of this article or subdivision two of section three hundred-eighty-four-c of the social services law; and (ii) such [father] parent openly held himself or herself out to be the [father] parent of such child [during such period] prior to the filing of a petition to terminate parental rights, application to execute a judicial surrender petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earlier, unless prevented from so doing by the person or agency having lawful custody of the child; and (iii) such [father] parent paid a fair and reasonable sum, in accordance with his or her means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child or child support, unless prevented from so doing by the person or agency having lawful custody of the child; and (iv) upon receiving notice of an adoption proceeding pursuant to the provisions of this chapter, or a notice of a proceeding to terminate parental rights pursuant to section three hundred eighty-four-b of the social services law, or a notice of the commitment of the guardianship and custody of the child by voluntary surrender instrument pursuant to section three hundred eighty-three-c or section three hundred eighty-four of the social services law, or a notice of a proceeding to grant temporary guardianship of the child to a proposed adoptive parent

pursuant to section one hundred fifteen-c of this article, such parent filed a motion to intervene in the proceeding, including an assertion of parentage and a request for custody, within thirty days of the date of such notice.

Such consent shall not be required unless parentage is established in accordance with the relevant and otherwise consistent provisions of the family court act, social services law and public health law.

§47. Subdivisions 1 and 2 of section 111-a of the domestic relations law, as amended by chapter 371 of the laws of 2013, are amended to read as follows:

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b of this article relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given to any person who previously has been given notice of any [proceeding] petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption involving the child, [pursuant to section three hundred eighty-four-c of the social services law,] and provided further that notice in an adoption proceeding[,] pursuant to this section shall not be required to be given to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b of this article. In addition to such other requirements as may be applicable to the petition in any proceeding in which notice must be given pursuant to this section, the petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice. For the purpose of determining persons entitled to notice of adoption proceedings initiated pursuant to this article, persons specified in subdivision two of this section shall not include any person who has been convicted of one or more of the following sexual offenses in this state or convicted of one or more offenses in another jurisdiction which, if committed in this state, would constitute one or more of the following offenses, when the child who is the subject of the

proceeding was conceived as a result: (A) rape in first or second degree; (B) course of sexual conduct against a child in the first degree; (C) predatory sexual assault; or (D) predatory sexual assault against a child.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court [in this state] of competent jurisdiction to be the [father] parent of the child;

(b) [any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c)] any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

[(d)] (c) any person who is recorded on the child's birth certificate as the child's [father] parent;

[(e)] (d) any person who is openly living with the child [and the child's mother] at the time the proceeding is initiated and who is holding himself out to be the child's father ;

[(f)] (e) any person who has been identified as the child's [father] other parent by the mother in a written, sworn statement;

[(g)] (f) any person holding himself or herself out as the child's parent who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law; [and]

[(h)] (g) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law or section 4135-b of the public health law;

(h) any person who has established legal parentage through the execution of an acknowledgment of paternity recognized by any state, territory or country in which it was executed to have the force and effect of an order of parentage; and

(i) any person who has filed a parentage or custody petition for a child in foster care in which he or she states that he or she is the parent of the child and where the petition remains pending despite his or her diligent efforts to prosecute it, so long as the petition was filed prior to issuance of any order freeing the child for adoption.

§48. The title and subdivisions 1 and 3 of section 111-b of the domestic relations law, as added by chapter 575 of the laws of 1980, are amended to read as follows:

§ 111-b. Determination of issue of [paternity] parentage by surrogate; limitations

1. In the course of an adoption proceeding conducted pursuant to this article, the surrogate shall have jurisdiction to determine any issue of [paternity] parentage arising in the course of the same proceeding and to make findings and issue an order thereon.

3. A judge of the family court shall continue to exercise all of the powers relating to adoption and declaration of [paternity] parentage conferred upon the family court by law.

§49. Subdivision 2 of section 4135 of the public health law, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

2. The name of the [putative father] alleged parent of a child born out of wedlock shall not be entered on the certificate of birth prior to filing without (i) an acknowledgment of paternity pursuant to section one hundred eleven-k of the social services law or section four thousand one hundred thirty-five-b of this article executed by both [the mother and putative father] parents, and filed with the record of birth; or (ii) notification having been received by, or proper proof having been filed with, the record of birth by the clerk of a court of competent jurisdiction or the parents, or their attorneys of a judgment, order or decree relating to parentage.

§50. Paragraph (a), subparagraphs (i), (ii), (iii), (iv), (v), (vi), (vi), (x), (xi), (xii) and the last sentence of paragraph (b) and paragraph (c) of subdivision 1, paragraph (b) of subdivision 2, paragraph (a) of subdivision 3 and subdivision 4 of section 4135-b of the public health law, as amended by chapter 402 of the laws of 2013, are amended to read as follows:

1. (a) Immediately preceding or following the in-hospital birth of a child to an unmarried woman, the person in charge of such hospital or his or her designated representative shall provide to the child's mother and [putative] alleged father, if such alleged father is readily identifiable and available, the documents and written instructions necessary for such mother and [putative] alleged father to complete an acknowledgment of paternity witnessed by two persons not related to the signatory. Such acknowledgment, if signed by both parties, at any time following the birth of a child, shall be filed with the registrar at the same time at which the certificate of live birth is filed, if possible, or anytime thereafter. Nothing herein shall be deemed to require the person in charge of such hospital or his or her designee to seek out or otherwise locate [a putative] an alleged father who is not readily identifiable or available. The acknowledgment shall be executed on a

form provided by the commissioner developed in consultation with the appropriate commissioner of the department of family assistance, which shall include the social security number of the [mother and of the putative father] parties and provide in plain language

(i) a statement by the mother consenting to the acknowledgment of paternity and a statement that the [putative] alleged father is the only possible father,

(ii) a statement by the [putative] alleged father that he is the father of the child, and

(iii) a statement that the signing of the acknowledgment of paternity by both parties shall have the same force and effect as an order of [filiation] parentage entered after a court hearing by a court of competent jurisdiction, including an obligation to provide support for the child except that, only if filed with the registrar of the district in which the birth certificate has been filed, will the acknowledgment have such force and effect with respect to inheritance rights.

(b) Prior to the execution of an acknowledgment of paternity, the [mother and the putative father] parties shall be provided orally, which may be through the use of audio or video equipment, and in writing with such information as is required pursuant to this section with respect to their rights and the consequences of signing a voluntary acknowledgment of paternity including, but not limited to:

(i) that the signing of the acknowledgment of paternity shall establish the [paternity] parentage of the child and shall have the same force and effect as an order of [paternity or filiation] parentage issued by a court of competent jurisdiction establishing the duty of both parties to provide support for the child;

(ii) that if such an acknowledgment is not made, the [putative] alleged father can be held liable for support only if the family court, after a hearing, makes an order declaring that the [putative] alleged father is the father of the child whereupon the court may make an order of support which may be retroactive to the birth of the child;

(iii) that if made a respondent in a proceeding to establish [paternity] parentage, the [putative] alleged father has a right to free legal representation if indigent;

(iv) that the [putative] alleged father has a right to a genetic marker test or to a DNA test when available;

(v) that by executing the acknowledgment, the [putative] alleged father waives [his] the right to a hearing[, to which he would otherwise be entitled,] on the issue of [paternity] parentage;

(vi) that a copy of the acknowledgment of paternity shall be filed with the putative

father registry pursuant to section three hundred seventy-two-c of the social services law, and that such filing may establish the child's right to inheritance from the [putative] alleged father pursuant to clause (B) of subparagraph two of paragraph (a) of section 4-1.2 of the estates, powers and trusts law;

(vii) that, if such acknowledgment is filed with the registrar of the district in which the birth certificate has been filed, such acknowledgment will establish inheritance rights from the [putative] alleged father pursuant to clause (A) of subparagraph two of paragraph (a) of section 4-1.2 of the estates, powers and trusts law;

(x) that the [putative father and mother] parties may wish to consult with attorneys before executing the acknowledgment; and that they have the right to seek legal representation and supportive services including counseling regarding such acknowledgment;

(xi) that the acknowledgment of paternity may be the basis for the [putative] alleged father establishing custody and visitation rights to the child and for requiring the [putative] alleged father's consent prior to an adoption proceeding;

(xii) that the mother's refusal to sign the acknowledgment shall not be deemed a failure to cooperate in establishing [paternity] parentage for the child; and

In addition, the governing body of such hospital shall insure that appropriate staff shall provide to the [child's mother and putative father] parties, prior to the mother's discharge from the hospital, the opportunity to speak with hospital staff to obtain clarifying information and answers to their questions about [paternity] establishment of parentage, and shall also provide the telephone number of the local support collection unit.

(c) Within ten days after receiving the certificate of birth, the registrar shall furnish without charge to each parent or guardian of the child or to the mother at the address designated by her for that purpose, a certified copy of the certificate of birth and, if applicable, a certified copy of the written acknowledgment of paternity. If [the mother] either party is in receipt of child support enforcement services pursuant to title six-A of article three of the social services law, the registrar also shall furnish without charge a certified copy of the certificate of birth and, if applicable, a certified copy of the written acknowledgment of paternity to the social services district of the county within which [the mother] such party resides.

2.(b) Where a child's paternity has not been acknowledged voluntarily pursuant to paragraph (a) of subdivision one of this section or paragraph (a) of this subdivision, the child's

[mother and the putative father] parents may voluntarily acknowledge a child's paternity pursuant to this paragraph by signing the acknowledgment of paternity.

3. (a) An acknowledgment of paternity executed by the [mother and father of a child born out of wedlock] parties shall establish the paternity of a child and shall have the same force and effect as an order of [paternity or filiation] parentage issued by a court of competent jurisdiction. Such [acknowledgement] acknowledgment shall thereafter be filed with the registrar pursuant to subdivision one or two of this section.

4. A new certificate of birth shall be issued if the certificate of birth of a child born out of wedlock as defined in paragraph (b) of subdivision one of section four thousand one hundred thirty-five of this article has been filed without entry of the name of [the father] both parties, and the commissioner thereafter receives a notarized acknowledgment of paternity accompanied by the written consent of the [putative father and mother] parties to the entry of the name of such [father] other party, which consent may also be to a change in the surname of the child.

§51. Paragraph (e) of subdivision 1 of section 4138 of the public health law, as amended by chapter 160 of the laws of 2008, is amended to read as follows:

(e) the certificate of birth of a child born out of wedlock as defined in paragraph (b) of subdivision one of section four thousand one hundred thirty-five of this article has been filed without entry of the [name] names of [the father] both parents and the commissioner thereafter receives the acknowledgment of paternity pursuant to section one hundred eleven-k of the social services law or section four thousand one hundred thirty-five-b of this article executed by the [putative father and mother] parents which authorizes the entry of the name of such [father] parent, and which may also authorize a conforming change in the surname of the child.

§52. Section 110-a of the social services law, as amended by chapter 456 of the laws of 1978, is amended to read as follows:

§ 110-a. Special provisions for legal services to enforce support to recover costs of public assistance and care and to establish [paternity] parentage

1. Any inconsistent provision of law notwithstanding, the appropriating body of a social services district may authorize and make provision for the social services commissioner of such district to obtain: (a) necessary legal services on a fee for service basis or other appropriate basis which the department may approve, to obtain support from spouses and parents, to recover costs of public assistance and care granted, to establish [paternity] parentage, and to initiate and

prosecute proceedings for the commitment of the guardianship and custody of destitute or dependent children to authorized agencies, pursuant to the provisions of this chapter and the domestic relations law, the family court act and other laws, and (b) necessary services of private investigators, licensed pursuant to section seventy of the general business law, on a fee for service or other appropriate basis which the department may approve, to provide investigative assistance in efforts of the district to locate absent parents [and fathers] of children born out of wedlock.

2. Expenditures made by a social services district for the costs of such services shall be subject to reimbursement by the state pursuant to the provisions of section one hundred fifty-three or other appropriate provisions of this chapter.

§53. The title of title 6-a and subdivisions1, 2-a and subparagraph (1) of paragraph (d) of subdivision 4-a of section 111-b of the social services law, as amended by chapter 398 of the laws of 1997, are amended to read as follows:

Title 6-a. Establishment of [Paternity] Parentage and Enforcement of Support

1. The single organizational unit within the department shall be responsible for the supervision of the activities of state and local officials relating to establishment of [paternity] parentage of children born out-of-wedlock, location of absent parents and enforcement of support obligations of legally responsible relatives to contribute for the support of their dependents.

2-a. The department shall prepare a notice which shall be distributed by social services officials to persons who may be required to assign support rights which notice shall explain the rights and obligations that may result from the establishment of [paternity] parentage and the right of the assignor to be kept informed, upon request, of the time, date and place of any proceedings involving the assignor and such other information as the department believes is pertinent. The notice shall state that the attorney initiating the proceeding represents the department.

(1) information on administrative actions and administrative and judicial proceedings and orders relating to [paternity] parentage and support;

§54. Subdivision 1, paragraph (g) of subdivision 2, subdivision 3 and paragraphs (a) and (c) of subdivision 4 of section 111-c of the social services law, subdivision 3 as amended by chapter 398 of the laws of 1997 and subdivision 4 as amended by chapter 343 of the laws of 2009, are amended to read as follows:

1. Each social services district shall establish a single organizational unit which shall be responsible for such district's activities in assisting the state in the location of absent parents,

establishment of [paternity] parentage and enforcement and collection of support in accordance with the regulations of the department.

g. obtain from respondent, when appropriate and in accordance with the procedures established by section one hundred eleven-k of this chapter, an [acknowledgement] acknowledgment of paternity or an agreement to make support payments, or both;

3. Notwithstanding the foregoing, the social services official shall not be required to establish the [paternity] parentage of any child born out-of-wedlock, or to secure support for any child, with respect to whom such official has determined that such actions would be detrimental to the best interests of the child, in accordance with procedures and criteria established by regulations of the department consistent with federal law.

a. A social services district represents the interests of the district in performing its functions and duties as provided in this title and not the interests of any party. The interests of a district shall include, but are not limited to, establishing [paternity] parentage, and establishing, modifying and enforcing child support orders.

c. A social services district may appear in any action to establish [paternity] parentage, or to establish, modify, or enforce an order of support when an individual is receiving services under this title.

§55. Subdivision 1 of section 111-d of the social services law, as amended by chapter 502 of the laws of 190, is amended to read as follows:

1. The provisions of section one hundred fifty-three of this chapter shall be applicable to expenditures by social services districts for activities related to the establishment of [paternity] parentage of children born out-of-wedlock, the location of deserting parents and the enforcement and collection of support obligations owed to recipients of aid to dependent children and persons receiving services pursuant to section one hundred eleven-g of this title.

§56. The title and subdivision 1 of section 111-g of the social services law, as amended by chapter 57 of the laws of 2008, are amended to read as follows:

§ 111-g. Availability of [paternity] parentage and support services

1. The office of temporary and disability assistance and the social services districts, in accordance with the regulations of the office of temporary and disability assistance, shall make services relating to the establishment of [paternity] parentage and the establishment and enforcement of support obligations available to persons not receiving family assistance upon

application by such persons. Such persons must apply by (i) completing and signing a form as prescribed by the office of temporary and disability assistance, or (ii) filing a petition with the court or applying to the court in a proceeding for the establishment of [paternity] parentage and/or establishment and/or enforcement of a support obligation, which includes a statement signed by the person requesting services clearly indicating that such person is applying for child support enforcement services pursuant to this title.

§57. The title and paragraphs (a), (c) and (d) of subdivision 2 of section 111-k of the social services law, as amended by chapter 398 of the laws of 1997, are amended to read as follows:

§ 111-k. Procedures relating to acknowledgments of [paternity] parentage, agreements to support, and genetic tests

(a) When the [paternity] parentage of a child is contested, a social services official or designated representative may order the mother, the child, and the alleged [father] parent to submit to one or more genetic marker or DNA tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether or not the alleged father is the father of the child. The order may be issued prior or subsequent to the filing of a petition with the court to establish [paternity] parentage, shall be served on the parties by certified mail, and shall include a sworn statement which either (i) alleges [paternity] parentage and sets forth facts establishing a reasonable possibility of the requisite sexual contact between the parties, or (ii) denies [paternity] parentage and sets forth facts establishing a reasonable possibility that the party is not the [father] parent. The parties shall not be required to submit to the administration and analysis of such tests if they sign a voluntary acknowledgment of paternity in accordance with paragraph (a) of subdivision one of this section, or if there has been a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married [woman] couple.

(c) The cost of any test ordered pursuant to this section shall be paid by the social services district, provided, however, that the alleged [father] parent shall reimburse the district for the cost of such test at such time as the alleged [father's paternity] parent's parentage is established by a

voluntary acknowledgment of paternity or an order of [filiation] parentage. If either party contests the results of genetic marker or DNA tests, an additional test may be ordered upon written request to the social services district and advance payment by the requesting party.

(d) The parties shall be required to submit to such tests and appear at any conference scheduled by the social services official or designee to discuss the notice of the allegation of [paternity] parentage or to discuss the results of such tests. If the alleged [father] parent fails to appear at any such conference or fails to submit to such genetic marker or DNA tests, the social services official or designee shall petition the court to establish [paternity] parentage, provide the court with a copy of the records or reports of such tests if any, and request the court to issue an order for temporary support pursuant to section five hundred forty-two of the family court act.

§58. Section 111-p of the social services law, as amended by section 54 of chapter 398 of the laws of 1997, is amended to read as follows:

§ 111-p. Authority to issue subpoenas. The department or the child support enforcement unit coordinator or support collection unit supervisor of a social services district, or his or her designee, or another state's child support enforcement agency governed by title IV-D of the social security act, shall be authorized, whether or not a proceeding is currently pending, to subpoena from any person, public or private entity or governmental agency, and such person, entity or agency shall provide any financial or other information needed to establish [paternity] parentage and to establish, modify or enforce any support order. If a subpoena is served when a petition is not currently pending, the supreme court or a judge of the family court may hear and decide all motions relating to the subpoena. If the subpoena is served after a petition has been served, the court in which the petition is returnable shall hear and decide all motions relating to the subpoena. Any such person, entity, or agency shall provide the subpoenaed information by the date as specified in the subpoena. Such subpoena shall be subject to the provisions of article twenty-three of the civil practice law and rules. The department or district may impose a penalty for failure to respond to such information subpoenas pursuant to section twenty-three hundred eight of the civil practice law and rules.

§59. Section 111-r of the social services law, as amended by section 54 of chapter 398 of the laws of 1997, is amended to read as follows:

§ 111-r. Requirement to respond to requests for information. All employers, as defined in section one hundred eleven-m of this article (including for-profit, not-for-profit and governmental

employers), are required to provide information promptly on the employment, compensation and benefits of any individual employed by such employer as an employee or contractor, when the department or a social services district or its authorized representative, or another state's child support enforcement agency governed by title IV-D of the social security act, requests such information for the purpose of establishing [paternity] parentage, or establishing, modifying or enforcing an order of support. To the extent feasible, such information shall be requested and provided using automated systems, and shall include, but is not limited to, information regarding the individual's last known address, date of birth, social security number, plans providing health care or other medical benefits by insurance or otherwise, wages, salaries, earnings or other income of such individual. Notwithstanding any other provision of law to the contrary, such officials are not required to obtain an order from any judicial or administrative tribunal in order to request or receive such information. The department shall be authorized to impose a penalty for failure to respond to such requests of five hundred dollars for an initial failure and seven hundred dollars for the second and subsequent failure.

§60. Subparagraph (1) of paragraph (a) of subdivision 2 of section 111-v of the social services law, as amended by section 54 of chapter 398 of the laws of 1997, is amended to read as follows:

(1) safeguards against unauthorized use or disclosure of information relating to procedures or actions to establish [paternity] parentage or to establish or enforce support;

§61. Subdivision 16 of section 131 of the social services law, as amended by chapter 214 of the laws of 1998, is amended to read as follows:

16. If, in accordance with section one hundred fifty-eight, three hundred forty-nine-b or other provisions of this chapter, the social services official determines that an individual is not cooperating in establishing [paternity] parentage or in establishing, modifying, or enforcing a support order with respect to a child of the individual, and the individual does not have good cause for such failure or is not otherwise excepted from so cooperating in accordance with regulations of the department, the assistance given to the household shall be reduced by twenty-five percent.

§62. Subdivisions 1 and 3 of section 132-a of the social services law, as added by chapter 184 of the laws of 1969, are amended to read as follows:

1. When an investigation is required by section one hundred thirty-two and other

provisions of this chapter for the purpose of determining the eligibility for public assistance and care of an applicant pregnant with or who is the mother of an out of wedlock child such investigation shall include diligent inquiry into the [paternity] parentage of such child.

3. In appropriate cases, such applicant shall be required to file a petition in the family court instituting proceedings to determine the [paternity] parentage of [her] the child, and she shall be required to assist and cooperate in establishing such [paternity] parentage. However, such a petition shall not be required to be filed if the child has been surrendered to the social services official for adoption or if such surrender is under consideration in accordance with the provisions of section one hundred thirty-two.

§63. Paragraph (b) of subdivision 1 and subdivision 2 of section 349-b of the social services law, as amended by chapter 214 of the laws of 1998, is amended to read as follows:

b) to cooperate with the state and the social services official, in accordance with standards established by regulations of the department consistent with federal law, in establishing the [paternity] parentage of a child born out-of-wedlock for whom assistance under this title is being applied for or received, in their efforts to locate any absent parent and in obtaining support payments or any other payments or property due such person and due each child for whom assistance under this title is being applied for or received, except that an applicant or recipient shall not be required to cooperate in such efforts in cases in which the social services official has determined, in accordance with criteria, including the best interests of the child, as established by regulations of the department consistent with federal law, that such applicant or recipient has good cause to refuse to cooperate. Each social service district shall inform applicants for and recipients of family assistance required to cooperate with the state and local social services officials pursuant to the provisions of this paragraph, that where a proceeding to establish [paternity] parentage has been filed, and the allegation of [paternity] parentage has been denied by the respondent, that there shall be a stay of all [paternity] parentage proceedings and related local social services proceedings until sixty days after the birth of the child. Such applicants and recipients shall also be informed that public assistance and care shall not be denied during the stay on the basis of refusal to cooperate pursuant to the provisions of this paragraph.

2. The amount of the payments due from the absent parent in meeting his or her support obligations under this section shall be the amount of a current court support order or, in the absence of a court order, if such parent agrees to meet his or her support obligation, an amount to

be determined in accordance with a support formula established by the department and approved by the secretary of the federal department of health[, education and welfare] and human services.

§64. Paragraphs (a), (d), (e) and (f) of subdivision 1 of section 352-a of the social services law, as amended by section 86 of part B of chapter 436 of the laws of 1997, are amended to read as follows:

(a) to ascertain who may be the putative [father] parent of such child born out of wedlock, and take appropriate steps to establish the [paternity] parentage thereof in accordance with applicable provisions of law;

(d) to establish cooperative arrangements with the family court, county attorneys, corporation counsels and other law enforcement officials, for the establishment of [paternity] parentage and location of missing parents of such children and for the enforcement of their obligations to support or contribute to support of such children to the extent of their ability;

(e) to provide pertinent information to such court and law enforcement officials to enable them to assist in locating [putative fathers] alleged and deserting parents of such children, in establishing [paternity] parentage and in securing support payments therefrom, provided that there is an agreement between such social services official and such court and such law enforcement officials insuring that such information will be used only for the purpose intended;

(f) to reimburse, to the extent that state and federal requirements authorize or require, appropriate courts and law enforcement officials for activities related to the requirements of this chapter and the family court act with respect to establishment of [paternity] parentage and for services they have undertaken on behalf of such official.

§65. Subdivisions 1, 2, 3 and 4 of section 372-c of the social services law, as amended by chapter 139 of the laws of 1979, are amended to read as follows:

1. The department shall establish a putative father registry which shall record the names and addresses of: (a) any person adjudicated by a court of this state to be the father of a child born out-of-wedlock; (b) any person who has filed with the registry before or after the birth of a child out-of-wedlock, a notice of intent to claim [paternity] parentage of the child; (c) any person adjudicated by a court of another state or territory of the United States to be the father of an out-of-wedlock child, where a certified copy of the court order has been filed with the registry by such person or any other person; (d) any person who has filed with the registry an instrument acknowledging paternity pursuant to section 4-1.2 of the estates, powers and trusts law or section

four thousand thirty-five-b of the public health law.

2. A person filing a notice of intent to claim [paternity] parentage of a child or an [acknowledgement] acknowledgment of paternity shall include therein his or her current address and shall notify the registry of any change of address pursuant to procedures prescribed by regulations of the department.

3. A person who has filed a notice of intent to claim [paternity] parentage may at any time revoke a notice of intent to claim [paternity] parentage previously filed therewith and, upon receipt of such notification by the registry, the revoked notice of intent to claim [paternity] parentage shall be deemed a nullity nunc pro tunc.

4. An unrevoked notice of intent to claim [paternity] parentage of a child may be introduced in evidence by any party, other than the person who filed such notice, in any proceeding in which such fact may be relevant.

§66. Subdivision 2 of section 384-c of the social services law, as amended by chapter 575 of the laws of 1980, is amended and a new subdivision 8 is added to read as follows:

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court [in this state] of competent jurisdiction to be the [father] parent of the child;

(b) [any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of this chapter;

(c)] any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of this chapter;

[(d)] (c) any person who is recorded on the child's birth certificate as the child's [father] parent;

[(e)] (d) any person who is openly living with the child [and the child's mother] at the time the proceeding is initiated or at the time the child was placed in the care of an authorized agency, and who is holding himself out to be the child's father;

[(f)] (e) any person who has been identified as the child's [father] other parent by the mother in a written, sworn statement;

[(g)] (f) any person holding himself or herself out as the child's parent who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution

of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b; [and]

[(h)] (g) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law or section 4135-b of the public health law;

(h) any person who has established legal parentage through the execution of an acknowledgment of paternity recognized by any state, territory or country in which it was executed to have the force and effect of an order of parentage; and

(i) any person who has filed a parentage or custody petition for a child in foster care in which he states that he or she is the parent of the child and where the petition remains pending despite his or her diligent efforts to prosecute it so long as the petition was filed prior to the issuance of any order freeing the child for adoption.

8. If a party noticed pursuant to this section for a proceeding under section three hundred eighty-four-b of this chapter appears and asserts that his or her consent to any adoption of the child would be required under section 111 of the domestic relations law, a hearing shall be held prior to the fact-finding hearing. At such hearing, the petitioner in the underlying proceeding shall bear the initial burden of going forward with evidence showing that the noticed party's consent to the adoption would not be required, but the noticed party shall bear the ultimate burden of establishing by a preponderance of the evidence that his or her consent would be required under the domestic relations law.

§67. The title and subdivisions 1 and 5 of section 6509-c of the education law, as amended by section 122 of chapter 398 of the laws of 1997, are amended to read as follows:

§ 6509-c. Additional definition of professional misconduct; failure to comply in [paternity] parentage or child support proceedings; limited application

1. The provisions of this section shall apply in all cases of licensee or registrant failure after receiving appropriate notice, to comply with a summons, subpoena or warrant relating to a [paternity] parentage or child support proceeding referred to the board of regents by a court pursuant to the requirements of section two hundred forty-four-c of the domestic relations law or pursuant to section four hundred fifty-eight-b or five hundred forty-eight-b of the family court act.

5. This section applies to [paternity] parentage or child support proceedings commenced under, and support obligations paid pursuant to any order of child support or child and spousal

support issued under provisions of section two hundred thirty-six or two hundred forty of the domestic relations law, or article four, five, five-A or five-B of the family court act.

§68. Section 4-1.2 of the estates, powers and trusts law, as amended by chapter 64 of the laws of 2010, is amended to read as follows:

§ 4-1.2 Inheritance by non-marital children

(a) For the purposes of this article:

(1) A non-marital child is the legitimate child of his or her mother so that he or she and his or her issue inherit from his or her mother and from his or her maternal kindred.

(2) A non-marital child is the legitimate child of his [father] or her other parent so that he or she and his or her issue inherit from his [father] or her other parent and [his paternal] such parent's kindred if:

(A) a court of competent jurisdiction has, during the lifetime of the [father] other parent, made an order of [filiation declaring paternity] parentage or the [mother and father] parents of the child have executed an acknowledgment of paternity pursuant to section four thousand one hundred thirty-five-b of the public health law, which has been filed with the registrar of the district in which the birth certificate has been filed or;

(B) the father of the child has signed an instrument acknowledging paternity, provided that

(i) such instrument is acknowledged or executed or proved in the form required to entitle a deed to be recorded in the presence of one or more witnesses and acknowledged by such witness or witnesses, in either case, before a notary public or other officer authorized to take proof of deeds and

(ii) such instrument is filed within sixty days from the making thereof with the putative father registry established by the state department of social services pursuant to section three hundred seventy-two-c of the social services law, as added by chapter six hundred sixty-five of the laws of nineteen hundred seventy-six and

(iii) the department of social services shall, within seven days of the filing of the instrument, send written notice by registered mail to the mother and other legal guardian of such child, notifying them that an acknowledgment of paternity instrument acknowledged or executed by such father has been duly filed or;

(C) [paternity] parentage has been established by clear and convincing evidence, which

may include, but is not limited to: (i) evidence derived from a genetic marker test, or (ii) evidence that the [father] putative parent openly and notoriously acknowledged the child as his or her own, however nothing in this section regarding genetic marker tests shall be construed to expand or limit the current application of subdivision four of section forty-two hundred ten of the public health law.

(3) The existence of an agreement obligating the [father] alleged parent to support the non-marital child does not qualify such child or his or her issue to inherit from [the father] such parent in the absence of an order of [filiation] parentage made or [acknowledgement] acknowledgment of paternity as prescribed by subparagraph (2).

(4) A motion for relief from an order of [filiation] parentage may be made [only by the father and a motion for relief from and acknowledgment of paternity may be made] by [the father, mother,] an established or alleged parent or other legal guardian of such child, or the child, provided however, such motion must be made within one year from the entry of such order or from the date of written notice as provided for in subparagraph (2).

(b) If a non-marital child dies, his or her surviving spouse, issue, [mother, maternal kindred, father and paternal] his or her parents and parental kindred inherit and are entitled to letters of administration as if the decedent was a marital child, provided that the [father and paternal] kindred of a parent other than the mother may inherit or obtain such letters only if the [paternity] parentage of the non-marital child has been established pursuant to any of the provisions of subparagraph (2) of paragraph (a).

§69. This act shall take effect on the first day of November after it shall have become a law.

REPEAL NOTE: Family Court Act §562, entitled "Proceedings to compel support by mother and father," has been incorporated into Family Court Act §561.

11. Alleged parents entitled to consent to adoptions and to notice of adoption, surrender and termination of parental rights proceedings [DRL §§111, 111-a; Soc. Serv. L. §384-c]

In 1979, the United States Supreme Court, in Caban *v*. Mohammed, 441 US 388 (1979), held a statute unconstitutional that failed to afford a birth father the right to consent to his child's adoption, where he had lived with the mother, admitted paternity and had a substantial relationship with, and provided support to, the child. Following Caban, the Legislature enacted new criteria defining those alleged or unwed fathers who are entitled to consent to adoptions ("consent fathers") and those who are entitled simply to notice of termination of parental rights, surrender and adoption proceedings ("notice-only fathers"). Those entitled to notice only may be heard regarding the children's best interests but do not have veto power over their adoptions. L.1980, c. 575. Notwithstanding the Legislature's goals of providing "reasonable, unambiguous and objective" criteria for notice and consent,[20] experience with the 1980 statute has demonstrated that it fulfills none of those intentions. The Family Court Advisory and Rules Committee is, therefore, proposing this measure to expand and objectify both the criteria for non-marital parents to consent to adoptions and the criteria for those entitled to notice of, but not veto power over, adoptions.

1. Consent Parents: Children Over the Age of Six Months [Domestic Relations Law §111(1)(d)]: Domestic Relations Law §111(1)(d) sets forth the standards by which the father of a child who was over six months old when "placed with adoptive parents" can achieve the status of a "consent father." Use of the phrase "placed with adoptive parents" has caused considerable confusion, with the case law noting it could arguably mean when a child is first placed with a family that later becomes the adoptive resource, or the date that the child's permanency goal is changed to adoption, or the date of the filing of a termination proceeding, or the point at which the adoptive parents signed an adoptive placement agreement. *See, e.g.*, Matter of Leake and Watts, Inc. (Kevin G.), 51 Misc.3d 1207(A), 37 N.Y.S.3d 207, 2016 NY Slip Op. 50447(Fam. Ct., Bx.Co, 2016)(Unrep.); Matter of Tatiana R., 17 Misc.3d 443, 455-57 (Kings Co. Fam. Ct. 2007); Matter of Tasha M., 33 A.D.2d 387 (1st Dept. 2006). The Committee's proposal provides a clearer, more objective criterion by substituting a more readily identifiable point in time, namely, whether the child was over six months old at the "time of the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earliest." By using a concrete and verifiable event, parties will better understand what their rights are and needless litigation over the meaning of the terms of the statute will be avoided. Further, in conjunction with the Committee's proposal to substitute "parentage" for "paternity," this proposal substitutes the phrase "alleged parent" or "alleged father," as appropriate.

In addition to clarifying the initial benchmark, the Committee's proposal incorporates well-established objective criteria into the determination of whether a non-marital parent, who did not give birth to the child, is a "consent" parent. "Consent" parents would include those who have established legal parentage in a timely manner by having been adjudicated as the parent either by a

[20] Sponsor's Memorandum, 1980 NYS Leg. Ann. 242-243.

court of competent jurisdiction or by having acknowledged paternity in a form recognized by the jurisdiction in which it was executed to have the force and effect of an order of parentage. The Committee's proposal sets time limits for the unwed parent's establishment of parentage that are consistent with a child's need for prompt resolution of permanency issues: to qualify as a consent parent under DRL § 111(1)(d), the unwed parent's legal parentage must be established within six months of the child's first entry into foster care or be the result of a court action filed within six months of the child's birth, so long as that matter was actively prosecuted from the time of filing until the order was entered.

This elevation of certain legally adjudicated and acknowledged parents to "consent parents" from their current status as "notice only" parents is consistent with the recently enacted statute underscoring the long-recognized need for early identification of all parents and relatives (paternal and maternal), who may become actively engaged in the children's lives and with whom children who are the subjects of child protective proceedings might reside. *See* Family Court Act §1017 [L. 2015, c. 567].

Further, again eliminating the ambiguous phrase "placement of the child for adoption," the measure would confer "consent" parent status upon an alleged father who openly lived with his child and held himself out as the father of the child "for a period of six months immediately preceding the earlier of the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption."

Finally, the Committee's proposal incorporates an accepted criterion for the level of visitation contained in the alternative behavioral criteria for establishing the status of a "consent" parent under DRL § 111(1)(d). Under the current statute, a non-marital parent may qualify as a "consent" parent if "substantial and continuous or repeated contact with the child" has been maintained as manifested by the payment of child support and by either visiting the child at least once a month if financially and physically able to do so or maintaining regular contact with the child or person or agency having custody of the child if not financially and physically able to visit. *See* Matter of Gabrielle G. Mike G. *v.* Catholic Guardian Services, 166 A.D.3d 416 (1st Dept., 2018); Matter of Elijah Manuel V., 161 A.D.3d 665 (1st Dept., 20180; Matter of Montrell A.D. (Miguel D. - Cinnamon Nyree P.), 161 A.D.3d 411 (1st Dept., 2018), *lve. app. Denied,* 31 N.Y.3d 913 (2018); Matter of Star Natavia B., 141 A.D.3d 430 (1st Dept., 2016). The Committee's proposal would modify the visitation criterion to require visits at least twice per month, as that is the minimum standard for foster care visiting contained in the regulations of the New York State Office of Children and Family Services. *See* 18 N.Y.C.R.R. § 430.12(c)(4) (ii)(d)(1)(I).

2. Consent Parents: Children Under the Age of Six Months [Domestic Relations Law §111(1)(e)]: Section 111(1)(e) of the Domestic Relations Law, governing the rights of alleged parents whose newborn non-marital children are placed for adoption, was declared unconstitutional by the Court of Appeals in Matter of Raquel Marie X., 76 N.Y.2d 387 (1990), *cert. den. sub nom* Robert C. *v.* Miguel T., 498 U.S. 984 (1990), but remains in the statute books, a trap for the unwary litigant. The Committee's measure would remedy the unconstitutionality and, as in its recommendations regarding DRL §111(1(d), it would substitute objective criteria for the calculation of the relevant time-frames.

In the absence of statutory guidance, courts have had to determine on a case-by-case basis whether the consent of a parent of an infant born out-of-wedlock is required before an adoption can be approved. This process undermines the confidence with which adoptions can be planned and impedes the achievement of permanent homes for children by significantly complicating the litigation. Moreover, as noted with respect to older children under DRL § 111(1)(d), in seeking to apply the judicially created criteria to determine whether a given unwed parent's consent should be required for adoption of a child under the age of six months, courts struggle with the ambiguous "placed for adoption" benchmark. The Committee's measure thus applies DRL § 111(1)(e) to infants born within six months of "the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earliest."

In setting the criteria to establish which unwed parents of infants should be afforded the right to withhold their consent to a proposed adoption, the Committee's proposal seeks to set forth standards that constitutionally limit these rights to those parents who, having learned of the pregnancy or birth, come forward promptly to assume full parental responsibility, assuming they have not been prevented from doing so.

The provision of section 111(1)(e) that was struck down in Raquel Marie X., *supra*, required the consent of an unwed father of an infant only if for the six months preceding the child's placement, he had lived with the child or mother, held himself out as the child's father, and provided financial support. The Court of Appeals held the "living together" requirement to be unacceptable, because it had no bearing on the question of the father's relationship to the newborn infant and could "easily be used to block the father's rights." *Id*. The Committee's measure thus substitutes the more objective criteria for an unwed alleged parent who would be entitled to receive notice of a judicial proceeding concerning the child under section 111-a of the Domestic Relations Law or section 384-c of the Social Services Law. The criteria were approved by the United States Supreme Court in Lehr *v.* Robertson, 463 U.S. 248 (1982) and include, *inter alia*, an individual adjudicated as the parent or who has been identified as the parent by the birth mother in a written, sworn statement.

The measure would continue the requirement that, in order to be considered a "consent" parent of an infant, an alleged father must have openly held himself out to be the father of the child, but again substitutes the more objective standard of "prior to the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earliest" to establish the pertinent time-frame. It also continues the requirement that the parent must have paid "a fair and reasonable sum, in accordance with his or her means" for medical expenses, but adds "child support" as another possible means of financial support. Consistent with the holding in Adoption of Baby Girl S., 76 N.Y.2d 387 (1990), moreover, the proposal includes a "savings clause" that would exempt an unwed parent from these requirements if prevented from fulfilling them by the person or agency having lawful custody of the child.

The final criterion establishing "consent" parent status in the Committee's proposal is the requirement that within 30 days of receiving notice of an adoption proceeding, termination of parental rights proceeding, proceeding to grant temporary guardianship of the child to a proposed adoptive parent or notice of the commitment of guardianship and custody of the child by voluntary surrender

instrument, the alleged parent must file a motion to intervene in the proceeding, including an assertion of parentage and request for custody. Significantly, the measure provides that the alleged parent's consent shall not be required unless and until parentage is in fact legally established.

The Committee's proposal thus cures the constitutional defect identified in Racquel Marie X., *supra*, sets forth clearer criteria for adjudicating the status of unwed, alleged parents of infants, and encourages such alleged parents to assert their claims of parentage promptly so that their children may obtain permanent homes in a time frame consistent with their developmental needs.

3. Notice-only Fathers [Domestic Relations Law § 111-a, Social Services Law § 384-c]: The Committee's proposal adds two criteria to the eight existing categories of "notice-only" parents, that is, those unwed alleged parents whose consent to a proposed adoption is not required, but who are nonetheless entitled to notice of a termination of parental rights, surrender or adoption proceeding and afforded the opportunity to be heard on the issue of their child's best interests. The new criteria include:

• any person who has established legal parentage in another state, territory or country through the execution of an acknowledgment of paternity recognized by that jurisdiction as having the force and effect of an order of parentage; and

• with respect to a child in foster care, any person who has filed a parentage or custody petition prior to the issuance of any order freeing the child for adoption in which the alleged parent alleges parentage of the child and where the petition remains pending despite diligent efforts to prosecute it.

The proposal also modifies two of the existing criteria for "notice-only" parents to include:

• any person adjudicated by a court of competent jurisdiction to be the parent of the child; and

• any alleged father who is openly living with the child, not necessarily also with the child's mother, at the time the proceeding is initiated or at the time the child was placed in the care of an authorized agency, and who is holding himself out to be the child's father.

4. Determination of challenges to "notice-only" status: The measure would amend Social Services Law §384-c to add a new section adding needed clarification of the burden of going forward, the burden of persuasion and the requisite quantum of proof in termination of parental rights cases in which a person given a notice seeks to be given the status of a "consent father." It requires that in such cases, a hearing must be held before the fact-finding hearing in the underlying termination of parental rights or other proceeding. Consistent with the decision of the Appellate Division, First Department in Matter of Dominique P., 24 A.D.3d 335 (1st Dept., 2005), *leave to app. denied*, 6 N.Y.3d 732 (2006), the proposal provides that the petitioner in the underlying proceeding would bear the initial burden of going forward with evidence showing that the noticed party's consent to the adoption would not be required, but the noticed party shall bear the ultimate burden of establishing by a preponderance of the evidence that his or her consent would be required pursuant to the Domestic Relations Law. *See also*, Matter of Elijah Manuel V., *supra;* Matter of Robert R., 30 A.D.3d 309 (1st Dept., 2006). The approach taken by the First Department is appropriate since, while the petitioning agency should be expected to present evidence supporting the allegations it has asserted, the alleged parent is the party with the most complete knowledge of what has or has not done to assert parental rights and fulfill parental responsibilities. While not addressed by the First Department, it is also appropriate to require the general quantum of proof applicable in civil cases, that is, preponderance

of the evidence. Enactment of this measure will provide an essential road-map for the threshold determination of the status of individuals who seek recognition as parents so that they may consent to or veto the adoption of their children.

