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 2014

A major priority of Chief Judge Lippman and long advocated by the Family Court Advisory and Rules Committee, the Legislature enacted a measure in its 2014 session amending the Family Court Act to create 25 new Family Court judgeships. Twenty preside starting on January 1, 2015 (nine in New York City and eleven outside New York City) and five more will commence on January 1, 2016, following elections in November, 2015. Additionally, three of the legislative proposals submitted by the Committee in 2014 were enacted into law. Each of these measures is summarized below.

1. Medical Treatment of Destitute Children [Laws of 2014, ch. 279; A 9732]: This measure, submitted by the Family Court Advisory and Rules Committee, amends Social Services Law §383-b to add destitute children to the categories of children for whom local commissioners of health or social services may provide consents to medical treatment. In addition to children in child abuse and neglect cases, who have been temporarily removed or placed, the measure adds children who have been placed on a temporary basis or as a disposition pursuant to Family Court Act §§1094 or 1095, respectively. **Effective: Aug. 11, 2014.**

2. Modification of Child Support (Laws of 2014, ch. 373; A 9464): In an effort to simplify the petition process, especially for the numerous unrepresented litigants in Family Court, this measure, submitted by the Family Court Advisory and Rules Committee, amends section 451 of the Family Court Act to eliminate the need for applicants to modify child support to file affidavits in addition to petitions in order to be entitled to hearings. The affidavits are duplicative of the modification petitions since both uniform forms contain provisions for the delineation of facts sufficient to satisfy one or more of the grounds for modification. The affidavit requirement is retained, however, for a petition to set aside or vacate an order of child support. No hearing is required in such a case unless the petition is accompanied by "an affidavit and other evidentiary material sufficient to establish a prima facie case for the relief requested." **Effective: Dec. 22, 2014 (90th day after the Governor's signature).**

3. Calculation of the *Child Support Standards Act* "Cap" (Laws of 2014, ch. 466; S 6784-a): This measure, submitted by the Family Court Advisory and Rules Committee, makes a technical correction to Social Services Law §111-i with respect to the method of calculating the combined parental income amount, colloquially known as the "cap." Current SSL §111-i provides that the "cap," which the NYS Office of Temporary and Disability Assistance must adjust every two years, equals the product 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 year period rounded to the nearest one thousand dollars. Use of the term "product" was most likely intended to refer to the product of the combined parental income "cap" multiplied by the combined total (that is, the sum) of the changes in the CPI-U during the preceding two-year period, that is the total level of inflation during the applicable period. However, read literally, use of the term "product" appears to require the change in the first year to be multiplied by the change in the second year. In order to better reflect the total amount of inflation during the measurement period, this measure requires the "sum" of the average annual percentage changes in the CPI-U for each of the two years to be multiplied by the existing combined parental income "cap" and then to be rounded to the nearest $1000. **Effective: February 19, 2015.**

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

As a high priority, the Committee strongly supports the efforts of Chief Judge Lippman to raise the age of criminal responsibility in New York State to 18 and looks forward to addressing the recommendations of the Governor's Commission on Youth, Public Safety and Justice during the coming year. Additionally, the Committee is proposing a comprehensive legislative agenda, including 11 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. <u>Severe child abuse and entry of orders of protection in child abuse and neglect cases onto the statewide registry of orders of protection</u>: Two serious limitations hamper the ability of the Family Court to fulfill its statutory mandate to "help protect children from injury and maltreatment and to help safeguard their physical, mental, and emotional well-being." [Family Court Act §1011]. The series of amendments to the provisions regarding severe and repeated child abuse have left one significant gap in law unaddressed, that is, the lack of authorization for the Family Court to render an enhanced finding with respect to a respondent in a child abuse case who is not a parent of the child. Moreover**,** Executive Law §221-a specifically excludes orders of protection issued in child abuse and neglect cases from entry onto the statewide automated registry of orders of protection and warrants. The Family Court Advisory and Rules Committee is proposing a measure to rectify both of these gaps in the law. First, the Committee's measure would provide that the enhanced finding of severe or repeated child abuse that may be made at an original child protective proceeding under Article 10 of the Family Court Act may be rendered with respect to any individual against whom a child protective proceeding could be brought, including a non-parent who is deemed a "person legally responsible." Second, the proposal would amend Executive Law §221-a to require all temporary and final orders of protection issued pursuant to Family Court Act §§1029 and 1056 to be entered onto the statewide registry established pursuant to the *Family Protection and Domestic Violence Intervention Act of 1994* [L. 1994, c. 222, 224],

2. <u>Consideration of spousal maintenance in calculating child support in Supreme and Family Court proceedings</u>: Addressing a source of persistent confusion in the calculation of child support has been the treatment of spousal maintenance with respect to the income of both the recipient and the payor spouse. The Family Court Advisory and Rules Committee is submitting a measure to clear up the ambiguity as to the implications for both parties. The measure would amend Family Court Act §413(1)(b)(5)(iii) and Domestic Relations Law §240(1-b)(5)(iii) to add a new subclause (I) that

would provide that alimony or spousal maintenance actually paid to a spouse who is a party to the action must be added to the recipient spouse's income, provided that the order contains an automatic adjustment to take effect upon the termination of the maintenance award. This addition would be based upon an amount already paid, e.g., an amount reported on the recipient spouse's last income tax return and would not simply be an estimate of future payments In that respect it codifies several appellate cases. *Further,* the proposal would amend the existing provision in both Family Court Act §413(1)(b)(5)(vii)(C) and Domestic Relations Law §240(1-b)(5)(vii) (C) to clarify that where spousal maintenance payments are deducted from the payor's income, the order must contain a specific provision adjusting the child support amount automatically upon the termination of the spousal maintenance award. This relieves the custodial parent of the burden of moving for a modification of the child support order upon the termination of maintenance but leaves open the possibility for either or both parties to seek a modification of the automatic adjustment if at the point that maintenance terminates, the income of either of the parties has changed in an amount that would qualify for a modification.

3. 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 Stuart LL *v.* Amy KK, -A.D.3d-, 995 N.Y.S.2d 317, 2014 NY Slip Op. 07222 (3rd Dept., 2014) and Matter of Rubackin *v.* Rubackin, 62 A.D.3d 11, 20–21, 875 N.Y.S.2d 90 (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.

4. 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. The 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; (2) disruptive courtroom behavior, as evidenced by a history of behavior that presented a substantial risk of physical harm to the child or another person; or (3) flight from the courtroom, as evidenced by a history of absconding." 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.

5. Orders for spousal maintenance in family offense proceedings: 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 temporary spousal maintenance. As is the case with temporary orders of child support, 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.

6. Dispositions of conditional discharge and probation for violations of Family Court orders of child support: In addressing particularly intractable cases of willful violations of court orders for child support, including those involving child support obligors who are self-employed or who are paid in cash or "off the books," the Family Court requires a broad range of sanctions. Incarceration may not be appropriate in all cases, since it at least temporarily cuts off a support obligor's earning capacity. The Family Court Advisory and Rules Committee is proposing a measure that would expand the range of sanctions available to the Family Court to address violations of orders that it issues. First, the measure would authorize the Family Court to direct that programs to which the Court refers support violators, including job training and other rehabilitative programs, must report to the Court regarding the party's compliance. Second, the proposal would add a new disposition of "conditional discharge" to the Family Court Act, similar to that which is applicable to juvenile delinquents. This option is particularly important for the many counties in New York State in which local probation departments, already stretched thin, are unable to provide services or supervision in Family Court child support cases. For those counties able to provide probation services in cases involving child support, the proposal provides time limits commensurate with the duration of orders of protection in Family Court family offense cases – that is, up to two years, or, if the Family Court finds aggravating circumstances, up to five years. Finally, procedures are delineated for willful violations of conditional discharge and probation.