Proposal

AN ACT to amend the domestic relations law and the social services law, in relation to non-marital parents in adoption, surrender and termination of parental rights proceedings and consents to adoptions in family and surrogate's courts

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraphs (d) and (e) of subdivision 1 of section 111 of the domestic relations law, as amended by chapter 575 of the laws of 1980, are amended to read as follows:

(d) Of the [father] other parent, whether adult or infant, of a child born out-of-wedlock and [placed with the adoptive parents] more than six months [after birth] old at the time of the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earliest, but only if such [father shall have] other parent has

(i) established legal parentage by having been adjudicated as the parent by a court of competent jurisdiction or by having acknowledged paternity in a form duly executed pursuant to section four thousand one hundred thirty-five-b of the public health law or in a form recognized by the state, territory or country in which it was executed to have the force and effect of an order of parentage, so long as said legal parentage:

A. was established within six months of the child's first entry into foster care, or

B. was the result of a court action filed within six months of the child's birth that was actively prosecuted until the order was entered; or

(ii) openly lived with the child and openly held himself out to be the parent of such child for a period of six months immediately preceding the earlier of the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption; or

(iii) maintained substantial and continuous or repeated contact with the child as manifested by[: (i)] the payment by the [father] parent toward the support of the child of a fair and reasonable

sum, according to [the father's] his or her means, and either [(ii) the father's]

A. visiting the child at least [monthly] twice per month when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or [(iii) the father's regular communication]

B. regularly communicating with the child or with the person or agency having the care or custody of the child, when physically [and] or financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child. [The]

For purposes of this subparagraph, the subjective intent of the [father] parent, whether expressed or otherwise, unsupported by evidence of acts specified in this [paragraph] subparagraph manifesting such intent, shall not preclude a determination that the [father] parent failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the [father] parent to perform the acts specified in this [paragraph] subparagraph. [A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained substantial and continuous contact with the child for the purpose of this subdivision.]

(e) Of the [father] other parent, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time [he is placed for] of the filing of a petition to terminate parental rights, application to execute a judicial surrender, a petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or a petition for adoption, whichever is earliest, but only if: (i) such [father] parent [openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption] is a person entitled to notice pursuant to subdivision two of section one hundred eleven-a of this article or subdivision two of section three hundred-eighty-four-c of the social services law; and (ii) such [father] parent openly held himself or herself out to be the [father] parent of such child [during such period] prior to the filing of a petition to terminate parental rights, application to execute a judicial surrender petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earlier, unless prevented from so doing by the person or agency having lawful custody of the child; and (iii) such [father] parent paid a fair and reasonable sum, in

accordance with his or her means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child or child support, unless prevented from so doing by the person or agency having lawful custody of the child; and (iv) upon receiving notice of an adoption proceeding pursuant to the provisions of this chapter, or a notice of a proceeding to terminate parental rights pursuant to section three hundred eighty-four-b of the social services law, or a notice of the commitment of the guardianship and custody of the child by voluntary surrender instrument pursuant to section three hundred eighty-three-c or section three hundred eighty-four of the social services law, or a notice of a proceeding to grant temporary guardianship of the child to a proposed adoptive parent pursuant to section one hundred fifteen-c of this article, such parent filed a motion to intervene in the proceeding, including an assertion of parentage and a request for custody, within thirty days of the date of such notice.

Such consent shall not be required unless parentage is established in accordance with the relevant and otherwise consistent provisions of the family court act, social services law and public health law.

§2. Subdivisions 1 and 2 of section 111-a of the domestic relations law, as amended by chapter 371 of the laws of 2013, are amended to read as follows:

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b of this article relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given to any person who previously has been given notice of any [proceeding] petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption involving the child, [pursuant to section three hundred eighty-four-c of the social services law,] and provided further that notice in an adoption proceeding[,] pursuant to this section shall not be required to be given to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b of this article. In addition to such other requirements as may be applicable to the petition in any proceeding in which notice must be given pursuant to this section, the petition shall set forth the

names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice. For the purpose of determining persons entitled to notice of adoption proceedings initiated pursuant to this article, persons specified in subdivision two of this section shall not include any person who has been convicted of one or more of the following sexual offenses in this state or convicted of one or more offenses in another jurisdiction which, if committed in this state, would constitute one or more of the following offenses, when the child who is the subject of the proceeding was conceived as a result: (A) rape in first or second degree; (B) course of sexual conduct against a child in the first degree; (C) predatory sexual assault; or (D) predatory sexual assault against a child.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court [in this state] of competent jurisdiction to be the [father] parent of the child;

(b) [any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c)] any person who has timely filed an unrevoked notice of intent to claim [paternity] parentage of the child, pursuant to section three hundred seventy-two-c of the social services law;

[(d)] (c) any person who is recorded on the child's birth certificate as the child's [father] parent;

[(e)] (d) any person who is openly living with the child [and the child's mother] at the time the proceeding is initiated and who is holding himself out to be the child's father;

[(f)] (e) any person who has been identified as the child's [father] other parent by the mother in a written, sworn statement;

[(g)] (f) any person holding himself or herself out as the child's parent who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law; [and]

[(h)] (g) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law or

section 4135-b of the public health law;

(h) any person who has established legal parentage through the execution of an acknowledgment of paternity recognized by any state, territory or country in which it was executed to have the force and effect of an order of parentage; and

(i) any person who has filed a parentage or custody petition for a child in foster care in which he or she states that he or she is the parent of the child and where the petition remains pending despite his or her diligent efforts to prosecute it, so long as the petition was filed prior to issuance of any order freeing the child for adoption.

§3. Subdivisions 1 and 2 of section 384-c of the social services law, subdivision 1 as amended by chapter 371 of the laws of 2013 and subdivision 2 as amended by chapter 575 of the laws of 1980, are amended and a new subdivision 8 is added to read as follows:

1. Notwithstanding any inconsistent provision of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any [proceeding initiated pursuant to sections three hundred fifty-eight-a, three hundred eighty-four, and three hundred eighty-four-b of this chapter,] petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption involving a child born out-of-wedlock. Persons specified in subdivision two of this section shall not include any person who has been convicted of one or more of the following sexual offenses in this state or convicted of one or more offenses in another jurisdiction which, if committed in this state, would constitute one or more of the following offenses, when the child who is the subject of the proceeding was conceived as a result: (A) rape in first or second degree; (B) course of sexual conduct against a child in the first degree; (C) predatory sexual assault; or (D) predatory sexual assault against a child.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court [in this state] of competent jurisdiction to be the [father] parent of the child;

(b) [any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of this chapter;

(c)] any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of this chapter;

[(d)] (c) any person who is recorded on the child's birth certificate as the child's [father] parent;

[(e)] (d) any person who is openly living with the child [and the child's mother] at the time the proceeding is initiated or at the time the child was placed in the care of an authorized agency, and who is holding himself out to be the child's father;

[(f)] (e) any person who has been identified as the child's [father] other parent by the mother in a written, sworn statement;

[(g)] (f) any person holding himself or herself out as the child's parent who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b; [and]

[(h)] (g) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law or section 4135-b of the public health law;

(h) any person who has established legal parentage through the execution of an acknowledgment of paternity recognized by any state, territory or country in which it was executed to have the force and effect of an order of parentage; and

(i) any person who has filed a parentage or custody petition for a child in foster care in which he states that he or she is the parent of the child and where the petition remains pending despite his or her diligent efforts to prosecute it so long as the petition was filed prior to the issuance of any order freeing the child for adoption.

8. If a party noticed pursuant to this section for a proceeding under section three hundred eighty-four-b of this chapter appears and asserts that his or her consent to any adoption of the child would be required under section 111 of the domestic relations law, a hearing shall be held prior to the fact-finding hearing. At such hearing, the petitioner in the underlying proceeding shall bear the initial burden of going forward with evidence showing that the noticed party's consent to the adoption would not be required, but the noticed party shall bear the ultimate burden of establishing by a preponderance of the evidence that his or her consent would be required under

the domestic relations law.

§4. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to petitions for adoption, termination of parental rights, approval of extra-judicial surrenders or extra-judicial consents to adoption or applications to execute judicial surrenders filed on or after such effective date; provided, however, that this act shall not apply to cases in which judicial determinations had been made prior to such effective date regarding whether an alleged parent's consent to an adoption would be required or whether he or she is entitled to notice under section 111-a of the domestic relations law or section 384-c of the social services law.

12. Determining parentage in Family Court proceedings after an acknowledgment of paternity has been executed [F.C.A. §§ 522, 523, 524, 532(a), 542(d)]

Section 516-a of the Family Court Act provides for the recognition of and challenges to acknowledgments of paternity (AOPs) executed pursuant to section 111-k of the Social Services Law. Section 516-a(a) states that once executed and filed, an AOP establishes parentage without the necessity of any further judicial proceeding and is the equivalent of an order of filiation. Under section 516-a(b), only the signatories to an AOP have standing to petition to vacate it. This has led to confusion about whether a non-signatory to the AOP could ever seek a determination that he or she is the child's parent. Since AOP's are generally executed in hospitals within days of a child's birth, even a non-signatory petitioner filing right away in Family Court may find that a legal father already exists.

The Family Court Advisory and Rules Committee is proposing a measure to amend the Family Court Act to clarify that a non-signatory to an AOP who comes forward alleging that he is the father has standing to file a paternity[21] petition notwithstanding the existence of an AOP signed by another individual. In such a case, the signatory to the AOP is a necessary party and would have to be named as a respondent. If appropriate, the Family Court would have discretion to order the male signatory to submit to DNA testing, in addition to the petitioner, mother and child. Finally, the court would be required to issue an order vacating the AOP where a non-signatory has been adjudged to be the father, even in the absence of a petition filed by a signatory. It should be noted that this proposal does not change the law on equitable estoppel, so that an alleged father seeking paternity may still be barred by equitable estoppel. *See*, Stephen N. *v.* Amanda O., 140 A.D.3d 1223 (3rd Dept., 2016).

The Committee's proposal is consistent with the rulings of appellate courts that have stepped in to resolve the ambiguity. In Dwayne J.B. *v.* Santos H., 89 A.D.3d 838 (2nd Dept. 2011), the Appellate Division, Second Department, determined that a prior AOP "does not serve as an insuperable bar to a claim of paternity by one who is a stranger to the acknowledgment." The Third and Fourth Departments have followed suit. *See* Stephen N. *v.* Amanda O., 140 A.D.3d 1223 (3rd Dept., 2016); Frost *v.* Wisniewski, 126 A.D.3d 1305 (4th Dept., 2015). However, even in these cases, little guidance has been given to the Family Courts about what to do should a non-signatory be declared the father. In the absence of any statutory authority, many courts are loathe to issue any orders vacating the underlying AOPs unless a signatory has filed a petition to vacate. In cases in which one of the signatories did not initiate the proceeding, they are unlikely to file a petition to vacate the AOP. This measure would provide needed clarification by amending Family Court Act §542 to provide that where the AOP signatory is determined not to be the father, the AOP must be vacated at the same time that a new order of filiation is issued.

The recent decision of the Family Court, Bronx County, in Matter of Emily R. *v.* Emilio R.

[21] The Committee is also proposing legislation to change the term "paternity" to "parentage." Apart from the phrase "acknowledgment of paternity," which is a mandate for states under Federal law and regulations [42 U.S.C.A. §666(a)(5) and 45 C.F.R. 302.70(a)(50(iii0, respectively], this proposal uses the suggested "parentage" terminology.

and Juan Alexis C., 53 Misc.3d 325 (Fam. Ct., Bx. Co., 2017), illustrates and, in fact, suggests the need for enactment of the Committee's proposal. The mother, a teenager at the time of the birth of the child, was involved with two men, one of whom joined the mother in signing an AOP right after the child's birth but soon became uninvolved both with the child and her mother. The other man, who was married and in his thirties when the child was born, developed a parental relationship with the child. The AOP signatory filed a petition to vacate the AOP but it was dismissed for failure to prosecute. The child's attorney filed a vacatur petition, but the Support Magistrate denied it since neither the mother nor the AOP signatory had a vacatur petition pending. Upon referral to a Family Court judge to adjudicate equitable estoppel issues, the judge noted that the limitation that only an AOP signatory may challenge an AOP is an "impediment to a non-signatory seeking to establish paternity." *Id.,* at 333. Noting that children's best interests are the paramount concern in paternity proceedings, the judge stated that adjudication of "the correct man" to be the child's father would be in her best interests:

> [S]he is locked into a legal status in which she has a "legal father" whom everyone agrees is not her biological father, who does not support her, and who does not wish to pursue a relationship with her...

Id., at 335. The child, as well as her biological father, requested that this matter be corrected as she related to his children as her siblings and wanted to adopt his surname. Correction of her true paternity was also necessary to ensure her rights to inheritance, Social Security and continued visitation. In granting the relief, the Court stated:

> Given the ambiguities of the statutory scheme as it impacts practice and procedure, I write this decision so the attention might be paid for consideration by appropriate authorities to future refinements of the practice and the statute.

Id., at 336. Adding the flexibility to Article 5 of the Family Court Act as recommended by the Committee would fully address the problems identified in Emily R. and would better enable the Family Court to fulfill its obligation to further children's best interests in its paternity decisions.

Proposal

AN ACT to amend the family court act, in relation to standing to file parentage petitions, necessary parties in parentage cases and vacaturs of acknowledgments of paternity

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 522 of the family court act, as amended by chapter 892 of the laws of 1986, is amended to read as follows:

§522. Persons who may originate proceedings.

(a) Proceedings to establish the [paternity] parentage of [the] a the child and to compel

support under this article may be commenced by [the mother]:

(1) a parent or an alleged parent whether a minor or not, [by a person alleging to be the father, whether a minor or not, by the]

(2) a child or child's guardian or other person standing in a parental relation or being the next of kin of the child,

(3) an individual who provided a biological or genetic component of assisted reproduction, an intended parent, and the spouse of an intended parent.

(4) an authorized representative of a support enforcement agency or other governmental agency authorized to maintain a parentage proceeding,

(5) a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor, in order to legally establish the child-parent relationship of a child, or [by]

(6) any authorized representative of an incorporated society doing charitable or philanthropic work, or if the [mother] other parent or child is or is likely to become a public charge on a county, city or town, by a public welfare official of the county, city or town where the [mother] other parent resides or the child is found.

(b) An alleged parent may file a petition to establish parentage notwithstanding an acknowledgment of paternity signed by the mother and an alleged father.

(c) If a proceeding is originated by a [public welfare official] support enforcement agency, other governmental agency or authorized representative of an incorporated society doing charitable or philanthropic work and thereafter withdrawn or dismissed without consideration on the merits, such withdrawal or dismissal shall be without prejudice to other persons.

§2. Section 523 of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

§ 523. Petition to establish parentage.

(a) Proceedings are commenced by the filing of a verified petition, alleging that the person named as respondent, or the petitioner if the petitioner is a person alleging to be the [child's father] parent of a child born out of wedlock, is the [father] parent of the child and petitioning the court to issue a summons or a warrant, requiring the respondent to show cause why the court should not enter a declaration of [paternity] parentage, an order of support, and such other and

further relief as may be appropriate under the circumstances.

(b) The petition shall be in writing and verified by the petitioner.

(c) Any such petition for the establishment of [paternity] parentage or the establishment, modification and/or enforcement of a child support obligation for persons not in receipt of family assistance, which contains a request for child support enforcement services completed in a manner as specified in section one hundred eleven-g of the social services law, shall constitute an application for such services.

(d) In the event that the mother signed an acknowledgment of paternity with a person other than the alleged parent, the signatory to the acknowledgment of paternity is a necessary party and must be named as a respondent.

(e) A proceeding to establish parentage through assisted reproduction is commenced by the filing of a verified petition which must include the following:

(1) a statement that the gestating parent became pregnant as a result of the donation of the gamete or embryo and a representation of non-access during the time of conception; and

(2) a statement that the non-gestating intended parent consented to assisted reproduction; and

(3) a statement of the donor's donative intent.

§3. Section 524 of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

§ 524. Issuance of summons.

(a) On receiving a petition sufficient in law [commencing] to commence a [paternity] parentage proceeding, the court shall cause a summons to be issued, requiring the respondent to show cause why the [declaration of paternity,] order of [filiation] parentage, order of support and other and further relief [prayed for by] requested in the petition should not be made.

(b) The summons shall contain or have attached thereto a notice stating: (i) that the respondent's failure to appear shall result in the default entry of an order of [filiation] parentage by the court upon proof of a respondent's actual notice of the commencement of the proceeding; and (ii) that a respondent's failure to appear may result in the suspension of his or her driving privileges; state professional, occupational and business licenses; and sporting licenses and permits.

§4. Subdivision (a) of section 532 of the family court act, as amended by chapter 214 of the laws of 1998, is amended to read as follows:

(a) The court shall advise the parties of their right to one or more genetic marker tests or DNA tests and, on the court's own motion or the motion of any party, shall order the [mother, her] parties, the child [and, the alleged father], and, if appropriate, the signatory to an acknowledgment of paternity to submit to one or more genetic marker or DNA tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether the alleged [father] parent is or is not the [father] parent of the child. No such test shall be ordered, however, upon a written finding by the court, after due inquiry, that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married [woman] couple. The record or report of the results of any such genetic marker or DNA test ordered pursuant to this section or pursuant to section one hundred eleven-k of the social services law shall be received in evidence by the court pursuant to subdivision (e) of rule forty-five hundred eighteen of the civil practice law and rules where no timely objection in writing has been made thereto and that if such timely objections are not made, they shall be deemed waived and shall not be heard by the court. If the record or report of the results of any such genetic marker or DNA test or tests indicate at least a ninety-five percent probability of [paternity] parentage, the admission of such record or report shall create a rebuttable presumption of [paternity] parentage, and shall establish, if unrebutted, the [paternity] parentage of and liability for the support of a child pursuant to this article and article four of this act.

§5. Section 542 of the family court act is amended by adding a new subdivision (d) to read as follows:

(d) If the mother signed an acknowledgment of paternity with another person whom the court has determined is not the parent of the child, the court shall make an order vacating the acknowledgment of paternity at the same time that it makes the order of parentage.

§6. This act shall take effect on the ninetieth day after it shall have become a law.

13. Duration of orders of protection in child abuse and neglect proceedings in Family Court
[F.C.A. §1056]

A serious problem confronting victims of family violence, both adults and children, in child protective cases is the heavy burden created by the extremely short duration of orders of protection against family members, a period far shorter than applicable periods for orders in family offense, custody, visitation, child support and paternity proceedings. Subdivision one of 1056 of the Family Court Act authorizes an order of protection against respondent parents, persons legally responsible for a child's care and such persons' spouses in child neglect and abuse proceedings to last only as long as a child protective dispositional order. *See* Matter of Pedro A. *v.* Gloria A.,- A.D.3d-, 2019 NY Slip Op. 00010 (3rd Dept., Jan. 3, 2019); Matter of Makayla I. *v.* Harold J., 162 A.D.3d 1139 (3rd Dept., 2018); Matter of Nevaeh T., 151 A.D.3d 1766 (4th Dept., 2017); Matter of Alexis A.(Richard V.), 143 A.D.3d 700 (2nd Dept., 2016); Matter of Kole HH, 84 A.D.3d 1518 (3rd Dept., 2011); Matter of Patricia B., 61 A.D.3d 861 (2d Dept., 2009), *lve. app. denied*, 13 N.Y.3d 713 (2009); Matter of Andrew Y., 44 A.D.3d 1063 (2d Dept., 2007); Matter of Candace S., 38 A.D.3d 786 (2d Dept., 2007), *lve. app. denied*, 9 N.Y.3d 805 (2007); Matter of Amanda WW., 43 A.D.3d 1256 (3d Dept., 2007); Matter of Collin H., 28 A.D.3d 806 (3d Dept., 2006). Dispositions in child protective cases include, *inter alia*, release of a child under supervision for one year, subject to a one-year extension, or placement of a child until the next permanency planing hearing. Permanency planning hearings must be convened for children in foster care, as well as children directly placed with relatives and other individuals, once they have been in care for eight months and then every six months thereafter. *See* Family Court Act §§1052, 1054, 1055, 1057, 1089. Thus, orders of protection even in the most extreme cases of severe child abuse may only last for six months or one year, subject to equally limited extensions, although identical allegations in other categories of cases would justify far longer orders.

The Family Court Advisory and Rules Committee is proposing a measure to remedy this problem. Similar to orders of protection in family offense cases, the proposal provides that orders of protection issued in child protective proceedings against individuals who are related by blood or marriage to the child or who were members of the child's household at the time of the disposition would be authorized to last up to two years or, or, upon findings of special circumstances or a violation of an order of protection, up to five years. The definition of special circumstances contained in Family Court Act §827(a)(vii) would be incorporated by reference:

> For the purposes of this section aggravating circumstances shall mean physical injury or serious physical injury to the petitioner caused by the respondent, the use of a dangerous instrument against the petitioner by the respondent, a history of repeated violations of prior orders of protection by the respondent, prior convictions for crimes against the petitioner by the respondent or the exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household.

Such orders could be extended upon judicial review, with notice to all affected parties, in the context

of a permanency hearing under Article 10-A of the Family Court Act or other post-dispositional proceeding under Article 10. These provisions for time-limited orders would, therefore, be consistent with the requirement for time-limited orders with authorizations for periodic judicial review as established by the Court of Appeals in Matter of Sheena D., 8 N.Y.3d 136 (2007).

The time limits in Family Court Act §1056 stand in sharp contrast to the duration limits of family offense orders of protection, which were extended by the Legislature in 2003 to up to two years or, if aggravating circumstances or a violation of an order of protection are found, up to five years. *See* Family Court Act §842 [L. 2003, c. 579]. Orders of protection in custody, visitation and other civil proceedings in Supreme and Family Court may last for specified periods until the youngest child reaches majority. Indeed, the Family Court in Child Protective Services *ex rel* Ashley B. *v.* William B., 7 Misc.3d 1017(A), 2005 *WL* 1021565, NY Slip Op. 50637 (Fam. Ct., Suff. Co., 2005)(Unrep.), in issuing a longer order in admitted contravention of the statutory language, stated:

> The facts of this case involve a grandfather who sexually abused his granddaughter. It is more likely than not that if not prevented from being a part of this child's life he may appear at some social or family function at a future date and the child and her siblings would not be protected by a Family Court order of protection.
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> FCA § 115 provides that the Family Court has exclusive original jurisdiction over abuse and neglect proceedings as set forth in Article 10. FCA § 1011 states that the Article is designed to help and protect children from injury or mistreatment and to safeguard their physical, mental and emotional well-being. Since the Court is statutorily empowered to issue an order of protection until a child's 18th birthday in a custody/visitation matter, it defies logic that the Court would not have a similar power under a child abuse/neglect proceeding.

Similar to Child Protective Services *ex rel* Ashley B., *supra*, the recent case of Matter of Makayla I. *v.* Harold J., *supra*, compels enactment of the Committee's proposal. Notwithstanding the Appellate Division's agreement in Makayla I. with the Family Court's conclusion that the best interests of two children would be served by prohibiting contact by the grandfather with his grandchild and step-grandchild in light of his sexual abuse, the Court was constrained to limit the duration of the order of protection regarding the grandchild to the one-year duration of the supervision order. Underscoring the anomalous nature of the current statute, the Court remanded the case regarding the order of protection with respect to the step-grandchild for the Family Court to determine whether the grandfather was related by blood or marriage to a "member of the child's household." Clearly both children required protection from serious sexual abuse and the disparate treatment of the two children by virtue of the language of the current law impeded the Court's ability to fulfill its mission of ensuring safety for both children,

Under current law, a parent, relative or other household member living in the home of the child who is the subject of a child abuse case, who has subjected the child to sexual abuse or other severe forms of child abuse, may only be ordered out of the home for the period of the disposition, typically six months (until the next permanency planning hearing) or one year, which may be extended for an additional year (if supervision had been ordered). Incorporation into Family Court Act §1056 of the family offense periods of two years and, where special circumstances have been found, five years, is essential to prevent further injury to children and critically important to

effectuate the purpose clause of the child protective article of the Family Court Act, that is, as stated in Family Court Act §1011, "to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well-being."

Proposal

AN ACT to amend the family court act, in relation to the duration of orders of protection in child abuse and neglect proceedings in family court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The opening paragraph of subdivision 1 of section 1056 of the family court act, as amended by chapter 526 of the laws of 2013, is amended to read as follows:

The court may [make] issue an order of protection in assistance or as a condition of any other order made under this part. Such order of protection [shall] issued under this section may remain in effect [concurrently with, shall expire no later than the expiration date of, and] for a period of up to two years or, if the court finds special circumstances, a period of up to five years. For purposes of this section, "special circumstances" shall mean physical injury or serious physical injury caused by the respondent to the protected person or persons or any minor child, the use of a dangerous instrument by the respondent against the protected person or persons or any minor child, a history of violations of orders of protection by the respondent, prior convictions for crimes against the protected person or persons or a minor child by the respondent or the exposure by the respondent of the protected person or persons or a minor child or any family or household member to physical injury or acts constituting a felony sex offense as defined in subdivision (e) of section one thousand twelve of this article and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the protected person or persons or a minor child or any family or household member. The order of protection may be extended independently or concurrently with, [such other] another order [made] issued under this [part] article or article ten-A of this act, except as provided in subdivision four of this section. The order of protection may set forth reasonable conditions of behavior for the purposes of protection to be observed for a specified time by a person who is before the court and is a parent or a person legally responsible for the child's care or the spouse of the parent or other person legally responsible for the child's care, or both. Such an order may require any such person:

§2. This act shall take effect on the ninetieth day after it shall have become a law.

14. Conditional surrenders of parental rights
in Family and Surrogate's Court
[DRL §112-b; F.C.A. §262; Soc. Serv. Law §§383-c, 384]

As noted by the Court of Appeals in Matter of Jacob, 86 N.Y.2d 651 (1995), the legislation enacted in 1990 authorizing surrenders of the parental rights of children to authorized child care agencies to contain conditions including, among others, designation of specific adoptive parents and delineation of post-adoption contact, reflected the first recognition of "open adoptions" under New York State Law. *See* L. 1990, c. 479. This legislation and its subsequent amendments created a framework to enable parents surrendering children to authorized child care agencies for the purposes of adoption to be able to seek judicial enforcement of agreed-upon conditions to the extent that the conditions comport with the children's best interests. With detailed provisions for the birth parents to receive notice of the consequences of their surrenders, sections 383-c and 384 of the Social Services Law were designed to ensure that birth parents would be fully aware of the ramifications of their surrenders and the remedies for enforcement of the conditions. Coupled with the provisions of Domestic Relations Law §112-b, which require that agreements for post-adoption contact be approved by the court as being in the children's best interests in order to be legally enforceable, the statutes were designed to provide judicial oversight that would fulfill the children's best interests through procedures that are fair to birth parents, adoptive parents, authorized agencies and, most important, the children.

Unfortunately, over two decades of experience have revealed all too many cases in which these legislative goals have not been met and in which what appeared to be plain terms of the statutes have not been followed. All too frequently, birth parents have been induced to execute surrenders, particularly extra-judicial surrenders, upon the assumption that informal agreements or side letters of understanding would be enforceable even though they were not presented to the Family or Surrogate's Court for approval and thus no approval was incorporated into any written court order. Although surrenders of children in foster care must contain notices in "conspicuous bold print on the first page" of the right to counsel, including the right to appointed counsel if indigent, many birth parents executing surrenders are unrepresented, particularly surrenders pursuant to Social Services Law §384 of children who are not in foster care, as well as extra-judicial surrenders of children both in and out of foster care that are executed by birth mothers while in the hospital immediately after giving birth. *See* Social Services Law §§383-c(5(b).[22]

In light of these deviations from the clear intent and letter of the statute, the Family Court Advisory and Rules Committee is submitting a proposal explicitly requiring that all conditions

[22] Notwithstanding Social Services Law §§383-c(5)(b), section 262 of the Family Court Act does not enumerate that statute in its list of categories of cases in which indigent parents have a right to counsel. Ironically, while Social Services Law §384 contains no reference to counsel, that section is included in Family Court Act §262(a)(iv). The Committee's proposal would correct both of these omissions. Significantly, in the case of extra-judicial surrenders, the right to appointed counsel for indigent parents is unevenly implemented because such surrenders do not need to approved by the Family or Surrogate's Court to be "valid" (or, in the case of surrenders of children in foster care, to trigger the time-limit for irrevocability), even if conditions contained within them must be court-approved in order to be enforceable. *See* Social Services Law §§383-c(6)(b); 384(4).

accompanying surrenders, both of children in and out of foster care, must be approved by the Family or Surrogate's Court as being in the child's best interests and the approval must be incorporated into a court order in order to be legally enforceable. To underscore the need for judicial oversight, the proposal requires that, with respect to an extra-judicial surrender executed on or after the effective date of the statute (January 1, 2020), an agreement designating the prospective adoptive parent or providing for post-adoption contact would only be enforceable if, in addition to the requirements that all parties consent in writing to the conditions and that the court determine that the agreement is in the child's best interests, two further conditions must be met, *i.e.*, (i) that if the party or parties surrendering the child are unable to appear in court to execute the surrender, they attest in a sworn affidavit that it would be an undue hardship for them to do so; and (ii) the party or parties surrendering the child were represented by counsel and such counsel was present at the execution of the surrender and informed the surrendering party or parties of the requirements for enforceability of the agreement. Agreements for post-adoption contact between the surrendered child and birth siblings and half-siblings, where either the child and/or siblings or half-siblings are 14 years of age or older, would likewise require their written consent in order to be enforceable. A copy of the court order incorporating an agreement designating a prospective adoptive parent or authorizing post-adoption contact must be given to all parties to the agreement. The proposal would also correct the omissions in Family Court Act §262 and Social Services Law §384 with respect to the right to counsel for surrendering parents. Social Services Law §383-c would be added to the categories of cases for which there is a right to appointed counsel for indigent adults and the provision regarding notice of the right to counsel, as well as notice of the right to supportive counseling contained in Social Services Law §383-c, would be added to Social Services Law §384(4).

The need for enactment of the Committee's proposal is illustrated by the case of Matter of Kaylee O. *v.* Michael O., 111 A.D.3d 1273 (4th Dept., 2013). While deferring to the Family Court's determination that a post-adoption contact agreement would not be in the child's best interests in that case, the Supreme Court, Appellate Division, Fourth Department, held that the agreement would not be enforceable in any event because it had not been approved by the court and incorporated into a court ordered adoption agreement, as required by Domestic Relations Law §112-b.

Further, in Matter of the Adoption of Jack *ex rel.* David B., 18 Misc.3d 397 (Fam. Ct., Monroe Co., 2007), the Family Court, Monroe County, deferred finalization of an adoption pending execution of new surrenders by the child's birth parents because the original extra-judicial surrenders, executed by birth parents, referred to an agreement for post-adoption contact, but neither the extra-judicial surrenders nor the agreement had been presented to the Family Court for approval. The Court noted that the proposed adoptive parents and birth parents intended the post-adoption contact agreement "to be exempt from court review and not enforceable in court," which it found "particularly troubling because the birth parents did not have counsel and because the terms of the agreement are not included in the surrender." With no judicial review of the agreement, no attorney for the child had been appointed, no best interests determination had been made and no clarity was offered as to the extent of post-adoption contact contemplated to occur following execution of the surrender but prior to the adoption finalization. The existence of this unenforceable "side agreement" was deemed to "cast[] a cloud over the surrenders themselves." The Court stated:

> ...Agreements made outside of the surrender instrument, especially made by birth parents

> unrepresented by counsel, leave the court with no way of knowing whether impermissible inducements contributed to the signing of the instrument and leave the surrender open for challenge in the future by the birth parents.
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> It was precisely the need to avoid unenforceable or impermissibly induced side agreements in adoptions that led the legislature to amend Social Services Law §384 to provide a procedure for enforceable post-adoption agreements that balance the rights of the parents and proposed adoptive parents within the context of the child's best interest (*see* L. 2005, c. 3, eff. August 23, 2005). ...By defining the right to enforce post-adoption contact agreements and providing judicial oversight to assure that agreements promote the child's best interest, the statutory framework has reduced or avoided possible litigation.
>
> It is this court's view that the parties are not permitted to agree to terms that contradict the statutory requirements or the purpose of the statute, which is to clarify and protect the rights of birth parents, prospective adoptive parents and promote the best interests of the child.

Declining to accept the surrenders, the Court held:

> The existence of an unenforceable side agreement for post-adoption contact made by unrepresented parents, which has not been provided to the court or reviewed by any court, creates doubts as to whether the surrenders were knowingly and voluntarily executed by the birth parents. Moreover, the failure of the adoption agency to apply to Erie County Surrogate's Court for approval of the surrender means that there has been no best interest review of the surrender.

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Matter of Kaylee O. *v.* Michael O. and Matter of the Adoption of Jack *ex rel.* David B., regrettably, were not isolated cases. Apparently, side agreements never presented to any court for approval have become common practice statewide and clearly thwart the clear intent of the Legislature in enacting the conditional surrender provisions of Social Services Law §§383-c and 384, as well as the requirements for post-adoption contact agreements in Domestic Relations Law §112-b. Enactment of the Committee's proposal would ensure necessary judicial oversight, thereby protecting both the fairness of the surrender process for all parties and the best interests of the children involved.

Proposal

AN ACT to amend the domestic relations law and the social services law, in relation to conditional surrenders of parental rights in family and surrogate's court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions 1 and 2 of section 112-b of the domestic relations law, subdivision 1 as amended by chapter 3 of the laws of 2005 and subdivision 2 as amended by

chapter 41 of the laws of 2010, are amended to read as follows:

1. Nothing in this section shall be construed to prohibit the parties to a proceeding under this chapter from entering into an agreement regarding communication with or contact between an adoptive child, adoptive parent or parents and a birth parent or parents and/or the adoptive child's biological siblings or half-siblings, provided, however, that such an agreement shall not be legally enforceable unless the judicial approval of the agreement has been incorporated into a written order entered by the court in accordance with subdivision two of this section.

2. Agreements regarding communication or contact between an adoptive child, adoptive parent or parents, and a birth parent or parents and/or biological siblings or half-siblings of an adoptive child shall not be legally enforceable unless the terms of the agreement are incorporated into a written court order entered in accordance with the provisions of this section. An agreement for contact or communication between the child and his or her siblings or half-siblings where the child and/or siblings or half-siblings are fourteen years of age or older shall not be enforceable unless such child and such sibling or half-sibling consent to the agreement in writing. The court shall not incorporate an agreement regarding communication or contact into an order unless the terms and conditions of the agreement have been set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the adoptive child. The court shall not enter a proposed order unless the court in which the surrender was executed or the court that approved the surrender of the child determined and stated in its order that the communication with or contact between the adoptive child, the prospective adoptive parent or parents and a birth parent or parents and/or biological siblings or half-siblings, as agreed upon and as set forth in the agreement, would be in the adoptive child's best interests. Notwithstanding any other provision of law, a copy of the order entered pursuant to this section incorporating the post-adoption contact agreement shall be given to all parties who have agreed to the terms and conditions of such order.

With respect to surrenders executed on or after January 1, 2020, an agreement regarding communication or contact following an adoption is only enforceable if approval of the agreement has been incorporated into an order in conjunction with a surrender executed before a judge; provided, however, that an agreement regarding communication or contact following an adoption of a child from an authorized agency made in conjunction with an extra-judicial surrender may be enforceable if the following additional conditions have been met: (i) the party or parties

surrendering the child attest in a sworn affidavit that it would be an undue hardship to appear in court to execute the surrender; and (ii) the party or parties surrendering the child were represented by counsel and such counsel was present at the execution of the surrender and informed the surrendering party or parties of the requirements for enforceability of the post-adoption contact agreement.

§2. Paragraph (iv) of subdivision (a) of section 262 of the family court act, as amended by chapter 437 of the laws of 2006, is amended to read as follows:

(iv) the parent or person legally responsible, foster parent, or other person having physical or legal custody of the child in any proceeding under article ten or ten-A of this act or section three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four or three hundred eighty-four-b of the social services law, and a non-custodial parent or grandparent served with notice pursuant to paragraph (e) of subdivision two of section three hundred eighty-four-a of the social services law;

§3. Paragraph (b) of subdivision 2 of section 383-c of the social services law, as amended by chapter 41 of the laws of 2010 is amended to read as follows:

(b) (i) If a surrender instrument designates a particular person or persons who will adopt a child, such person or persons, the child's birth parent or parents, the authorized agency having care and custody of the child and the child's attorney[,] may enter into a written agreement providing for communication or contact between the child and the child's parent or parents on such terms and conditions as may be agreed to by the parties. Such terms and conditions shall be set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the child.

(ii) If a surrender instrument does not designate a particular person or persons who will adopt the child, then the child's birth parent or parents, the authorized agency having care and custody of the child and the child's attorney may enter into a written agreement providing for communication or contact, on such terms and conditions as may be agreed to by the parties. Such terms and conditions shall be set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the child.

(iii) Such agreement also may provide terms and conditions for communication with or contact between the child and the child's biological siblings or half-siblings, if any. If any such

sibling or half-sibling is fourteen years of age or older, such terms and conditions shall not be enforceable unless such sibling or half-sibling consents to the agreement in writing.

(iv) If the court before which the surrender instrument is presented for approval determines that the agreement concerning communication and contact is in the child's best interests, the court shall approve the agreement and incorporate such approval into a written court order, a copy of which shall be given to the parties. If the court does not approve the agreement, the court may nonetheless approve the surrender; provided, however, that the birth parent or parents executing the surrender instrument shall be informed that the agreement is not enforceable in a court of law and shall be given the opportunity at that time to withdraw such instrument.

(v) Enforcement of any agreement prior to the adoption of the child shall be in accordance with subdivision (b) of section one thousand fifty-five-a of the family court act. Subsequent to the adoption of the child, enforcement of any agreement shall be in accordance with section one hundred twelve-b of the domestic relations law.

§4. Subdivision 4 of section 383-c of the social services law is amended by adding a new paragraph (g) to read as follows:

(g) A surrender of a child, executed on or after January 1, 2020, which is made in conjunction with an agreement containing conditions, including, but not limited to, identifying the prospective adoptive parent or parents or prescribing communication or contact with the child and the adoptive parent or parents and/or between the child and his or her biological siblings or half-siblings following the surrender and adoption of the child shall be executed before a judge; provided, however, that such an agreement made in conjunction with an extra-judicial surrender executed after such date may be enforceable if the following conditions have been met in addition to those delineated in paragraph (b) of this subdivision: (A) the party or parties surrendering the child attest in a sworn affidavit that it would be an undue hardship to appear in court to execute the surrender; and (B) the party or parties surrendering the child were represented by counsel and such counsel was present at the execution of the surrender and informed the surrendering party or parties of the requirements for enforceability of the agreement.

§5. Subparagraphs (ii) and (iii) of paragraph (b) of subdivision 5 of section 383-c of the social services law, as amended by chapter 41 of the laws of 2010, are amended to read as follows:

(ii) that the parent is giving up all rights to have custody, visit with, speak with, write to or learn about the child, forever, unless the parties have agreed to different terms pursuant to subdivision two of this section[,] and unless such terms are written in the surrender or are written in an agreement approved by the court in an order in accordance with such subdivision, or, if the parent registers with the adoption information register, as specified in section forty-one hundred thirty-eight-d of the public health law, that the parent may be contacted at anytime after the child reaches the age of eighteen years, but only if both the parent and the adult child so choose;

(iii) that the child will be adopted without the parent's consent and without further notice to the parent, and will be adopted by any person that the agency chooses, unless the surrender paper or an agreement approved by the court in an order in accordance with subdivision two of this section contains the name of the person or persons who will be adopting the child; and

§6. Paragraph (b) of subdivision 2 of section 384 of the social services law, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

(b) (i) If a surrender instrument designates a particular person or persons who will adopt a child, such person or persons, the child's birth parent or parents, the authorized agency having care and custody of the child and the child's attorney[,] may enter into a written agreement providing for communication or contact between the child and the child's parent or parents on such terms and conditions as may be agreed to by the parties. Such terms and conditions shall be set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the child.

(ii) If a surrender instrument does not designate a particular person or persons who will adopt the child, then the child's birth parent or parents, the authorized agency having care and custody of the child and the child's attorney may enter into a written agreement providing for communication or contact, on such terms and conditions as may be agreed to by the parties. Such terms and conditions shall be set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the child.

(iii) Such agreement also may provide terms and conditions for communication with or contact between the child and the child's biological sibling or half-sibling, if any. If the child or any such sibling or half-sibling is fourteen years of age or older, [such terms and conditions] an agreement for contact or communication between the child and his or her siblings or half-siblings

shall not be enforceable unless such child, sibling or half-sibling consents to the agreement in writing.

(iv) If the court before which the surrender instrument is presented for execution or approval, determines that the agreement [concerning communication and contact] is in the child's best interests, the court shall approve the agreement and incorporate such approval into a written court order, a copy of which shall be given to the parties. If the court does not approve the agreement, the court may nonetheless approve the surrender; provided, however, that the birth parent or parents executing the surrender instrument shall be informed that the agreement is not enforceable in a court of law and shall be given the opportunity at that time to withdraw such instrument. Enforcement of any agreement prior to the adoption of the child shall be in accordance with subdivision (b) of section one thousand fifty-five-a of the family court act. Subsequent to the adoption of the child, enforcement of any agreement shall be in accordance with section one hundred twelve-b of the domestic relations law.