7. Roles, rights and responsibilities of non-respondent parents in child neglect and abuse proceedings in Family Court: Notwithstanding a growing trend toward identifying and engaging both parents, including those not charged as respondents, as well as their extended families, in resolving child protective proceedings, article 10 of the Family Court Act contains a number of gaps and anomalies with respect to the treatment of non-respondent parents. This measure inserts provisions that explicitly encourage greater participation by non-respondent parents in abuse or neglect proceedings concerning their children and expands the pretrial and dispositional options available to ensure the children's safety and well being with due regard for the legal rights of both parents. The measure defines and differentiates the notices to, and roles of, parents recognized by law in contrast to those whose legal status has not been determined. It further authorizes release of children to non-respondent parents, both during the pendency of the child protective proceeding and as a disposition. Finally, it includes non-respondent parents in the provisions of Family Court Act §§1055-b, 1089 and 1096 through which a child abuse or neglect, permanency or destitute child proceeding may be resolved through an order of custody under article six of the Family Court Act in cases in which further involvement by the Family Court and local social services agency is determined not to be necessary.

8. 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 (diverted without 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.

9. Persons in need of supervision and juvenile delinquency proceedings: procedures for admissions and violations of orders of disposition: To fill gaps in the post-dispositional procedures applicable in juvenile delinquency and PINS cases, the Committee is submitting a proposal clarifying the various provisions of Articles 3 and 7 of the Family Court Act regarding violations of orders of disposition by juveniles. First, the proposal clarifies that, as in probation violation cases, the period of a conditional discharge would be tolled during the pendency of a violation petition. *See* Matter of Donald MM, 231 A.D.2d 810, 647 N.Y.S.2d 312 (3d Dept., 1996), *lve. app. denied*, 89 N.Y.2d 804 (1996). Second, the proposal would delineate the procedures for violations of suspended judgment and probation in PINS cases, drawing upon existing juvenile delinquency provisions. *See* F.C.A. §§360.2, 360.3. Finally, with respect to the fact-finding stage of PINS proceedings, in response to a long line of appellate cases, the proposal would add a new section 743 to the Family Court Act, establishing a judicial allocution procedure for accepting admissions in PINS cases, analogous to the allocution provision in juvenile delinquency cases [Family Court Act §321.3].

10. 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 a attorney for the child in a juvenile delinquency or PINS case would continue during the life of any dispositional or post-dispositional order;

• 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 independent living services necessary to assist youth 14 and older 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; 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.

11. 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 revised version of its 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.

C. Previously Endorsed Measures

The Committee is recommending resubmission of the following 16 proposals:

1. Putative fathers entitled to consent to adoptions and to notice of adoption, surrender and termination of parental rights proceedings: In 1980, following the decision of the Untied States Supreme Court in Caban *v.* Mohammed,441 US 388 (1979), the Legislature enacted new criteria defining those putative fathers who are entitled to consent to adoptions and those who are entitled simply to notice of termination of parental rights, surrender and adoption proceedings. Those entitled to notice 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, the 1980 statute fulfills none of those intentions. *See* Sponsor's Memorandum, 1980 NYS Leg. Ann. 242-243. The Family Court Advisory and Rules Committee is proposing a measure to expand and objectify the criteria for putative fathers to consent to adoptions of children who were more than six months of age at the time of the filing of the 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 filing is earliest. Those criteria would include, *inter alia*, those named on a child's birth certificate or acknowledgment of paternity, those adjudicated as fathers in New York or another state or territory, those who maintained substantial and continuous or repeated contact with the child through visits at least twice per month or through regular communication, and those who lived with the child for six months during the year prior to the child's placement in foster care or for adoption. Criteria for putative fathers entitled to notice would be expanded to include those who filed and appeared on a custody petition and those identified in an acknowledgment or order of paternity in another country that is entitled to comity in New York State.

2. Orders of protection in termination of parental rights, child protective and permanency proceedings: 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. These orders of protection, as well as those issued in child protective proceedings, must be entered on the statewide registry of orders of protection and Family Courts must inquire whether other orders have been issued regarding the parties. 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, the proposal would permit orders of protection against respondent parents in child protective proceedings to last for up to two years or, upon a finding of aggravating circumstances or violation of an order of protection, up to five years. These orders would then be able to be extended in conjunction with permanency hearings under Article 10-A of the Family Court Act or, for child protective proceedings, other post-dispositional proceedings under Article 10 of the Family Court Act. This parallels the permissible duration of orders of protection in family offense cases and would reduce the burden imposed upon domestic violence victims to request frequent extensions of protective orders. Further, 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.

3. 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, 2015) to meet two additional criteria, *i.e.*, 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.

4. 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.

5. 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 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.

6. Orders for genetic testing in child protective proceedings: Family Court Act §564 permits the Family Court in cases other than paternity cases to enter orders of filiation in limited circumstances: where both parents are before the court, where the father waives the filing of a paternity petition and his right to be heard on that petition and where the court is satisfied as to sworn statements and testimony in support of paternity. In the absence of these requisites, the court's only alternative is to direct a party to file a paternity petition. The statute provides no authority for the court to direct genetic testing which, with current DNA technology, would provide a swift and accurate answer to questions of parentage. The Committee is proposing a measure that would amend sections 532 and 564 of the Family Court Act to authorize the court to order genetic testing in non-paternity proceedings upon the consent of both parents. Where consent is not obtained, the court would be permitted to direct any party to file a verified paternity petition. Where the mother's consent is not forthcoming by reason of her absence from the court, the court would be authorized to direct genetic testing so long as she had received notice and an opportunity to be heard.. As in paternity cases, no test would be ordered in cases where the court has made a written finding that testing would not be in the child's best interests by reason of res judicata, equitable estoppel or the presumption of legitimacy. Further, Family Court Act §564 would be amended to permit the Family Court to adjudicate paternity on the basis of genetic testing, not simply on the basis of sworn statements or testimony. Corresponding amendments would be made to child protective and permanency provisions of the Family Court Act [Family Court Act §§1035, 1089].

7. Educational neglect and Persons in Need of Supervision proceedings alleging truancy or school misbehavior**:** Educational problems, whether coming to the attention of the Family Court through a PINS or educational neglect proceeding, present among the most complex challenges for the Family Court and service agencies. A comprehensive approach amending both the education PINS and educational neglect statutes is critically needed that recognizes the vital role that educators play in

resolving both categories of proceedings. Educators are critical to the efforts to divert both types of cases from the court system where possible. The Family Court Advisory and Rules Committee is proposing a measure to ensure the active participation of educators both at the diversion and at the petition stages in both PINS and educational neglect proceedings. In PINS proceedings, regardless of whether or not they are the potential petitioners, school districts or local educational agencies would need to be consulted by the designated lead diversion agencies and their efforts to divert the proceeding or, at minimum, to resolve the education-related issues in the proceeding must be documented as a prerequisite to filing. Similar requirements would be applicable in child protective proceedings in which educational neglect is alleged, that is, that the investigating child protective agencies would be required to document efforts made by school districts or local educational agencies to resolve the education-related problems. The fact that such efforts were unsuccessful would need to be pled in the petition and proven as an element of the fact-finding, since educational neglect would be 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 joined as parties so that they may participate in resolving the education issues presented.

8. Authorization for pilot programs for obtaining orders of protection by video-conference: One of the most noteworthy initiatives of the New York State Courts Access to Justice Program has been the development of the "Advocate-Assisted Family Offense Petition Program," an easy-to-use, automated program that permits an applicant for a temporary order of protection, with the aid of a trained domestic violence advocate, to prepare a family offense petition and, if needed, an address confidentiality affidavit, for filing in Family Court. The program is available at courthouse locations and is suitable for expansion to remote sites, such as Family Justice Centers, senior centers and domestic violence shelters. With video equipment connected to judges or court attorney referees at courthouses, this program can be used in conjunction with actual court proceedings on the record for the issuance of temporary orders of protection. Taking advantage of the broad potential of this technology, this measure would amend section 212 of the Judiciary Law to authorize the Chief Administrator of the Courts to "establish pilot programs for the filing of petitions for temporary orders of protection by electronic means and for the issuance of such orders by audio-visual means." Family Court Act §153-c would delineate details of the pilot programs, definitions, consultation required and elements of proposed plans. Participation in the programs would be strictly voluntary, would require the consent of the petitioner on the record and would be limited to *ex parte* applications for temporary orders of protection. Proceedings must be on the record and preserved for transcription and documentary evidence, if any, must be electronically transmitted and formally introduced into evidence. Existing laws requiring personal service of process and confidentiality of, as well as the parties' access to, records would not in any way be altered.