§7. Subdivision 3 of section 384 of the social services law, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

3. Instrument and intervention. (a) The instrument herein provided shall be executed and acknowledged [(a)] (i) before any judge or surrogate in this state having jurisdiction over adoption proceedings, except that if the child is being surrendered as a result of, or in connection with, a proceeding before the family court pursuant to article ten or ten-A of the family court act, the instrument shall be executed and acknowledged in the family court that exercised jurisdiction over such proceeding and shall be assigned, wherever practicable, to the judge who last presided over such proceeding; or [(b)](ii) in the presence of one or more witnesses and acknowledged by such witness or witnesses, in the latter case before a notary public or other officer authorized to take proof of deeds, and shall be recorded in the office of the county clerk in the county where such instrument is executed, or where the principal office of such authorized agency is located, in a book which such county clerk shall provide and shall keep under seal;

(b) A surrender of a child, executed on or after January 1, 2020, which is made in conjunction with an agreement containing conditions, including, but not limited to, identifying the prospective adoptive parent or parents or prescribing communication or contact with the child and the adoptive parent or parents and/or between the child and his or her biological siblings or half-

siblings following the surrender and adoption of the child shall be executed before a judge; provided, however, that such an agreement made in conjunction with an extra-judicial surrender executed after such date may be enforceable if the following conditions have been met in addition to those delineated in paragraph (b) of subdivision two of this section:

(i) the party or parties surrendering the child attest in a sworn affidavit that it would be an undue hardship to appear in court to execute the surrender; and

(ii) the party or parties surrendering the child were represented by counsel and such counsel was present at the execution of the surrender and informed the surrendering party or parties of the requirements for enforceability of the agreement.

(c) Such record shall be subject to inspection and examination only as provided in subdivisions three and four of section three hundred seventy-two of this title.

(d) Notwithstanding any other provision of law, if the parent surrendering the child for adoption is in foster care, the instrument shall be executed before a judge of the family court.

(e) Whenever the term surrender or surrender instrument is used in any law relating to the adoption of children who are not in foster care, it shall mean and refer exclusively to the instrument [hereinabove] described in this subdivision for the commitment of the guardianship of the person and the custody of a child to an authorized agency by his or her parents, parent or guardian; and in no case shall it be deemed to apply to any instrument purporting to commit the guardianship of the person and the custody of a child to any person other than an authorized agency, nor shall such term or the provisions of this section be deemed to apply to any instrument transferring the care and custody of a child to an authorized agency pursuant to section three hundred eighty-four-a of this chapter.

(f) (i) Any person or persons having custody of a child for the purpose of adoption through an authorized agency shall be permitted as a matter of right, as an interested party, to intervene in any proceeding commenced to set aside a surrender purporting to commit a guardianship of the person or custody of a child executed under the provisions of this section. Such intervention may be made anonymously or in the true name of said person.

(ii) Any person or persons having custody for more than twelve months through an authorized agency for the purpose of foster care shall be permitted as a matter of right, as an interested party, to intervene in any proceeding commenced to set aside a surrender purporting to

commit the guardianship of the person and custody of a child executed under the provisions of this section. Such intervention may be made anonymously or in the true name of said person or persons having custody of the child for the purpose of foster care.

(g) A copy of such surrender shall be given to [such] the surrendering parent upon the execution thereof. The surrender shall include the following statement: "I, (name of surrendering parent), this ___ day of _____, _____, have received a copy of this surrender. (Signature of surrendering parent)". Such surrendering parent shall so acknowledge the delivery and the date of the delivery in writing on the surrender.

(h) Where the parties have agreed that the surrender shall be subject to conditions pursuant to subdivision two of this section, the instrument shall further state in plain language that:

(i) the authorized agency shall notify the parent, unless such notice is expressly waived by a statement written by the parent and appended to or included in such instrument, the attorney for the child and the court that approved the surrender within twenty days of any substantial failure of a material condition of the surrender prior to the finalization of the adoption of the child; and

(ii) except for good cause shown, the authorized agency shall file a petition on notice to the parent unless notice is expressly waived by a statement written by the parent and appended to or included in such instrument and the child's attorney in accordance with section one thousand fifty-five-a of the family court act within thirty days of such failure, in order for the court to review such failure and, where necessary, to hold a hearing; provided, however, that, in the absence of such filing, the parent and/or attorney for the child may file such a petition at any time up to sixty days after notification of such failure. Such petition filed by a parent or attorney for the child must be filed prior to the child's adoption; and

(iii) the parent is obligated to provide the authorized agency with a designated mailing address, as well as any subsequent changes in such address, at which the parent may receive notices regarding any substantial failure of a material condition, unless such notification is expressly waived by a statement written by the parent and appended to or included in such instrument.

Nothing in this paragraph shall limit the notice on the instrument with respect to a failure to comply with a material condition of a surrender subsequent to the finalization of the adoption of the child.

§8. Subdivision 4 of section 384 of the social services law, as amended by chapter 185 of

the laws of 2006, is amended to read as follows:

4. Upon petition by an authorized agency, a judge of the family court, or a surrogate, may approve such surrender, on such notice to such persons as the surrogate or judge may in his or her discretion prescribe. If the child is being surrendered as a result of, or in connection with, a proceeding before the family court pursuant to article ten or ten-A of the family court act, the petition shall be filed in the family court that exercised jurisdiction over such proceeding and shall be assigned, wherever practicable, to the judge who last presided over such proceeding. The petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to section three hundred eighty-four-c of this title, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice pursuant to such section. At the time that a parent appears before a judge or surrogate to execute and acknowledge a surrender or for the judge or surrogate to approve a surrender, the judge or surrogate shall inform such parent of the right to be represented by legal counsel of the parent's own choosing and of the right to obtain supportive counseling and of any right to have counsel assigned pursuant to section two hundred sixty-two of the family court act, section four hundred seven of the surrogate's court procedure act, or section thirty-five of the judiciary law. No person who has received such notice and been afforded an opportunity to be heard may challenge the validity of a surrender approved pursuant to this subdivision in any other proceeding. However, this subdivision shall not be deemed to require approval of a surrender by a surrogate or judge for such surrender to be valid, provided, however, that an agreement made in conjunction with a surrender that contains conditions, including, but not limited to, identifying the prospective adoptive parent or parents or prescribing communication or contact with the child and the adoptive parent or parents and/or between the child and his or her biological siblings or half-siblings following the surrender and adoption of the child shall be enforceable in a court of law only if the requirements of subdivisions two and three of this section have been met.

§9. This act shall take effect on the first of January after it shall have become a law.

III. Previously Submitted Proposals

1. Adjustment of juvenile delinquency cases in Family Court by local departments of probation [F.C.A. §§308.1, 320.6]

One of the major strengths of the juvenile justice system, recognized both in New York State and nationally, is its mechanism for local probation departments to divert non-serious cases from formal processing before petitions are filed. The *Final Report of the Governor's Commission on Youth, Public Safety and Justice* (2015), noting that approximately 38% of juvenile delinquency complaints statewide are adjusted, indicated that, in addition to the lower cost of diversion as compared to placements or other interventions, "research has demonstrated that low-risk youth who are drawn into "deep-end' interventions (like out-of-home placement or intensive community-based programming) actually are more likely to re-offend than if such interventions are not used." *Id.* at 39, 45. The report noted that, in part because of statutory restrictions, a sizable number of cases are referred to Family Court that could be successfully adjusted. One out of three cases referred to Family Court in 2013, for example, were for misdemeanors and over half of the total cases petitioned in Family Court resulted in non-incarcerative outcomes. *Id.,* at 46. While not addressing the serious crimes in which adjustment is either precluded or restricted, the Family Court Advisory and Rules Committee is recommending a measure to modify three statutory provisions that pose barriers to adjustment of cases that may lend themselves to successful informal resolution.

First, as identified by the Governor's Commission, *id.,* at pages 47, 49, the Committee has concluded that the two-month limit on the initial adjustment period is too short. The Committee's proposal would amend Family Court Act §308.1(9) to lengthen that period to three months. Balancing the length of the adjustment period with the need for prompt adjudication of the rare cases where adjustment fails, the measure does not alter the authorization for probation departments to seek a two month extension of the adjustment period.

Consistent with the Committee's proposal, the 50-state survey, conducted as part of the MacArthur Foundation's *Models for Change Juvenile Diversion Guidebook* (Mar., 2011), at p. 80, indicated that 44% of states utilize adjustment periods of between three and six months; 30% use periods under three months and 19% utilize periods of six months to one year. Probation Departments have reported a frequent need for an initial period of over two months in order for all parties to come together to engage in the process, for appropriate referrals to be made and for actual program services to begin. By adding a modest initial extension, the Committee's proposal seeks to balance this need with the need to provide a timely fact-finding should the formal court process prove necessary.

Second, in lieu of according the complainant an absolute right to veto adjustment, the measure would amend Family Court Act §308.1(8) to instead require the probation department to "consider the views of the complainant and the impact of the alleged act or acts of juvenile delinquency upon the complainant and upon the community in determining whether adjustment under this section would be suitable." Many cases, most particularly, nonviolent misdemeanor cases in which the accused juveniles are determined by a risk assessment instrument to pose a low risk of re-offending, are precluded from appropriate adjustment because of the provision in the current law according complainants an absolute right to access the presentment agency for the purpose of filing a petition. Since access to the presentment agency does not guarantee that the presentment agency will actually file a petition, Professor Merril Sobie, in his McKinney's Practice Commentary to Family Court Act §308.1, indicated that:

> [A] complainant's refusal to consent to an adjustment proposed by the probation service may be self-defeating. Any benefit which an informal resolution might provide to the complainant (such as restitution or an agreement to desist from further complained of activity) is forfeited when the presentment agency exercises its right to decline prosecution...

Many of the cases that would benefit from the Committee's proposal involve shop-lifting in which the complainant is a corporation or chain store with a rigid, zero-tolerance policy against adjustment of any cases, no matter how low-risk the alleged offender may be to re-offend and no matter how much the alleged offender might benefit from adjustment services. The National Council of Juvenile and Family Court Judges, in its *Enhanced Juvenile Justice Guidelines: Improving Court Practice in Juvenile Justice Cases* (Jan, 2019), emphasized that judges " should ensure that their systems divert cases to alternative systems "whenever possible and appropriate." *Id.,* at ch. 3, p. 9. Consistent with the Committee's proposal, the *Guidelines* suggest that serious consideration be given to the position of the victim but do not give the victim veto power over adjustment. *Ibid.*

> Although a victim's opposition or unwillingness to participate informally should not by itself rule out diversion in an otherwise appropriate case, victim-offender mediation and other restorative justice practices should be incorporated whenever possible. The victim's viewpoint and desires should be carefully weighed.

Id., at ch. 3, p. 8-9.

Third, the measure amends Family Court Act §320.6 to provide that, notwithstanding the filing of a juvenile delinquency petition, the Family Court may refer a case to the probation department for possible adjustment not simply at the initial appearance but, alternatively, at any subsequent appearance. Sometimes the suitability of a case for adjustment, including the willingness of the accused juvenile and his or her family to engage in the process and cooperate with services, becomes evident at a later point in the proceeding. There is no reason to prevent appropriate diversion efforts in such cases. The complainant would not have an absolute veto over the referral for adjustment but, again, the probation department would be required to "consider the views of the complainant and the impact of the alleged act or acts of juvenile delinquency upon the complainant and upon the community."

Enactment of the Committee's proposal would remove significant obstacles to the diversion of appropriate cases from formal juvenile delinquency processing. In so doing, the resources of the Family Court would be reserved for those cases requiring more intensive intervention.

Proposal

AN ACT to amend the family court act, in relation to adjustment of juvenile delinquency cases by local departments of probation in the family court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions 8 and 9 of section 308.1 of the family court act, subdivision 8 as amended by chapter 398 of the laws of 1983 and subdivision 9 as added by chapter 920 of the laws of 1982, are amended

to read as follows:

8. The probation service [may not prevent any person who wishes to request that a petition be filed from having access to the appropriate presentment agency for that purpose] shall consider the views of the complainant and the impact of the alleged act or acts of juvenile delinquency upon the complainant and upon the community in determining whether adjustment under this section would be suitable.

9. Efforts at adjustment pursuant to rules of court under this section may not extend for a period of more than [two] three months without leave of the court, which may extend the period for an additional two months.

§2. Subdivision 2 of section 320.6 of the family court act, as amended by chapter 926 of the laws of 1982, is amended to read as follows:

2. At the initial appearance or at any subsequent appearance, the court may[, with the consent of the victim or complainant and the respondent,] refer a case to the probation service for adjustment services. The probation service shall consider the views of the complainant and the impact of the alleged act or acts of juvenile delinquency upon the complainant and upon the community in determining whether adjustment under this section would be suitable. In the case of a designated felony petition, the consent of the presentment agency shall [also] be required to refer a case to the probation [services] service for adjustment services.

§3. This act shall take effect on the ninetieth day after it shall have become a law.

2. Use of restraints on children appearing before the Family Court [F.C.A. §162-a]

A rapidly escalating national consensus is emerging to restrict the routine use of hardware restraints upon children when they appear in court. Two major national organizations– the National Council of Juvenile and Family Court Judges and the American Bar Association – adopted resolutions in 2015 calling for states to enact presumptions against the use of restraints, reserving their use only for cases in which the child poses a demonstrated safety risk to himself or herself or others.[23] Recognizing the particular vulnerability of children, at least 30 states have imposed a presumption against restraints either by statute, court rule or case law; fifteen states have statutes requiring an individualized judicial finding prior to use of restraints, eleven of which afford youth a right to be heard.[24] Most recently, presumptions against routine restraints and processes similar to the Committee's proposal have been established in Delaware, Connecticut, Indiana, Nebraska and Nevada by statute, in Washington, D.C. by Administrative Order of the Superior Court and in Illinois, Ohio, North Dakota, Utah, Iowa and Tennessee by court rule.[25] As the Florida Supreme Court stated, in promulgating its amendment to section 8.100 of the Florida Rules of Juvenile Procedure in 2009, routine shackling of children is "repugnant, degrading, humiliating, and contrary to the stated purpose of the juvenile justice system."[26] Following this trend, the Family Court Advisory and Rules Committee is proposing to amend the Family Court Act to create a new section 162-a, applicable to youth under the age of 21 when they appear in Family Court in all categories of Family Court proceedings.

The Committee's proposal provides that restraints are prohibited and thus must presumptively be removed upon entry of the juvenile into the courtroom[27] unless Family Court determines and explains on the record why restraints are "necessary to prevent: (1) physical injury by the child to himself or herself or

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[23] *See* National Council of Juvenile and Family Court Judges, *Resolution Regarding Shackling of Children in Juvenile Court* (Adopted July 15, 2015; www.ncjfcj.org); American Bar Association, *Resolution and Report to the House of Delegates* (Adopted by the House of Delegates, February, 2015); www.americanbar.org).

[24] Federal Advisory Committee on Juvenile Justice, *Spotlight on Juvenile Justice Initiatives: A State by State Survey* 28, 29 (May, 2017); Campaign to End Indiscriminate Juvenile Shackling, *Shackling Reform Statewide Court Rules, Policies, Administrative Orders & Statutes* [Aug., 2016; http://njdc.info/campaign-against-indiscriminate-juvenile-shackling; *Juvenile Justice in a Developmental Framework: A 2015 Status Report* (MacArthur Fdtn., 2015) at p. 30.

[25] *See* Delaware House Bill HB 211 (2016); Conn. H.B. 7050§3, Gen. Ass., Jan. Sess. (2015); Indiana Code Ann. §31-30.5(2015); Nebraska L.B. 482 (2015); Nevada A.B. 8 (2015); Superior Court of the District of Columbia Administrative Order 16-09 (2016); Illinois Supreme Court Rule 943 (2016); Ohio R. Juv. Proc. 5.01 (2016); Tenn. R. Juv. Proc. 204 (2016); N.D. Rules of Juv. Proc. §20 (2017); Utah Council Code of Judicial Administration §4-905 (2015); Iowa Rules of Juv. Proc. §8.41 (2017).

[26] *See In Re Amendment to Fla. Rules of Juvenile Procedure*, 26 So.2d 552, 556 (Fl., 2009).

[27] The measure solely addresses courtroom appearances. A similar presumption currently applies to use of restraints during transportation of juveniles from New York State Office of Children and Family Services facilities pursuant to an injunction issued in the class action case of Matter of John F. *v.* Carrión, -Misc.3d-, *N.Y.L.J.*, Jan. 27, 2010 (S.Ct., N.Y.Co., 2010).

another person; (2) physically disruptive courtroom behavior, as evidenced by a recent history of behavior that presented a substantial risk of physical harm to the child or another person where the behavior indicates a substantial likelihood of current physically disruptive courtroom behavior by the child; or (3) the child' flight from the courtroom, as evidenced by a recent history of absconding from the Court." the particular restraints permitted must be the "least restrictive alternative" and, in order to ensure due process, the child must be given an opportunity to he heard regarding a request to impose restraints. The measure further provides that in cases where the exception is invoked, only handcuffs or footcuffs may be used and handcuffs may not be joined to footcuffs.

The measure closely mirrors the presumption, exception factors and right to be heard in the Florida and Illinois court rules, as well as the Model Statute/Court Rule developed by the Campaign Against Indiscriminate Juvenile Shackling, the statute and court rule in Pennsylvania, and the statutes in Delaware, New Hampshire, North Carolina and South Carolina.[28] It is similar to the court rules in Massachusetts, Washington, New Mexico, Maryland, Illinois, North Dakota, Utah and, most recently, Iowa.[29] It is consistent with the orders that resulted from challenges to restraints in California, North Dakota, Oregon and Illinois.[30] It reflects the criticisms articulated in, and recommendations by, myriad commentators[31] and, most recently, in the resolutions by the National Council of Juvenile and Family

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[28] *See Fla. Rules of Juvenile Procedure* §8.100(b) (2009); Campaign Against Indiscriminate Juvenile Shackling, *2014 Model Statute/Court Rule* (www.njdc.info, checked Dec. 29, 2014)*; Adoption of the New Rule 139 of the Rules of Juvenile Court Procedure,* Pa. S.Ct., No. 527, 237 Pa. Code §139 (Apr. 26, 2011); 42 Pa. C.S.A. §6336.2 (2012); Del. House Bill HB 211 (2016); N.H. R.S.A. §126-U:13 (2010); N.C. Gen. Stat. §7B-2402 (2013); S.C. Code Ann. §63-19-1435 (2014).

[29] *See* Illinois Supreme Court Rule 943; Amendment to *Trial Court of the Commonwealth [of Mass.] Court Officer Policy and Procedures Manual, ch. 4 Courtroom Procedures, Section VI, Juvenile Court Sessions* (2010); N.M. Children's Ct. R. §10-223A (2013); Wash. Ct. Rule (effective Sept. 1, 2014); *Resolution Regarding Shackling of Children in Juvenile Court* (Adopted by Md. Judiciary and Chief Judge of Court of Appeals, Sept. 21, 2015); N.D. Rules of Juv. Proc. §20 (2017); Utah Council Code of Judicial Administration §4-905 (2015); Iowa Rules of Juv. Proc. §8.41 (2017).

[30] *See* Tiffany A. *v.* Superior Court, 150 Cal. App. 4th 1344 (2007); In Re R.W.S., 728 N.W.2d 326 (N.D. 2007); In Re Millican, 906 P.2d 857 (Or. Ct.App., 1995); In Re Staley, 364 N.E.2d 72 (Ill., 1977).

[31] *See*, *e.g., B*. Schatz, "A Court Put a Nine-year Old in Shackles for Stealing Chewing Gum– an Outrage that Happens Every Single Day: Research Shows that Shackling is Bad for Kids and Unnecessary for Courtroom Safety. So Why Do Judges Keep Doing It?," *Mother Jones* (Feb., 2015; www.motherjones.com/politics/2015/02/courts-shackle-juvenile-children-ABA); S. Marsh, "OP-ED: Indiscriminate Shackling of Children in Juvenile Court Should End*,"* Juvenile Justice Information Exchange, www.jjie.org, 2015); J. Abdul-Alim, "Justice Advocates Fight to Limit Shackles, Seclusion for Juveniles," (Juvenile Justice Information Exchange, June 18, 2015, www.jjie.org); G. Gately, "Why Do We Still Shackle Kids?", *The Crime Report*, (June 15, 2015); R.May, "Why Do We Still Put Kids In Shackles When They Go To Trial? Murder Suspects Come to Court in Suits. Kids Who Steal Gum Arrive in Belly Irons and Belly Chains," *Washington Post*, (OpEd, May 8, 2015); P. Puritz, "Shackling Juvenile Offenders can do permanent damage to our kids," *Washington Post* (OpEd., Nov. 13, 2014); National Juvenile Justice Network, *Policy Update: Unchain the Children: Policy Opportunities to End the Shackling of Youth in Court* (Sept., 2014; www.njjn.org, checked Dec. 29, 2014); National Juvenile Defender Center, *Issue Brief: Ending the Indiscriminate Shackling of Youth* (2014; www.njdc.info); K. McLaurin, "Children in Chains: Indiscriminate Shackling of Juveniles," 38 *Wash. U. J.L.&Policy* 213(2012); H. Ted Rubin, "Shackling Juveniles for Court Hearings: Only if

Court Judges and the American Bar Association noted above. Estimating that over 100,000 children have been routinely shackled in court nationally, the National Campaign to End Indiscriminate Shackling of Youth has reported that, since its campaign began in August, 2014, Delaware, Illinois, Connecticut, Maryland, Indiana, Nebraska, Alaska, Utah, Nevada, Ohio, Tennessee and the District of Columbia have prohibited indiscriminate use of restraints.[32] Significantly, reports of the implications of shackling limitations in Miami-Dade County, Florida, and Linn County, Oregon, two and five years, respectively, after the imposition of the limitations have indicated no adverse effects on courtroom safety and decorum.[33] Nor has implementation presented any significant burdens upon the courts as requests for restraints are rare and the hearings, when held, are brief.[34]

Restrictions upon the use of mechanical restraints on adult offenders in criminal trials has long been recognized as necessary to a fair trial. The United States Supreme Court, in Deck *v.* Missouri, in rejecting routine shackling as a violation of due process, noted its origins in common law:

> Blackstone's 1769 Commentaries on the Laws of England noted that "it is laid down in our ancient books" that a defendant "must be brought to the bar without irons, or in any manner of shackled or bonds, unless there be evident dangers of an escape."

544 U.S. 622, 626 (2005). Following Deck, the New York Court of Appeals, in People *v.* Best, 39 N.Y.3d 739 (2012) criticized the shackling of a defendant in a judge trial in the absence of a showing of necessity on the record, noting that "judges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder," in addition to harming the defendant and the public's perception of both the defendant "and of criminal proceedings generally." Chief Judge Lippman, dissenting from the majority's conclusion that the use of restraints constituted harmless error, observed that "(t)he unwarranted shackling of defendants strikes at the very heart of the right to be presumed innocent. Visible shackles give the impression to any trier of fact that a person is violent, a miscreant, and cannot be trusted." *Id*. More recently, in United States *v.* Haynes, 729 F.3d 178, 188 (2nd Cir., 2013), the United States Court of Appeals, Second Circuit, held that:

Necessary," 16 *Juvenile Justice Update* #1:1 (Feb./March, 2010); Zeno, "Shackling Children During Court Appearances: Fairness and Security in Juvenile Courtrooms," 12 *J.Gender Race & Just.* 257 (2009); Perlmutter, "Unchain the Children: *Gault, Therapeutic Jurisprudence and Shackling," 5 Barry L. Rev.* 1(2007).

[32] Campaign to End Indiscriminate Juvenile Shackling, *supra,* note 43; B. Schatz, *supra,* note 50 *;* G.Gately, *supra,* note 50.

[33] A study of 20,000 youth appearing in Miami-Dade County juvenile court from 2006, when the county limited shackling, through 2011 indicated no incidents of flight or harm. *See* Puritz, *supra*, note 50, and ABA, *supra,* note 42. And no incidents were reported by Judge Daniel Murphy regarding ten years of experience in Linn County, Oregon. *See* Rubin, *supra*, note 50 at 11.

[34] See, e.g., e-mail from Hon. Jay D. Blitzman, First Justice, Massachusetts Juvenile Court, Middlesex Division, dated Nov. 26, 2014.

> It is beyond dispute that a defendant may not be tried in shackles unless the trial judge finds on the record that it is necessary to use such a restraint as a last resort to satisfy a compelling interest such as preserving the safety of persons in the courtroom.

The arguments for restricting use of restraints upon adult offenders are even more compelling with respect to children. Not only is the use of shackles an infringement upon the presumption of innocence at the fact-finding (trial) stage, but it also impedes the ability and willingness of youth to participate in court proceedings, including dispositional and permanency hearings, and to engage in planning for their futures. Juveniles are critical participants in such hearings, pursuant to Family Court Act §§341.2(1), 355.5(8), 756-a(d-1). The Federal *Preventing Sex Trafficking and Strengthening Families Act* (Public Law 113-183) requires placement agencies to involve youth 14 years of age and older in development of their plans, expanding upon the earlier Federal mandate for courts to consult with juveniles in an age-appropriate manner. Significantly, hardware restraints inhibit counsel's ability to develop an attorney-client relationship with their child clients deemed so integral to the Family Court Act (*see, e.g.*, Family Court Act §241) and to the United States Supreme Court decision in *Matter of Gault*, 387 U.S. 1 (1967).

The need for a presumption against use of restraints upon juveniles appearing in Family Court is further underscored by the wealth of recent research on adolescent brain development, particularly by the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. *See* www.adjj.org. Children's characters are not fully formed until well into adulthood and their sense of self-esteem is especially vulnerable to the harm caused by indiscriminate use of shackles. As Patricia Puritz, former Executive Director of the National Juvenile Defender Center, noted, it is well-documented that "young people are less likely to re-offend when they perceive that the juvenile justice system has treated them fairly":

> Shackling is simply incompatible with the rehabilitative mission of the juvenile court. Children report feeling like a slave, an animal or a criminal when shackled. This experience does not frighten them into compliance. On the contrary, child psychiatrists say that shackling is so damaging to a child's developing sense of self that it may well push him or her into further criminality.

Puritz, *supra*, note 50.

The Committee's measure recognizes the rare circumstances in which use of restraints may be necessary and provides a simple means of addressing those circumstances. In states in which restrictions upon restraints are in effect, the culture has shifted; invocation of the exceptions is rare and the provision of a right for the juvenile to be heard upon an oral application, often by a court officer or placement agency official, for restraints to be used has been neither lengthy nor burdensome and has caused no adverse effects. Recognition by the United States Supreme Court and New York Court of Appeals of the need to protect adult criminal defendants from the adverse effects of

restraints renders even more compelling the need to enact a measure protecting children before the Family Court.

Proposal

AN ACT to amend the family court act, in relation to use of restraints on children appearing before the Family Court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The family court act is amended by adding a new section 162-a to read as follows:

§162-a. Use of restraints on children in courtrooms. (a) Use of restraints. Except as otherwise provided in subdivision (b) of this section, restraints on children under the age of twenty-one, including, but not limited to, handcuffs, chains, shackles, irons or straitjackets, are prohibited in the courtroom.

(b) Exception. Permissible physical restraint consisting of handcuffs or footcuffs that shall not be joined to each other may be used in the courtroom during a proceeding before the court only if the court determines on the record, after providing the child with an opportunity to be heard, why such restraint is the least restrictive alternative necessary to prevent:

(1) physical injury to the child or another person by the child;

(2) physically disruptive courtroom behavior by the child, as evidenced by a recent history of behavior that presented a substantial risk of physical harm to the child or another person, where such behavior indicates a substantial likelihood of current physically disruptive courtroom behavior by the child; or

(3) flight from the courtroom by the child, as evidenced by a recent history of absconding from the court.

§2. This act shall take effect immediately.

3. Sealing and expungement of records in Persons in Need of Supervision proceedings [F.C.A. §§783, 784]

When Article 3 of the Family Court Act, the juvenile delinquency procedure statute, was enacted over three decades ago [L. 1982, c. 920], applicable provisions of the Criminal Procedure Law deemed essential for due process and fairness were incorporated into Article 3. However, a similar process was not undertaken in the remaining provisions of Article 7 of the Family Court Act, which from that point onward applied only to Persons in Need of Supervision (PINS). One of the most glaring omissions is the provision regarding confidentiality of records. Article 3, modeled after Criminal Procedure Law §160.50, has afforded youth who are accused of juvenile delinquency, like adults accused of crimes, far more protections than those who are the subjects of PINS proceedings.

Professor Merril Sobie noted this disparity in his Practice Commentaries to Family Court Act §751:

> [Family Court Act] Article 7, unlike Article 3 [the juvenile delinquency statute], does not provide for the automatic sealing of records when a petition is dismissed or withdrawn (see Section 375.1). Hence, the records remain relatively open, subject only to the generalized, imprecise [Family Court Act] Section 166 stipulation that "[t]he records of any proceeding in the family court shall not be open to indiscriminate public inspection". Ironically, children who are falsely accused of non-criminal "status offense" conduct are afforded less protection than youths who are accused of engaging in criminal activities.

The Family Court Advisory and Rules Committee is submitting a measure to correct that imbalance. First, closely tracking section 375.1 of the Family Court Act and section 160.50 of the Criminal Procedure Law, the measure would amend Family Court Act §783 to provide that court records in actions terminated favorably to the accused – that is, cases that had been diverted (diverted without petition), withdrawn or dismissed -- would automatically be sealed. Notices would be required to be sent to probation departments, designated lead agencies for PINS diversion and, if either presentment or law enforcement agencies have been involved, to such agencies, directing them to seal their records as well. Youth whose cases had been favorably terminated prior to the effective date of the statute would be permitted to move for sealing upon twenty days' notice. The proposal authorizes designated lead diversion agencies to check their records if a juvenile returns on a subsequent PINS, and, where the diversion agency is the local Department of Social Services, the local Department may have access to its own records where necessary for service determinations and where the Commissioner determines the information is necessary to comply with Social Services Law §422-a regarding disclosure of fatality-related information.

Second, in cases in which a juvenile has been adjudicated as a PINS, the juvenile would be permitted to make a motion for sealing of the record in the interests of justice. If granted, notices would likewise be sent to the agencies involved in the case to seal their records. As in Family Court Act §375.3, the Family Court would retain its inherent authority to expunge, rather than simply seal,

its records. *See* Matter of Dorothy D. *v.* New York City Probation Department, 49 N.Y.2d 212 (1980)(juvenile delinquency); Matter of Richard S. *v.* City of New York, 32 N.Y.2d 592 (1973)(PINS); Matter of Daniel PP., 224 A.D.2d 906 (3d Dept., 1996)(PINS). As the Court of Appeals held in Matter of Dorothy D. *supra*:

> That the very existence of such records, despite provisions for confidentiality, may constitute a substantial impediment to entry into institutions of higher learning, government or private employment, the armed services, or the professions, cannot be seriously questioned. For this reason it would be antithetical to the purpose of the Family Court Act to maintain records which would not benefit society and would result in bringing unwarranted discrimination to a child's future. (Matter of Richard S. *v.* City of New York, 32 N.Y.2d 592, 595-596, 347 N.Y.S.2d 54, 56, 300 N.E.2d 426, 427).

Many states, in fact, include expungement, not simply sealing, as their mechanism for ensuring the confidentiality of juvenile records. *See, e.g.,*West's Colorado Revised Statutes §19-1-306*;* Illinois Compiled Statutes §405/5-915 (juvenile delinquency) and §405/1-9 (juvenile court records other than juvenile delinquency); Ohio Revised Code §§2151.355, 2151.356, 2151.358 (juvenile delinquency and "unruly children" records); Revised Code of Washington §13.50.050; Delaware Code §§1014-1018; North Carolina General Statutes §§7B-3200, 3201 (juvenile delinquency and "undisciplined" children); Arizona Revised Statutes §13-921; Arkansas Code §§9-27-309[b][1][A], [b][2]; West's California Code, Div. 2, C. 2, Art. 22, §826[a]; Connecticut General Statutes §§46b-133a,46b-146; West's Florida Statutes §943.0582; Minnesota Statutes §260B.235[9]; Pennsylvania Consolidated Statutes §9123; West's Code of Virginia §16-1-306.

Finally, recognizing that PINS behavior consists of conduct that would not be criminal if committed by adults, sections 783 and 784 of the Family Court Act would be amended to preclude use of PINS records in other courts. The language in section 783, permitting such records to be utilized in criminal sentencing proceedings, as well as the reference in section 784 to criminal courts taking action regarding police records, are vestiges of the days when juvenile delinquency and PINS proceedings were both covered by Article 7 of the Family Court Act and are more appropriately applied solely to juvenile delinquency records. Indeed, these provisions have been incorporated into Article 3. *See* Family Court Act §§381.2, 381.3(2). The Committee's proposed measure appropriately deletes these provisions from Family Court Act Article 7.

The need to keep records of juvenile misbehavior, both criminal and noncriminal in nature, confidential has long been a central feature of the juvenile justice system. As former Chief Justice Rehnquist noted, in his concurring opinion in Smith *v.* Daily Mail, 443 U.S. 97, 107 (1979):

> It is a hallmark of our juvenile justice system in the United States that, virtually from its inception at the end of the last century, its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity. See H. Lou, Juvenile Courts in the United States 131-133 (1927); Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mt.L.Rev. 101, 102, 116 (1958). This insistence

> on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and "bury them in the graveyard of the forgotten past.'" In re Gault, 387 U. S. 1, 387 U. S. 24-25 (1967).

The Committee's proposal recognizes that non-criminal conduct, the gravamen of PINS cases, no less than the criminal conduct that forms the basis of juvenile delinquency proceedings, compels the protections that have long been deemed essential to fulfilling the goals of the juvenile justice system.

Proposal

AN ACT to amend the family court act, in relation to sealing and expungement of records in persons in need of supervision cases in the family court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 783 of the family court act is amended to read as follows:

§783. Use of [record] records in other court; sealing and expungement of records.

(a) Neither the fact that a person was before the family court under this article for a hearing nor any confession, admission or statement made by him or her to the court or to any officer thereof in any stage of the proceeding is admissible as evidence against him or her or his or her interests in any other court. [Another court, in imposing sentence upon an adult after conviction, may receive and consider the records and information on file with the family court concerning such person when he was a child.]

(b) For purposes of this section, "sealing" shall mean that all official records and papers, including judgments and orders of the court (but not including public court decisions or opinions or records and briefs on appeal), relating to the arrest, prosecution and court proceedings and records of the probation service and designated lead agency, including all duplicates or copies thereof, on file with the court, police department and law enforcement agency, probation service, designated lead agency and presentment agency, if any, shall be protected from public inspection and, except as provided in paragraphs (v) and (vi) of subdivision (c) of this section, shall not be made available to any person or public or private agency.

(c) Automatic sealing of a proceeding under this article that is terminated in favor of the respondent. (i) Upon termination of a proceeding under this article in favor of the respondent, the

clerk of the court shall immediately notify and direct the directors of the appropriate probation department, designated lead agency pursuant to section seven hundred thirty-five of this article and, if a presentment agency represented the petitioner in the proceeding, such agency, that the proceeding has terminated in favor of the respondent and that the records, if any, of such action or proceeding on file with such offices shall be sealed. If the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency or petitioner pursuant to section seven hundred thirty-three of this article, the notice shall also be sent to the appropriate police department or law enforcement agency. Upon receipt of such notification, the records shall be sealed in accordance with subdivision (b) of this section. The attorney for the respondent shall be notified by the clerk of the court in writing of the date and agencies and departments to which such notifications were sent.

(ii) For the purposes of this section, a proceeding under this article shall be considered terminated in favor of a respondent where the proceeding has been:

(A) diverted prior to the filing of a petition pursuant to subdivision (g) of section seven hundred thirty-five of this article or subsequent to the filing of a petition pursuant to subdivision (b) of section seven hundred forty-two of this article; or

(B) withdrawn or dismissed for failure to prosecute, or for any other reason at any stage; or

(C) dismissed following an adjournment in contemplation of dismissal pursuant to subdivision (a) of section seven hundred forty-nine of this article.

(iii) If, with respect to a respondent who had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency, the designated lead agency diverts a case either prior to or subsequent to the filing of a petition under this article, the designated lead agency shall notify the appropriate probation service and police department or law enforcement agency in writing of such diversion. Such notification may be on a form prescribed by the chief administrator of the courts. Upon receipt of such notification, the probation service and police department or law enforcement agency shall seal any records in accordance with subdivision (b) of this section in the same manner as is required thereunder with respect to an order of a court.

(iv) If, following the referral of a proceeding under this article for the filing of a petition, the

petitioner or, if represented by a presentment agency, such agency, elects not to file a petition under this article, the petitioner or, if applicable, the presentment agency, shall notify the appropriate probation service and designated lead agency of such determination. Such notification may be on a form prescribed by the chief administrator of the courts and may be transmitted by electronic means. If the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency, the notification shall also be sent to the appropriate police department or law enforcement agency. Upon receipt of such notification, the records shall be sealed in accordance with subdivision (b) of this section in the same manner as is required thereunder with respect to an order of a court, provided, however, that the designated lead agency may have access to its own records in accordance with paragraph (v) of this subdivision.

(v) Where a proceeding has been diverted pursuant to subparagraph (A) of paragraph (ii) of this subdivision or where a proceeding has been referred for the filing of a petition but the potential petitioner or, if represented by a presentment agency, such agency, elects not to file a petition in accordance with paragraph (iv) of this subdivision, the designated lead agency shall seal its records under this section, but shall have access to its own records:

(A) where there is continuing or subsequent contact with the child under this article; or

(B) in a proceeding in which the designated lead agency is the local department of social services, where the information is necessary for such department to determine what services had been arranged or provided to the family or where the commissioner determines that the information is necessary in order for the commissioner of such department to comply with section 422-a of the social services law.

(vi) Records sealed under this section shall be made available to the juvenile or his or her agent and, where the petitioner or potential petitioner is a parent or other person legally responsible for the juvenile's care, such parent or other person. No statement made to a designated lead agency by the juvenile or his or her parent or other person legally responsible that is contained in a record sealed under this section shall be admissible in any court proceeding, except upon the consent or at the request, respectively, of the juvenile or his or her parent or other person legally responsible for the juvenile's care.

(vii) A respondent in whose favor a proceeding was terminated prior to the effective date of this paragraph may, upon motion, apply to the court, upon not less than twenty days notice to the petitioner or (where the petitioner is represented by a presentment agency) such agency, for an order granting the relief set forth in paragraph (i) of this subdivision. Where a proceeding under this article was terminated in favor of the respondent in accordance with paragraph (iii) or (iv) of this subdivision prior to the effective date of this paragraph, the respondent may apply to the designated lead agency, petitioner or presentment agency, as applicable, for a notification as described in such paragraphs granting the relief set forth therein and such notification shall be granted.

(d) Motion to seal after an adjudication and disposition. (i) If an action has resulted in an adjudication and disposition under this article, the court may, in the interest of justice and upon motion of the respondent, order the sealing of the records and proceedings.

(ii) Such motion must be in writing and may be filed at any time subsequent to the conclusion of the disposition, including, but not limited to, the expiration of the period of placement, suspended judgment, order of protection or probation or any extension thereof. Notice of such motion shall be served not less than eight days prior to the return date of the motion upon the petitioner or, if the petitioner was represented by a presentment agency, such agency. Answering affidavits shall be served at least two days before the return date.

(iii) The court shall set forth in a written order its reasons for granting or denying the motion. If the court grants the motion, all court records, as well as all records in the possession of the designated lead agency, the probation service, the presentment agency, if any, and, if the respondent had been the subject of a warrant or an arrest in connection with the proceeding or if the police or law enforcement agency was the referring agency or petitioner pursuant to section seven hundred thirty-three of this article, the appropriate police or law enforcement agency, shall be sealed in accordance with subdivision (b) of this section.

(e) Expungement of court records. Nothing contained in this article shall preclude the court's use of its inherent power to order the expungement of court records.

§2. Section 784 of the family court act is amended to read as follows:

§784. Use of police records. All police records relating to the arrest and disposition of any

person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection, but such records shall be open to inspection upon good cause shown by the parent, guardian, next friend or attorney of that person upon the written order of a judge of the family court in the county in which the order was made [or, if the person is subsequently convicted of a crime, of a judge of the court in which he was convicted].

§3. This act shall take effect on the ninetieth day after it shall have become a law.

4. Permanency planning in juvenile delinquency and persons in need of supervision proceedings in Family Court [F.C.A. §§312.1, 320(2), 353.3, 355.5, 736, 741, 756, 756-a]

When the Legislature enacted chapter 3 of the Laws of 2005, the landmark child welfare permanency legislation, it deferred consideration of the significant constellation of issues relating to permanency planning and permanency hearings regarding juvenile delinquents and Persons in Need of Supervision (PINS). Over a decade later, however, these issues remain critically important and should be addressed comprehensively. The permanency hearing provisions, including those regarding planning for return of the youth from out-of-home care, are vital for the successful resolution of these cases for the youth, their families and their communities. Not only are they essential for the judiciary's ability to fulfill its mandates under the Federal *Adoption and Safe Families Act* [Public Law 105-89], but the recent enactment of the Federal *Preventing Sex Trafficking and Strengthening Families Act* [Public Law 113-183] has rendered the need to incorporate these features into the statutes pertaining to juvenile delinquents and PINS even more compelling. Most recently, in re-authorizing and expanding the *Juvenile Justice and Delinquency Prevention Act of 1974* [34 U.S.C. §11103], the Federal *Juvenile Justice Reform Act of 2018* (H.R. 6964), which was signed into law on December 21, 2018, requires States to include prompt educational records and academic credit transfers as part of the planning process for release of youth from out-of-home care. As the Family Court, Queens County, has observed, permanency hearings in juvenile delinquency and PINS proceedings "serve the same purpose" as those in child abuse and neglect cases. *See* In the Matter of Mario S., 38 Misc. 3d 444 (Fam. Ct., Qns. Co., 2012). Recent enactments, as part of the New York State budgets for Fiscal Years 2015 and 2016, which make identical modifications to the juvenile delinquency, Persons in Need of Supervision, child protective and permanency statutes, underscore this equivalence. *See* L.2016, c. 54; L. 2015, c. 56.