9. Conditions of orders of protection in matrimonial proceedings and remedies and procedures for violations of orders of protection in Family Court and matrimonial proceedings: In light of ambiguities, gaps and discrepancies in the language of the current statutes, the Committee is submitting a proposal designed to provide guidance for civil enforcement of orders of protection in Family and Supreme Courts, to remedy a disparity in the duration of probation in family offense cases and to incorporate all of the permissible conditions of orders of protection in family offense cases into the provisions regarding orders of protection in matrimonial proceedings. The proposal clarifies that the

violation procedures and consequences contained in Article 8 of the Family Court Act apply to all orders of protection and temporary orders of protection issued in family offense, child support, paternity, child custody, visitation, divorce and other matrimonial proceedings, thus building upon the incorporation in chapter 1 of the laws of 2013 of firearms license and suspension remedies into these provisions of the Family Court Act and Domestic Relations Law. The proposal makes clear that willful violators of temporary and final orders of protection in all categories of cases would be subject to the following sanctions: probation, restitution, visitation prohibition or requirement for supervision, firearms surrender, firearms license suspension or revocation and/or commitment to jail for up to six months. Finally, the proposal would authorize the Family Court to place a respondent in a family offense proceeding on probation for a period of up to two years or, where an order of protection pursuant to Family Court Act §842 has been issued for five years, a period of up to five years, thus equalizing the periods of probation with the duration of orders of protection, as extended by the legislature in 2003. *See* L.2003, c. 579.

10. Transfers of identification documents: Recognizing that victims of domestic violence may need possession of critical documents in order to be able to escape to places of safety, the Legislature, as part of Chapter 526 of the Laws of 2013, included a procedure for victims to request that local criminal and family courts direct return or transfer of "identification documents" as a condition of a temporary or final order of protection. This measure would augment and clarify the identification document transfer procedure in two respects. First, it would add to the definition of identification document "any identification document in the name of a protected child who is in the care of a protected party." Clearly, the documents required for a domestic violence victim, along with his or her child, to escape to a place of safety may well include passports, immigration documents and other documents in the name of the child. Second, in order to prevent litigants from doing an "end-run" around the courts presiding over litigation regarding marital property and other assets the measure excludes from the transfer procedure those documents that are at issue in ongoing litigation either in a Family Court child support proceeding or a matrimonial proceeding in Supreme Court. This provision is particularly critical so as not to undermine Domestic Relations Law §236B (2)(b), which requires automatic orders freezing most marital property to be served with summonses in matrimonial proceedings.

11. Reentry of 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 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 placed in foster care with 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 social services district or authorized child care agency.

12. Orders for recoupment of over-payments: 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. 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.

13. 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* in support agreements and stipulations. The proposal would provide that if an agreement or stipulation fails to comply with any of the *CSSA* requirements, it 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. Curing the problem noted by the Supreme Court, Appellate Division, Second Department in Matter of Savini *v.* Burgaleta, 34 A.D.3d 686 (2d Dept., 2006), the proposal would provide that, unless precluded by the Supreme Court, the Family Court should be considered a court of competent jurisdiction that would have 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 *Child Support Standards Act*.

14. Services for youth in juvenile delinquency and persons in need of supervision proceedings in Family Court: For the ever-shrinking population of adjudicated juvenile delinquents and Persons in Need of Supervision who require placement, provision of adequate services, both in the facilities and in the youth's communities to aid in their reintegration upon release, is absolutely essential. This measure is designed to ensure provision of necessary services and to increase the alternatives available to the Family Courts both at the dispositional stage and later when faced with applications for extensions of placement in juvenile delinquency and PINS proceedings. The proposal includes, *inter alia*:

• delineation of the responsibility for the Family Court not only to consider, but also to craft, a case-specific order, that meets the needs and best interests of the juveniles and, in juvenile delinquency cases, that balances these factors with the need for protection of the community;

• authorization for the Family Court to be able to order specific services that are necessary to facilitate the juveniles' successful return home;

• discretion for the Family Court to order intensive supervision, which may include participation in a community-based rehabilitative program, in conjunction with probation, as a disposition for adjudicated juvenile delinquents and PINS who would otherwise be placed and, in juvenile delinquency cases, to include electronic monitoring as a condition of the order;

• authorization for the Family Court to order that, in lieu of extending placement in juvenile delinquency and PINS cases, juveniles may be placed on probation for up to one year or that, in juvenile delinquency cases, juveniles may be conditionally discharged;

• a requirement that "[r]outine, emergency or other mental health treatment, including administration of psychotropic medication, shall be provided by licensed mental health professionals as authorized by law;" and

• a requirement that the New York State Education Department develop and implement standards to promote school stability for youth in out-of-home care, to require that facility educational programs meet State standards and generate credits for youth that will be recognized by local school districts and to require local school districts to promptly enroll youth in school upon their release.

15. Dispositional investigations and pre-sentence investigations in family offense proceedings and penalties for unauthorized disclosure from the statewide registry of orders of protection and warrants: In light of the importance of evidence of domestic violence to determinations in custody, visitation, guardianship and child protective proceedings, the Committee is again proposing legislation that would explicitly authorize, but not require, courts to request probation departments to conduct pre-dispositional or pre-sentence investigations in criminal and Family Court family offense cases. Further, since the statewide automated registry of orders of protection and warrants has grown into a substantial database containing approximately 2.7 million orders of protection, the need to ensure its security and integrity grows ever more compelling. The proposal thus also delineates civil and criminal penalties for unauthorized release of data from the statewide automated registry of orders of protection and warrants.

16. Compensation of guardians *ad litem*: Filling 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 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 [jfink@nycourts.gov]
Family Court Advisory and Rules Committee
New York State Office of Court Administration
25 Beaver Street, Suite 1170
New York, New York 10004

II. New or Modified Measures

1. Determinations of severe child abuse and entry of orders of protection in child abuse and neglect cases onto the statewide automated registry of orders of protection [F.C.A. §1051(e); Exec. Law §221-a(1)]

Two serious limitations hamper the ability of the Family Court to fulfill its statutory mandate to "help protect children from injury and maltreatment and to help safeguard their physical, mental, and emotional well-being." [Family Court Act §1011]. The series of amendments to the provisions regarding severe and repeated child abuse have left one significant gap in law unaddressed, that is, the lack of authorization for the Family Court to render an enhanced finding with respect to a respondent in a child abuse case who is not a parent of the child. Moreover**,** Executive Law §221-a specifically excludes orders of protection issued in child abuse and neglect cases from entry onto the statewide automated registry of orders of protection and warrants. The Family Court Advisory and Rules Committee is proposing a measure to rectify both of these gaps in the law.

Termination of parental rights on the grounds of severe or repeated child abuse was added to Social Services Law §384-b by the New York State Legislature in 1981, but these grounds were rarely utilized because of inherent difficulties in the statute. Since an initial child abuse finding need only be proven by a preponderance of the evidence, it could not be utilized to obviate the need to retry the abuse in a later termination of parental rights proceeding, since the latter requires proof by clear and convincing evidence. *Cf*., Family Court Act §1046(b)(i) and Social Services Law §384-b(3)(g). In 1999, the Legislature authorized the Family Court, in an original child abuse case designated as "severe," to render an enhanced finding pursuant to Family Court Act §§1046(b)(ii) and 1051(e) by clear and convincing evidence [L. 1999, c. 7]. Most recently, the Legislature in 2013 clarified that the enhanced finding could relate solely to abuse itself and need not include the finding that the agency had exercised diligent efforts to reunify the family, since the latter element could either be proven or dispensed with in the subsequent termination of parental rights proceeding. *See* Family Court Act §1039-b; Social Services Law §384-b(7)(e) [L.2013, c. 430]. This series of amendments has greatly facilitated the ability of the Family Court to provide critical protections for children who are victims of severe and/or repeated abuse, but did not address to whom the enhance finding could relate.