If the Family Court is to be able to exercise its critical monitoring functions and convene meaningful permanency hearings in juvenile delinquency and PINS proceedings, it must have the benefit of at least the same information that is required to be presented in child welfare proceedings. The Court must make determinations of specificity at least comparable to those in child welfare proceedings and the parties must have the benefit of continuity of legal representation. None of the applicable Federal statutes make any distinction between juvenile justice and child welfare proceedings for those states, including New York, that receive significant Federal foster care funding under Title IV-E of the *Social Security Act* for placements of juvenile delinquents and status offenders.

To that end, the Family Court Advisory and Rules Committee has developed a proposal that incorporates essential elements of the child welfare permanency hearing article of the Family Court Act (Article 10-A) into the permanency hearing provisions of Articles 3 and 7 of the Act. It would provide greater specificity regarding the services that must be provided for youth and would expand the alternatives available to the Court both in dispositional and permanency hearings in juvenile delinquency and PINS cases. Briefly, the proposal contains the following provisions:

1. Notices to non-custodial parents: To ensure that all possible resources are engaged in the

resolution of juvenile delinquency and PINS proceedings, the proposal would require that non-custodial parents, if any, be given notices of their children's cases in Family Court to enable them to appear. This supplements the existing requirement that a summons be issued for an accused juvenile's parent or other person legally responsible. The local probation department that generally interviews parties at the outset for adjustment purposes, as well as the presentment agency (prosecution), would be charged with the responsibility of asking the custodial parent for the necessary contact information for parents other than those already notified. In juvenile delinquency cases, the presentment agency must send the notice, along with a copy of the petition, to the non-custodial parent or parents at least five days before the appearance date. In PINS cases, where there is most often no presentment agency, the Family Court would be charged with sending the notice. Consistent with Family Court Act §§341.2(3) and 741(c), however, the absence of the parent who was sent the notice to appear in court would not be grounds to delay the proceedings.

As in child abuse, child neglect and PINS proceedings, so, too, in juvenile delinquency proceedings the child's non-custodial parent may be a critical participant in the dispositional process. Sometimes a non-custodial parent or his or her extended family may provide vitally-needed placement resources for a child, both temporarily during the pendency of the action and on a more extended basis at disposition. These family members may at the very least provide helpful participation that may positively influence the child's behavior. However, unlike the statutory provisions applicable to child protective and PINS proceedings, the Family Court Act contains no mandate to even notify non-custodial parents of, let alone engage them in resolving, their children's juvenile delinquency proceedings. This proposal would fill that gap.

2. Continuity of counsel: The proposal provides necessary continuity in representation by attorneys for juveniles in both delinquency and PINS cases. Similar to the requirement in Family Court Act §1016 for the appointment of the attorney for the child in a child protective proceeding to continue during the life of a dispositional or post-dispositional order, Family Court Act §§320.2(2) and 741(a) would be amended to continue the appointment of the child's attorney in juvenile delinquency and PINS proceedings for the entire period of a dispositional order, an adjournment in contemplation of dismissal and any extensions of permanency hearings, violation hearings or other post-dispositional proceedings. As in child protective cases, the appointment would automatically continue unless the Family Court relieves the attorney or grants the attorney's application to be relieved, in which case the Court must appoint another attorney immediately. While the current practice of the attorney submitting a voucher for payment at the close of a proceeding would continue, the attorney would be able, as in child protective proceedings, to submit a separate application for compensation for post-dispositional services rendered.

One of the central precepts underlying the Family Court Act is the necessity of representation of juveniles at every stage of the proceedings, a precept "based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition." Family Court Act §241. The Act recognizes that juveniles "often require the assistance of counsel to help protect their interests and to help them express their wishes to the court." *Id*. Both the juvenile delinquency and PINS statutes explicitly require appointment of an attorney for the youth at the outset of proceedings, require the attorney's personal

appearance at every hearing and provide for the continuation of the appointment on appeal. *See* Family Court Act §§307.4(2), 320.2(2), 320.3, 341.2(1), 728(a), 741(a), 1120(b). What is less clear, however, is whether the appointment of the attorney, absent an appeal, continues after the disposition of a juvenile delinquency or PINS proceeding. This proposal eliminates that ambiguity. Representation of juveniles in such cases after disposition in case conferences and subsequent reviews is critically important to efforts to ensure that effective permanency planning takes place. In the juvenile delinquency and PINS context, this representation may significantly further the goal of ensuring that services are in place to facilitate the juvenile's successful reintegration into his or her community.

3. Permanency planning**:** Where the dispositional order places the juvenile with a county Department of Social Services or, in the case of juvenile delinquents outside New York City, who are placed with the New York State Office of Children and Family Services for non-secure or limited secure care, the dispositional order must contain or have annexed the same elements as child protective placement orders, including a description of the family visitation plan, the service plan if available (or if not yet available, then within 60 days of the disposition) and a directive that notice be given to the parents of any planning conferences. These elements of a permanency order in juvenile delinquency and PINS cases are as critical as those already recognized by the Legislature in its recent enactments implementing the Federal Law, Public Law 113-183, that is, the need to document the services necessary to assist juveniles 14 and older to make the transition from foster care to successful adulthood, the need in Alternative Planned Permanent Living Arrangement cases to specify "a significant connection to an adult willing to be a permanency resource for the child," the need for placement agencies to document – and the courts to monitor – the provision of age and developmentally appropriate services to youth using a "reasonable and prudent parent" standard, the need for youth 14 and older to be integrally involved in planning for their futures and the limitation of the permanency goal of Another Planned Permanent Living Arrangement" to youth 16 years of age and older. *See* L. 2016, c. 54; L. 2015, c. 56.

Unquestionably, these features of the permanency legislation, most specifically addressing the needs of adolescents in out-of-home care, are equally essential for the adolescents who comprise the juvenile delinquency and PINS caseloads of the Family Courts statewide. Planning for the juveniles' release to their families, the predominant permanency goal in juvenile delinquency and PINS cases, must begin early and, where their families will not be a resource, the identification of suitable permanency resources is critically important. As recent reports regarding New York's placement system point out, youth exiting out-of-home care are especially vulnerable and have significant needs that must be met if they are to make a successful adjustment to the community.

4. Educational and vocational release planning in juvenile delinquency and PINS proceedings: Any finding that reasonable efforts, as required by both Federal and State law, have been made to further the permanency goals of juvenile delinquents and PINS must include advance efforts to ensure their prompt enrollment in a school or vocational program upon release from out-of-home care. The proposal thus amends both the juvenile delinquency and PINS statutes for agencies in which youth are placed to notify the school districts in which the youth will be attending school upon release not less than 14 days in advance of their release, to promptly transfer records to the school districts and to try to coordinate release

dates with school terms so as to minimize disruption to the youths' educational programs. The proposal further requires that local school districts enroll youth exiting placement in school within five business days of their release. Consistent with the school stability provisions of the Federal *Fostering Connections to Success and Adoption Improvement Act of 2008* [Public Law 110-351] and the *Every Student Succeeds Act* [Public Law 114-95], school authorities would also be required to ensure that, where appropriate, students may remain in the schools they attended prior to their placement or remand into foster care. Most recently, as noted above, section 205 of the Federal *Juvenile Justice Reform Act of 2018* (H.R. 6964), signed into law on December 21, 2018, requires States to include in their State Plans prompt educational records and academic credit transfers as part of the planning process for release of youth from out-of-home care.

All of these provisions further the goals embodied in and are consistent with the *Guiding Principles for Providing High-Quality Education in Juvenile Justice Secure Care Settings* jointly issued by the United States Department of Education and Department of Justice in December, 2014. The cover letter, from the Attorney General and Secretary of Education that accompanied the *Guiding Principles,* dated December 8, 2014, stated that:

> For youth who are confined in juvenile justice facilities, providing high-quality correctional education that is comparable to offerings in traditional public schools is one of the most powerful – and cost-effective – levers we have to ensure that youth are successful once released and are able to avoid future contact with the justice system. High-quality correctional education, training, and treatment are essential components of meaningful rehabilitation because these equip youth with the skills needed to successfully reenter their communities and either continue their education or join the workforce.

While referring to secure settings, the document notes that "the principles and core activities should also inform the services provided to any youths so displaced, regardless of where they are located or for how long." *Id.* at 2. The *Guidelines* stress the need for timely and comprehensive reentry planning, transfers of school records to ensure expeditious re-enrollment and full compliance with the *Individuals with Disabilities Education Act (IDEA). See also*, Letter from the Attorney General and Secretary of Education, dated December 5, 2014, regarding *IDEA* requirements.

It is most ironic that PINS, many, if not most, of whom had been adjudicated for truancy or other school difficulties, are the only category of juveniles before the Family Court who do not have specific statutory rights to school and vocational release planning. Therefore, the Committee's proposal conforms the PINS statute to the juvenile delinquency school and vocational release mandates of chapter 181 of the Laws of 2000 and to chapter 3 of the Laws of 2005, which added identical provisions for children in foster care. The proposal requires the agency with which a PINS is placed – the local Department of Social Services or an authorized child care agency operating under contract – to engage in constructive planning for the child's release, including arranging appropriate educational and/or vocational programs, and to report to the Family Court and to the parties on such efforts. Where an extension of placement is not being sought, the proposal requires a report regarding the child's release plan 30 days prior to the conclusion of the placement period. Where the agency is requesting an extension of placement and

permanency hearing, the report must be annexed to the petition, which must be filed 60 days prior to the date on which the permanency hearing must be held.

The release plan mandated in the report must delineate the steps that the agency has taken or will be taking to ensure that the PINS would be enrolled in school promptly after release, that records would be promptly transferred and that special education services, if any, would continue until such time as the new local education agency develops and implements a new Individual Education Plan, as necessary. As in juvenile delinquency and foster care cases, for a PINS not subject to the State compulsory education law who affirmatively elects not to continue in school, the agency must describe steps taken or planned to promptly ensure the juvenile's gainful employment or enrollment in a vocational program. In a consolidated extension of placement and permanency hearing, this release plan would be reviewed by the Family Court in conjunction with its review of the permanency plan and the Court's order would include a determination of the adequacy of the release plan and would specify any necessary modifications. Recognizing that, of all children in out-of-home care, PINS children are among the most likely to have serious educational deficits and needs, these provisions would help to ameliorate the serious, pervasive deficiencies in agency referrals of youth to school and vocational programs upon release from foster care.[35]

The importance of increasing efforts to ensure that both juvenile delinquents and PINS are able to stay in, re-enroll in and succeed in school cannot be overstated. High school drop-outs are 3.5 times as likely to be arrested as high school graduates and more than eight times more likely to be incarcerated in jails or prisons. Even a 10% increase in graduation rates has been estimated to prevent approximately 180 murders and 9,000 aggravated assaults in New York annually.[36]

5. Placement and permanency hearing orders: The Federal *Adoption and Safe Families Act* [Public Law 105-89]**,** the *Fostering Connections to Success and Adoption Improvement Act of 2008* [Public Law 110-351] and, most recently, the *Preventing Sex Trafficking and Strengthening Families Act* [Public Law 113-183] significantly augment the responsibilities of the Family Court to monitor and shape the placements of youth in out-of-home care, including juvenile delinquents, since New York State receives Federal foster care reimbursement under Title IV-E of the *Social Security Act* for such youth when they are originally placed in or are "stepped down to" non-secure facilities housing 25 children or fewer or to foster homes. Thus, the Committee's proposal requires permanency hearings for juveniles placed with local Departments of Social Services and with the New York State Office of Children and Family

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[35] *Educational Neglect: The Delivery of Educational Services to Children in New York City's Foster Care System* (Advocates for Children of New York, July, 2000); *Changing the PINS System in New York: A Study of the Implications of Raising the Age Limit for Persons in Need of Supervision (PINS)*, p. 34 (Vera Inst., Sept., 2001); *Changing the Status Quo for Status Offenders: New York State's Efforts to Support Troubled Teens* (Vera Inst., Dec., 2004).

[36] *See* Fight Crime, Invest in Kids, *Getting Juvenile Justice Right in New York: Proven Interventions Will Cut Crime and Save Money* (2007) at pages 4,6.

Services for limited secure and non-secure facilities. Although New York State does not receive Federal Title IV-E foster care reimbursement for youth in limited secure facilities, these youth are likely, during the course of placement, be transferred into IV-E- eligible non-secure facilities. Convening permanency hearings for such youth greatly facilitates the planning process and assures compliance with the Federally-required time-limits applicable once the youth are transferred. Such hearings are already generally the practice statewide, thus imposing no new burdens upon NYS OCFS, but should be made uniform through a statutory requirement. *See, e.g.*, Matter of Donovan Z., 6 Misc.3d 1023(A), 800 N.Y.S.2d 345 (Fam. Ct., Monroe Co., 2005)(Unreported opinion).

Further, as in the child welfare permanency legislation, the proposal requires that permanency hearing orders in juvenile delinquency and PINS proceedings include: a description of the visiting plan between the juvenile and his or her parent or legally-responsible adult and siblings; a service plan designed to fulfill the permanency goal for the juvenile;[37] a direction that the parent or other person legally responsible be notified of, and be invited to be present at, any planning conferences convened by the placement agency with respect to the child; and a warning that if the juvenile remains in placement for 15 out of 22 months, the agency may be required to file a petition to terminate parental rights. A copy of the court order and service plan must be provided to the juvenile, his or her attorney and the juvenile's parent or other legally responsible individual. *Cf.*, Family Court Act §§1089(d)(2)(vii)(A), 1089(e).

State and Federal law and regulations are unequivocal in their requirements that juvenile delinquency and PINS cases conform to the Federal *Adoption and Safe Families Act* ["*ASFA,"* Public Law 105-89]. The reauthorization of the Federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273] in 2002 made compliance with *ASFA* a requirement, not only for New York State to receive Federal foster care assistance pursuant to Title IV-E of the *Social Security Act* [42 U.S.C.], but also for eligibility for Federal juvenile justice funding from the Department of Justice. In addition to the 2015 and 2016 New York State budget enactments cited above, the enactment of amendments in 2000 to New York State legislation implementing the Federal *ASFA* underscored the Legislature's recognition that the reasonable efforts, permanency planning and permanency hearing requirements of *ASFA* are fully applicable to juvenile delinquency and PINS proceedings in Family Court and are critical aspects of the State's compliance with Federal foster care [*Social Security Act*, 42 U.S.C. Title IV-E] funding mandates. *See* L. 2000, c. 145; Senate Memorandum in Support of S 7892-a.[38] That these amendments were

[37] If a service plan has not been prepared by the date of disposition, it must be disseminated to the Family Court, presentment agency, child's attorney and parent or person legally responsible for the child's care within 60 days of the issuance of the dispositional order.

[38] The 2000 amendments require case-specific, rather than categorical, exclusions of juvenile delinquency and PINS proceedings from the mandate to file termination of parental rights proceedings for juveniles who have been in care for 15 of the most recent 22 months. Particularized findings must be made at the earliest pre-trial detention hearings regarding whether reasonable efforts had been made to prevent detention or facilitate return home and whether detention is in the child's best interests. Significantly, the amendments clarify that permanency hearings must be held in juvenile delinquency proceedings within 30 days of a finding that reasonable efforts are not required

compelled by Federal law is evident from the regulations promulgated on January 25, 2000 by the Children's Bureau of the United States Department of Health and Human Services. 45 *C.F.R.* Parts 1355-1357; 65 *Fed.Reg.* 4019-4093 (Jan. 25, 2000).

The Committee's proposal is vital to address the current conundrum faced by the Family Court: the Court is charged with the responsibility to conduct permanency hearings, monitor permanency planning and issue fact-specific permanency orders in juvenile delinquency and PINS proceedings, but it is not given the information or authority it requires to discharge that responsibility. If the Family Court and all parties are provided with specific service plans, if needed services are ordered, if representation by the juveniles' attorneys is continued without interruption and if the agencies' responsibilities to work with, and provide appropriate visitation to, the juveniles' parents and other legally responsible adults and siblings are clearly articulated, the likelihood of successful permanency planning is significantly increased. This would benefit not only New York State in its efforts to demonstrate compliance with *ASFA*, but also the juveniles, their families and the communities to which the juveniles return.

In Matter of Robin G., 20 Misc.3d 328 (Fam. Ct., Queens Co., 2008), for instance, at a combined permanency/extension of placement hearing, the Family Court made a finding of no reasonable efforts against NYS OCFS since neither it, nor the authorized agency having custody of the juvenile, made reasonable efforts to facilitate the juvenile's return to her mother's home; no services or counseling were provided to the mother, who was not involved in the child's transition planning, and no plan was in place to ensure that the child's mental health needs would be met upon her release. Concomitantly, Matter of Donovan Z., 6 Misc.3d 1023(A), 800 N.Y.S.2d 345 (Fam. Ct., Monroe Co., 2005)(Unreported opinion) provides a more positive example of a case where, at a combined permanency/extension of placement hearing, the Family Court was able to ascertain that both the juvenile's and his mother's needs to facilitate his ultimate release home were being met by OCFS.

The importance of these provisions is underscored as well in the recently revised, nationally recognized guidelines approved by the National Council of Juvenile and Family Court Judges.[39] As one child welfare expert has written:[40]

> If *ASFA* and Title IV-E are applied properly, consistently and with a view toward reunification, rehabilitation and safe permanent homes for the children involved, the results can be extraordinary. One outcome – collaboration among courts, agencies, and lawyers – can result in fewer delinquency, status offender, and dependency [child abuse and neglect] cases; more youths and

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or, if no such finding has been made, no later than 12 months after the child entered foster care and every 12 months thereafter. *Id.* McKinney's 2000 Session L. New York, C. 145.

[39] *Enhanced Juvenile Justice Guidelines: Improving Court Practice in Juvenile Justice Cases* (National Council of Juvenile and Family Court Judges, Jan., 2019).

[40] V. Hemrich, "Applying *ASFA* to Delinquency and Status Offender Cases," 18 *ABA Child Law Practice* 9:129, 134 Nov., 1999).

families involved with one another and their communities; and fewer future adult crimes. Collaboration also is efficient under a cost-benefit analysis since it provides extra funding for juvenile justice initiatives and preventive services.

ASFA and Title IV-E can be important tools to reform the juvenile justice field. They can provide juvenile justice agencies with added means to control and oversee youths, work preventively with families at risk, and get community involvement and "buy-in."

Proposal

AN ACT to amend the family court act, in relation to permanency planning in juvenile delinquency and persons in need of supervision proceedings in family court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section of the family court act is amended by adding a new subdivision 4 to read as follows:

4. Upon the filing of a petition under this article, the presentment agency shall notify any non-custodial parents of the respondent who had not been issued a summons in accordance with subdivision one of this section, provided that the addresses of any such parents have been provided. The probation department and presentment agency shall ask the custodial parent or person legally responsible for information regarding any other parent or parents of the respondent. The notice shall inform the parent or parents of the right to appear and participate in the proceeding and to seek temporary release or, upon disposition, direct placement of the respondent. The presentment agency shall send the notice to the non-custodial parent at least five days before the return date. The failure of a parent entitled to notice to appear shall not be cause for delay of the respondent's initial appearance, as defined by section 320.1 of this article.

§2. Subdivision 2 of section 320.2 of the family court act, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

2. At the initial appearance the court must appoint an attorney to represent the respondent pursuant to the provisions of section two hundred forty-nine of this act if independent legal representation is not available to such respondent. Whenever an attorney has been appointed by the family court to represent a child in a proceeding under this article, such appointment shall continue without further court order or appointment during the period covered by any order of disposition issued by the court, an adjournment in contemplation of dismissal, or any extension or violation

thereof, or during any permanency hearing, other post-dispositional proceeding or appeal. All notices and reports required by law shall be provided to such attorney. Such appointment shall continue unless another appointment of an attorney has been made by the court or unless such attorney makes application to the court to be relieved of his or her appointment. Upon approval of such application to be relieved, the court shall immediately appoint another attorney to whom all notices and reports required by law shall be provided. The attorney for the respondent shall be entitled to compensation pursuant to applicable provisions of law for services rendered up to and including disposition of the petition. The attorney shall, by separate application, be entitled to compensation for services rendered after the disposition of the petition. Nothing in this section shall be construed to limit the authority of the court to remove an attorney from his or her assignment.

§3. Section 353.3 of the family court act is amended by adding a new subdivision 4-a to read as follows:

4-a. Where the respondent is placed with the office of children and family services or the commissioner of social services pursuant to subdivision two, three or four of this section, the dispositional order or an attachment to the order incorporated by reference into the order shall include:

(a) a description of the plan to facilitate visitation, including any plans for visits and/or contact with the respondent's siblings. If the visitation plan has not yet been developed, then the visitation plan must be filed with the court and delivered to the presentment agency, attorney for the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than sixty days from the date the disposition was made; and

(b) a service plan, if available. If the service plan has not yet been developed, then the service plan must be filed with the court and delivered to the presentment agency, attorney for the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than sixty days from the date the disposition was made; and

(c) a direction that the parent or parents or other person or persons legally responsible for the respondent shall be notified of any planning conferences to be held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and of their right to have counsel or another representative or companion with them; and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as

required by federal law.

A copy of the court's order and attachments shall be given to the parent or parents or other person or persons legally responsible for the care of the respondent. The order shall also contain a notice that if the respondent remains in placement for fifteen of the most recent twenty-two months, the agency with which the child is placed may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

§4. Paragraphs (a), (b) and (c) of subdivision 7 of section 353.3 of the family court act, paragraphs (a) and (b) as amended by chapter 6 of part 6 of chapter 58 of the laws of 2010, and paragraph (c) as amended by section 16 of part L of chapter 56 of the laws of 2015, are amended to read as follows:

(a) Where the respondent is placed pursuant to subdivision two [or], two-a, three or four of this section and where the agency is not seeking an extension of the placement pursuant to section 355.3 of this part, such report shall be submitted not later than thirty days prior to the conclusion of the placement.

(b) Where the respondent is placed pursuant to subdivision two [or], two-a, three or four of this section and where the agency is seeking an extension of the placement pursuant to section 355.3 of this part and a permanency hearing pursuant to section 355.5 of this part, such report shall be submitted not later than sixty days prior to the date on which the permanency hearing must be held and shall be annexed to the petition for a permanency hearing and extension of placement.

(c) Where the respondent is placed pursuant to subdivision two [or], two-a, three or four of

this section, such report shall contain a plan for the release, or conditional release (pursuant to section five hundred ten-a of the executive law), of the respondent to the custody of his or her parent or other person legally responsible, or to another permanency alternative as provided in paragraph (d) of subdivision seven of section 355.5 of this part. For purposes of this paragraph, "placement agency" shall refer to the office of children and family services, the commissioner of social services or the authorized agency under contract with the office of children and family services or commissioner of social services with whom the respondent has been placed. The release or conditional release plan shall provide as follows:

(i) If the respondent is subject to article sixty-five of the education law or elects to

participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the respondent is placed has taken and will be taking in conjunction with the local education agency to [facilitate] ensure the immediate enrollment of the respondent in [a] an appropriate school or educational program leading to a high school diploma [following] within five days of release, or, if such release occurs during the summer recess, immediately upon the commencement of the next school term. The placement agency shall ascertain the school calendar from the school district and shall, to the extent possible, work with the school district so that the timing of respondent's release from the program and enrollment in school are minimally disruptive for the respondent and further his or her best interests. Not less than fourteen days prior to the respondent's release, the placement agency shall notify the school district where the respondent will be attending school and transfer all necessary records, including, but not limited to, the respondent's course of study, credits earned and academic record.

(ii) If the placement agency has reason to believe that the respondent may have a disability or if the respondent had been found eligible to receive special education services prior to or during the placement, in accordance with article eighty-nine of the education law, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking to ensure that the local education agency makes any necessary referrals or arranges for special educational evaluations or services, as appropriate, and provides necessary records immediately in accordance with state and federal law.

(iii) If the respondent is not subject to article sixty-five of the education law and does not elect to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the respondent is placed has taken and will be taking to assist the respondent to become gainfully employed or enrolled in a vocational program following release.

§5. The opening paragraph of subdivision 2, the opening paragraph of subdivision 3, subdivision 5, subdivision 6 and paragraph (d) of subdivision 7 of section 355.5 of the family court act, the opening paragraph of subdivision 2 and the opening paragraph of subdivision 3 as amended by chapter 145 of the laws of 2000, subdivision 5 as added by chapter 7 of the laws of 1999, subdivision 6 as amended by section 1 of part B of chapter 327 of the laws of 2007, and paragraph (d) of subdivision 7 as amended by section 18 of part L of chapter 56 of the laws of 2015, are

amended and a new subdivision 10 is added to such section to read as follows:

Where a respondent is placed with a commissioner of social services or the office of children and family services pursuant to subdivision two, two-a, three or four of section 353.3 of this [article] part for a period of twelve or fewer months and resides in a foster home or in a non-secure or limited secure facility:

Where a respondent is placed with a commissioner of social services or the office of children and family services pursuant to subdivision two, two-a, three or four of section 353.3 of this [article] part for a period in excess of twelve months and resides in a foster home or in a non-secure or limited secure facility:

5. A petition for an initial or subsequent permanency hearing shall be filed by the office of children and family services or by the commissioner of social services with whom the respondent was placed. Such petition shall be filed no later than sixty days prior to the end of the month in which an initial or subsequent permanency hearing must be held, as directed in subdivision two of this section. The petition shall be accompanied by a permanency hearing report that contains the information required by subdivision seven of section 353.3 and subdivision (c) of section one thousand eighty-nine of this act regarding the determinations that the court must make in accordance with subdivision seven of this section.

6. The respondent and his or her attorney shall be shall be notified of the hearing and of the respondent's right to be heard and a copy of the permanency petition and accompanying report filed in accordance with subdivision five of this section shall be served on the respondent's attorney. The foster parent caring for the respondent or any pre-adoptive parent or relative providing care for the respondent, as well as the respondent's parents and other persons legally responsible for the respondent's care, shall be provided with notice of any permanency hearing held pursuant to this section by the office of children and family services or the commissioner of social services with whom the respondent was placed. Such foster parent, pre-adoptive parent and relative shall have the right to be heard at any such hearing; provided, however, no such foster parent, pre-adoptive parent or relative shall be construed to be a party to the hearing solely on the basis of such notice and right to be heard. The failure of the foster parent, pre-adoptive parent, or relative caring for the [child] respondent to appear at a permanency hearing shall constitute a waiver of the right to be heard and such failure to appear shall not cause a delay of the permanency hearing nor shall such failure to

appear be a ground for the invalidation of any order issued by the court pursuant to this section.

(d) with regard to the completion of placement ordered by the court pursuant to section 353.3 or 355.3 of this part: whether and when the respondent: (i) will be returned to the parent or parents or other persons legally responsible for the respondent's care; (ii) should be placed for adoption with the local commissioner of social services filing a petition for termination of parental rights; (iii) should be referred for legal guardianship; (iv) should be placed permanently with a fit and willing relative; or (v) should be placed in another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the respondent if the respondent is age sixteen or older and (A) the office of children and family services or the local commissioner of social services has documented to the court: (1) the intensive, ongoing, and, as of the date of the hearing, unsuccessful efforts made to return the respondent home or secure a placement for the respondent with a fit and willing relative including adult siblings, a legal guardian, or an adoptive parent, including through efforts that utilize search technology including social media to find biological family members for children, (2) the steps being taken to ensure that (i) the respondent's foster family home or child care facility is following the reasonable and prudent parent standard in accordance with guidance provided by the United States department of health and human services, and (ii) the respondent has regular, ongoing opportunities to engage in age or developmentally appropriate activities including by consulting with the respondent in an age-appropriate manner about the opportunities of the respondent to participate in activities; and (B) the office of children and family services or the local commissioner of social services has documented to the court and the court has determined that there are compelling reasons for determining that it continues to not be in the best interest of the respondent to return home, be referred for termination of parental rights and placed for adoption, placed with a fit and willing relative, or placed with a legal guardian; and (C) the court has made a determination explaining why, as of the date of this hearing, another planned living arrangement with a significant connection to an adult willing to be a permanency resource for the respondent is the best permanency plan for the respondent; and

10. (a) If the order resulting from the permanency hearing extends the respondent's placement pursuant to section 355.3 of this part in a foster home or non-secure or limited secure facility or if the respondent continues in such placement under a prior order of placement or an

extension thereof, the order or an attachment to the order incorporated into the order by reference shall include:

(i) a description of the plan to facilitate visitation, including any plans for visits and/or contact with the respondent's siblings;

(ii) a service plan aimed at effectuating the permanency goal; and

(iii) a direction that the parent or parents or other person or persons legally responsible for the respondent's care shall be notified of any planning conferences, including those held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and their right to have counsel or another representative or companion with them and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as required by paragraph (b) of subdivision seven of this section.

(b) Where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would further the respondent's needs and best interests and the need for protection of the community and would make it possible for the respondent to safely return home or to make the transition from foster care to successful adulthood, the court may include in its order a direction for a local social services, mental health or probation official or an official of the office of children and family services or office of mental health, as applicable, to provide or arrange for the provision of services or assistance to the respondent and his or her family. Such order regarding a local social services official shall not include the provision of any service or assistance to the respondent and his or her family that is not authorized or required to be made available pursuant to the county child and family services plan then in effect. In any order issued pursuant to this section, the court may require the official to make periodic progress reports to the court on the implementation of such order. Violation of such order shall be subject to punishment pursuant to section seven hundred fifty-three of the judiciary law.

(c) A copy of the court's order and the attachments shall be given to the respondent and his or her attorney and to the respondent's parent or parents or other person or persons legally responsible for the respondent's care. The order shall also contain a notice that if the respondent remains in foster care for fifteen of the most recent twenty-two months, the agency with which the respondent is placed may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

§6. Section 736 of the family court act is amended by adding a new subdivision (4) to read as follows:

(4) In any proceeding under this article, the court shall cause a copy of the petition and notice of the time and place to be heard to be served upon any non-custodial parent of the child, provided that the address of such parent is known to or is ascertainable by the court. Service shall be made by ordinary first class mail at such parent's last known residence. The failure of such parent to appear shall not be cause for delay of the proceedings.

§7. Subdivision (a) of section 741 of the family court act, as amended by chapter 41 of the laws of 2010, is amended and a new subdivision (d) is added to such section to read as follows:

(a) At the initial appearance of a respondent in a proceeding and at the commencement of any hearing under this article, the respondent and his or her parent or other person legally responsible for his or her care shall be advised of the respondent's right to remain silent and of the respondent's right to be represented by counsel chosen by him or her or his or her parent or other person legally responsible for his or her care, or by an attorney assigned by the court under part four of article two. [Provided, however, that in] In the event of the failure of the respondent's parent or other person legally responsible for his or her care to appear, after reasonable and substantial effort has been made to notify such parent or responsible person of the commencement of the proceeding and such initial appearance, the court shall appoint an attorney for the respondent and shall, unless inappropriate, also appoint a guardian ad litem for such respondent, and in such event, shall inform the respondent of such rights in the presence of such attorney and any guardian ad litem.

(d) Whenever an attorney has been appointed by the family court to represent a respondent in a proceeding under this article pursuant to subdivision (a) of this section, such appointment shall continue without further court order or appointment during an order of disposition issued by the court, an adjournment in contemplation of dismissal, or any extension or violation thereof, or any permanency hearing, other post-dispositional proceeding or appeal. All notices and reports required by law shall be provided to such attorney. Such appointment shall continue unless another appointment of an attorney has been made by the court or unless such attorney makes application to the court to be relieved of his or her appointment. Upon approval of such application to be relieved, the court shall immediately appoint another attorney to whom all notices and reports required by law shall be provided. The attorney shall be entitled to compensation pursuant to applicable

provisions of law for services rendered up to and including disposition of the petition. The attorney shall, by separate application, be entitled to compensation for services rendered after the disposition of the petition. Nothing in this section shall be construed to limit the authority of the court to remove an attorney from his or her assignment.

§8. Section 756 of the family court act is amended by adding new subdivisions (d), (e) and (f) to read as follows:

(d) Where the respondent is placed pursuant to this section, the dispositional order or an attachment to the order incorporated by reference into the order shall include:

(i) a description of the visitation plan, including any plans for visits and/or contact with the respondent's siblings. If the visitation plan has not yet been developed, then the visitation plan must be filed with the court and delivered to the presentment agency, attorney for the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than sixty days from the date the disposition was made;

(ii) a service plan, if available. If the service plan has not yet been developed, then the service plan must be filed with the court and delivered to the presentment agency, attorney for the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than sixty days from the date the disposition was made; and

(iii) a direction that the parent or parents or other person or persons legally responsible for care of the respondent shall be notified of any planning conferences to be held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and of their right to have counsel or another representative or companion with them and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as required by paragraph (ii) of subdivision (d) of section seven hundred fifty-six-a of this part.

A copy of the court's order and attachments shall be given to the respondent and his or her attorney and to the respondent's parent or parents or other person or persons legally responsible for the care of the respondent. The order shall also contain a notice that if the respondent remains in placement for fifteen of the most recent twenty-two months, the agency with which the respondent is placed may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

(e) Where the respondent has been placed pursuant to this section, the local commissioner of social services or the relative or suitable person with whom the respondent has been placed shall submit a report to the court, the attorney for the respondent and the presentment agency, if any, not later than thirty days prior to the conclusion of the placement period, which, among other information, contains a plan for the release of the respondent to the custody of his or her parent or parents or other person or persons legally responsible for the respondent's care. The plan for respondent's release shall provide as follows:

(i) If the respondent is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma following release, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking in conjunction with the local education agency to ensure the immediate enrollment of the respondent in an appropriate school or educational program leading to a high school diploma within five business days of release or, if such release occurs during the summer recess, immediately upon the commencement of the next school term. The placement agency shall ascertain the school calendar from the school district and shall, to the extent possible, work with the school district so that the timing of respondent's release from the program and enrollment in school are minimally disruptive for the respondent and further his or her best interests. Not less than fourteen days prior to the respondent's release, the placement agency shall notify the school district where the respondent will be attending school and transfer all necessary records, including, but not limited to the respondent's course of study, credits earned and academic record.

(ii) If the placement agency has reason to believe that the respondent may have a disability or if the respondent had been found eligible to receive special education services prior to or during the placement, in accordance with article eighty-nine of the education law, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking to ensure that the local education agency makes any necessary referrals or arranges for special educational evaluations or services, as appropriate, and provides necessary records immediately in accordance with state and federal law.

(iii) If the respondent is not subject to article sixty-five of the education law and elects not to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking to assist the

respondent to become gainfully employed or to be enrolled in a vocational program immediately upon release.

(f) Where the local commissioner of social services or the relative or suitable person with whom the respondent has been placed files a petition for an extension of the placement and a permanency hearing pursuant to section seven hundred fifty-six-a of this part, such report shall be submitted not later than sixty days prior to the date on which the permanency hearing must be held, shall be annexed to the petition and shall contain the information required by section seven hundred fifty-six-a of this part.

§9. Subdivision (a), subdivision (b) and the opening paragraph and paragraphs (iv) and (v) of subdivision (d) of section 756-a of the family court act, subdivision (a) as amended by chapter 309 of the laws of 1996, subdivision (b) and the opening paragraph of subdivision (d) as amended by section 4 of part B of chapter 327 of the laws of 2007 and paragraphs (iv) and (v) of subdivision (d) as amended by section 23 of part L of chapter 56 of the laws of 2015, are amended and a new paragraph (vi) is added to subdivision (d) to read as follows:

(a) In any case in which the [child] respondent has been placed pursuant to section seven hundred fifty-six, the [child] respondent, the person with whom the [child] respondent has been placed or the commissioner of social services may petition the court to extend such placement. Such petition shall be filed at least sixty days prior to the expiration of the period of placement, except for good cause shown, but in no event shall such petition be filed after the original expiration date. The petition shall be accompanied by a permanency hearing report

(i) The permanency hearing report shall contain the information required by subdivision (c) of section one thousand eighty-nine of this act and shall contain recommendations and such supporting data as is appropriate regarding the determinations that the court must make in accordance with subdivision (d) of this section. The permanency hearing report shall include, but is not limited to, a plan for the release of the respondent to the custody of his or her parent or parents or other person or persons legally responsible for the respondent's care, or to another permanency alternative as provided in paragraph (iv) of subdivision (d) of this section. For purposes of this paragraph, "placement agency" shall refer to the commissioner of social services or an authorized agency under contract with the commissioner of social services with whom the respondent has been placed. The release plan shall provide as follows:

(1) If the respondent is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma following release, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking in conjunction with the local education agency to ensure the immediate enrollment of the respondent in an appropriate school or educational program leading to a high school diploma within five business days of release or, if such release occurs during the summer recess, immediately upon the commencement of the next school term. The placement agency shall ascertain the school calendar from the school district and shall, to the extent possible, work with the school district so that the timing of respondent's release from the program and enrollment in school are minimally disruptive for the respondent and further his or her best interests. Not less than fourteen days prior to the respondent's release, the placement agency shall notify the school district where the respondent will be attending school and transfer all necessary records, including, but not limited to the respondent's course of study, credits earned and academic record.

(2) If the placement agency has reason to believe that the respondent may have a disability or if the respondent had been found eligible to receive special education services prior to or during the placement, in accordance with article eighty-nine of the education law, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking to ensure that the local education agency makes any necessary referrals or arranges for special educational evaluations or services, as appropriate, and provides necessary records immediately in accordance with state and federal law.

(3) If the respondent is not subject to article sixty-five of the education law and elects not to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking to assist the respondent to become gainfully employed or to be enrolled in a vocational program immediately upon release.

(b) The court shall conduct a permanency hearing concerning the need for continuing the placement. The [child] respondent, the person with whom the [child] respondent has been placed and the commissioner of social services shall be notified of such hearing and shall have the right to be heard thereat. A copy of the petition and accompanying permanency hearing report shall be served on the respondent's attorney and upon the respondent's parent or parents.

(d) At the conclusion of the permanency hearing, the court may, in its discretion, order an extension of the placement for not more than one year, which may include a period of post-release supervision and aftercare, or may direct that the respondent be placed on probation for not more than one year, pursuant to section seven hundred fifty-seven of this part, or may order that the petition for an extension of placement be dismissed. The court must consider and determine in its order:

(iv) whether and when the [child] respondent: (A) will be returned to the parent; (B) should be placed for adoption with the social services official filing a petition for termination of parental rights; (C) should be referred for legal guardianship; (D) should be placed permanently with a fit and willing relative; or (E) should be placed in another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the child if the child is age sixteen or older and (1) the social services official has documented to the court: (I) intensive, ongoing, and, as of the date of the hearing, unsuccessful efforts made by the social services district to return the child home or secure a placement for the child with a fit and willing relative including adult siblings, a legal guardian, or an adoptive parent, including through efforts that utilize search technology including social media to find biological family members for children, (II) the steps the social services district is taking to ensure that (A) the child's foster family home or child care facility is following the reasonable and prudent parent standard in accordance with guidance provided by the United States department of health and human services, and (B) the child has regular, ongoing opportunities to engage in age or developmentally appropriate activities including by consulting with the child in an age-appropriate manner about the opportunities of the child to participate in activities; and (2) the social services district has documented to the court and the court has determined that there are compelling reasons for determining that it continues to not be in the best interest of the child to return home, be referred for termination of parental rights and placed for adoption, placed with a fit and willing relative, or placed with a legal guardian; and (3) the court has made a determination explaining why, as of the date of the hearing, another planned living arrangement with a significant connection to an adult willing to be a permanency resource for the child is the best permanency plan for the child; and

(v) where the child will not be returned home, consideration of appropriate in-state and out-of-state placements; and

(vi) with regard to the placement or extension of placement ordered by the court pursuant to section seven hundred fifty-six of this part, the steps that must be taken by the agency with which the respondent is placed to implement the plan for release submitted pursuant to paragraphs (iii) and (iv) of subdivision (a) of such section, the adequacy of such plan and any modifications that should be made to such plan.

§10. Subdivisions (e) and (f) of section 756-a of the family court act are re-lettered subdivisions (h) and (i) and new subdivisions (e), (f) and (g) are added to read as follows:

(e) If the order from the permanency hearing extends the respondent's placement or if the respondent continues in placement under a prior order, the order or an attachment to the order incorporated into the order by reference shall include:

(i) a description of the plan to facilitate visitation, including any plans for visits and/or contact with the respondent's siblings;

(ii) a service plan aimed at effectuating the permanency goal; and

(iii) a direction that the parent or parents or other person or persons legally responsible for the respondent's care shall be notified of any planning conferences, including those held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and their right to have counsel or another representative or companion with them and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as required by paragraph (ii) of subdivision (d) of this section.

(f) Where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would further the respondent's needs and best interests and would make it possible for the respondent to safely return home or to make the transition from foster care to successful adulthood, the court may include in its order a direction for a local social services, mental health or probation official or an official of the office of children and family services or office of mental health, as applicable, to provide or arrange for the provision of services or assistance to the respondent and his or her family. Such order regarding a local social services official shall not include the provision of any service or assistance to the respondent and his or her family that is not authorized or required to be made available pursuant to the county child and family services plan then in effect. In any order issued pursuant to this section, the court may require the official to make periodic progress reports to the court on the implementation of such

order. Violation of such order shall be subject to punishment pursuant to section seven hundred fifty-three of the judiciary law.

(g) A copy of the court's order and the attachments shall be given to the respondent and his or her attorney and to the respondent's parent or parents or other person or persons legally responsible for the respondent's care. The order shall also contain a notice that if the respondent remains in foster care for fifteen of the most recent twenty-two months, the agency with which the respondent is placed may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

§11. This act shall take effect on the ninetieth day after it shall have become a law.

5. Simplification of the notification of rights to victims of domestic violence in criminal and family court proceedings [F.C.A. §812; C.P.L. §530.11]

The amendments to Family Court Act §812 and Criminal Procedure Law §530.11, contained in the comprehensive domestic violence statute enacted in 1994 [L. 1994, c. 222, 224], included important protections for alleged victims of domestic violence. The statutes placed a collective responsibility upon law enforcement, prosecutors and the courts to ensure that victims would be made aware of their rights, of the expectations they may have to obtain assistance from both the civil and criminal justice systems and of the remedies and resources available to them. The notice must be in writing in both English and Spanish and must recite the statutory language verbatim. Law enforcement has provided the notice as part of the victims' copy of the "Domestic Incident Report" and the court system has made the notices available in eight languages. *See* www.nycourts.gov. However, the required language in the notice is overly complex and, particularly where alleged victims of domestic violence are unrepresented, has impeded the statutory goal of making the justice system fully responsive to the needs of victims of abuse.

The Family Court Advisory and Rules Committee is submitting a measure to amend Family Court Act §812 and Criminal Procedure Law §530.11 by substantially simplifying the language contained in the notice while, at the same time, expanding the breadth of information it provides. The proposal enhances its utility by providing that the notice use the language provided and that it be made available, at minimum, in plain English, Spanish, Russian and Mandarin Chinese. As the chart below indicates, using five generally accepted means of measurement of the grade level of the language used, the notice proposed by this measure averages 8.6 (middle school) in grade level compared to the 16.3 (college senior) average level of the existing notice and its readability score is substantially higher that of the current notice:[41]

MEASUREMENT FORMULA	EXISTING NOTICE	PROPOSED NOTICE
Flesch-Kincaid Grade Level	15.3	6.7
Gunning-Fog Score	20.5	10.6
Coleman-Liau Index	12.0	9.0
SMOG Index	17.6	10.8
Automated Readability Index	15.9	5.7
Average Grade Level	16.3	8.6
TEXT STATISTICS		
Character Count	2140	3068
Syllable Count	820	1028
Word Count	734	726
Sentence Count	15	43
Characters per Word	4.7	4.2

[41] *See* www.readability-score.com (Visited Nov. 29, 2016).

Syllables per Word	1.6	1.4
Words per Sentence	30.3	16.9
Readability Formula	39.5	72.9
(Flesch-Kincaid; scale: 1 to 100)		

The language in the proposed notice mirrors the basic principles of writing in plain English, in particular, the use of short, declarative sentences, use of personal pronouns, use of active voice, avoidance of legal terms and organization into easy-to-read bullets. *See, e.g.*, *Federal Plain Language Guidelines* (www.plainlanguage.gov); *Writing for Self-represented Litigants: A Guide for Maryland Courts and Legal Services Providers* (Md. Access to Justice Commission, Nov., 2012). As indicated on the web-site www.writeclearly.org:

> Limited English speakers find it particularly difficult to navigate legal texts that contain strange words and describe unfamiliar procedures. These readers are substantially disadvantaged in accessing legal information.

Research has demonstrated that where documents are too complex for readers, they generally stop reading. *See* W.H. DuBay, "Principles of Readability, Readability and Reader Persistence," at 30 (National Adult Literacy Database, 2004; www.nald.ca).

Utilization of plain English is particularly important for victims of domestic violence, who may be experiencing trauma as a result of the alleged abusive incident or incidents, trauma that itself makes it more difficult for victims to understand their options and to make the often difficult decisions required at the outset of abuse cases. Significantly, victims are most often not represented by counsel either at the point of a law enforcement response to a call to 911 or upon their first appearances in Family Court seeking temporary orders of protection. Noting the high incidence of unrepresented litigants in family law-related matters in New York State courts, the 2010, 2014 and 2015 Reports to the Chief Judge of the Task Force (now Permanent Commission) to Expand Access to Civil Legal Services in New York included simplification of forms among its recommendations. In drastically reducing the complexity of the statutorily required notice to victims of domestic violence, this measure would fulfill those recommendations and would enhance the capacity of the justice system to respond effectively to victims' needs.

Proposal

AN ACT to amend the family court act and the criminal procedure law, in relation to notification of rights of victims of domestic violence in criminal and family court proceedings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 5 of section 812 of the family court act, as amended by chapter 224 of the laws of 1994, is amended to read as follows:

5. Notice. Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of this act and the criminal procedure law[, the family court act and the domestic relations law]. Such notice shall be available, at minimum, in plain English [and], Spanish, Chinese and Russian and, if necessary, shall be delivered orally and shall include but not be limited to the information contained in the following statement:

["If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a family member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you.

You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court is not in session, you may seek immediate assistance from the criminal court in

obtaining an order of protection.

The forms you need to obtain an order of protection are available from the family court and the local criminal court (the addresses and telephone numbers shall be listed). The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be listed and space shall be provided for local domestic violence hotline telephone numbers).

Filing a criminal complaint or a family court petition containing allegations that are knowingly false is a crime."] "Are you the victim of domestic violence? If you need help now, you can call 911 for the police to come to you. You can also call a domestic violence hotline.

You can have a confidential talk with an advocate at the hotline about help you can get in your community including: where you can get treatment for injuries, where you can get shelter, where you can get support, and what you can do to be safe. The New York State 24-hour Domestic & Sexual Violence Hotline number is (Insert the statewide multilingual 800 number).

They can give you information in many languages. If you are deaf or hard of hearing, call 711.

This is what the police can do:

They can help you and your children find a safe place such as a family or friend's house or a shelter in your community.

You can ask the officer to take you or help you and your children get to a safe place in your community.

They can help connect you to a local domestic violence program.

They can help you get to a hospital or clinic for medical care.

They can help you get your personal belongings.

They must complete a report discussing the incident. They will give you a copy of this police report before they leave the scene. It is free.

They may, and sometimes must, arrest the person who harmed you if you are the victim of a crime. The person arrested could be released at any time, so it is important to plan for your safety.

If you have been abused or threatened, this is what you can ask the police or district attorney to do:

File a criminal complaint against the person who harmed you.

Ask the criminal court to issue an order of protection for you and your child if the district attorney files a criminal case with the court.

Give you information about filing a family offense petition in your local family court.

You also have the right to ask the family court for an order of protection for you and your children.

This is what you can ask the family court to do:

To have your family offense petition filed the same day you go to court.

To have your request heard in court the same day you file or the next day court is open.

Only a judge can issue an order of protection. The judge does that as part of a criminal or family court case against the person who harmed you.

An order of protection in family court or in criminal court can say:

That the other person have no contact or communication with you by mail, phone, computer or through other people.

That the other person stay away from you and your children, your home, job or school.

That the other person not assault, harass, threaten, strangle, or commit another family offense

against you or your children.

That the other person turn in their firearms and firearms licenses, and not get any more firearms.

That you have temporary custody of your children.

That the other person pay temporary child support.

That the other person not harm your pets or service animals.

If the family court is closed because it is night, a weekend, or a holiday, you can go to a criminal court to ask for an order of protection.

If you do not speak English or cannot speak it well, you can ask the police, the district attorney, or the criminal or family court to get you an interpreter who speaks your language. The

interpreter can help you explain what happened.

You can get the forms you need to ask for an order of protection at your local family court. (Insert addresses and contact information for courts). You can also get them online: www.NYCourts.gov/forms.

You do not need a lawyer to ask for an order of protection.

You have a right to get a lawyer in the family court. If the family court finds that you cannot afford to pay for a lawyer, it must get you one for free.

If you file a complaint or family court petition, you will be asked to swear to its truthfulness because it is a crime to file a legal document that you know is false."

The division of criminal justice services in consultation with the state office for the prevention of domestic violence shall prepare the form of such written notice consistent with the provisions of this section and distribute copies thereof to the appropriate law enforcement officials pursuant to subdivision nine of section eight hundred forty-one of the executive law. Additionally, copies of such notice shall be provided to the chief administrator of the courts to be distributed to victims of family offenses through the family court at such time as such persons first come before the court and to the state department of health for distribution to all hospitals defined under article twenty-eight of the public health law. No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.

§2. Subdivision 6 of section 530.11 of the criminal procedure law, as amended by chapter 224 of the laws of 1994, is amended to read as follows:

6. Notice. Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of [the criminal procedure law,] this chapter and the family court act [and the domestic relations law]. Such notice shall be prepared, at minimum, in plain English, Spanish [and English], Chinese and Russian and if necessary, shall be delivered orally, and shall include but not be limited to the information contained in the following statement:

["If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a family member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you.

You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection.

The forms you need to obtain an order of protection are available from the family court and the local criminal court (the addresses and telephone numbers shall be listed). The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be listed and space shall be provided for local domestic violence hotline telephone numbers).

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knowingly false is a crime."] "Are you the victim of domestic violence? If you need help now, you can call 911 for the police to come to you. You can also call a domestic violence hotline.

You can have a confidential talk with an advocate at the hotline about help you can get in your community including: where you can get treatment for injuries, where you can get shelter, where you can get support, and what you can do to be safe. The New York State 24-hour Domestic & Sexual Violence Hotline number is (Insert the statewide multilingual 800 number).

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They can help connect you to a local domestic violence program.

They can help you get to a hospital or clinic for medical care.

They can help you get your personal belongings.

They must complete a report discussing the incident. They will give you a copy of this police report before they leave the scene. It is free.

They may, and sometimes must, arrest the person who harmed you if you are the victim of a crime. The person arrested could be released at any time, so it is important to plan for your safety.

If you have been abused or threatened, this is what you can ask the police or district attorney to do:

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Ask the criminal court to issue an order of protection for you and your child if the district attorney files a criminal case with the court.

Give you information about filing a family offense petition in your local family court.

You also have the right to ask the family court for an order of protection for you and your children.

This is what you can ask the family court to do:

To have your family offense petition filed the same day you go to court.

To have your request heard in court the same day you file or the next day court is open.

Only a judge can issue an order of protection. The judge does that as part of a criminal or family court case against the person who harmed you.

An order of protection in family court or in criminal court can say:

That the other person have no contact or communication with you by mail, phone, computer or through other people.

That the other person stay away from you and your children, your home, job or school.

That the other person not assault, harass, threaten, strangle, or commit another family offense against you or your children.

That the other person turn in their firearms and firearms licenses, and not get any more firearms.

That you have temporary custody of your children.

That the other person pay temporary child support.

That the other person not harm your pets or service animals.

If the family court is closed because it is night, a weekend, or a holiday, you can go to a criminal court to ask for an order of protection.

If you do not speak English or cannot speak it well, you can ask the police, the district attorney, or the criminal or family court to get you an interpreter who speaks your language. The interpreter can help you explain what happened.

You can get the forms you need to ask for an order of protection at your local family court. (Insert addresses and contact information for courts). You can also get them online: www.NYCourts.gov/forms.

You do not need a lawyer to ask for an order of protection.

You have a right to get a lawyer in the family court. If the family court finds that you cannot afford to pay for a lawyer, it must get you one for free.

If you file a complaint or family court petition, you will be asked to swear to its truthfulness

because it is a crime to file a legal document that you know is false."

The division of criminal justice services in consultation with the state office for the prevention of domestic violence shall prepare the form of such written notice consistent with provisions of this section and distribute copies thereof to the appropriate law enforcement officials pursuant to subdivision nine of section eight hundred forty-one of the executive law.

Additionally, copies of such notice shall be provided to the chief administrator of the courts to be distributed to victims of family offenses through the criminal court at such time as such persons first come before the court and to the state department of health for distribution to all hospitals defined under article twenty-eight of the public health law. No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.

§3. This act shall take effect on the ninetieth day after it shall have become a law.

6. Orders for spousal support in Family Court family offense proceedings and date of calculation of the spousal maintenance "cap" [F.C.A. §§412, 828, 842; DRL §§236B(5-a), 236B(6)]

The *Family Protection and Domestic Violence Intervention Act of 1994* (L. 1994, c. 222) provided authority for Family Courts, when issuing orders of protection in family offense cases, to issue temporary orders of child support. This has provided a needed life-saver to petitioners in family offense cases at a particularly vulnerable point in their lives, that is, when they are taking steps to escape alleged domestic violence. This provision has proven invaluable in getting the process started quickly with a temporary order in place.

Experience during the two decades under the statute has revealed a significant gap – that is, that it does not provide an analogous safety net to married petitioners in family offense proceedings who do not have minor, dependent children. As the Appellate Division, Third Department noted, in Matter of Childers *v.* Childers, 260 A.D.2d 767 (3d Dept., 1999), child support, but not spousal support, may be ordered in conjunction with the issuance of an order of protection. As has been evident in cases in the Unified Court System's Integrated Domestic Violence Courts, petitioners in need of temporary spousal support are often older litigants in long-term marriages, who are victims of domestic violence, frequently including financial abuse. They frequently lack means of their own to cover immediate expenses, particularly the expenses of relocation, as they seek safe refuges from violence.

This measure would remedy this gap. It would amend sections 828 and 842 of the Family Court Act to provide authority for the Family Court, when issuing temporary and final orders of protection, to direct the parties to appear, in the same action, within seven business days of the issuance of the temporary order of protection for consideration of an order of temporary spousal support. While the parties will be directed to appear with information with respect to income and assets, the measure permits issuance of a temporary order of spousal support on the return date "notwithstanding the respondent's default upon notice and notwithstanding that information with respect to income and assets of the petitioner or respondent may be unavailable." Upon making an order for temporary spousal support, the court shall set the spousal support matter down for determination of the final order.

As was recognized by the Legislature in enacting recent legislation (L. 2013, c. 526), economic abuse is a significant form of domestic violence and is often inflicted upon elderly, vulnerable family members. *See* Memo in Support of A. 7400 (L. 2013, c. 526). As documented in *Under the Radar: The New York State Elder Abuse Study: Final Report*, financial abuse is the most common form of abuse reported by the elderly.[42] Even where financial abuse has not been alleged, a married family offense petitioner's lack of income or access to family assets may impede his or

[42] *See Under the Radar: The New York State Elder Abuse Study: Final Report* (Lifespan & Cornell-Weill Medical Center, May 2011), available at: http://ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf (reviewed Jan. 6, 2014).

her ability to escape to a place of safety, free of domestic violence, and is frequently the reason many domestic violence victims return repeatedly to their abusers before being able to permanently extricate themselves from abusive situations. Often a victim needs a temporary life-line, some means of securing resources to tide him or her over while seeking a more long-term order in a Supreme or Family Court proceeding. This measure would thus provide much needed emergency relief.

Finally, the measure would also amend Family Court Act §412(10) and Domestic Relations Law §236B(5-a)(b)(5) and §236B(6)(b)(4) to fix the date of the biennial adjustment of the spousal maintenance "cap" at March 1st, rather than January 31st. It would commence the adjustment process in 2018, since the 2018 adjustment from $178,000 to $184,000 has been made. This proposal would conform the adjustment date to that already in effect for the child support income "cap," self-support reserve and poverty level.

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to orders for temporary spousal support in conjunction with temporary and final orders of protection in family court and calculation of the spousal maintenance "cap"

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (d) of subdivision 2 of section 412 of the family court act, as amended by chapter 269 of the laws of 2015, are amended to read as follows:

(d) "income cap" shall mean up to and including one hundred [seventy-five] eighty-four thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] March first, two thousand [sixteen] twenty and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

§2. The title of section 828 of the family court act, as amended by chapter 222 of the laws of 1994, is amended and a new subdivision 5 is added to such section to read as follows:

§828. Temporary order of protection; temporary [order] orders for child support and spousal maintenance.

5. Notwithstanding the provisions of section eight hundred seventeen of this article, where a temporary order of spousal support has not already been issued, the court may, in addition to the issuance of a temporary order of protection pursuant to this section, issue an order directing the parties to appear within seven business days of the issuance of the order in the family court, in the same action, for consideration of an order for temporary spousal support in accordance with article four of this act. If the court directs the parties to so appear, the court shall direct the parties to appear with information with respect to income and assets, but a temporary order for spousal support may be issued pursuant to article four of this act on the return date notwithstanding the respondent's default upon notice and notwithstanding that information with respect to income and assets of the petitioner or respondent may be unavailable.

§2. Section 842 of the family court act, as amended by chapters 480 and 526 of the laws of 2013, is amended to read as follows:

§842. Order of protection. An order of protection under section eight hundred forty-one of this part shall set forth reasonable conditions of behavior to be observed for a period not in excess of two years by the petitioner or respondent or for a period not in excess of five years upon (i) a finding by the court on the record of the existence of aggravating circumstances as defined in paragraph (vii) of subdivision (a) of section eight hundred twenty-seven of this article; or (ii) a finding by the court on the record that the conduct alleged in the petition is in violation of a valid order of protection. Any finding of aggravating circumstances pursuant to this section shall be stated on the record and upon the order of protection. The court may also, upon motion, extend the order of protection for a reasonable period of time upon a showing of good cause or consent of the parties. The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order. The court must articulate a basis for its decision on the record. The duration of any temporary order shall not by itself be a factor in determining the length or issuance of any final order. Any order of protection issued pursuant to this section shall specify if an order of probation is in effect. Any order of protection issued pursuant to this section may require the petitioner or the respondent:

(a) to stay away from the home, school, business or place of employment of any other party, the other spouse, the other parent, or the child, and to stay away from any other specific location designated by the court, provided that the court shall make a determination, and shall state such

determination in a written decision or on the record, whether to impose a condition pursuant to this subdivision, provided further, however, that failure to make such a determination shall not affect the validity of such order of protection. In making such determination, the court shall consider, but shall not be limited to consideration of, whether the order of protection is likely to achieve its purpose in the absence of such a condition, conduct subject to prior orders of protection, prior incidents of abuse, extent of past or present injury, threats, drug or alcohol abuse, and access to weapons;

(b) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods;

(c) to refrain from committing a family offense, as defined in subdivision one of section eight hundred twelve of this act, or any criminal offense against the child or against the other parent or against any person to whom custody of the child is awarded, or from harassing, intimidating or threatening such persons;

(d) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in this proceeding or in any other proceeding or action under this act or the domestic relations law;

(e) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety or welfare of a child;

(f) to pay the reasonable counsel fees and disbursements involved in obtaining or enforcing the order of the person who is protected by such order if such order is issued or enforced;

(g) to require the respondent to participate in a batterer's education program designed to help end violent behavior, which may include referral to drug and alcohol counselling, and to pay the costs thereof if the person has the means to do so, provided however that nothing contained herein shall be deemed to require payment of the costs of any such program by the petitioner, the state or any political subdivision thereof;

(h) to provide, either directly or by means of medical and health insurance, for expenses incurred for medical care and treatment arising from the incident or incidents forming the basis for the issuance of the order;

(i) 1. to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the petitioner or a

minor child residing in the household.

2. “Companion animal”, as used in this section, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law;

(j) 1. to promptly return specified identification documents to the protected party, in whose favor the order of protection or temporary order of protection is issued; provided, however, that such order may: (A) include any appropriate provision designed to ensure that any such document is available for use as evidence in this proceeding, and available if necessary for legitimate use by the party against whom such order is issued; and (B) specify the manner in which such return shall be accomplished.

2. For purposes of this subdivision, "identification document" shall mean any of the following: (A) exclusively in the name of the protected party: birth certificate, passport, social security card, health insurance or other benefits card, a card or document used to access bank, credit or other financial accounts or records, tax returns, any driver's license, and immigration documents including but not limited to a United States permanent resident card and employment authorization document; and (B) upon motion and after notice and an opportunity to be heard, any of the following, including those that may reflect joint use or ownership, that the court determines are necessary and are appropriately transferred to the protected party: any card or document used to access bank, credit or other financial accounts or records, tax returns, and any other identifying cards and documents; and

(k) to observe such other conditions as are necessary to further the purposes of protection.

The court may also award custody of the child, during the term of the order of protection to either parent, or to an appropriate relative within the second degree. Nothing in this section gives the court power to place or board out any child or to commit a child to an institution or agency.

Notwithstanding the provisions of section eight hundred seventeen of this article, where a temporary order of child support has not already been issued, the court may, in addition to the issuance of an order of protection pursuant to this section, issue an order for temporary child support in an amount sufficient to meet the needs of the child, without a showing of immediate or emergency need. The court shall make an order for temporary child support notwithstanding that information with respect to income and assets of the respondent may be unavailable. Where such information is available, the court may make an award for temporary child support pursuant to the

formula set forth in subdivision one of section four hundred thirteen of this act. Temporary orders of support issued pursuant to this article shall be deemed to have been issued pursuant to section four hundred thirteen of this act.

Upon making an order for temporary child support pursuant to this subdivision, the court shall advise the petitioner of the availability of child support enforcement services by the support collection unit of the local department of social services, to enforce the temporary order and to assist in securing continued child support, and shall set the support matter down for further proceedings in accordance with article four of this act.

Where the court determines that the respondent has employer-provided medical insurance, the court may further direct, as part of an order of temporary support under this subdivision, that a medical support execution be issued and served upon the respondent's employer as provided for in section fifty-two hundred forty-one of the civil practice law and rules.

Notwithstanding the provisions of section eight hundred seventeen of this article, where a temporary order of spousal support has not already been issued, the court may, in addition to the issuance of an order of protection pursuant to this section, issue an order directing the parties to appear within seven business days of the issuance of the order in the family court, in the same action, for consideration of an order for temporary spousal support in accordance with article four of this act. If the court directs the parties to so appear, the court shall direct the parties to appear with information with respect to income and assets, but a temporary order for spousal support may be issued pursuant to article four of this act on the return date notwithstanding the respondent's default upon notice and notwithstanding that information with respect to income and assets of the petitioner or respondent may be unavailable.

In any proceeding in which an order of protection or temporary order of protection or a warrant has been issued under this section, the clerk of the court shall issue to the petitioner and respondent and his or her counsel and to any other person affected by the order a copy of the order of protection or temporary order of protection and ensure that a copy of the order of protection or temporary order of protection [be] is transmitted to the local correctional facility where the individual is or will be detained, the state or local correctional facility where the individual is or will be imprisoned, and the supervising probation department or the department of corrections and community supervision where the individual is under probation or parole supervision.

Notwithstanding the foregoing provisions, an order of protection, or temporary order of protection where applicable, may be entered against a former spouse and persons who have a child in common, regardless of whether such persons have been married or have lived together at any time, or against a member of the same family or household as defined in subdivision one of section eight hundred twelve of this article.

In addition to the foregoing provisions, the court may issue an order, pursuant to section two hundred twenty-seven-c of the real property law, authorizing the party for whose benefit any order of protection has been issued to terminate a lease or rental agreement pursuant to section two hundred twenty-seven-c of the real property law.

The protected party in whose favor the order of protection or temporary order of protection is issued may not be held to violate an order issued in his or her favor nor may such protected party be arrested for violating such order.

§4. Subparagraph (5) of paragraph (b) of subdivision 5-a of part B of section 236 of the domestic relations law, as amended by chapter 269 of the laws of 2015, is amended to read as follows:

(5) "Income cap" shall mean up to and including one hundred [seventy-five]eighty-four thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] March first, two thousand [sixteen] twenty and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI–U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

§5. Subparagraph (4) of paragraph (b) of subdivision 6 of part B of section 236 of the domestic relations law, as amended by chapter 269 of the laws of 2015, is amended to read as follows:

(4) "Income cap" shall mean up to and including one hundred [seventy-five] eighty-four thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] March first, two thousand [sixteen] twenty and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for

all urban consumers (CPI–U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

§6. This act shall take effect on the ninetieth day after it shall have become a law.

7. Adjournments in contemplation of dismissal and suspended judgments in child protective proceedings
[F.C.A. §§1039, 1053, 1071]

Long-standing uncertainty regarding the consequences of adjournments in contemplation of dismissal and suspended judgments in child protective proceedings has hindered the ability of the Family Courts to utilize these important mechanisms for resolving child protective cases without the need for more drastic alternatives, such as out-of-home foster care placements. The Family Court Advisory and Rules Committee is, therefore, submitting a proposal to clarify and fill gaps in the statutory framework with respect to both of these options.

The proposal would make clear that an adjournment in contemplation of dismissal may be ordered either before the entry of a fact-finding order or before the entry of a final disposition. It would maintain the current law permitting an adjournment in contemplation of dismissal to be ordered upon the consent of the parties and child's attorney prior to the entry of a fact-finding order. Preserving the 1990 amendment to Family Court Act §1039(e) that followed from the Court of Appeals decision in Matter of Marie B., 62 N.Y.2d 352 (1984), if the Family Court finds a violation of the conditions of a pre-fact-finding adjournment and restores the matter to the Family Court calendar, the parent would be entitled to a fact-finding hearing on the original child abuse or neglect petition prior to the case advancing to the dispositional stage. Eliminating the confusing and overly limiting phrase "upon a fact-finding hearing," the proposal makes clear that an adjournment in contemplation of dismissal may alternatively be ordered '[a]fter the entry of a fact-finding order but prior to the entry of a dispositional order," by the Family Court or also upon motion by any party or the child's attorney. In such a case, the consent of the petitioner child protective agency and child's attorney would not be required but both would have a right to be heard regarding their positions. In the event the matter is restored to the Family Court calendar as a result of a violation of the conditions of the adjournment, the matter would proceed to disposition no later than thirty days after the application to restore the matter to the calendar, unless an extension for "good cause" is granted by the Court. In all cases, the Family Court would have to state reasons on the record for adjourning a case in contemplation of dismissal.

The proposal also clarifies that an adjournment in contemplation of dismissal may be extended for up to one year, either upon consent of the parties and child's attorney (if prior to fact-finding) or for good cause upon the respondent's consent (if after fact-finding and prior to disposition). If a violation of the conditions of the adjournment is alleged, the adjournment period is tolled pending a determination regarding the alleged violation. Additionally, sixty days prior to the expiration of the adjournment, the child protective agency must submit a report to the Family Court, parties and child's attorney regarding compliance with the conditions. If there has been no violation of the adjournment in contemplation of dismissal and the adjournment in contemplation of dismissal has not been extended, the petition would be deemed dismissed and, in the case of a post-fact-finding ACD, the fact-finding itself would be deemed vacated. If the court finds a violation, the FamilyCourt may extend the ACD, possibly with new or different conditions, or may restore the matter to the calendar for fact-finding (for pre-fact-finding ACD's) or for disposition (for post-fact-finding ACD's).

During the period of an ACD, Family Court would not be authorized to place the child pursuant to Family Court Act §§1017(2)(a)(iii), 1052(a)(iii), 1055 or order custody to a parent or non-respondent parent pursuant to Family Court Act §§1017(2)(a)(i), 1052(a)(vi), (vii), 1055-b and Article Six of the Family Court Act. A release of the child to a non-respondent parent would, however, be permisible, if, for example, the condition of the ACD included a mandate for a respondent parent to complete a particular program. The ACD may not be conditioned upon the child's voluntary placement pursuant to Social Services Law §358-a. Except as necessary under sections 1024 or 1027 of the Family Court Act, the child could not be removed from home during the adjournment period. These amendments are necessary in light of the fact that children remanded or placed in foster care, notwithstanding the adjournment in contemplation of dismissal of the underlying proceeding, are not eligible for Federal foster care reimbursement under Title IV-E of the *Social Security Act*. It goes without saying that if the case warrants dismissal following a period of adjournment, the Court would not be able to find that retention in the home would be contrary to the child's best interests, as is required by the New York State and Federal *Adoption and Safe Families Act*s for Federal foster care eligibility. *See* Family Court Act §1027(b); Social Services Law §358-a(3); Public Law 105-89.

Like the provisions regarding adjournments in contemplation of dismissal, the dispositional alternative of suspended judgment in child protective cases has long generated confusion, because the Family Court Act is largely silent regarding procedures for its issuance, as well as its ultimate consequences. Similar to the amendments made in 2005 and 2006 to Family Court Act §633,[43] the suspended judgment provisions applicable to permanent neglect cases, the proposal would amend Family Court Act §1053 to require that the order suspending judgment contain the duration, terms and conditions of the order. The order would also require a warning in conspicuous print that failure to comply may lead to its revocation and to issuance of any other order of disposition that might have been made under Family Court Act §1052 at the time the judgment was suspended. A copy of the order must be furnished to the respondent.

The proposal would add clarity regarding procedures applicable when a parent has successfully complied with the conditions of a suspended judgment. The order suspending judgment must include a date for a review by the Court and parties of the parent's compliance no later than 30 days prior to the expiration of the suspended judgment period. In addition to the existing requirements for progress reports 90 days after issuance of the order and as ordered by the Court, the proposal would require a report no later than 60 days prior to the suspended judgment's expiration.

Consistent with the observation of the Supreme Court, Appellate Division, Third Department, in Matter of Baby Girl W., 245 A.D.2d 830 (3d Dept., 1997), the Committee's proposal provides that at the end of a successful period of a suspended judgment, the underlying order of fact-finding would not automatically be vacated; nor would the report on the Statewide

[43] *See* L. 2005, c. 3; L. 2006, c. 437.

Central Register of Child Abuse and Maltreatment automatically be sealed or expunged. Rather, as in Matter of Makynli N., 17 Misc.3d 1127(A), 2007 N.Y.Slip Op. 52162 (Fam. Ct., Monroe Co., 2007) (Unreported), the parent could apply to the Family Court, pursuant to Family Court Act §1061, for an order vacating the order of fact-finding and dismissing the proceeding in accordance with subdivision (c) of section 1051 of the Family Court Act on the ground that the aid of the Court is no longer required and that the dismissal would be in the children's best interests. *See also* Matter of Crystal S., 74 A.D.3d 823 (2nd Dept., 2010); Matter of Araynah B., 34 Misc.3d 566, 939 N.Y.S.2d 239 (Fam. Ct., Kings Co., 2011). Such a dismissal would then provide the parent with grounds to seek administrative relief in terms of sealing or expungement of the State Central Register report. As the Family Court, Monroe County, noted in its earlier opinion in the case,

> [A] suspended judgment neither condones Respondent's neglectful action, nor does it necessarily eradicate the finding. [Citation omitted].

Matter of MN, 16 Misc.3d 499, 506 (Fam. Ct., Monroe Co., 2007). Significantly, it is the requirement of this procedural step, *i.e.*, the motion under Family Court Act §1061, that distinguishes the outcome of a successful suspended judgment from that of an adjournment in contemplation of dismissal. A suspended judgment may thus be an appropriate disposition in cases in which the Court determines that a full dismissal of the proceedings, including vacatur of the fact-finding, should not be automatic.

Concomitantly, the Committee's proposal amends the procedures to be followed in the event that the parent does not comply with the conditions of a suspended judgment. While chapter 519 of the Laws of 2008 amended Family Court Act §1052(a) to clarify that a disposition of suspended judgment may not be combined with that of placement of a child, there may be cases where a temporary removal of a child may be necessary pending the outcome of a motion or order to show cause alleging a violation of a suspended judgment. Thus, just as a Family Court may remove a child from home if necessary for the child's protection pending disposition of a child protective proceeding, pursuant to Family Court Act §1027(a)(iii), so, too, the Committee's proposal would permit the convening of a hearing and, if needed, the temporary removal of child from his or her home pending the resolution of a violation proceeding.

The Committee's proposal provides needed clarity to both the provisions regarding adjournments in contemplation of dismissal and the disposition of suspended judgment, thus enhancing the usefulness of these options for the resolution of child abuse and neglect proceedings in Family Court. Both of these options are critically important to promote and preserve the well-being of children and their families by providing opportunities for families to access services in order to repair the problems that precipitated court action without the disruption and, all too often, the trauma of out-of-home placement.

Proposal

AN ACT to amend the family court act, in relation to adjournments in contemplation of dismissal and suspended judgments in child protective proceedings in the family court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1039 of the family court act, as amended chapter 707 of the laws of 1975, subdivisions (a), (b), (c), (d) and (e) as amended by chapter 41 of the laws of 2010 and subdivision (f) as amended by chapter 601of the laws of 1985, is amended to read as follows:

§1039. Adjournment in contemplation of dismissal. (a) (i) Prior to [or upon] the entry of a fact-finding [hearing] order, the court may, upon a motion by [the petitioner with the consent of the respondent and] any party or the child's attorney with the consent of all parties and the child's attorney, or upon its own motion with the consent of [the petitioner, the respondent] all parties and the child's attorney, order that the proceeding be ["]adjourned in contemplation of dismissal.["] Under no circumstances shall the court order any party to consent to an order under this section]

(ii) After entry of a fact-finding order but prior to the entry of a dispositional order, the court may, with consent of the respondent and upon motion of any party or the child's attorney or upon its own motion without requiring the consent of the petitioner or attorney for the child, order that the proceeding be adjourned in contemplation of dismissal. The petitioner, respondent and attorney for the child shall have a right to be heard with respect to the motion.

(iii) The court may make [such] an order under this section only after it has apprised the respondent of the provisions of this section and it is satisfied that the respondent understands the effect of such provisions. Under no circumstances shall the court order any party to consent to an order under this section. The court shall state its reasons on the record for ordering an adjournment in contemplation of dismissal under this section.

(b) An adjournment in contemplation of dismissal is an adjournment of the proceeding for a period not to exceed one year with a view to ultimate dismissal of the petition in furtherance of justice. In the case of an adjournment in contemplation of dismissal after the entry of a fact-finding order, such dismissal includes vacatur of the fact-finding order.

(i) Upon the consent of the petitioner, the respondent and the child's attorney, the court may issue an order extending [such] the period of an adjournment in contemplation of dismissal issued pursuant to paragraph (i) of subdivision (a) of this section prior to the entry of a fact-finding order for such time and upon such conditions as may be agreeable to the parties.

(ii) For good cause shown and with the consent of the respondent, the court may, on its own

motion or on motion of any party or the attorney for the child and after providing notice and an opportunity to be heard to all parties and the attorney for the child, issue an order extending an adjournment in contemplation of dismissal issued pursuant to paragraph (ii) of subdivision (a) of this section after entry of a fact-finding order for such time and upon such conditions as may be in the best interests of the child or children who are the subjects of the proceeding.

(iii) The court shall state its reasons on the record for extending an adjournment in contemplation of dismissal under this subdivision, including its reasons for changes in the terms and conditions, if any.

(c) [Such] The order [may] shall include terms and conditions [agreeable to the parties and to the court, provided that such terms and conditions] in furtherance of the best interests of the child or children who are the subjects of the proceeding and shall include, but not be limited to, a requirement that the child and the respondent be under the supervision of a child protective agency during the adjournment period. Except as provided in subdivision (g) of this section, an order pursuant to subparagraphs (i) and (iii) of paragraph (a) of subdivision two of section one thousand seventeen, paragraphs (iii), (vi), and (vii) of subdivision (a) of section one thousand fifty-two, section one thousand fifty-five or section one thousand fifty-five-b of this article shall not be made in any case adjourned under this section; nor shall an order under this section contain a condition requiring the child or children to be placed voluntarily pursuant to sections three hundred fifty-eight or three hundred eighty-four-a of the social services law. In any order issued pursuant to this section, [such agency] the petitioner shall be directed to make a progress report to the court, the parties and the child's attorney on the implementation of such order, no later than ninety days after the issuance of such order[, unless the court determines that the facts and circumstances of the case do not require such reports to be made] and shall submit a report pursuant to section one thousand fifty-eight of this article no later than sixty days prior to the expiration of the order. The [child protective agency] petitioner shall make further reports to the court, the parties and the child's attorney in such manner and at such times as the court may direct.

(d) Upon application of the respondent, the petitioner[,] or the child's attorney or upon the court's own motion, made at any time during the duration of the order, if the child protective agency has failed substantially to provide the respondent with adequate supervision or to observe the terms and conditions of the order, the court may direct the child protective agency to observe such terms

and conditions and provide adequate supervision or may make any order authorized pursuant to section two hundred fifty-five or one thousand fifteen-a of this act.

(e) [Upon application of] If, prior to the expiration of the period of an adjournment in contemplation of dismissal, a motion or order to show cause is filed by the petitioner or the child's attorney or upon the court's own motion, made at any time during the duration of the order, [the] that alleges a violation of the terms and conditions of the adjournment, the period of the adjournment in contemplation of dismissal is tolled as of the date of such filing until the entry of an order disposing of the motion or order to show cause. The court may revoke the adjournment in contemplation of dismissal and restore the matter to the calendar or the court may extend the period of the adjournment in contemplation of dismissal pursuant to subdivision (b) of this section, if the court finds after a hearing on the alleged violation that the respondent has failed substantially to observe the terms and conditions of the order or to cooperate with the supervising child protective agency. [In such event] Where the court has revoked the adjournment in contemplation of dismissal and restored the matter to the calendar:

(i) in the case of an adjournment in contemplation of dismissal issued prior to the entry of a fact-finding order, unless the parties consent to an order pursuant to section one thousand fifty-one of this [act] article or unless the petition is dismissed upon the consent of the petitioner, the court shall thereupon proceed to a fact-finding hearing under this article no later than sixty days after [such] the application to restore the matter to the calendar has been granted, unless such period is extended by the court for good cause shown; or

(ii) in the case of an adjournment in contemplation of dismissal issued after the entry of a fact-finding order, the court shall thereupon proceed to a dispositional hearing under this article no later than thirty days after the application to restore the matter to the calendar has been granted, unless such period is extended by the court for good cause shown.

(iii) The court shall state its reasons on the record for revoking an adjournment in contemplation of dismissal and restoring the matter to the calendar under this subdivision.

(f) If the proceeding is not [so] restored to the calendar as a result of a finding of an alleged violation pursuant to subdivision (e) of this section and if the adjournment in contemplation of dismissal is not extended pursuant to subdivision (b) of this section, the petition is, at the expiration of the adjournment in contemplation of dismissal period, deemed to have been dismissed by the

court in furtherance of justice [unless an application is pending pursuant to subdivision (e) of this section]. If [such application is granted] the court finds a violation pursuant to subdivision (e) of this section, the petition shall not be dismissed and shall proceed in accordance with the provisions of such subdivision (e).

(g) Notwithstanding the provisions of this section, if a motion or order to show cause is filed alleging a violation pursuant to subdivision (e) of this section and the court finds that removal of the child from the home is necessary pursuant to section one thousand twenty-seven of this article during the pendency of the violation motion or order to show cause, the court[,] may, at any time prior to dismissal of the petition pursuant to subdivision (f), issue an order authorized pursuant to section one thousand twenty-seven of this article. Nothing in this section shall preclude the child protective agency from taking emergency action pursuant to section one thousand twenty-four of this article where compelled by the terms of that section. If the violation is found and the matter is restored to the calendar, the court may make further orders in accordance with subdivision (e) of this section.

§2. Section 1053 of the family court act, as added by chapter 962 of the laws of 1970 and subdivision (c) as amended by chapter 41 of the laws of 2010, is amended to read as follows:

§1053. Suspended judgment. (a) Rules of court shall define permissible terms and conditions of a suspended judgment. These terms and conditions shall relate to the acts or omissions of the parent or other person legally responsible for the care of the child.

(b) The maximum duration of any term or condition of a suspended judgment is one year, unless the court finds at the conclusion of that period, upon a hearing, that exceptional circumstances require an extension thereof for a period of up to an additional year. The court shall state its reasons on the record for extending a period of suspended judgment under this subdivision, including its reasons for changes in the terms and conditions, if any.

(c) Except as provided for herein, in any order issued pursuant to this section, the court may require the child protective agency to make progress reports to the court, the parties, and the child's attorney on the implementation of such order. Where the order of disposition is issued upon the consent of the parties and the child's attorney, such agency shall report to the court, the parties and the child's attorney no later than ninety days after the issuance of the order, unless the court determines that the facts and circumstances of the case do not require such report to be made.

(d) The order of suspended judgment must set forth the duration, terms and conditions of the suspended judgment, and must contain a date certain for a court review not later than thirty days prior to the expiration of the period of suspended judgment. The order of suspended judgment also must state in conspicuous print that a failure to obey the order may lead to its revocation and to the issuance of any order that might have been made at the time judgment was suspended. A copy of the order of suspended judgment must be furnished to the respondent.

(e) Not later than sixty days before the expiration of the period of suspended judgment, the petitioner shall file a report, pursuant to section one thousand fifty-eight of this article, with the family court and all parties, including the respondent and his or her attorney, the attorney for the child and intervenors, if any, regarding the respondent's compliance with the terms of the suspended judgment. The report shall be reviewed by the court on the scheduled court date. Unless a motion or order to show cause has been filed prior to the expiration of the period of suspended judgment alleging a violation or seeking an extension of the period of the suspended judgment, the terms of the disposition of suspended judgment shall be deemed satisfied. In such event, the court's jurisdiction over the proceeding shall be terminated. However, the order of fact-finding and the presumptive effect of such finding upon retention of the report of suspected abuse and neglect on the state central register in accordance with paragraph (b) of subdivision eight of section four hundred twenty-two of the social services law shall remain in effect unless the court grants a motion by the respondent to vacate the fact-finding pursuant to section one thousand sixty-one of this article.

§3. Section 1071 of the family court act, as amended by chapter 437 of the laws of 2006, is amended to read as follows:

§1071. Failure to comply with terms and conditions of suspended judgment. If, prior to the expiration of the period of the suspended judgment, a motion or order to show cause is filed that alleges that a parent or other person legally responsible for a child's care violated the terms and conditions of a suspended judgment issued under section one thousand fifty-three of this article, the period of the suspended judgment shall be tolled as of the date of such filing pending disposition of the motion or order to show cause. If a motion or order to show cause alleging a violation has been filed and the court finds that removal of the child from the home pending disposition of the motion or order to show cause is necessary pursuant to section one thousand twenty-seven of this article,

the court may issue an order pursuant to such section one thousand twenty-seven. Nothing in this section shall preclude the child protective agency from taking emergency action pursuant to section one thousand twenty-four of this article where compelled by the terms of that section. If, after a hearing on the alleged violation, the court is satisfied by competent proof that the parent or other person violated the order of suspended judgment, the court may revoke the suspension of judgment and enter any order that might have been made at the time judgment was suspended or may extend the period of suspended judgment pursuant to subdivision (b) of section one thousand fifty-three of this article. The court shall state its reasons for revoking or extending a period of suspended judgment under this section.

§4. This act shall take effect on the ninetieth day after it shall have become a law.

8. Requirements for notices of indicated child maltreatment reports and changes in foster care placements in child protective and voluntary foster care proceedings [F.C.A. §§1017, 1055, 1089; Soc. Serv. Law §358-a]

Acknowledging significant legislative developments on both the State and Federal levels, the Family Court Advisory and Rules Committee is proposing a measure that would amend provisions of the Family Court Act and the Social Services Law to ensure that parties to child protective and voluntary foster care placement and review proceedings and the attorneys for affected children are promptly informed of any changes in placement and of any indicated reports of maltreatment that may warrant court intervention.

Reflecting a pronounced legislative trend at both Federal and State levels, the ongoing oversight responsibility of the Family Court with respect to children in foster care has increased sharply in the past two decades, culminating in the passage of the Federal *Adoption and Safe Families Act of 1997* [Public Law 105-89], its state implementing legislation [L.1999, c. 7], the landmark New York State permanency law [L.2005, c. 3] and, most recently, the Federal *Preventing Sex Trafficking and Strengthening Families Act* [Public Law 113-183]. Both the Federal and State *Adoption and Safe Families Acts* emphasize that the safety of the child is paramount, compelling the conclusion that the Court and parties must be informed promptly of all events affecting child safety, especially indicated reports of abuse or maltreatment. Recognizing that children in foster care are at significant risk of becoming victims of human trafficking, Public Law 113-183 reinforces that conclusion, in particular, with respect to children who abscond.

Equally as important, the Federal *ASFA* measures success in terms of outcomes, *i.e.*, the States' ability to reach Federally-established targets for timely achievement of permanency for children. Both the second and third "Child and Family Service Reviews (CFSR's)," conducted by the Administration for Children and Families of the United States Department of Health and Human Services (HHS) in 2008 and 2015, respectively, concluded that New York State ranked among the lowest scores in the nation and demonstrated how far the State needs to progress in order to achieve Federal targets.[44] Legislative action is thus compelled in order to ensure that the Family Courts can exercise their important monitoring functions on the basis of complete, timely information. The 2005 permanency legislation, with its salutary provisions for continuing jurisdiction, was an important step, but further legislation is necessary to ensure that information regarding the most compelling of circumstances is conveyed to the Court, the child's attorney and the parties on a timely basis in order to bring New York State into compliance with *ASFA*.

Recognizing that "time is of the essence" where children are concerned, the Family Court Advisory and Rules Committee is submitting a proposal to ensure that the parties and children's

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[44] As in 2001, New York State scored poorly in both 2008 and 2015 in the time for children to achieve permanency. *See Final Report of the Child and Family Services Review of New York State: Executive Summary*, p. 2 (March, 2009)(available at http://www.acf.hhs.gov/programs/cb/cwrp/executive/ny/html); Schuyler Center for Analysis and Advocacy, *Federal Analysis Shows that New York State is Failing to Keep Children Safe or to Find Permanent Homes for Children in Foster Care within a Reasonable Time* (2016; available at www.scaa.org).

attorneys are informed promptly of any changes in placement and of any indicated reports of maltreatment that may warrant Court intervention. The Committee's proposal would amend sections 1055 and 1089 of the Family Court Act, as well as section 358-a of the Social Services Law, to require an agency with which a child has been placed, either voluntarily or as a result of an abuse or neglect finding, or to whom guardianship and custody has been transferred as a result of the child being freed for adoption, to report to the attorney for the child not later than ten days in advance of any change in the child's placement status and not later than the next business day in any case in which an emergency placement change has been made. These provisions are consistent with the policy directives of the New York State Office of Children and Family Services and the New York City Administration for Children's Services, but would have the stronger force of statute.[45]

The measure adds two important requirements not contained in the State or New York City agency policies. First, it requires a report within five days of the date that any report of abuse or maltreatment is found to be indicated. Indicated reports include those naming the child and, where the subjects of the reports involve the person or persons caring for the child, reports naming other children in the home. It contains an important proviso that such reports notify the recipients that the information shall be kept confidential, shall be used only in connection with the child protective, foster care or related proceedings under the Family Court Act and may not be re-disclosed except as necessary for such proceeding or proceedings and as authorized by law. Second, recognizing that fairness also compels such notifications to be made to the attorneys for all parties, not simply the attorneys for the children, the measure requires that both notices of changes in placement and indicated child maltreatment reports be conveyed to attorneys for the birth parents except in cases involving children freed for adoption. The two types of reports, in fact, are related, as the existence of an indicated report of maltreatment may bear directly upon the suitability of a planned status change. Indeed, there have been instances in which the existence of indicated child abuse reports has not come to light until the point of finalization of adoptions.

Significantly, the Committee's proposal is fully responsive to the concerns raised in the Governor's Veto Message regarding A 8418, a bill requiring notification to children's attorneys of changes in placement that passed both houses of the Legislature in 2010. First, by explicitly authorizing electronic transmittal of the notices, the measure minimizes the burden imposed upon the placement agencies. Second, since the notifications are sent to the attorneys but not to the courts, the measure insures that court intervention would only occur in the rare cases in which an application is made by one of the attorneys.

In few areas of the Court's functioning is its continuing jurisdiction as critical as in child welfare, where complex decisions regarding children must be adjusted to the dynamic of their constantly changing needs and circumstances. The Federal and State statutes emphasize that safety of the child must be deemed the paramount consideration and that timely achievement of

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[45] N.Y.S. Office of Children and Family Services, "Notice of Placement Change to Attorneys for Children," Administrative Directive #10-OCFS-ADM-16 (Dec. 14, 2010); Memorandum of John B. Mattingly, Commissioner, N.Y.C. Administration for Children's Services, entitled "Notice of Placement Change to Attorneys for Children," dated Aug. 30, 2010.

permanence must be the central goal. Not only are these matters of statutory imperative, but they are also determinative of New York State's eligibility for over five hundred million dollars of annual Federal foster care aid. Prompt receipt by the Court, the parties and attorneys for children of information regarding the child's ever-changing circumstances, both as to any child maltreatment suffered by the child and as to changes in the child's placement, is vital to the effective exercise of the Family Court's continuing jurisdiction and is a critical component of New York State's ability to comply with the *ASFA* funding eligibility mandates.

Changes in placement covered by the notification requirement would include, but not be limited to, cases in which the child has been moved from the foster or pre-adoptive home or program into which he or she has been placed, cases in which the foster or pre-adoptive parents move out of state with the child and, with respect to children not freed for adoption, cases in which a trial or final discharge of the child from foster care has been made. The report of a change in placement must provide enough information for the litigants and the Family Court to assess whether further judicial intervention may be warranted. It must state the reasons for the change, as well as the grounds for the agency's conclusion that the change is in the best interests of the child. This notification requirement does not contemplate court action in every case; nor does it interfere with the discretion of social services agencies to make necessary changes.

Both the *Adoption and Safe Families Act* and permanency legislation increased the frequency of judicial reviews of children in foster care, thus minimizing the problem of stale information. However, the ability of the Family Court and of the litigants to respond effectively is seriously impeded – and harm to children may be compounded – if information regarding significant changes in status of the children, and, importantly, indicated reports of neglect or abuse of the children, is not conveyed to parties until the next permanency hearing, often a delay of several months. This proposal will facilitate timely, informed responses to changes in children's placements and incidents of maltreatment, thus prompting more expeditious and effective resolution of their cases.

Proposal

AN ACT to amend the family court act and the social services law, in relation to notice of indicated reports of child maltreatment and changes of placement in child protective and voluntary foster care placement and review proceedings; and to repeal certain provisions of the family court act, in relation to technical changes thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1017 of the family court act is amended by adding a new subdivision 5 to read as follows:

5. In any case in which an order has been issued pursuant to this article remanding or placing a child in the custody of the local social services district, the social services official or

authorized agency charged with custody or care of the child shall report any anticipated change in placement to the attorneys for the parties and the attorney for the child not later than ten days prior to such change in any case in which the child is moved from the foster home or program into which he or she has been placed or in which the foster parents move out of state with the child; provided, however, that where an immediate change of placement on an emergency basis is required, the report shall be transmitted no later than the next business day after such change in placement has been made. The social services official or authorized agency shall also submit a report to the attorneys for the parties and the attorney for the child or include in the placement change report any indicated report of child abuse or maltreatment concerning the child or (if a person or persons caring for the child is or are the subject of the report) another child in the same home within five days of the indication of the report. The official or agency may protect the confidentiality of identifying or address information regarding the foster or prospective adoptive parents. Reports regarding indicated reports of child abuse or maltreatment provided pursuant to this subdivision shall include a statement advising recipients that the information in such report of child abuse or maltreatment shall be kept confidential, shall be used only in connection with a proceeding under this article or related proceedings under this act and may not be redisclosed except as necessary for such proceeding or proceedings and as authorized by law. Reports under this paragraph may be transmitted by any appropriate means, including, but not limited to, electronic means or placement on the record during proceedings in family court.

§2. Section (E) of paragraph (i) of subdivision (b) of section 1055 of the family court act, as amended by chapter 41 of the laws of 2010, is REPEALED.

§3. Section 1055 of the family court act is amended by adding a new subdivision (j) to read as follows:

(j) In any case in which an order has been issued pursuant to this section placing a child in the custody or care of the commissioner of social services, the social services official or authorized agency charged with custody of the child shall report any anticipated change in placement to the attorneys for the parties and the attorney for the child not later than ten days prior to such change in any case in which the child is moved from the foster home or program into which he or she has been placed or in which the foster parents move out of state with the child; provided, however, that where an immediate change of placement on an emergency basis is required, the report shall be

transmitted no later than the next business day after such change in placement has been made. The social services official or authorized agency shall also submit a report to the attorneys for the parties and the attorney for the child or include in the placement change report any indicated report of child abuse or maltreatment where concerning the child or (if a person or persons caring for the child is or are the subject of the report) another child in the same home.within five days of the indication of the report. The official or agency may protect the confidentiality of identifying or address information regarding the foster or prospective adoptive parents. Reports regarding indicated reports of child abuse or maltreatment provided pursuant to this subdivision shall include a statement advising recipients that the information in such report of child abuse or maltreatment shall be kept confidential, shall be used only in connection with a proceeding under this article or related proceedings under this act and may not be redisclosed except as necessary for such proceeding or proceedings and as authorized by law. Reports under this paragraph may be transmitted, by any appropriate means, including, but not limited to, electronic means or placement on the record during proceedings in family court.

§4. Subparagraph (vii) of paragraph 2 of subdivision (d) of section 1089 of the family court act is amended by adding a new clause (H) to read as follows:

(H) a direction that the social services official or authorized agency charged with care and custody or guardianship and custody of the child, as applicable, report any anticipated change in placement to the attorneys for the parties and the attorney for the child not later than ten days prior to such change in any case in which the child is moved from the foster home or program into which he or she has been placed or in which the foster parents move out of state with the child; provided, however, that where an immediate change of placement on an emergency basis is required, the report shall be transmitted no later than the next business day after such change in placement has been made. The social services official or authorized agency shall also submit a report to the attorneys for the parties and the attorney for the child or include in the placement change report any indicated report of child abuse or maltreatment concerning the child or (if a person or persons caring for the child is or are the subject of the report) another child in the same home within five days of the indication of the report. The official or agency may protect the confidentiality of identifying or address information regarding the foster or prospective adoptive parents. Reports under this paragraph shall not be sent to attorneys for birth parents whose parental rights have been

terminated or who have surrendered their child or children. Reports regarding indicated reports of child abuse or maltreatment provided pursuant to this subdivision shall include a statement advising recipients that the information in such report of child abuse or maltreatment shall be kept confidential, shall be used only in connection with a proceeding under this article or related proceedings under this act and may not be redisclosed except as necessary for such proceeding or proceedings and as authorized by law. Reports under this paragraph may be transmitted by any appropriate means, including, but not limited to, electronic means or placement on the record during proceedings in family court; and

§5. Subdivision 3 of section 358-a of the social services law is amended by adding a new paragraph (g) to read as follows:

(g) In any case in which an order has been issued pursuant to this section approving a foster care placement instrument, the social services official or authorized agency charged with custody or care of the child shall report any anticipated change in placement to the attorneys for the parties and the attorney for the child not later than ten days prior to such change in any case in which the child is moved from the foster home or program into which he or she has been placed or in which the foster parents move out of state with the child; provided, however, that where an immediate change of placement on an emergency basis is required, the report shall be transmitted no later than the next business day after such change in placement has been made. The social services official or authorized agency shall also submit a report to the attorneys for the parties and the attorney for the child or include in the placement change report any indicated report of child abuse or maltreatment concerning the child or (if a person or persons caring for the child is or are the subject of the report) another child in the same home within five days of the indication of the report. The official or agency may protect the confidentiality of identifying or address information regarding the foster or prospective adoptive parents. Reports regarding indicated reports of child abuse or maltreatment provided pursuant to this subdivision shall include a statement advising recipients that the information in such report of child abuse or maltreatment shall be kept confidential, shall be used only in connection with a proceeding under this section or related proceedings under the family court act and may not be redisclosed except as necessary for such proceeding or proceedings and as authorized by law. Reports under this paragraph may be transmitted by any appropriate means, including, but not limited to, electronic means or placement on the record during proceedings in

family court.

§6. This act shall take effect immediately, provided that sections one, three, four and five of this act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that section two of this act shall be deemed to have taken effect on the same date as section 1 of chapter 342 of the laws of 2010 took effect.

REPEAL NOTE: Section 67 of chapter 41 of the laws of 2010 contains language inconsistent with language in chapter 342 of the laws of 2010.

9. Determinations of willful violations of Family Court orders of protection [F.C.A. §846-a]

Section 846-a of the Family Court Act provides that a willful violation of an order of protection must be proven by "competent evidence," but the statute is silent regarding the quantum of proof required. This gap in the law has resulted in disparate standards being applied in different parts of the State, that is, in "justice by geography." As the Supreme Court, Appellate Division, Third Department, recognized, in Matter of Stuart LL *v.* Amy KK, 123 A.D.3d 218 (3rd Dept., 2014), "[c]ase law has not been consistent regarding the level of proof when considering an alleged willful violation of a protective order (*see, e.g.,* Matter of Rubackin *v*. Rubackin, 62 A.D.3d 11, 20–21, 875 N.Y.S.2d 90 [2nd Dept., 2009]." *See also* Matter of Cori XX, 155 A.D.3d 113(3rd Dept., 2017); Matter of Nicola V., 134 A.D.3d 1131 (2nd Dept., 2015). The Family Court Advisory and Rules Committee is proposing a measure to clear up the ambiguity by codifying recent decisions issued by the Supreme Court, Appellate Divisions, Second and Third Departments.

Following Matter of Cori XX, Matter of Stuart LL *v.* Amy KK, Matter of Nicola V. and Matter of Rubackin *v.* Rubackin, *supra*, the Committee's proposal requires that if a Respondent is brought before the Family Court for a willful violation that is in the nature of a criminal contempt and that results in a definite sentence including incarceration, the willful violation must be proven beyond a reasonable doubt. This requirement would apply to sentences actually imposed, as well as to sentences that are suspended or that may be served on particular days, rather than continuously. The proposal would also clarify the provision authorizing the Family Court to suspend sentences or direct the days on which sentences must be served.

Some willful violations of orders of protection under Family Court Act §846-a may be characterized as civil in nature, that is, those that may be remediated through use of a non-incarcerative sanction or through an indefinite jail sentence lasting until the contemnor has purged the contempt. However, many willful violations of orders of protection prosecuted in Family Court are more accurately characterized as criminal contempts, aimed at punishing the contemnor for a past act. In holding that such contempts may thus preclude a criminal prosecution for the same act as a violation of the constitutional protection against double jeopardy, the Court of Appeals, in People *v.* Wood, 95 N.Y.2d 509, 719 N.Y.S.2d 639 (2000), stated:

> We have recognized that despite the "civil" legislative label (see, Family Court Act 812[2][b]), section 846-a, which provides for a penalty of incarceration for violation of Family Court orders, is punitive in nature [cites omitted]. An adjudication for contempt under Article 8 is properly characterized as punitive because it does not seek to coerce compliance with any pending court mandate, but imposes a definite term of imprisonment and punishes the contemnor for disobeying a prior court order [cites omitted] [95 N.Y.2d 513].

Applying this characterization, the Appellate Division, in Matter of Rubackin *v.* Rubackin, *supra*, looked to long-established decisions of the United States Supreme Court for its holding that proof beyond a reasonable doubt is required in criminal contempt cases. Both Gompers *v.* Bucks Stove & Range Co., 221 U.S. 418 (1911) and Michaelson *v.* United States *ex rel* Chicago St.P., M & O. R. Co., 266 U.S. 42

(1924) required proof beyond a reasonable doubt where the purpose of the incarceration was to punish a past violation. Similarly, the New York State Court of Appeals required this quantum of proof in labor cases [County of Rockland *v.* Civil Service Employees Association, 62 N.Y.2d 11 (1984)], and the Appellate Division, Second Department, applied the standard in cases involving violations of judgments, grand jury subpoenas to produce documents and temporary injunctions. *See* Muraca *v.* Meyerowitz, 49 A.D.3d 697, 853 N.Y.S.2d 636 (2nd Dept., 2008); Matter of Kuriansky *v*. Azam, 176 A.D.2d 943, 575 N.Y.S.2d 679 (2nd Dept., 1991); Matter of Jones [McKanic], 160 A.D.2d 870, 554 N.Y.S.2d 303 (2nd Dept., 1990); Matter of Gold *v.* Valentine, 35 A.D.2d 958, 318 N.Y.S.2d 360 (2nd Dept., 1970).

No reason exists to distinguish willful violations of orders of protection in Family Court cases from the contexts in which these settled principles of law evolved. As the Appellate Division held, in Matter of Stuart LL *v.* Amy KK,

> Where, as here, a person who has violated an order of protection is incarcerated as a punitive remedy for a definite period—with no avenue to shorten the term by acts that extinguish the contempt—then that aspect of the Family Ct. Act article 8 proceeding "is one involving criminal contempt [and] [t]he standard of proof that must be met to establish that the individual willfully violated the court's order is beyond a reasonable doubt" (*Matter of Rubackin v. Rubackin*, 62 A.D.3d at 21, 875 N.Y.S.2d 90; see Merril Sobie, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act §846–a, at 346).

In codifying Cori XX, Stuart L.L., Nicola V. and Rubackin, the Committee's measure will bring uniformity to the prosecution of violations of orders of protection in Family Court in adherence with well-established constitutional precepts.

Proposal

AN ACT to amend the family court act, in relation to determinations of willful violations of orders of protection

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 846-a of the family court act, as amended by chapter 1 of the laws of 2013, is amended to read as follows:

§846-a. Powers on failure to obey order. (a) If a respondent is brought before the court for failure to obey any lawful order issued under this article or an order of protection or temporary order of protection issued pursuant to this act or issued by a court of competent jurisdiction of another state, territorial or tribal jurisdiction and if, after hearing, the court is satisfied by competent proof that the respondent has willfully failed to obey any such order, the court may:

(i) modify an existing order or temporary order of protection to add reasonable conditions of

behavior to the existing order,

(ii) make a new order of protection in accordance with section eight hundred forty-two of this part, [may]

(iiii) order the forfeiture of bail in a manner consistent with article five hundred forty of the criminal procedure law if bail has been ordered pursuant to this act, [may]

(iv) order the respondent to pay the petitioner's reasonable and necessary counsel fees in connection with the violation petition where the court finds that the violation of its order was willful, and [may]

(v) commit the respondent to jail for a term not to exceed six months. [Such] A commitment under this paragraph may be served upon certain specified days or parts of days as the court may direct or may be suspended, and the court may, at any time within the term of such sentence, revoke such direction or suspension and commit the respondent for the remainder of the original sentence, or suspend the remainder of such sentence. A commitment under this paragraph to a definite jail term as a result of a determination of criminal contempt, whether or not such term has been suspended, must be based upon proof beyond a reasonable doubt.

(b) If the court determines that the willful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, assault or attempted assault and if such a respondent is licensed to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law, the court may also immediately revoke such license and may arrange for the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, and disposal of any firearm such respondent owns or possesses.

(c) If the willful failure to obey such order involves the infliction of physical injury as defined in subdivision nine of section 10.00 of the penal law or the use or threatened use of a deadly weapon or dangerous instrument, as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, such revocation and immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law [six] and disposal of any firearm owned or possessed by respondent shall be mandatory, pursuant to subdivision eleven of section 400.00 of the penal law.

§2. This act shall take effect immediately.

10. Orders of protection in termination of parental rights proceedings, child protective proceedings and permanency planning hearings in Family Court
[F.C.A. §§635, 1029, 1056, 1072, 1089; Soc. Serv. L. §384-b; Exec. L. §221-a]

In most cases, the conclusion of a termination of parental rights proceeding marks the beginning of a new phase for a child in foster care, a significant step toward a stable, permanent home, most often through adoption. Sometimes, particularly in the case of kinship adoptions or mediated agreements, permanency is achieved with the understanding, agreed upon by everyone involved, that some contact would continue with the child's birth family and that such contact would be in the child's best interests. However, in some instances, continuing contact with the birth family would endanger the child and destabilize his or her new family. Indeed, in rare cases, stalking behavior by disturbed birth parents has posed a serious impediment to the adoption of their children, has caused prospective adoptive parents to become ambivalent about whether to finalize the adoptions and has caused serious upset and harm to the children themselves. Unfortunately, since prospective adoptive, pre-adoptive and foster parents do not meet the definition of family contained in Article 8 of the Family Court Act, the current statutory structure provides no vehicle to protect children and their new families short of a criminal prosecution for a non-family offense.

The Family Court Advisory and Rules Committee is proposing a measure to fill this serious gap. First, the proposal would amend Family Court Act §635 and Social Services Law §384-b, the termination of parental rights and permanent neglect statutes, to add authority for the Family Court, for good cause after giving the birth parent notice and an opportunity to be heard, to issue a temporary order of protection, or, in conjunction with a disposition committing guardianship and custody of the child, an order of protection. The application would need to allege, and the Court would have to have a reasonable basis to believe, that a family offense as defined by Family Court Act §812(1) had been committed. The order of protection or temporary order of protection may contain conditions that further the purposes of protection including, among other conditions, a prohibition against the birth parent from contacting the child and the child's foster, pre-adoptive or adoptive parent. An order issued in conjunction with a disposition may last for a period of up to five years. Second, the proposal would amend Family Court Act §1089 to authorize such an order to be issued as part of the disposition of a permanency planning hearing. Third, the proposal would amend Family Court Act §1056 to add a condition to orders of protection in child protective proceedings requiring the respondent to stay away, *inter alia*, from a "person with whom the child has been paroled, remanded, placed or released by the court..."

That children and their new families are sometimes in critical need of these protections is clear from experience in numerous cases. The Family Courts have had cases in which disturbed birth parents, whose rights had been terminated, have contacted children at their schools, followed them home from school, accosted them when playing outside their homes, called them repeatedly on their cell-phones and scared them at home upon having a third party knock on their door on a pretext. While not frequent, such instances cry out for legal remedies. Families in such situations should not be forced to pursue criminal prosecutions as their only means of obtaining relief to keep their children and families safe.

Finally, just as orders of protection in child abuse and neglect proceedings must be entered onto the statewide registry of orders of protection and warrants, pursuant to chapter 492 of the Laws of 2015, in order to maximize their effectiveness, the proposal would require that orders of protection in termination of parental rights and permanency proceedings be entered as well. The registry, established pursuant to the *Family Protection and Domestic Violence Intervention Act of 1994* [L. 1994, c. 222, 224], has become an invaluable tool both for law enforcement and the courts.

With 3,665,342 orders of protection in the registry database as of December, 2016,[46] and with the database connected to the comprehensive national "Protection Order File" maintained by the National Crime Information Center (Federal Bureau of Investigation), the registry helps to assure informed judgments at all stages of domestic violence cases. All too often, law enforcement does not take seriously reports of violations of orders of protection if the orders are not included on the registry, thus leaving victims and their families, even in cases of severe abuse, without the shield of protection that the order should provide. Further, if a court, in determining whether an individual is suitable as a placement or custodial resource for a child or should be able to visit with the child in a neglect, abuse, custody or visitation case, is not made aware of orders of protection issued against the individual in all child welfare proceedings, the child may suffer serious harm. Significantly, legislation enacted in 2008 and amended in 2009 requires the registry to be checked in all Family and Supreme Court cases of child custody and visitation, thus making the registry a critically important resource in these cases as well. See L.2008, c. 595; L.2009, c. 295. All orders, including those in permanency, permanent neglect and other termination of parental rights proceedings, must be entered onto the registry in order for it to provide the protection necessary for all victims of family violence. Law enforcement and courts need to have confidence in the completeness and accuracy of the responses to their inquiries regarding both the existence of outstanding orders, including possibly conflicting orders, and the parties' histories of orders of protection. It is essential that the registry be complete – that is, that it include all orders of protection issued by all courts in family and intimate partner violence cases – in order for it to fulfill its purpose of protecting all individuals, including children, from harm.

The importance of inclusion of these orders on the registry cannot be overstated. If a termination of parental rights or permanency proceeding is brought against an abuser, the order of protection issued to protect both the children and their caretakers should provide as much protection as orders of protection issued in family offense and all other cases – a principle that compels inclusion of the order on the statewide domestic violence registry and, consequently, on the Federal "Protection Order File" as well. That domestic violence and child abuse frequently coexist in homes has been widely recognized, with estimates of the overlap ranging from 40% to 60%.[47] Research has estimated

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[46] Source: NYS Office of Court Administration Division of Technology (Dec. 12, 2016).

[47] *See* "The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association" (Amer. Bar Assoc., 1994), p. 18; "Diagnostic and Treatment Guidelines on Domestic Violence" (Amer. Medical Assoc.,1992). *See also* M, Fields, "The Impact of Spouse Abuse on Children, and its Relevance in Custody and Visitation Decisions in New York State," 3 *Cornell J. of Law and Pub. Policy* 222, 224 (1994); A. Jones, *Next Time She'll be Dead* 84 (1994) [citing, E. Stark and A. Flitcraft, "Women and Children at Risk: A Feminist Perspective on Child Abuse," 18 *Int'l. J. Health Services* 1:97 (1988); L. McKibben, *et al.*, "Victimization of

that children are abused at a rate 1,500 times higher than the national average in homes where domestic violence is also present.[48] Significantly, child sexual abuse has also been closely correlated with domestic violence. Just as inclusion of orders of protection on the domestic violence registry in child protective proceedings was deemed necessary for the protection of children before the Family Court, so, too, should orders of protection issued in other child welfare proceedings be entered onto the registry. Inclusion of orders of protection in such cases on the registry will significantly advance the Legislature's goal of providing an integrated response in all family violence cases and of protecting all victims of domestic abuse, including children and those who are providing care for them, from suffering further violence.

Enactment of this proposal would fill significant gaps in the current statutory framework governing child welfare cases and would further the fundamental precept underlying the Federal and New York State *Adoption and Safe Families Acts*, i.e., that "the health and safety of children is of paramount importance." *See* Social Services Law §384-b(1); 42 U.S.C. §§629b(a)(9), 670, 671(a).

Proposal

AN ACT to amend the family court act, the social services law and the executive law, in relation to orders of protection in termination of parental rights proceedings, child protective proceedings and permanency hearings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The family court act is amended by adding a new section 635 to read as follows:

§635. Orders of protection and temporary orders of protection. (a) Where the petitioner alleges that the respondent has committed a family offense among the offenses enumerated in subdivision one of section eight hundred twelve of the family court act against the child, the child's foster, pre-adoptive or adoptive parent or parents or other members of the household in which the child resides, the petitioner may seek an order of protection against the respondent in writing, either in the petition, by an order to show cause or by motion, upon notice to all parties, including the attorney for the child.

(b) Where the court has a reasonable basis to believe that the respondent has committed a family offense among the offenses enumerated in subdivision one of section eight hundred twelve of the family court act against the child, the child's foster, pre-adoptive or adoptive parent or parents or

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Mothers of Abused Children: A Controlled Study," 84 *Pediatrics* #3 (1989); L. Walker, *The Battered Woman Syndrome* 59 (1984)].

[48] "The Violence Against Women Act of 1990: Hearings on S. 2754," Senate Committee on the Judiciary, Report 1-545, 101st Cong., 2d Sess. 37 (1990)[cited in J. Zorza, "Woman Battering: A Major Cause of Homelessness," *Clearinghouse Review* (Special Issue, 1991)].

other members of the household in which the child resides, the court may, upon good cause, issue a temporary order of protection to protect the child and the child's foster, pre-adoptive or adoptive parent or parents and other designated members of the household in which the child resides during the pendency of the proceeding under this article or until further order of the court, whichever is earlier. Where the order is granted on an emergency basis ex parte, all parties, including the attorney for the child, shall be given notice and a prompt opportunity to be heard,

(c) Upon disposition on an adjudication of permanent neglect, where the court, after giving all parties, including the attorney for the child, notice and an opportunity to be heard, determines by a preponderance of the evidence that a family offense among the offenses enumerated in subdivision one of section eight hundred twelve of the family court act had been committed and that good cause exists, the court may issue an order of protection to protect the child and the child's foster, pre-adoptive or adoptive parent or parents and other designated members of the household in which the child resides. An order of protection issued under this section may remain in effect for a period of up to five years.

(d) An order of protection or temporary order of protection issued under this section may direct the respondent to observe reasonable conditions that further the purposes of protection, which may include, among others, that the respondent stay away from the child and from the home, school, business or place of employment of the child or the child’s foster, pre-adoptive or adoptive parent or parents or other designated members of the household in which the child resides. Prior to issuing the order, the court shall inquire as to the existence of any other orders of protection involving the parties. The court shall state its reasons on the record for issuing the order.

(e) Prior to the expiration of the period of an order of protection or temporary order of protection issued under this section, a motion or order to show cause may be filed that alleges that the respondent violated the terms and conditions of such order willfully and without just cause. If, after giving notice and an opportunity to be heard to all parties, including the attorney for the child, the court is satisfied by competent proof that the respondent violated the order of protection or temporary order of protection willfully and without just cause, the court may issue an order pursuant to section eight hundred forty-two-a, eight hundred forty-six or eight hundred forty-six-a of this act.

(f)) The court may, upon motion, extend the order of protection for a reasonable period of time upon a showing of good cause or consent of the parties. The fact that a violation of the order has not

been pleaded or proven during the pendency of the order shall not constitute sufficient ground for denying or failing to extend the order. The court must articulate a basis for its decision on the record.

§2. Subdivision (a) of section 1029 of the family court act, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

(a)[The] Where the petitioner alleges that the respondent has committed a family offense among the offenses enumerated in subdivision one of section eight hundred twelve of this act against the child, the child's parent or parents, the child's foster, pre-adoptive or adoptive parent or parents or other members of the household in which the child resides, the petitioner may seek a temporary order of protection against the respondent in writing, either in the petition, by order to show cause or by motion, upon notice to all parties, including the attorney for the child.

(i) Where the court has a reasonable basis to believe that the respondent has committed a family offense among the offenses enumerated in subdivision one of section eight hundred twelve of this act against the child, the child's foster, pre-adoptive or adoptive parent or parents or other members of the household in which the child resides, the family court, upon [the application of any person who may originate a proceeding under this article, for] good cause shown, may issue a temporary order of protection, before or after the filing of such petition, [which] to protect the child, the child's parent, the child's foster, pre-adoptive or adoptive parent or parents and other designated members of the household in which the child resides during the pendency of the proceeding or until further order of the court, whichever is earlier.

(ii) The order may contain any of the provisions authorized on the making of an order of protection under section one thousand fifty-six of this act.

(iii) Where the order is granted on an emergency basis ex parte, all parties, including the attorney for the child, shall be given notice and a prompt opportunity to be heard.

(iv) Prior to issuing a temporary order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties.

(v) If such order is granted before the filing of a petition and a petition is not filed under this article within ten days from the granting of such order, the order shall be vacated. In any case where a petition has been filed and an attorney for the child has been appointed, such attorney may make application for a temporary order of protection pursuant to the provisions of this section.

§3. Subdivision 2 of section 1056 of the family court act, as amended by chapter 483 of the laws of 1995, is amended to read as follows:

2. [The] Where the petitioner alleges in writing that the respondent has committed a family offense among the offenses enumerated in subdivision one of section eight hundred twelve of this act against the child, the child's parent or parents, the child's foster, pre-adoptive or adoptive parent or parents or other members of the household in which the child resides, the order of protection against the respondent may be issued to protect such person or persons. Prior to issuing an order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties. Where the court [may also award] has determined, in accordance with the requirements of section one thousand seventeen, part two, section one thousand fifty-two or section one thousand fifty-five of this article to release a child to a non-respondent parent or to directly place or order custody of the child, during the term of the temporary order of protection or order of protection, as applicable, to [either parent, or to] an appropriate relative [within the second degree] or suitable person, the order of release or custody may be included in the temporary order of protection or order of protection, as applicable. Nothing in this section gives the court power to place or board out any child or to commit a child to an institution or agency. In making orders of protection, the court shall so act as to insure that in the care, protection, discipline and guardianship of the child his or her religious faith shall be preserved and protected.

§4. Section 1072 of the family court act, as amended by chapter 437 of the laws of 2006, is amended to read as follows:

§1072. Failure to comply with terms and conditions of supervision or order of protection.

1. If, prior to the expiration of the period of an order of supervision pursuant to section one thousand [fifty-four or one thousand] fifty-seven of this article, a motion or order to show cause is filed that alleges that a parent or other person legally responsible for a child's care violated the terms and conditions of an order of supervision issued under section one thousand [fifty-four or one thousand] fifty-seven of this article, the period of the order of supervision shall be tolled pending disposition of the motion or order to show cause. If, after hearing, the court is satisfied by competent proof that the parent or other person violated the order of supervision willfully and without just cause, the court may:

(a) revoke the order of supervision [or of protection] and enter any order that might have been made at the time the order of supervision [or of protection] was made, or

(b) commit the parent or other person who willfully and without just cause violated the order to jail for a term not to exceed six months.

2. Prior to the expiration of the period of an order of protection or temporary order of protection issued pursuant to section one thousand twenty-nine or one thousand fifty-six of this article, a motion or order to show cause may be filed that alleges that the respondent violated the terms and conditions of such order willfully and without just cause. If, after giving all parties, including the attorney for child, notice and an opportunity to be heard, the court is satisfied by competent proof that the respondent violated the order of protection or temporary order of protection willfully and without just cause, the court may:

(a) revoke or modify the order of protection or temporary order of protection and enter any order that might have been made at the time such order had been issued, or

(b) issue an order in accordance with sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a or one thousand fifty-six-a of this act; provided, however, that a commitment under this paragraph to a definite jail term as a result of a determination of criminal contempt, whether or not such term has been suspended, must be based upon proof beyond a reasonable doubt.

§5. Clause (D) of subparagraph (viii) of paragraph 2 of subdivision (d) of section 1089 of the family court is amended by adding five subclauses to read as follows:

I. Where the petitioner alleges in writing that the child's parent or person legally responsible for the child's care has committed a family offense among the offenses enumerated in subdivision one of section eight hundred twelve of this act against the child, the child's foster, pre-adoptive or adoptive parent or parents or other members of the household in which the child resides, the petitioner may seek an order of protection against such parent or person. Such an order may be sought against a parent or person legally responsible for the child's care against whom a child protective finding had been made under article ten of this act or a family offense finding under article eight of this act or against a parent determined to have committed a family offense in an application for an order of protection under section six hundred thirty-five of this act or section three hundred eighty-four-b of the social services law. Notice of the application shall be given to all parties, including the attorney for the child. Where the child has been freed for adoption, the parent whose rights had been terminated or surrendered and

against whom the order is sought shall be given notice, the right to intervene, the right to counsel, including appointed counsel if indigent, and the right to be heard regarding the application.

(II) Where the court has a reasonable basis to believe that the respondent has committed such a family offense against the child, the child's foster, pre-adoptive or adoptive parent or parents or other members of the household in which the child resides, the court may, upon good cause, issue a temporary order of protection to protect the child and the child's foster, pre-adoptive or adoptive parent or parents and other designated members of the household in which the child resides during the pendency of the proceeding under this article or until further order of the court, whichever is earlier. Where the order is granted on an emergency basis ex parte, all parties, including the attorney for the child, and respondent parent-intervenor, if any, shall be given notice and a prompt opportunity to be heard.

(III) Upon issuance of a permanency hearing order under this subdivision, where the court, after giving all parties, including the attorney for the child and parent-intervenor, if any, notice and an opportunity to be heard, determines by a preponderance of the evidence that a family offense among the offenses enumerated in subdivision one of section eight hundred twelve of this act has been committed and that good cause exists, the court may issue an order of protection to protect the child and the child's foster, pre-adoptive or adoptive parent or parents and other designated members of the household in which the child resides. An order of protection issued under this paragraph may remain in effect for a period of up to five years.

(IV) An order of protection or temporary order of protection issued under this clause may direct the parent, person legally responsible for the child’s care or parent-intervenor, if any, to observe reasonable conditions that further the purposes of protection and that may include, among others, to stay away from the child and from the home, school, business or place of employment of the child or the child’s foster, pre-adoptive or adoptive parent or parents or other designated members of the household in which the child resides. Prior to issuing the order, the court shall inquire as to the existence of any other orders of protection involving the parties. The court shall state its reasons on the record for issuing the order.

(V) Prior to the expiration of the period of an order of protection or temporary order of protection issued under this section, a motion or order to show cause may be filed that alleges that the person against whom the order was issued violated the terms and conditions of such order willfully

and without just cause. If, after giving notice and an opportunity to be heard to all parties, including the attorney for the child, the court is satisfied by competent proof that such person violated the order of protection or temporary order of protection willfully and without just cause, the court may issue an order pursuant to section eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a or one thousand fifty-six-a of this act; provided, however, that a commitment under this paragraph to a definite jail term as a result of a determination of criminal contempt, whether or not such term has been suspended, must be based upon proof beyond a reasonable doubt..

§6. Section 384-b of the social services law is amended by adding a new subdivision 14 to read as follows:

14. (a) Where the petitioner alleges that the respondent has committed a family offense among the offenses enumerated in subdivision one of section eight hundred twelve of the family court act against the child, the child's foster, pre-adoptive or adoptive parent or parents or other members of the household in which the child resides, the petitioner may seek an order of protection against the respondent in writing, either in the petition, by order to show cause or by motion, upon notice to all parties, including the attorney for the child.

(b) Where the court has a reasonable basis to believe that the respondent has committed a family offense among the offenses enumerated in subdivision one of section eight hundred twelve of the family court act against the child, the child's foster, pre-adoptive or adoptive parent or parents or other members of the household in which the child resides, the court may, upon good cause, issue a temporary order of protection to protect the child and the child's foster, pre-adoptive or adoptive parent or parents and other designated members of the household in which the child resides during the pendency of the proceeding under this article or until further order of the court, whichever is earlier. Where the order is granted on an emergency basis ex parte, all parties, including the attorney for the child, shall be given notice and a prompt opportunity to be heard,

(c) Upon disposition on an adjudication terminating parental rights, where the court, after giving all parties, including the attorney for the child, notice and an opportunity to be heard, determines by a preponderance of the evidence that a family offense among the offenses enumerated in subdivision one of section eight hundred twelve of the family court act had been committed and that good cause exists, the court may issue an order of protection to protect the child and the child's foster, pre-adoptive or adoptive parent or parents and other designated members of the household in which

the child resides. An order of protection issued under this paragraph may remain in effect for a period of up to five years.

(d) An order of protection or temporary order of protection issued under this subdivision may direct the respondent to observe reasonable conditions that further the purposes of protection, which may include, among others, that the respondent stay away from the child and from the home, school, business or place of employment of the child or the child's foster, pre-adoptive or adoptive parent or parents or other designated members of the household in which the child resides. Prior to issuing the order, the court shall inquire as to the existence of any other orders of protection involving the parties. The court shall state its reasons on the record for issuing the order.

(e) Prior to the expiration of the period of an order of protection or temporary order of protection issued under this subdivision, a motion or order to show cause may be filed that alleges that the respondent violated the terms and conditions of such order willfully and without just cause. If, after giving notice and an opportunity to be heard to all parties, including the attorney for the child, the court is satisfied by competent proof that the respondent violated the order of protection or temporary order of protection willfully and without just cause, the court may issue an order pursuant to section eight hundred forty-two-a, eight hundred forty-six or eight hundred forty-six-a of the family court act; provided, however, that a commitment under this paragraph to a definite jail term as a result of a determination of criminal contempt, whether or not such term has been suspended, must be based upon proof beyond a reasonable doubt.

§7. Subdivision 1 of section 221-a of the executive law, as amended by chapter 492 of the laws of 2015, is amended to read as follows:

1. The superintendent, in consultation with the division of criminal justice services, office of court administration, the state office for the prevention of domestic violence and the division for women, shall develop a comprehensive plan for the establishment and maintenance of a statewide computerized registry of all orders of protection issued pursuant to articles four, five, six [and], eight, [and] ten and ten-a of the family court act, section 384-b of the social services law, section 530.12 of the criminal procedure law and, insofar as they involve victims of domestic violence as defined by section four hundred fifty-nine-a of the social services law, section 530.13 of the criminal procedure law and sections two hundred forty and two hundred fifty-two of the domestic relations law, and orders of protection issued by courts of competent jurisdiction in another state, territorial or tribal jurisdiction,

special orders of conditions issued pursuant to subparagraph (i) or (ii) of paragraph (o) of subdivision one of section 330.20 of the criminal procedure law insofar as they involve a victim or victims of domestic violence as defined by subdivision one of section four hundred fifty-nine-a of the social services law or a designated witness or witnesses to such domestic violence, and all warrants issued pursuant to sections one hundred fifty-three and eight hundred twenty-seven of the family court act, and arrest and bench warrants as defined in subdivisions twenty-eight, twenty-nine and thirty of section 1.20 of the criminal procedure law, insofar as such warrants pertain to orders of protection or temporary orders of protection; provided, however, that warrants issued pursuant to section one hundred fifty-three of the family court act pertaining to articles three and seven of such act and section 530.13 of the criminal procedure law shall not be included in the registry. The superintendent shall establish and maintain such registry for the purposes of ascertaining the existence of orders of protection, temporary orders of protection, warrants and special orders of conditions, and for enforcing the provisions of paragraph (b) of subdivision four of section 140.10 of the criminal procedure law.

§8. This act shall take effect on the ninetieth day after it shall have become a law.

11. Reentry of former foster care children into foster care
[F.C.A. §§355.3, 756-a, 1088, 1091]

Chapter 342 of the Laws of 2010, which permits youth who have "aged out" of foster care at the age of 18 to reenter care, has provided a vital "safety net" in cases where the youth would otherwise be facing homelessness or other adverse outcomes. Enacted at the time that Federal foster care assistance first became available for youth between the ages of 18 and 21,[49] the statute has proven invaluable in preventing future societal costs by ensuring that the youth will have the support necessary to fulfill the commitments that they must make to participate in educational or vocational programs as a condition of reentry into care.

The Family Court Advisory and Rules Committee is submitting this measure to extend the option of foster care reentry to a discrete group of youth not covered by chapter 342 who would benefit significantly from it. In addition to the rare cases of youth who "age out" of foster care at the age of 18, the measure would also apply to the limited number of youth who were discharged from foster care on or after attaining the age of 16 but who are or are likely to be homeless unless returned to foster care. Like the youth who have "aged out," the measure would provide that such youth would not be able to petition to reenter foster care until they reach the age of 18. In order to accommodate this category, youth who have been discharged prior to their 18th birthday would have to make their reentry applications prior to their 20th birthday. The requirement to make the application within 24 months of discharge from foster care would continue to apply to youth discharged on or after their 18th birthday.

The inclusion of youth discharged prior to reaching 18 in the definition of "former foster care youth" is critically important as providers of services to runaway and homeless youth have reported a significant influx of these youth in their shelters – youth who would be better served and for a longer period of time by a return to foster care than by the temporary shelter available from these providers. Recognizing the efficacy of returning to foster care as a means of reducing the prevalence of former foster care youth in homeless youth facilities, the language bill accompanying the Fiscal Year 2017-2018 New York State budget amended the *Runaway and Homeless Youth Act* [Executive Law §532-b(1)(h)] to require that runaway and homeless youth crisis services programs "provide information to eligible youth about their ability to reenter foster care" in accordance with this statute. See L. 2017, c. 56, Part M, §3.

Additionally, the measure would clarify an aspect of the statute that has caused some confusion, that is, the categories of former foster care youth to which the statute applies. "Former foster care youth" is not defined in Family Court Article 10-B and although referenced in the permanency hearing provisions (Family Court Act Article 10-A), no specific cross-references are contained in provisions applicable to juvenile delinquents or Persons in Need of Supervision (PINS). The Committee's measure would remedy that gap by amending the post-dispositional provisions regarding extensions of placement in the juvenile delinquency and PINS statutes [Family Court Act

[49] Federal foster care assistance under Title IV-E of the *Social Security Act* became available as of October 1, 2010 pursuant to the *Fostering Connections to Success and Increasing Adoptions Act of 2008* [Public Law 110-351].

§§355.3, 756-a(f)] to include references to Family Court Act §1091. It would further amend Family Court Act §1091 to add a definition of "former foster care youth" that explicitly includes youth placed in foster care with local social services districts pursuant to juvenile delinquency, PINS, child protective or destitute child adjudications and voluntary placements, as well as children freed for adoption but not yet adopted, whose guardianship and custody have been transferred to a local social services district or authorized child care agency. It would also include the small number of juvenile delinquents placed by Family Courts in counties outside New York City, who were discharged from non-secure or limited-secure care placements with the New York State Office of Children and Family Services (NYS OCFS).[50]

The Committee's proposal would codify the only appellate ruling on the statute to date and is consistent with the position taken by the NYS OCFS, the oversight agency for foster care in New York. The Appellate Division, Second Department, in Matter of Jefry H., 102 A.D.3d 132, 955 N.Y.S.2d 90 (2nd Dept., 2012), reversed a Family Court decision in which the judge had construed the absence of specific language to mean that the statute did not cover PINS cases. In holding that Family Court Act §1091 does apply to PINS who had been placed in foster care, the Appellate Division noted that the rationale for enacting chapter 342 applies with equal force to all foster care youth discharged from care. The Court further noted the broad interpretation accorded to the scope of the statute by the NYS OCFS. *Id.* Consistent with Federal requirements to treat all categories of youth eligible to receive foster care assistance under Title IV-E of the *Social Security Act* identically, the NYS OCFS, in its administrative memorandum to local social services districts, indicated that the statute applied to all former foster care youth, including former foster care youth placed with local departments of social services. *See* 11-OCFS ADM-02 (March 3, 2011) at pps 2, 7.

Professor Merril Sobie, in his 2012 Practice Commentary to Family Court Act §1091, indicated that "[t]he language strongly suggests that the statute applies to each and every foster child, and is not limited to children who have been placed as a result of an Article 10 [child protective] proceeding." Writing before the Appellate Division reversal in Matter of Jefry H., Prof. Sobie continued:

> 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).

[50] With the implementation of the "Close to Home" program in New York City, the New York City Family Court only places delinquent youth with the New York City Administration for Children's Services, except for a small number placed restrictively with NYS OCFS, a category not covered by the existing reentry statute or the measure.

Predictably, most youth returning to foster care are those who had been placed pursuant to child protective proceedings, but the option is equally vital for those youth in the juvenile justice system who have been placed with local social services districts. As the Supporting Memorandum for chapter 342 stated:

> Although the Family Court Act permits [foster care youth] to consent to continued foster care with its attendant supports and services until they reach the age of 21, many make precipitous decisions to show their independence and refuse to consent to remain in care even when they are desperately in need of assistance. Youth living in intact families are not faced with such decisions; they may leave home to attend college, but they do not abruptly terminate all connections with their families and often continue to receive financial and other aid. Youth leaving foster care, in contrast, often have no family to fall back on. For them, independent living' may be akin to falling off a precipice.

(Assembly Mem in Support, Bill Jacket, L. 2010, c. 342 at 8).

The well-documented problems faced by former foster care youth – increased incidence of school drop-out, homelessness, unemployment, criminality and teen pregnancy[51] – afflict such youth regardless of the ages at which they are discharged and may be even more serious with respect to the vulnerable juvenile justice population upon discharge from care. In its memos to the Governor regarding chapter 342, both the Division of the Budget and NYS OCFS noted the additional costs to counties from these adverse consequences that would be averted by permitting the option for youth to reenter foster care. *See* Memo of Division of the Budget and Letter from NYS OCFS General Counsel, Bill Jacket, L. 2010 c. 342. Codification of Matter of Jefry H. through enactment of the Committee's proposal, as well as extension of the option to youth discharged prior to their 18th birthday, therefore, will provide a cost-effective avenue to support particularly vulnerable youth as they make the difficult transition from foster care to successful, productive and law-abiding adulthood.

Proposal

AN ACT to amend the family court act, in relation to reentry of former foster care children into foster care

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 6 of section 355.3 of the family court act, as amended by chapter 663 of the laws of 1985, is amended to read as follows:

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[51] *See, e.g.,* Citizen's Committee for Children of New York, *Young and Homeless: A Look at Homeless Youth in New York City* (2006), pages 5, 8; M. Freundlich, *Time Running Out: Teens in Foster Care* (Children's Rights, Inc., Legal Aid Society and Lawyers for Children, Nov., 2003), pages 43-46; M. Courtney, A. Dworsky & H. Pollack, *When Should the State Cease Parenting? Evidence from the Midwest Study* (Chapin Hall, Univ. of Chicago, Issue Brief #115 (Dec., 2007).

6. Successive extensions of placement under this section may be granted, but no placement may be made or continued beyond the respondent's eighteenth birthday without [the child's] his or her consent and in no event past [the child's] his or her twenty-first birthday. A respondent who has attained the age of eighteen but is less than twenty years of age may move or, with his or her consent, may be the subject of a motion to reenter foster care in accordance with the provisions of section one thousand ninety-one of this act, provided that:

(i) the respondent was either discharged from foster care on or after attaining the age of eighteen due to a failure to consent to the continuation of placement or was discharged from foster care on or after attaining the age of sixteen but who is or is likely to be homeless unless returned to foster care; and

(ii) where the respondent had been previously placed or transferred into placement with a local social services district pursuant to this section or section 353.3 or 355.1 of this chapter, the motion may be made by a social services official; or where the respondent had been previously placed with the state office of children and family services for a non-secure or limited secure level of care pursuant to this section or section 353.3 or 355.1 of this chapter where the placement was made in a county that does not have an approved "close to home" program, the motion may be made by an official of the state office of children and family services.

§2. Subdivision (f) of section 756-a of the family court act, as added by chapter 604 of the laws of 1986, is amended to read as follows:

(f) Successive extensions of placement under this section may be granted, but no placement may be made or continued beyond the child's eighteenth birthday without his or her consent and in no event past his or her twenty-first birthday. A child who was previously placed with a local social services district pursuant to section seven hundred fifty-six of this chapter and who was discharged from foster care on or after attaining the age of eighteen due to a failure to consent to continuation of placement or was discharged from foster care on or after attaining the age of sixteen but who is or is likely to be homeless unless returned to foster care may move, or, with his or her consent, may be the subject of a motion by a social services official to reenter foster care in accordance with the provisions of section one thousand ninety-one of this act.

§3. Section 1088 of the family court act, as amended by chapter 605 of the laws of 2011, is amended to read as follows:

§1088. Continuing court jurisdiction. (a) If a child is placed pursuant to section three hundred fifty-eight-a, three hundred eighty-four, or three hundred eighty-four-a of the social services law, or pursuant to section one thousand seventeen, one thousand twenty-two, one thousand twenty-seven, one thousand fifty-two, one thousand eighty-nine, one thousand ninety-one, one thousand ninety-four or one thousand ninety-five of this act, or directly placed with a relative pursuant to section one thousand seventeen or one thousand fifty-five of this act; or if the child is freed for adoption pursuant to section six hundred thirty-seven of this act or section three hundred eighty-three-c, three hundred eighty-four or three hundred eighty-four-b of the social services law, the case shall remain on the court's calendar and the court shall maintain jurisdiction over the case until the child is discharged from placement and all orders regarding supervision, protection or services have expired.

(b) The court shall rehear the matter whenever it deems necessary or desirable, or upon motion by any party entitled to notice in proceedings under this article, or by the attorney for the child, and whenever a permanency hearing is required by this article. While the court maintains jurisdiction over the case, the provisions of section one thousand thirty-eight of this act shall continue to apply.

(c) The court shall also maintain jurisdiction over a case for purposes of hearing a motion to permit 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], as defined in subdivision (a) of section one thousand ninety-one of this act, to return to the custody of the [local commissioner of] social services [or other officer, board or department authorized to receive children as public charges] district from which the youth was most recently discharged, or, in the case of a child freed for adoption, the authorized agency into whose custody and guardianship the child has been placed.

§4. Section 1091 of the family court act, as amended by chapter 342 of the laws of 2010, is amended to read as follows:

§1091. Motion to return to foster care placement.

(a) For purposes of this article, "former foster care youth" shall mean a youth who has attained the age of eighteen but is under the age of twenty-one and who had been:

(1) discharged from foster care on or after attaining the age of eighteen due to a failure to consent to continuation in foster care or discharged from foster care on or after attaining the age of sixteen but who is or is likely to be homeless unless returned to foster care; and

(2)(i) placed in foster care with a local social services district pursuant to article three, seven, ten, ten-A or ten-C of this act or section three hundred fifty-eight-a of the social services law, or

(ii) freed for adoption in accordance with section six hundred thirty-seven of this act or section three hundred eighty-three-c, three hundred eighty-four or three hundred eighty-four-b of the social services law but has not yet been adopted; or

(iii) the subject of a motion to restore parental rights that had been conditionally granted pursuant to paragraph (iii) of subdivision (b) of section six hundred thirty-seven of this act; or

(iv) placed with the state office of children and family services for a non-secure or limited secure level of care pursuant to section 353.3, 355.1 or 355.3 of this act where the placement was made in a county that does not have an approved "close to home" program.

(b) 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] district from which the youth was most recently discharged, or, in the case of a youth placed with the office of children and family services in accordance with subparagraph (iv) of paragraph two of subdivision (a) of this section, the commissioner of the office of children and family services, or, in the case of a child freed for adoption, the social services district or authorized agency into whose custody and guardianship the child has been placed, may be made by such former foster care youth, or by [a] the applicable official of the local social services [official] district, authorized agency or state office of children and families 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]

(c)(1) With respect to a former foster care youth discharged on or after his or her eighteenth birthday, 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.

(2) With respect to a former foster care youth discharged prior to his or her eighteenth birthday, the court shall not entertain a motion filed after his or her twentieth birthday.

[(a)] (d) A motion made pursuant to this [section] article by [a] the applicable official of the local social services [official] district, authorized agency or state office of children and family services 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; and

(5) in the case of a former foster care youth discharged from foster care on or after attaining the age of sixteen, the youth is or is likely to be homeless unless returned to foster care.

[(b)](e) A motion made pursuant to this [section] article by a former foster care youth shall be made by order to show cause [or] on ten days notice to the applicable official of the local social services [official] district, authorized agency or state office of children and family services. Such motion shall show by affidavit or other evidence that:

(1) the requirements outlined in paragraphs one, two and three and, if applicable, paragraph five of subdivision [(a)] (d) of this section are met; and

(2) (i) the applicable official of the local social services district, authorized agency or state office of children and family services consents to the re-entry of such former foster care youth, or [if]

(ii) the applicable official of the local social services district, authorized agency or state office of children and family services refuses to consent to the re-entry of such former foster care youth and [that] such refusal is unreasonable.

[(c)](f) (1) If at any time during the pendency of a proceeding brought pursuant to this [section] article, 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 applicable local commissioner of social services or [other officer, board or department authorized to receive children as public charges] official of the applicable authorized agency or state office of children and family services, pending a final decision on the motion, the court may issue a temporary order returning the youth to the custody of [the] such local

commissioner of social services or other [officer, board or department authorized to receive children as public charges] official.

(2) Where the applicable official of the local social services district, authorized agency or state office of children and family services has refused to consent to the re-entry of a former foster care youth, and where it is alleged pursuant to subparagraph (ii) of paragraph two of subdivision [(b)] (e) of this section, that such refusal [by such social services district] is unreasonable, the court shall grant a motion made pursuant to subdivision [(b)](e) of this section if the court finds and states in writing that the refusal [by the local social services district] is unreasonable. For purposes of this [section] article, a court shall find that a refusal [by a local social services district] to allow a former foster care youth to reenter care is unreasonable if:

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

(ii) the youth consents to enrollment in and attendance at an appropriate educational or vocational program, unless the court finds a compelling reason that such enrollment or attendance is unnecessary or inappropriate, given the particular circumstances of the youth; and

(iii) re-entry into foster care is in the best interests of the former foster care youth.

(3) Upon making a determination on a motion filed pursuant to this [section] article, where a motion has previously been granted pursuant to this [section] article, in addition to the applicable findings required by this [section] article, the court shall grant the motion to return a former foster care youth to the custody of the applicable local commissioner of social services or [other officer, board or department authorized to receive children as public charges] official of the applicable authorized agency or state office of children and family services, only:

(i) upon a finding that there is a compelling reason for such former foster care youth to return to care;

(ii) if the court has not previously granted a subsequent motion for such former foster care youth to return to care pursuant to this paragraph; and

(iii) upon consideration of the former foster care youth's compliance with previous orders of the court, including the youth's previous participation in an appropriate educational or vocational program, if applicable.

§5. This act shall take effect immediately.

12. Stipulations and agreements for child support in Family Court and matrimonial proceedings [S 4829-a version] [F.C.A. §413(1)(h); DRL §240(1-b)(h)]

Section 413(1)(h) of the Family Court Act and section 240(1-b)(h) of the Domestic Relations Law provide three important protections for children when their parents enter into agreements and stipulations for the payment of child support. Validly executed agreements and stipulations entered into by the parties and presented to the Supreme or Family Court for incorporation into orders or judgments must include a statement that the parties were advised of the provisions of the Child Support Standards Act (*CSSA*), as well as a statement that the "basic child support obligation" (application of the *CSSA* percentages to the parties' combined parental income) would "presumptively result in the correct amount of child support to be awarded." Where the agreement or stipulation is at variance with the basic child support obligation, a statement must also be included of what the presumptive amount would have been and why the deviation from that amount is appropriate. These protections are not waivable by the parties or their attorneys. All four Judicial Departments have held that agreements not in compliance with these requirements are invalid and unenforceable. *See* David *v.* Cruz, 103 A.D.3d 494 (1st Dept., 2013); Jefferson *v.* Jefferson, 21 A.D.3d 879 (2nd Dept., 2005); Spooner *v.* Spooner, 154 A.D.3d 1158 (3rd Dept., 2017); Panzarella *v.* Panzarella, 106 A.D.3d 1527 (4th Dept., 2013). However, they have not agreed on the procedures to be followed and the remedies for noncompliance with these mandates. The Family Court Advisory and Rules Committee is proposing legislation to supply necessary clarity to this area.

The Committee's proposal would amend both Family Court Act §413(1)(h) and Domestic Relations Law §240(1-b)(h) to provide that if an agreement or stipulation fails to comply with any of the three provisions of the *CSSA*, the non-*CSSA*-compliant provisions must be deemed void as of the earlier of the date that one of the parties alleged the noncompliance in a pleading or motion or the date the Court made a finding of noncompliance. This approach is consistent with that of the Appellate Division, Third Department, which, in Clark *v.* Liska, 263 A.D.2d 640, 692 N.Y.S.2d 825 (3d Dept., 1999), treated a motion to vacate a stipulation on the ground of noncompliance with these requirements as a prospective modification of the parties' obligations. Noting that retroactive vacatur of the agreement would negatively affect the accumulated child support arrears owed by defendant, the cancellation of which is generally prohibited, the Court affirmed the modification date as the date of the application. *See also* Luisi *v.* Luisi, 6 A.D.3d 398 (2d Dept., 2004); Matter of B.J.G. *v.* M.D.G., 29 Misc.3d 670 Sup.Ct., Nassau Co., 2010). *Cf.*, Jefferson *v.* Jefferson, 21 A.D.3d 879, 800 N.Y.S.2d 612 (2d Dept., 2005) (noncompliance with *CSSA* rendered agreement invalid and unenforceable; matter remitted for new determination of child support retroactive to the original date of the agreement).

Further, the Committee's proposal requires that upon a finding of noncompliance, the Court must schedule a hearing to determine an appropriate amount of child support as of the earlier of the date the noncompliance had been asserted in a pleading or a motion or the date of the Court's finding of noncompliance. Concomitantly, the proposal provides that the noncompliance with the *CSSA* may not be asserted as a defense to non-payment of child support in violation of an agreement or stipulation for

a period prior to the assertion of noncompliance in a motion or pleading or judicial determination of noncompliance, whichever was earlier.

At the same time, the measure recognizes that there are instances when child support provisions that do not comply with the *CSSA* are so intertwined with a non-child support provision that voiding the child support provisions would also result in the inappropriate invalidation of non-child support provisions. *See*, Cimons *v.* Cimons, 53 A.D.3d 125 (2nd Dept., 2008). Therefore the proposed legislation provides that if the Family Court determines that there are intertwined provisions over which it has no jurisdiction, e.g., equitable distribution, it must dismiss the petition in order to allow the parties to return to Supreme Court.

Finally, the proposal provides that unless the Supreme Court has retained exclusive jurisdiction to enforce or modify the agreement, the Family Court would have subject matter jurisdiction to review, and, where necessary, set a new child support obligation in cases in which a divorce judgment did not conform to the *CSSA*. *See* J.Gallet and M.Fine, *Spouse and Child Support in New York* §13:2 (Feb., 2018 Update). While the Third Department has held that the Family Court has the authority to make such an order, [Hardman *v.* Coleman, 154 A.D.3d 1146 (3rd Dept., 2017), Du Bois *v.* Swisher, 306 A.D.2d 610 (3rd Dept., 2003)], the First and Second Departments have decided that in the absence of statutory authority, the Family Court has no jurisdiction to make a new order of support where it finds that the underlying order did not comply with the *CSSA*. *See* Byrne *v.* Javino, 145 A.D.3d 718 (2nd Dept., 2016); Georgette D.W. *v.* Gary N.R., 134 A.D.3d 406 (1st Dept., 2015); Castaneda *v*. Castaneda, 132 A.D.3d 667 (2nd Dept., 2015); Savini *v*. Burgaleta, 34 A.D.3d 686 (2d Dept., 2006). If a Family Court in one of these jurisdictions finds that the support order is unenforceable, it has no choice but to dismiss the petition and direct the parties to return to Supreme Court, an often time-consuming and expensive option. And since the order is invalid, the Family Court cannot even direct a support obligor to pay arrears that may have accrued under the order to the custodial parent.

In light of the ambiguity surrounding the law in this area and, in particular, the varying approaches taken by the courts regarding the treatment of agreements and stipulations deemed not to comply with the *CSSA*, the Committee's proposal will provide needed clarification. In so doing, it will spur greater compliance with the *CSSA*, thus fulfilling the legislative intent of providing appropriate support for children.

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to agreements and stipulations of child support

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (h) of subdivision 1 of section 413 of the family court act, as amended by chapter 41 of the laws of 1992, is amended to read as follows:

(h)(1) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include the following:

(i) a provision stating that the parties have been advised of the provisionsof this subdivision; and

(ii) a provision stating that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded.

(2) In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount.

(3) Such provision may not be waived by either party or counsel.

(4) Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section.

(5) Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(6) If a court of competent jurisdiction finds that sections relating to child support in any agreement, stipulation or court order fail to comply with any of the provisions of this paragraph, such sections shall be deemed void as of the date that any of the parties raises this failure to comply in a pleading or motion or as of the date that a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier. Any sections of an agreement, stipulation or court order that are so directly connected or intertwined with a section deemed void that they necessarily must be recalculated therewith shall also be deemed void as of the same earlier date. Provided, however, that the provisions of this subparagraph shall be subject to the terms of subparagraph (8) of this paragraph.

(7) If a court of competent jurisdiction finds that an agreement, stipulation or court order fails to comply with any of the provisions of this paragraph, the court shall issue a temporary order of child support and schedule a hearing to determine the final child support order. The final determination of

child support shall be made pursuant to this section de novo and shall be effective as of the date that any of the parties raises the failure to comply with any of the provisions of this paragraph in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(8) If the family court finds that sections of an agreement, stipulation or court order other than those relating to child support are directly connected or intertwined with a section that relates to child support that the court has found fails to comply with this paragraph, it shall dismiss the proceeding without prejudice.

(9) The provisions of this paragraph shall not constitute a defense to non-payment of a child support obligation prior to the date that any of the parties raises the failure to comply in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(10) For purposes of this section, a court of competent jurisdiction shall be either the family court or the supreme court, notwithstanding the court in which the agreement, stipulation or order was initiated, unless the supreme court has retained exclusive jurisdiction to enforce or modify the agreement, stipulation or order.

§2. Paragraph (h) of subdivision 1-b of section 240 of the domestic relations law, as amended by chapter 41 of the laws of 1992, is amended to read as follows:

(h)(1) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include the following:

(i) a provision stating that the parties have been advised of the provisions of this subdivision[,]; and

(ii) a provision stating that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded.

(2) In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount.

(3) Such provision may not be waived by either party or counsel.

(4) Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section.

(5) Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(6) If a court of competent jurisdiction finds that sections relating to child support in any agreement, stipulation or court order fail to comply with any of the provisions of this paragraph, such sections shall be deemed void as of the date that any of the parties raises this failure to comply in a pleading or motion or as of the date that a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier. Any sections of an agreement, stipulation or court order that are so directly connected or intertwined with a section deemed void that they necessarily must be recalculated therewith shall also be deemed void as of the same earlier date. Provided, however, that the provisions of this subparagraph shall be subject to the terms of subparagraph (8) of this paragraph.

(7) If a court of competent jurisdiction finds that an agreement, stipulation or court order fails to comply with any of the provisions of this paragraph, the court shall issue a temporary order of child support and schedule a hearing to determine the final child support order. The final determination of child support shall be made pursuant to this section de novo and shall be effective as of from the date that any of the parties raises the failure to comply with any of the provisions of this paragraph in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(8) If the family court finds that sections of an agreement, stipulation or court order other than those relating to child support are directly connected or intertwined with a section that relates to child support that the court has found fails to comply with this paragraph, it shall dismiss the proceeding without prejudice.

(9) The provisions of this paragraph shall not constitute a defense to non-payment of a child support obligation prior to the date that any of the parties raises the failure to comply in a pleading or

motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(10) For purposes of this section, a court of competent jurisdiction shall be either the family court or the supreme court, notwithstanding the court in which the agreement, stipulation or order was initiated, unless the supreme court has retained exclusive jurisdiction to enforce or modify the agreement, stipulation or order.

§3. This act shall take effect on the ninetieth day after it shall become a law and shall apply to agreements and stipulations entered into on or after such date.

13. Family Court reviews of administrative suspensions of driver's licenses for failure to pay child support and eligibility for restricted use licenses [F.C.A. §454; Soc. Serv. Law §111-b(12); V.T.L.§§510, 530]

Of the many mechanisms for child support enforcement required by Federal law and embodied in New York State law, suspension of driver's licenses as a penalty for accumulation of more than four months of unpaid arrears has been widely recognized as an effective deterrent. The threat of a suspension propels many support obligors to pay their outstanding obligations. However, in cases where the suspension is actually imposed, it often has the effect of undermining its statutory goal of promoting payment. The Congressional Research Service, in a report issued in 2011, noted that, according to census data, approximately 76 percent of employees nationally commute to work in private vehicles and 11 percent commute by car-pool; many entry-level jobs require driver's licenses and many jobs are inaccessible by public transportation, especially in suburban and rural areas.[52] The report indicated that suspensions may be particularly punitive for low-income support obligors, "may lessen a person's ability to keep a job or find work, and thus impede a non-custodial parent's ability to fulfill his or her child support obligation."[53]

The Family Court Advisory and Rules Committee is submitting a measure designed to mitigate this counterproductive effect by delineating a clear method for the Family Court to review administrative suspensions following the support obligor's exhaustion of administrative remedies and clarifying the uses to which a restricted use license may be put during the period of suspension. The measure would alter the means of challenging unsuccessful administrative challenges to administrative driver's license suspensions and would add flexibility to the statute regarding restrictive licenses.

1. Challenges to denials of administrative hearings regarding administrative license suspensions

Pursuant to Title IV-D of the Federal *Social Security Act*, all State plans, as a condition for eligibility for 66 percent Federal reimbursement for State child support programs, must include procedures to "withhold or suspend, or to restrict the use of driver's licenses, professional and occupational licenses, and recreational and sporting licenses of individuals owing overdue support or failing, after receiving appropriate notice, to comply with subpoenas or warrants relating to paternity or child support proceedings." *See* 42 USC §666(a)(16). Congress afforded states "a great deal of flexibility in implementing license suspension programs"[54] and did not mandate specific procedures for the suspension and reinstatement of such licenses. New York laws, recently extended to August 31, 2019 [L.2017, c.138], thus prescribe two methods for suspending drivers' licenses of child support obligors who have accumulated more than four months of unpaid arrears:

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[52] Congressional Research Service, *Child Support Enforcement and Driver's License Suspension Policies* (CRS Report #41762, Apr. 11, 2011) at pages 2,5.

[53] *Id.* at page 11.

[54] Congressional Research Service, *supra* note 16, at p.6.

• A Family or Supreme Court may order the New York State Department of Motor Vehicles (DMV) to suspend an obligor's license in the context of an enforcement proceeding pursuant to Domestic Relations Law §244-b(a) and Family Court Act §458-a(a). The court may later order DMV to restore an obligor's driving privileges upon full or partial payment of arrears.

• The Support Collection Unit (SCU) of a local Department of Social Services may administratively direct DMV to suspend an obligor's license under Social Services Law §111-b(12). An obligor in default is provided notice that the SCU intends to direct the suspension and the obligor has 45 days to challenge the determination, a challenge that may only be based upon a failure to receive actual notice of the suspension. Among the bases for a successful challenge are: the arrears have been paid in full; the obligor is in receipt of public assistance or Supplemental Security Income (SSI), the obligor's income is below the self-support reserve, or that the obligor is able to make a satisfactory payment arrangement with the SCU. A satisfactory payment arrangement requires, among other things, a confession of judgment and payments of support and arrears pursuant to an income execution. The SCU has up to 75 days to review the obligor's challenge. If, after the review, the obligor disagrees with the SCU determination, he or she may file objections with the Family Court pursuant to Family Court Act §454(5). The review is based on written submissions and unless the Family Court finds that the SCU's decision to suspend the driver's license was "based upon a clearly erroneous determination of fact or error of law," the Court must deny the objections.

While both methods can be effective in promoting collection of support arrears, they often have the perverse effect noted above of preventing obligors from finding and maintaining employment, thus hampering their ability to make support payments. With respect to administrative suspensions under Social Services Law §111-b(12), an unemployed or underemployed obligor may not be able to reach a satisfactory repayment agreement with the SCU in order to avoid or terminate the suspension. An obligor whose license has been suspended will generally not have the license reinstated until he or she has a job with support being deducted via an income execution. Moreover, the limitation of the grounds for challenges significantly impedes full review. The Committee's measure thus amends subdivision twelve of Social Services Law §111-b to permit administrative reviews – and thus ultimately judicial reviews – of license suspensions on grounds in addition to lack of actual notice of the suspension.

While the Family Court may review a support obligor's objections to an administrative denial by the SCU of a challenge to an administrative driver's license suspension, experience statewide demonstrates that almost no support obligors avail themselves of that remedy. The Family Court has received only a handful of objections to administrative denials of license suspension challenges.

In order to make the process to challenge denials resulting from administrative reviews more accessible to litigants, especially those without legal representation, the proposed measure would amend subdivision five of Family Court Act §454 to substitute the more familiar petition process. Since the Family Court does not charge fees for initiating actions, such a change would not add any expense for the litigant; nor would it encumber the litigant with an undue burden of service since the process would be similar to the current notification requirements regarding objections. The measure

would require the obligor to submit financial disclosure documents, since, as in all child support proceedings, the information is critically important to the resolution of the matters. Conforming amendments referencing the petition process for judicial review would be added to section 111-b of the Social Services Law and subdivision 4-e of section 510 of the Vehicle and Traffic Law.

Support obligors whose licenses have been suspended routinely file modification petitions with the court seeking reviews of suspensions, only to be informed by the courts that they must follow the procedures in FCA §454. Because of the strict time limits in that section and subdivision twelve of section 111-b of the Social Services Law, support obligors are often by this time precluded from taking appropriate action to have their licenses returned. And because the written objection process proves to be too onerous for many support obligors, they are often unable to obtain the relief to which they would otherwise be entitled. By shifting the process from a written objection to a petition and appearance, the Family Court can ensure that support obligors challenging their license suspensions are given the necessary opportunities to collect and present the evidence necessary to obtain effective judicial review of their cases.

2. Restricted use licenses

The Committee's measure clarifies an apparent contradiction in the activities permitted under a restricted use license pursuant to section 530 of the Vehicle and Traffic Law. In both judicial and administrative license suspension cases, a support obligor may apply for a restricted use license which is limited to travel to and from his or her place of employment or school, commuting as part of a job-search and in other limited circumstances. Family Courts are routinely faced with obligors who report that they are unable to find and maintain employment as a result of license suspensions. Without the ability to address what may be a root cause of a non-custodial parent's unemployment, the Court has only two options when addressing violations of child support orders – either lower the support obligation or continue the order, which will ultimately result in greater arrears and possible incarceration – neither of which achieves the goal of increasing support payments to custodial parents for the benefit of their children.

Vehicle and Traffic Law §530(3)(a) permits a restricted use license to be used "during the time the holder is actually engaged in pursuing or commuting to or from his business, trade, occupation or profession," clearly permitting use both for commuting and for job-seeking. The enumerated activities permitted in subdivision three exclude any driving that is a part of the license holder's job, and, consequently, exclude driving any commercial vehicle or vehicle for hire, such as a car service or taxi. Vehicle and Traffic Law §530(5), however, states that obligors, whose licenses have been suspended for non-payment of support, may nonetheless drive most vehicles for hire with the exception of commercial vehicles defined in Vehicle and Traffic Law §501-a(4). These sections appear to be in contradiction, since a vehicle for hire would be used as part of a driver's job, not simply for commuting. The measure, therefore, amends subdivision three of section 510 of the Vehicle and Traffic Law to harmonize the subdivisions by making it clear that where a restricted use license is issued to a driver whose license had been suspended for failure to pay child support, the restricted use license may be used for driving that is a part of the job. While preserving the exclusion of commercial vehicles, the measure permits a restricted license to be used for driving other types of motor vehicles

"incident to the [license] holder's business, trade, occupation or profession." A clarifying amendment is also proposed for Vehicle and Traffic Law §530(5).

New York would not be alone in enacting a measure utilizing the flexibility afforded by Federal law to blunt the adverse effects of license suspensions as an enforcement tool. The National Conference of State Legislatures reported in 2014 that:

> States are continuing to make changes during each legislative session, with a number of states easing up on driver's license restrictions in particular in order to allow the obligor[s] to continue working so that they can meet their support obligation in the future.[55]

Indiana law, for example, authorizes a person "whose driving privileges have been suspended by the [B]ureau [of Motor Vehicles] by an administrative action and not by a court order [to] petition a court for specialized driving privileges". [56] West Virginia permits an obligor to avoid a court-ordered license suspension if it would cause significant hardship to "the person . . . the person's employees, or to persons, businesses or entities to whom the person provides goods or services; " the obligor must pay a portion of the arrears and establish a payment plan for the remainder, which must be paid within one year.[57] California and Louisiana permit restricted-use licenses to be in effect for a designated period without limiting their use to the commute to and from work.[58] Consistent with this growing national trend, enactment of the Committee's proposal would increase the effectiveness of driver's license suspensions as a tool to promote, rather than impede, child support payments.

Proposal:

AN ACT to amend the family court act, the social services law and the vehicle and traffic law, in relation to family court reviews of administrative driver's license suspensions for failure to pay child support and eligibility for restricted use licenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

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[55] National Conference of State Legislatures, *License Restrictions for Failure to Pay Child Support* (Jan. 30, 2014) at page 1.

[56] Such privileges are determined by the court and can require using "ignition interlock devices" and only driving "during certain hours of the day" or "between specific locations and the person's residence; operation of vehicles requiring commercial driver's licenses are specifically excluded." *See* Indiana Code §§9-30-16-3, 9-30-16-4.

[57] *See* W. Va. Code §48-15-209.

[58] *See* Cal. Fam. Code §17520); La. Stats. Ann.-R.S. 9:315.33.

Section 1. Subdivision 5 of section 454 of the family court act, as amended by chapter 468 of the laws of 2012, is amended to read as follows:

(5) The court may review a support collection unit's denial of [a] an administrative challenge made by a support obligor pursuant to paragraph (d) of subdivision twelve of section one hundred eleven-b of the social services law if [objections thereto are] a petition is filed by a support obligor who has received notice that the office of temporary and disability assistance intends to notify the department of motor vehicles that the support obligor's driving privileges are to be suspended. [Specific written objections to]

a. The petition challenging a support collection unit's denial may be filed by the support obligor within thirty-five days of the mailing of the notice of the support collection unit's denial. A support obligor who files such [objections] a petition shall serve a copy of the [objections] petition upon the support collection unit and the support obligee, [which] each of whom shall have ten days from such service to file a written [rebuttal to such objections and] answer. On or before the return date of the petition, the support collection unit shall provide to the court a copy of the record upon which the support collection unit's denial was made, including all documentation submitted by the support obligor. Proof of service shall be filed with the court at the time of filing of [objections] the petition and any [rebuttal. The court's review shall be based upon the record and submissions of the support obligor and the support collection unit upon which the support collection unit's denial was made. Within forty-five days after the rebuttal if any, is filed, the] answer.

b. The support obligor shall submit to the court the financial disclosure required by subdivision (a) of section four hundred twenty-four-a of this act. The court shall not determine the petition in the absence of such submission.

c. The court shall (i) deny the [objections] petition and remand to the support collection unit or (ii) [affirm] grant the [objections] petition if the court finds the determination of the support collection unit is based upon a clearly erroneous determination of fact or error of law[, whereupon]. If the court grants the petition, it shall direct the support collection unit not to notify the department of motor vehicles to suspend the support obligor's driving privileges.

d. Provisions set forth herein relating to procedures for [appeal to] review by the family court by individuals subject to suspension of driving privileges for failure to pay child support shall apply

solely to such cases and not affect or modify any other procedure for review or appeal of administrative enforcement of child support requirements.

§2. Paragraphs (d) and (f) of subdivision 12 of section 111-b of the social services law, as amended by chapter 81 of the laws of 1995 and chapter 29 of the laws of 2015, are amended to read as follows:

(d)(1) A support obligor may challenge in writing the correctness of the determination of the support collection unit that the obligor's driving privileges should be suspended, and in support of the challenge may submit documentation demonstrating mistaken identity, error in calculation of arrears, financial exemption from license suspension pursuant to the conditions enumerated in paragraph (e) of this subdivision, the absence of an underlying court order to support such determination, or other reason that the person is not subject to such determination. Such documents may include but are not limited to a copy of the order of support pursuant to which the obligor claims to have made payment, other relevant court orders, copies of cancelled checks, receipts for support payments, pay stubs or other documents identifying wage withholding, and proof of identity. The support collection unit shall review the documentation submitted by the support obligor, shall adjust the support obligor's account if appropriate, and shall notify the support obligor of the results of the review initiated in response to the challenge within seventy-five days from the date of the notice required by paragraph (b) of this subdivision. If the support collection unit's review indicates that the determination to suspend driving privileges was correct, the support collection unit shall notify the support obligor of the results of the review and that the support obligor has thirty-five days from the date of mailing of such notice to satisfy the full amount of the arrears or commence payment of the arrears/past due support as specified in paragraph (e) of this subdivision and if the support obligor fails to do so, the support collection unit shall notify the department of motor vehicles to suspend the support obligor's driving privileges pursuant to section five hundred ten of the vehicle and traffic law. The support obligor shall be further notified that if the support obligor files [objections with] <u>a petition for review by</u> the family court and serves [these objections] <u>the petition</u> on the support collection unit within thirty-five days from the date of mailing of the notice denying the challenge pursuant to subdivision five of section four hundred fifty-four of the family court act, the support collection unit shall not notify the department of

motor vehicles to suspend the support obligor's driving privileges until fifteen days after entry of [judgement] judgment by the family court denying the [objections] relief requested in the petition.

(2) A support obligor may within thirty-five days of mailing of the notice denying his or her challenge by the support collection unit [request that the] file a petition seeking family court review of the support collection unit's determination pursuant to subdivision five of section four hundred fifty-four of the family court act. If the support obligor [requests the] files a petition seeking family court [to] review of the determination of the support collection unit, the support collection unit shall not notify the department of motor vehicles to suspend the support obligor's driving privileges until fifteen days after mailing of a copy of the judgment by the family court to the support obligor denying the [objections] relief requested in the petition.

(f) A support obligor [who alleges that he or she has not received actual notice pursuant to paragraph one of subdivision (b) of this section and] whose driving privileges were suspended may at any time request a review pursuant to subdivision (d) of this section or comply with the requirements of subdivision (e) of this section, and upon a determination that he or she has not accumulated support arrears equivalent to or greater than the amount of support due for a period of four months or that he or she meets the requirements of subdivision (e) of this section, the department shall notify the department of motor vehicles that the suspension of driving privileges shall be terminated. If the support collection unit upholds the suspension, the support obligor may seek a review by the family court of the determination pursuant to subdivision (d) of this section and section four hundred fifty-four of the family court act.

§3. Paragraph (3) of subdivision 4-e of section 510 of the vehicle and traffic law, as amended by chapter 81 of the laws of 1995, is amended to read as follows:

(3) Upon receipt of notification from the office of temporary and disability assistance of a person's failure to satisfy support arrears or to make satisfactory payment arrangements thereon pursuant to paragraph (e) of subdivision twelve of section one hundred eleven-b of the social services law or notification from a court issuing an order pursuant to section four hundred fifty-four or four hundred fifty-eight-a of the family court act or section two hundred forty-four-b of the domestic relations law, the commissioner or his or her agent shall suspend the license of such person to operate a motor vehicle. In the event such person is unlicensed, such person's privilege of obtaining a license

shall be suspended. Such suspension shall take effect no later than fifteen days from the date of the notice thereof to the person whose license or privilege of obtaining a license is to be suspended, and shall remain in effect until such time as the commissioner is advised that the person has satisfied the support arrears or has made satisfactory payment arrangements thereon pursuant to paragraph (e) of subdivision twelve of section one hundred eleven-b of the social services law or until such time as the court issues an order to terminate such suspension;

§4. Subdivisions (3) and (5) of section 530 of the vehicle and traffic law, subdivision (3) as amended by chapter 539 of the laws of 1990 and subdivision (5) as amended by section 31 of part LL of chapter 56 of the laws of 2010, are amended to read as follows:

(3) Such license or privilege and renewal thereof shall be issued for a period not exceeding the period during which such person's regular driver's license or privilege has been suspended or revoked, shall be marked and identified as a restricted use license or privilege and shall be valid only: (a) during the time the holder is actually engaged in pursuing or commuting to or from his or her business, trade, occupation or profession, (b) en route to and from a driver rehabilitation program or related activity specified by the commissioner at which his or her attendance is required, (c) to and from a class or course at an accredited school, college or university or at a state approved institution of vocational or technical training, (d) en route to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of his or her household, as evidenced by a written statement to that effect from a licensed medical practitioner, or (e) enroute to and from a place, including a school, at which the child or children of the holder are cared for on a regular basis and which is necessary for the holder to maintain such holder's employment or enrollment at an accredited school, college or university or at a state approved institution of vocational or technical training and shall contain the terms and conditions under which it is issued and is valid. In the event the holder of a restricted use license or privilege is convicted of: any violation (other than parking, stopping or standing) or of operating a motor vehicle for other than his or her employment, business, trade, occupational or professional or other purposes for which the license or privilege was issued, or does not comply with other requirements established by the commissioner, such license or privilege may be revoked and the holder shall not be eligible to receive a license or privilege pursuant to this section for a period of five years from the date of such revocation. Subject to the limitations of subdivision five of of this section, a restricted use license issued to a person whose license has been

suspended for failure to make payments of child support or combined child and spousal support shall be valid for operation of a motor vehicle incident to the holder's business, trade, occupation or profession.

(5) A restricted use license or privilege shall be valid for the operation of any motor vehicle, except a vehicle for hire as a taxicab, livery, coach, limousine, van or wheelchair accessible van or tow truck as defined in this chapter subject to the conditions set forth herein, which the holder would otherwise be entitled to operate had his drivers license or privilege not been suspended or revoked. Notwithstanding anything to the contrary in a certificate of relief from disabilities or a certificate of good conduct issued pursuant to article twenty-three of the correction law, a restricted use license shall not be valid for the operation of a commercial motor vehicle. A restricted use license shall not be valid for the operation of a vehicle for hire as a taxicab, livery, coach, limousine, van or wheelchair accessible van or tow truck where the holder thereof had his or her drivers license suspended or revoked and (i) such suspension or revocation is mandatory pursuant to the provisions of subdivision two or two-a of section five hundred ten of this title; or (ii) any such suspension is permissive for habitual or persistent violations of this chapter or any local law relating to traffic as set forth in paragraph d or i of subdivision three of section five hundred ten of this title; or (iii) any such suspension is permissive and has been imposed by a magistrate, justice or judge of any city, town or village, any supreme court justice, any county judge, or judge of a district court. Except for a commercial motor vehicle as defined in subdivision four of section five hundred one-a of this title, the restrictions on types of vehicles which may be operated with a restricted license contained in this subdivision shall not be applicable to a restricted license issued to a person whose license has been suspended for failure to make payments of child support or combined child and spousal support pursuant to paragraph three of subdivision four-e of section five hundred ten of this title.

§5. This act shall take effect immediately.

14. Stays of administrative fair hearings regarding reports of child abuse or maltreatment
[F.C.A. §§1039, 1051; Soc. Serv. Law §§22(4), 422(8), 424-a(1)]

Two parallel systems, one judicial and one administrative, coexist to determine the validity of reports of suspected child abuse or maltreatment contained in the statewide central registry. Because these systems operate on different tracks with different time-frames, they sometimes produce disparate results that can be extremely harmful to the children and families involved. Because fair hearings are being held in increasing numbers and with greater dispatch than in the past, the problem of harmful, disparate results has escalated. The Family Court Advisory and Rules Committee is proposing this measure to ensure that, in cases in which parallel Family Court and administrative proceedings are in progress, the administrative fair hearing process would not precipitously advance without awaiting the outcome of the Family Court matter.

Under existing law, a report of suspected child abuse or maltreatment that is determined upon investigation to be supported by some credible evidence may form the basis for a child protective petition in Family Court pursuant to Article 10 of the Family Court Act. In accordance with the due process protections afforded by the Family Court Act, judges of the Family Court may make findings of child abuse or neglect by a preponderance of the evidence or, in particularly serious cases, may make findings of severe or repeated child abuse by clear and convincing evidence. Once findings are made, cases proceed to disposition, which results in final determinations of whether children are in need of protection. *See* Family Court Act §§1047, 1051, 1052. Alternatively, on consent of the parties, cases may be adjourned in contemplation of dismissal for a period not to exceed one year upon designated terms and conditions which, if complied with, result in dismissal of the proceedings. *See* Family Court Act §§1039, 1039-a.

Existing law permits individuals, who are the subjects of reports of suspected child abuse or maltreatment, to challenge those reports administratively by requesting that the findings be amended, even while Family Court proceedings are pending. In fact, the subjects of reports are required to request such amendments within 90 days of being notified that the child protective agency has found the report to be "indicated," *i.e.*, supported by credible evidence. The investigating child protective agency must send the relevant records to the New York State Office of Children and Family Services (OCFS) within 20 days of a request by OCFS and OCFS must make its determination regarding the request to amend within 15 days of receiving the records. *See* Social Services Law §422(8). Reports reviewed and determined by OCFS not to be indicated by a fair preponderance of the evidence must be amended to be "unfounded," which would preclude their use in court or for any purpose other than limited use by child protective agencies in subsequent investigations. *See* Social Services Law §422(5). If OCFS declines to amend the report within 90 days, or if the report is found upon the agency's review to be supported by a fair preponderance of the evidence, the report may be the subject of a fair hearing at which the agency has the burden of sustaining the report (or, as the case may be, supporting its disclosure as reasonably related to employment) by a preponderance of the evidence. *See* Matter of Lee T.T *v.* Dowling, 87 N.Y.2d 699 (1996).

In many, if not most, cases, the Family Court proceeding has concluded prior to the resolution of the administrative review and fair hearing process. Indeed, the Legislature clearly contemplated that the administrative process would be informed by and, in cases in which a judicial adjudication has been made, bound by the results of the judicial proceeding. Section 422(8)(b) of the Social Services Law provides that the fact that the Family Court has made a finding of child abuse or neglect regarding an allegation forming the basis of a report of child abuse or maltreatment creates an "irrebuttable presumption" that a fair preponderance of the evidence supports the allegation. A Family Court finding is thus conclusive proof by statute of the fact that a report is "indicated" and, as noted, is dispositive as well of whether an allegation of abuse or neglect against the subject of the report (the "Respondent" in the Family Court proceeding) has been proven by a preponderance of the evidence or, in cases of severe or repeated child abuse, by the higher level of clear and convincing evidence. The conclusive effect of a Family Court finding was recognized by the Supreme Court, Appellate Division, First Department in McReynolds *v.* City of New York, 18 A.D.3d 316 (1st Dept., 2005), *leave app. denied,* 5 N.Y.3d 707 (2005), *cert. dismissed sub nom* McReynolds *v.* Office of Children and Family Services, 546 U.S. 1027 (2005). (Family Court abuse finding supports retention of maltreatment reports on State Central Register).

However, in some cases the Family Court proceeding is still pending when the statutory deadline looms for resolution of the administrative process. Unfortunately, the statute is silent on what impact the pendency of an unresolved Family Court case should have on the administrative process. This has led to anomalous results, including cases in which the administrative review or fair hearing resulted in a determination that the report had been "unfounded," although the Family Court ultimately determined the case to be fully proven under Article 10 of the Family Court Act. One disturbing example was an adoption case in which the prospective adoptive parent received a clearance from the child abuse registry, even though she had been adjudicated in Family Court for child abuse. In some instances in which the administrative amendment of the report as "unfounded" has occurred prior to the adjudication of the Family Court proceeding, the conversion of the report to "unfounded" has precluded its admissibility in the Family Court proceeding, notwithstanding its clear admissibility pursuant to Family Court Act §1046(a)(v). In other cases, the administrative process has operated entirely without reference to the Family Court process, with administrative law judges unaware that Family Court judges have made adjudications that should, in fact, trigger the irrebuttable presumption that such reports are substantiated ("indicated").

The Committee is proposing a simple solution to this conundrum that is designed to harmonize the administrative and judicial processes. The proposal would amend sections 22(4), 422(8) and 424-a(1) of the Social Services Law to provide that where a proceeding pursuant to Article 10 of the Family Court Act is pending in Family Court with respect to a child named in a child abuse or maltreatment report, the time periods for amendments and for requesting and resolving fair hearings should not begin to run until the Family Court matter has been concluded. The administrative process must, therefore, await a disposition of the Family Court proceeding or the conclusion of a period of an adjournment in contemplation of dismissal of the Family Court case, whichever occurs later. Further, where a Family Court proceeding is pending, the local child protection agency (the Petitioner in the Family Court matter) must provide the NYS OCFS with copies of pleadings and court orders and must report the status of the action. NYS OCFS would then be required to defer its administrative review and determination until the conclusion of the Family Court case. Additionally, conforming amendments are made to Social Services

Law §§422(8) and 424-a to incorporate the "fair preponderance of the evidence" standard of Social Services Law §424-a(1)(e)(iv) enacted by chapter 323 of the Laws of 2008.

These requirements for an automatic stay, transfer of necessary records and status reports will prevent the administrative and judicial processes from operating at cross-purposes and will avoid inconsistent results. In ensuring that administrative processes will be resolved with the benefit of knowledge of the outcome of the Family Court cases, and in protecting the admissibility of necessary records in Family Court, this proposal will significantly further the goals of justice and accuracy in both the administrative and judicial realms.

Proposal

AN ACT to amend the family court act and the social services law, in relation to administrative fair hearings regarding reports of child abuse or maltreatment in the state central registry

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1039 of the family court act is amended by adding a new subdivision (h) to read as follows:

(h) The petitioner shall notify the office of children and family services, in accordance with sections 422 and 424-a of the social services law, of the outcome of an adjournment in contemplation of dismissal pursuant to this section, including dismissal of the petition upon expiration of the adjournment or, where the proceeding has been restored to the calendar, of any proceedings under this article following such restoration.

§2. Section 1051 of the family court act is amended by adding a new subdivision (g) to read as follows:

(g) The petitioner shall notify the office of children and family services, in accordance with sections 422 and 424-a of the social services law, of any findings of abuse or neglect and of any orders of dismissal entered pursuant to this section.

§3. Paragraph (a) of subdivision 4 of section 22 of the social services law, as added by chapter 473 of the laws of 1978, is amended to read as follows:

(a) Except as provided in paragraph (c) of subdivision two of section four hundred twenty-four-a of this chapter and in paragraph (b) of this subdivision, any appeal pursuant to this section must be requested within sixty days after the date of the action or failure to act complained of. However, where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in a child abuse or maltreatment report that is the subject of an appeal pursuant to sections four hundred

twenty-two or four hundred twenty-four-a of this chapter, the period to request an appeal shall not commence, any pending appeal shall be stayed and the appeal shall not be determined until the disposition of such family court proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later.

§4. Paragraphs (a) and (b) of subdivision 8 of section 422 of the social services law, paragraph (a) as amended by chapter 323 of the laws of 2008 and paragraph (b) as amended by chapter 12 of the laws of 1996, are amended to read as follows:

(a)(i) At any time subsequent to the completion of the investigation but in no event later than ninety days after the subject of the report is notified that the report is indicated the subject may request the commissioner to amend the record of the report. If the commissioner does not amend the report in accordance with such request within ninety days of receiving the request, the subject shall have the right to a fair hearing, held in accordance with paragraph (b) of this subdivision, to determine whether the record of the report in the central register should be amended on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this title. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in the child abuse or maltreatment report that is the subject of a request to amend under this section, the ninety-day period to request an amendment of the report and the ninety-day period for the commissioner to amend the report shall not commence and any pending request to amend the report shall be stayed until the disposition of such family court proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later.

(ii) Upon receipt of a request to amend the record of a child abuse and maltreatment report the office of children and family services shall immediately send a written request to the child protective service or the state agency which was responsible for investigating the allegations of abuse or maltreatment for all records, reports and other information maintained by the service or state agency pertaining to such indicated report. The service or state agency shall as expeditiously as possible but within no more than twenty working days of receiving such request, forward all records, reports and other information it maintains on such indicated report to the office of children and family services, including a copy of any petition and court order or orders with respect to a proceeding pursuant to article ten of the family court act either pending or disposed of regarding such report. Where a proceeding

pursuant to article ten of the family court act is pending regarding a child named in the child abuse or maltreatment report that is the subject of a request to amend under this section, the child protective service or state agency, as applicable, shall report the status of the family court proceeding to the office of children and family services, which shall defer its review and determination pending the disposition of the proceeding or conclusion of any period of adjournment of the proceeding in contemplation of dismissal, whichever is later. Immediately upon the disposition of the proceeding or conclusion of any adjournment in contemplation of dismissal, the child protective service or state agency, as applicable, shall report the disposition of the proceeding or outcome of the adjournment in contemplation of dismissal, to the office of children and family services. The office of children and family services shall as expeditiously as possible but within no more than fifteen working days of receiving such materials from the child protective service or state agency, review all such materials in its possession concerning the indicated report and determine, after affording such service or state agency a reasonable opportunity to present its views, whether there is a fair preponderance of the evidence to find that the subject committed the act or acts of child abuse or maltreatment giving rise to the indicated report and whether, based on guidelines developed by the office of children and family services pursuant to subdivision five of section four hundred twenty-four-a of this title, such act or acts could be relevant and reasonably related to employment of the subject of the report by a provider agency, as defined by subdivision three of section four hundred twenty-four-a of this title, or relevant and reasonably related to the subject of the report being allowed to have regular and substantial contact with children who are cared for by a provider agency, or relevant and reasonably related to the approval or disapproval of an application submitted by the subject of the report to a licensing agency, as defined by subdivision four of section four hundred twenty-four-a of this title. In determining whether there is a fair preponderance of the evidence that the subject committed the act or acts of child abuse or maltreatment giving rise to the indicated report, the fact that there is a family court finding of abuse or neglect against the subject in regard to an allegation contained in the report shall create an irrebuttable presumption that the allegation is substantiated by a fair preponderance of the evidence.

(iii) If it is determined at the review held pursuant to this paragraph (a) that there is no credible evidence in the record to find that the subject committed an act or acts of child abuse or maltreatment,

the [department] office of children and family services shall amend the record to indicate that the report is "unfounded" and notify the subject forthwith.

(iv) If it is determined at the review held pursuant to this paragraph (a) that there is [some credible] a fair preponderance of the evidence in the record to find that the subject committed such act or acts but that such act or acts could not be relevant and reasonably related to the employment of the subject by a provider agency or to the subject being allowed to have regular and substantial contact with children who are cared for by a provider agency or the approval or disapproval of an application which could be submitted by the subject to a licensing agency, the [department] office of children and family services shall be precluded from informing a provider or licensing agency which makes an inquiry to the [department] office of children and family services pursuant to the provisions of section four hundred twenty-four-a of this title concerning the subject that the person about whom the inquiry is made is the subject of an indicated report of child abuse or maltreatment. The [department] office of children and family services shall notify forthwith the subject of the report of such determinations and that a fair hearing has been scheduled pursuant to paragraph (b) of this subdivision. The sole issue at such hearing shall be whether the subject has been shown by [some credible] a fair preponderance of the evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report.

(v) If it is determined at the review held pursuant to this paragraph (a) that there is [some credible] a fair preponderance of the evidence in the record to prove that the subject committed an act or acts of child abuse or maltreatment and that such act or acts could be relevant and reasonably related to the employment of the subject by a provider agency or to the subject being allowed to have regular and substantial contact with children cared for by a provider agency or the approval or disapproval of an application which could be submitted by the subject to a licensing agency, the [department] office of children and family services shall notify forthwith the subject of the report of such determinations and that a fair hearing has been scheduled pursuant to paragraph (b) of this subdivision.

(b)(i) If the [department] office of children and family services, within ninety days of receiving a request from the subject that the record of a report be amended, does not amend the record in accordance with such request, the [department] office of children and family services shall schedule a fair hearing and shall provide notice of the scheduled hearing date to the subject, the statewide central register and, as appropriate, to the child protective service or the state agency which investigated the report. Where a

proceeding pursuant to article ten of the family court act is pending with respect to a child named in a child abuse or maltreatment report that is the subject of a request to amend under this section, the period to schedule the fair hearing regarding the failure to amend shall not commence, any pending fair hearing shall be stayed and the fair hearing shall not be determined until the disposition of such family court proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later. Where a proceeding pursuant to article ten of the family court act is pending, the child protective service or state agency, as applicable, shall report the status of the family court proceeding to the office of children and family services. Immediately upon the disposition of the proceeding or conclusion of any adjournment in contemplation of dismissal, whichever is later, the child protective service or state agency, as applicable, shall report the disposition of the proceeding or outcome of the adjournment in contemplation of dismissal, to the office of children and family services.

(ii) The burden of proof in such a hearing shall be on the child protective service or the state agency which investigated the report, as the case may be. In such a hearing, the fact that there is a family court finding of abuse or neglect against the subject in regard to an allegation contained in the report shall create an irrebuttable presumption that said allegation is substantiated by [some credible] a fair preponderance of the evidence. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in the child abuse or maltreatment report that is the subject of a fair hearing under this section, the office of children and family services shall defer its determination until the disposition of such family court proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later.

§5. Subparagraphs (i), (ii) and (iii) and (v) of paragraph (e) of subdivision 1 of section 424-a of the social services law, as amended by chapter 12 of the laws of 1996, are amended to read as follows:

(i) Subject to the provisions of subparagraph (ii) of this paragraph, the [department] office of children and family services shall inform the provider or licensing agency, or child care resource and referral programs pursuant to subdivision six of this section, whether or not the person is the subject of an indicated child abuse and maltreatment report only if: (a) the time for the subject of the report to request an amendment of the record of the report pursuant to subdivision eight of section four hundred twenty-two has expired without any such request having been made; or (b) such request was made within such time and a fair hearing regarding the request has been finally determined by the commissioner and

the record of the report has not been amended to unfound the report or delete the person as a subject of the report. Where a request for an amendment of the record and/or a fair hearing has been made regarding an indicated report, but action on such request has been deferred because of the pendency of a proceeding pursuant to article ten of the family court act, the office of children and family services shall inform the provider or licensing agency or child care resource and referral program that there is an indicated report that is the subject of a pending family court proceeding. Once the office of children and family services is informed by the child protective service or state agency, as applicable, that a disposition of the family court proceeding has been ordered or a period of any adjournment of such proceeding in contemplation of dismissal has concluded, whichever is later, and the office of children and family services has taken action regarding the request to amend or the fair hearing, the office of children and family services shall inform the provider or licensing agency or child care resource and referral program of its action regarding the indicated report.

(ii) If the subject of an indicated report of child abuse or maltreatment has not requested an amendment of the record of the report within the time specified in subdivision eight of section four hundred twenty-two of this title or if the subject had a fair hearing pursuant to such section prior to January first, nineteen hundred eighty-six and an inquiry is made to the [department] office of children and family services pursuant to this subdivision concerning the subject of the report or where a request for an amendment of the record and/or a fair hearing has been made regarding an indicated report, but action on such request has been deferred because of the pendency of proceeding pursuant to article ten of the family court act, the [department] office of children and family services shall, as expeditiously as possible but within no more than ten working days of receipt of the inquiry, determine whether, in fact, the person about whom an inquiry is made is the subject of an indicated report. Upon making a determination that the person about whom the inquiry is made is the subject of an indicated report of child abuse and maltreatment, the [department] office of children and family services shall immediately send a written request to the child protective service or state agency which was responsible for investigating the allegations of abuse or maltreatment for all records, reports and other information maintained by the service or state agency on the subject. The service or state agency shall, as expeditiously as possible but within no more than twenty working days of receiving such request, forward all records, reports and other information it maintains on the indicated report to the [department]

office of children and family services, including a copy of any petition and court order or orders with respect to a proceeding pursuant to article ten of the family court act either pending or disposed of regarding such report. The [department] office of children and family services shall, within fifteen working days of receiving such records, reports and other information from the child protective service or state agency, review all records, reports and other information in its possession concerning the subject, and determine whether there is [some credible] a fair preponderance of the evidence to find that the subject had committed the act or acts of child abuse or maltreatment giving rise to the indicated report. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in the child abuse or maltreatment report, the child protective service or state agency, as applicable, shall report the status of the proceeding to the office of children and family services, which shall defer its review and determination until the disposition of such proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later. Immediately upon the disposition of the proceeding or conclusion of any adjournment in contemplation of dismissal, the child protective service or state agency, as applicable, shall report the disposition of the proceeding or outcome of the adjournment in contemplation of dismissal, to the office of children and family services.

(iii) If it is determined, after affording such service or state agency a reasonable opportunity to present its views, that there is [no credible] not a fair preponderance of the evidence in the record to find that the subject committed such act or acts, the [department] office of children and family services shall amend the record to indicate that the report was unfounded and notify the inquiring party that the person about whom the inquiry is made is not the subject of an indicated report. In determining whether there is a fair preponderance of the evidence that the subject committed the act or acts of child abuse or maltreatment giving rise to the indicated report, the fact that there is a family court finding of abuse or neglect against the subject in regard to an allegation contained in the report shall create an irrebuttable presumption that the allegation is substantiated by a fair preponderance of the evidence. If the subject of the report had a fair hearing pursuant to subdivision eight of section four hundred twenty-two of this title prior to January first, nineteen hundred eighty-six and the fair hearing had been finally determined by the commissioner and the record of the report had not been amended to unfound the report or delete the person as a subject of the report, then the [department] office of children and family services shall

determine that there is [some credible] a fair preponderance of the evidence to find that the subject had committed the act or acts of child abuse or maltreatment giving rise to the indicated report.

(v) If it is determined after a review by the [department] office of children and family services of all records, reports and information in its possession concerning the subject of the report that there is [some credible] a fair preponderance of the evidence to prove that the subject committed the act or acts of abuse or maltreatment giving rise to the indicated report and that such act or acts are relevant and reasonably related to issues concerning the employment of the subject by a provider agency or to the subject being allowed to have regular and substantial contact with children cared for by a provider agency or the approval or disapproval of an application which has been submitted by the subject to a licensing agency, the [department] office of children and family services shall inform the inquiring party that the person about whom the inquiry is made is the subject of an indicated report of child abuse and maltreatment; the [department] office of children and family services shall also notify the subject of the inquiry of his or her fair hearing rights granted pursuant to paragraph (c) of subdivision two of this section.

§6. This act shall take effect immediately and shall apply to requests for appeals and fair hearings pending as of such effective date.

15. Orders for recoupment of over-payments of child support in Family and Supreme Court proceedings [F.C.A. §451; DRL §240]

Neither the Family Court Act nor the Domestic Relations Law address an issue that is frequently presented in both Family and Supreme Court proceedings, that is, the question of whether a support obligor who has overpaid on a child support order may recoup all or part of those payments. New York's statutory framework is silent as to whether recoupment should be available at all and, if so, what court, if any, should entertain such applications, what the standard should be, whether recoupment should be credited toward future support or arrearages and over what period of time payments should be made or credited. Since the equities favor court intervention to provide redress to a party who has overpaid in particular cases in which the recipient of the payments has been unjustly enriched, the Family Court Advisory and Rules Committee is proposing this measure to fill this substantive and procedural void.

First, the Committee's proposal provides that the court that issued or modified the child support order for which an overpayment is alleged possesses continuing jurisdiction over an application for recoupment. This would make clear that such applications may not be made in a local small claims, civil, district, city, town or village court, but must be made in the court that issued or modified the child support order in question. In the case of an order issued by a Supreme Court without a reservation of exclusive jurisdiction, the Family Court would also be authorized to adjudicate a recoupment application. The proposal also precludes an application for recoupment of payments made to cover a period prior to the existence of a child support order, which had been the ground for denial of recoupment in the Appellate Division, Second Department, case of Foxx *v.* Foxx, 114 A.D.2d 605, 494 N.Y.S.2d 446 (3d Dept., 1985).

Second, the measure provides a standard for determining whether recoupment of all or part of an alleged overpayment would be appropriate, that is, "where the interests of justice require," as well as specification of the proof required. The applicant would need to provide proof of the overpayment, as well as proof "that the amount of the recoupment and the method and rate of its collection will not substantially impair the custodial parent's ability to meet the financial needs of the child or children." Finally, the court would be required to state its reasons on the record for any order granting or denying recoupment.

While some appellate courts have permitted recoupment of support overpayments in certain circumstances, recoupment has frequently been denied on the basis of a long-standing public policy against recoupment.[59] While none of these cases explain the rationale or roots of this public policy, it is

[59] *See, e.g.*, Johnson *v.* Chapin, 12 N.Y.3d 461 (2009), *rearg. Denied*, 13 N.Y.3d 888 (2009); Apjohn *v.* Lubinski, 114 A,D,3d 1061 (3rd Dept., 2014); Krowl *v.* Nightingale, 103 A.D.3d 726 (2nd Dept., 2013); Mairs *v.* Mairs, 61 A.D.3d 1204 (3d Dept., 2009); Matter of Taddonio *v.* Wasserman-Taddonio, 51 A.D.3d 935, 858 N.Y.S.2d 721 (2d Dept., 2008); Matter of Annette M.R. *v.* John W.R., 45 A.D.3d 1306, 845 N.Y.S.2d 616 (4th Dept., 2007); Colicci *v.* Ruhm, 20 A.D.3d 891, 798 N.Y.S.2d 280 (4th Dept., 2005); Niewadowski *v.* Dower, 286 A.D.2d 948, 731 N.Y.S.2d 420 (4th Dept., 2001); Baraby *v.* Baraby, 250 A.D.2d 201, 205, 681 N.Y.S.2d 826 (3d

safe to assume that, consistent with the underpinnings of the Family Court Act, the Domestic Relations Law and specifically the *Child Support Standards Act*, the public policy disfavoring recoupment must be rooted in a concern for the best interests of the children involved.

Assuming this is the case, the Committee's proposal is carefully tailored to incorporate this public policy while at the same time permitting the courts, where justice warrants, to provide a fair result to a support obligor in circumstances in which the child or children will not be harmed. The measure is not suggesting a balancing of interests but, instead, includes lack of hardship to the children as an element of proof that the applicant for recoupment must demonstrate in addition to the overpayment itself. The Court would be authorized to order partial recoupment in order to obviate any hardship to the children. Inclusion of the requirement for proof that the amount of the recoupment itself, as well as both the method and rate of its collection, will not create a financial hardship for the custodial parent in meeting the child's or children's financial needs is, in fact, consistent with case law in several other states that have required lack of hardship to the children as a prerequisite for recoupment.[60]

The circumstances that give rise to overpayments of child support are varied. Notably, where a mother obtained a child support order in New York after a Connecticut order of support had expired upon the child's eighteenth birthday, the Court of Appeals, in Spencer *v.* Spencer, 10 N.Y.3d 60, 853 N.Y.S.2d 274 (2008), reversed the New York order on the ground that Connecticut possessed exclusive, continuing jurisdiction under the *Uniform Interstate Family Support Act.* The Court remanded the matter, inter alia, for a determination regarding recoupment. Perhaps the most common situation where recoupment has been approved by courts has been where a court has ordered a downward modification of a child support order, but the Support Collection Unit of the county Department of Social Services has not immediately reduced the previously applicable automatic income deduction order. *See, e.g.,* Francis *v*. Francis, 156 A.D.2d 637, 548 N.Y.S.2d 816 (2d Dep't 1989). Recoupment has also been approved where an appellate court reversed a lower court order for child support on the ground that it involved a misapplication of, or faulty mathematical calculation under, the *Child Support Standards Act*. *See*, *e.g.*, People *ex rel*. Breitstein *f.k.a.*. Aaronson *v*. Aaronson, 3 A.D. 3d 588, 771 N.Y.S. 2d 159 (2d Dep't 2004); F.S. *v.* K.O.*,* 42 Misc.3d 466 (Fam. Ct., Albany Co., 2013). It has also been permitted where a parent prepaid child support for a period in which the child no longer lived with the recipient of the payments. *See*, e.g., Aulov *v.* Yukhananova, 31 Misc.3d 1226(A), 929 N.Y.S.2d 198, 2011 WL 1833263, 2011 N.Y. Slip Op. 50853(U) (Sup. Ct., Queens Co., 2011). The Appellate Division, Second

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Dept., 1998); Baranek *v.* Baranek, 41 Misc.3d 145 (A), 983 N.Y.S.2d 201, 2013 NY Slip Op. 52075 (App. Term, 2nd Dept., 2013) (U); Ramos *v.* Chacon, 30 Misc.3d 145(A); 926 N.Y.S.2d 346, 2011 NY Slip Op. 50433 (App. Term, 1st Dept, 2011)(U).

[60] *See, e.g.,* Griess *v.* Griess, 9 Neb. App. 105, 608 N.W.2d 217 (2000); In re Marriage of DiFatta, 306 Ill. App. 3d 656, 239 Ill. Dec. 795, 714 N.E.2d 1092 (2d Dist. 1999); In re Marriage of Olsen, 229 Ill. App. 3d 107, 171 Ill. Dec. 39, 593 N.E.2d 859 (1st Dist. 1992); Zofcak *v.* Zofcak, 8 Conn. L. Rptr. 18, 1992 WL 360591 (Conn. Super. Ct. 1992); Pellar *v.* Pellar, 178 Mich. App. 29, 443 N.W.2d 427 (1989); Topper *v.* Topper, 553 A.2d 639 (Del. 1988). *See generally,* "Right to Credit on Child Support for Previous Overpayment to Custodial Parent for Minor Child While a Child is Not Living With Obligor Parent," 7 A.L.R.6th 411 (2005).

Department, approved applying an over-payment of child care expenses to reduce arrears in a case in which the child was 17 years old. *See* Zengling *v.* *Shenglin Lu,* 110 A.D.3d 729 (2nd Dept., 2013). Finally, recoupment may be justified where a support obligor, who is making payments pursuant to a child support order, or a support obligor's employer, who is automatically deducting child support payments from the support obligor's paycheck, is unaware that the child, who is the beneficiary of the order, has become emancipated through marriage.

For each of these situations, as well as others that may arise, the interests of justice may be shown to warrant recoupment of all or a portion of the overpayments, with the rate and mode of recoupment dictated by the particular facts of the case and needs, if any, of the child. The Committee's proposal would provide a needed clarification that courts issuing or modifying child support orders have jurisdiction to vindicate those interests and would fill a long-standing procedural void in New York State's *Child Support Standards Act.*

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to recoupment of overpayments of child support in family and supreme court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 451 of the family court act is amended by adding a new subdivision 3 to read as follows:

3. The court that issued a child support order or an order of modification under this act has continuing jurisdiction over motions seeking recoupment of overpayments of child support. Where an order was issued by the supreme court without a reservation of jurisdiction or was transferred or referred to the family court, the family court may exercise jurisdiction over an application for recoupment. Where the interests of justice require, the court may allow recoupment of all or part of the overpayment of a child support obligation upon proof of the overpayment and upon proof that the amount of the recoupment and the method and rate of its collection will not substantially impair the custodial parent's ability to meet the financial needs of the child or children. The court shall state its reasons on the record for any order issued under this subdivision.

§2. Section 240 of the domestic relations law is amended by adding a new subdivision 6 to read as follows:

6. The court that issued a child support order or an order of modification under this act has continuing jurisdiction over motions seeking recoupment of overpayments of child support. Where an order was issued by the supreme court without a reservation of jurisdiction or was transferred or referred

to the family court, the family court may exercise jurisdiction over an application for recoupment. Where the interests of justice require, the court may allow recoupment of all or part of the overpayment of a child support obligation upon proof of the overpayment and upon proof that the amount of the recoupment and the method and rate of its collection will not substantially impair the custodial parent's ability to meet the financial needs of the child or children. The court shall state its reasons on the record for any order issued under this subdivision.

§3. This act shall take effect on the ninetieth day after it shall have become a law.

16. Compensation of guardians ad litem appointed for children and adults in civil proceedings out of public funds [CPLR §1204]

While attorneys for children assigned to represent children under Judiciary Law §35 or Family Court Act §249 are remunerated out of State funds, where independent means are not available, no analogous provision for compensation from public funds exists for guardians ad litem appointed for children and impaired adults in civil proceedings pursuant to section 1204 of the Civil Practice Law and Rules (CPLR). The Family Court Advisory and Rules Committee, with the support of the Chief Administrative Judge's Advisory Committee on Civil Practice, is proposing this measure to redress that inequity.

There are a variety of situations in which children and adults may be deemed by judges to require the protection afforded by a guardian ad litem. For example, in Family Court, the respondent in a child protective proceeding (the parent of the child who is allegedly mistreated) may be under 18 years of age. An adult may require appointment of a guardian ad litem if his or her mental capacity is challenged, for instance, in termination of parental rights proceedings based on the parental mental illness or developmental disability. Additionally, a guardian ad litem is occasionally appointed in matrimonial proceedings in Supreme Court in lieu of a an attorney for a child.

While judges now have the authority to make these appointments, they are reluctant to do so because they cannot guarantee that the guardian ad litem will receive any payment. Section 1204 of the CPLR authorizes payment for the services of a guardian ad litem by "any other party or from any recovery had on behalf of the person whom such guardian represents or from such person's other property." Neither the Family Court Act nor the CPLR provide for payment where there is no monetary corpus from which payment can be made, and the courts have ruled that no public funds may be used in such circumstances. *See* Matter of Wood *v.* Cordello, 91 A.D. 2d 1178 (4th Dept. 1983). *See also* Matter of Baby Boy O., 298 A.D.2d 677 (3d Dept., 2002)(County Commissioner of Social Services could not be ordered to pay for guardian ad litem as he was not a party). In Family Court proceedings, the parties are often indigent and thus unable to compensate the guardian ad litem.

This proposal would authorize payment for the services of the guardian ad litem out of public funds, as a state charge, where the guardian served on behalf of a child, and as a county charge, if the guardian served on behalf of an adult, consistent with the present statutory sources of funding for assignment of attorneys for children and counsel for indigent adults. By virtue of section 165 of the Family Court Act, section 1204 of the CPLR, as amended, would apply to Family Court proceedings. In addition, if the proceeding is one in which there is a subsequent monetary recovery, the funds could to be recovered pursuant to section 1103 of the CPLR.

Proposal

AN ACT to amend the civil practice law and rules, in relation to compensation of guardians ad litem

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1204 of the civil practice law and rules is amended to read as follows:

§1204. Compensation of guardian ad litem. A court may allow a guardian ad litem a reasonable compensation for [his] the guardian's services to be paid in whole or part by any other party or from any recovery had on behalf of the person whom such guardian represents or from such person's other property, or if there is no such source, compensation for services shall be from state funds appropriated to the judiciary in the same amounts established by subdivision three of section thirty-five of the judiciary law, if the guardian ad litem has been appointed for an infant, and out of county funds in the same amounts established by section seven hundred twenty-two-b of the county law, if appointed for an adult. No order allowing compensation shall be made except on an affidavit of the guardian or [his] the guardian's attorney showing the services rendered.

§2. This act shall take effect immediately.

IV. Future Matters:

Under the leadership of the Committee's co-chairs, Hon. Michele Pirro Bailey, Judge of the Family Court, Onondaga County, and Hon. Peter Passidomo, Judge of the Family Court, Bronx County, the Family Court Advisory and Rules Committee had a remarkably productive year in 2018. In addition to its significant legislative achievement regarding school-related child neglect and Persons in Need of Supervision proceedings, the Committee recommended significant rules revisions, as well as numerous new and revised forms, that have been posted on the Unified Court System's Internet web-site for ready public access (http://www.nycourts.gov).

In addition to reviewing legislative proposals, the Committee will continue its comprehensive review of the Family Court rules with a view towards recommending possible revisions. Further, the Committee's five subcommittees are expected to be actively engaged in the following projects, among others, during the coming year:

• Child Welfare: The Subcommittee will continue to explore means of expediting the filing of child welfare proceedings, including improvements that may be made in the area of service of process and timely diligent searches for parents and relatives, as well as incorporating innovative practices from other states in child protective, permanency and termination of parental rights proceedings. The Subcommittee will explore possible changes to statutes and policies regarding, among others, supervision of parents, warrants for youth absconding from foster care and procedures for violations of conditional surrenders. It will also continue its efforts to monitor implementation of significant legislation and regulations in the child welfare area, including, *inter alia*, the Federal *Families First Act, the Every Student Succeeds Act,* the *Preventing Sex Trafficking and Strengthening Families Act* and the *Indian Child Welfare Act,* as well as State statutes in the child welfare area.

• Juvenile Justice: With the second phase of of the "raise the age" statute to be implemented in 2019, the Subcommittee will continue to focus on the myriad questions and issues raised by the legislation. The Subcommittee will also explore the issue of inter-county juvenile delinquency proceedings, including the absence of adjustment consideration for foster care youth who commit offenses in counties in which they have been placed out of their homes. In conjunction with its proposals regarding restraints of juveniles in courtrooms and video recording of interrogations, as well as with the increase in the use of risk-assessment instruments, the Subcommittee will keep track of innovations, laws and practices in other states. Particularly in light of implications for addressing the needs of cross-system youth (youth with both juvenile justice and child welfare cases), the Subcommittee will review proposals regarding information- and record-sharing among education, mental health and child welfare agencies and the courts. Building upon the recent enactment of Criminal Procedure Law §160.59, the Subcommittee will explore means of reducing unwarranted collateral consequences of juvenile delinquency and Persons in Need of Supervision adjudications, *e.g.*, by developing mechanisms by which juvenile records may be sealed after an adjudicated youth has not had a juvenile or criminal case for a designated period of time. Finally, with a particular concern for effective evidence-based approaches to reentry of youth from facilities back to their

neighborhoods, the Subcommittee will also continue its advocacy for its permanency planning proposal and for greater support for Family Court probation and community-based alternatives to detention and placement.

• Child Support and Parentage: A major focus for the Subcommittee in 2019 will be the implementation, in coordination with the New York State Office of Temporary and Disability Assistance, of recent Federal regulations regarding child support, which may require statutory, rules and forms changes. The Subcommittee will consider any ramifications of changes at the Federal level, *inter alia*, regarding taxes and health-care. The Subcommittee will also continue to monitor implementation of the spousal maintenance guidelines statute in Family Court, as well as the amended *Uniform Interstate Family Support Act,* and will continue its exploration of recent case law and possible statutes regarding parentage. The Subcommittee will continue to explore possible improvements to procedures regarding drivers' license suspensions, inter-county transfers of cases and approaches to child support proceedings involving non-wage income and self-employed individuals.

• Custody, Visitation and Domestic Violence: The Subcommittee will monitor implementation of recent statutes, including, *inter alia*, the judicial procedure regarding marriages of 17-year olds and the expanded standby guardianship statute. With a focus upon custody and visitation cases involving parents with mental health issues, the Subcommittee will continue to address issues regarding forensic evaluations, commenting upon proposed legislation regarding access by parties and counsel to the reports. The Subcommittee will finalize its model forensic appointment order, forms regarding protection of the reports, and guidelines for determining when forensic evaluations should be ordered. In the area of domestic violence, the Subcommittee will continue to monitor service, concurrent criminal jurisdiction, implementation of firearms statutes and other issues regarding orders of protection, as well as means of protecting abuse victims from contact with abusers in court-related programs.

• Forms and Technology: The Subcommittee will continue to propose revisions of uniform forms as necessitated by new legislation, including forms related to the implementation of the "raise the age" juvenile delinquency legislation, the increase in digitalization of court records and e-filing initiatives. The Subcommittee will continue its efforts to simplify the current orders of protection and other forms to enhance access to justice for self-represented litigants as has been recommended by the Commission to Expand Access to Civil Legal Services in New York.

* * *

The Committee, which includes experienced judges, support magistrates, court attorney referees, Family Court clerks and practitioners drawn from throughout New York State, brings a variety of valuable perspectives to the task of addressing the crushing workload and complex problems facing the Family Court. The substantial expertise of the Committee's active and diverse membership contributed to significant accomplishments in 2018 and with the substantial agenda described above, the Committee hopes to compile a similar record of achievement in 2019 as it grapples with the many difficult issues within its jurisdiction during these most difficult of times.

In conclusion, in furtherance of Chief Judge Janet DiFiore's "Excellence Initiative," the Committee pledges its continuing deep dedication in 2019 to improving the functioning of the Family Court and the quality of justice it delivers to children and families in New York State.

Respectfully submitted,

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