The Committee's measure would provide that the enhanced finding of severe or repeated child abuse that may be made at an original child protective proceeding under Article 10 of the Family Court Act may be rendered with respect to any individual against whom a child protective proceeding could be brought. Section 1012(a) of the Family Court Act defines a respondent as a "any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child." Abuse charges are often brought with respect to "persons legally responsible," that is, boyfriends, girlfriends and others who live in the home but are not biological parents of the abused child. Family Court Act §1012(g) defines a "person legally responsible" as "the child's custodian, guardian, or any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child." The Court of Appeals, in Matter of Yolanda D., 88 N.Y.2d 790, 651 N.Y.S.2d 1 (1996), clarified that a "person legally responsible" is an individual who "acts as the functional equivalent of a parent in a familial or household setting, in essence, as "*in loco parentis*." The Court enumerated factors to be considered in the fact-specific

assessment of whether an individual is a "person legally responsible," including, *inter alia*, the "frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s)." The Court cautioned that Family Court Act Article 10 "should not be construed to include persons who assume fleeting or temporary care of a child such as a supervisor of a play-date or an overnight visitor or those persons who provide extended daily care of children in institutional settings, such as teachers." *See also* Matter of Carmelo G., -Misc.3d-, 2014 NY Slip Op. 51703 (Unrep.)(Fam. Ct., Bronx Co., Dec. 14, 2014).

However, because Social Services Law §384-b, the termination of parental rights statute, provides that such proceedings may only be brought against parents, several court decisions have held that enhanced findings of severe or repeated child abuse may only be made in an original child abuse proceeding under Article 10 of the Family Court Act against parents as well. The Supreme Court, Appellate Division, in Matter of Leonardo V., 95 A.D.3d 1343, 944 N.Y.S.2d 917 (2nd Dept., 2012), upheld an enhanced finding of severe abuse against a father regarding his biological child, following his conviction for homicide of the child's mother, but reversed the enhanced finding that had been made against him regarding the child's half-sibling, because he was a person legally responsible for, but not the parent of, the half-sibling. Likewise, the Appellate Division, Third Department, has held that "severe abuse requires acts committed by a parent." *See* Matter of Tiarra D.; Washington County Dept. of Social Services *v.* Philip C., -A.D.3d-, 2015 N.Y. Slip Op. 00272 (3rd Dept., Jan. 8, 2015); Matter of Nicholas S. [John T.], 107 A.D.3d 1307, 1311 n 3 (2013), *leave app. denied,* 22 N.Y.3d 854 [2013). In Matter of Yamilette G., 33 Misc.3d 841, 872 N.Y.S.2d 897 (Fam. Ct., Kings Co., 2009), the Family Court made findings of both derivative child abuse and severe abuse against a mother of a surviving child after she and her "paramour" were convicted of homicide of the child's half-sibling. However, because the "paramour" was the parent of the deceased child, but not the surviving child, the Family Court made only a derivative abuse finding, but not an enhanced severe abuse finding, against the paramour. In both of these cases, the identical homicidal conduct resulted in disparate consequences. Additionally, in Matter of Meredith DD, 13 Misc. 3d 894, 821 N.Y.S.2d 741 (Fam. Ct., Chemung Co., 2013), the Family Court held that it was precluded from making an enhanced finding of severe abuse in a serious case of long-standing child sexual abuse, because the respondent, who lived in the home, was a person legally responsible for, but was not the parent of, the abused child. Clearly, in order to protect children from severe or repeated child abuse – and to protect later-born or other children from a repetition of serious and often felonious behavior -- enhanced findings by clear and convincing evidence against both parents and persons legally responsible should be able to be made in initial child abuse proceedings pursuant to Family Court Act §1051(e).

Equally important to realizing the precept articulated in sections 1011, 1039-b and 1052 of the Family Court Act that the safety of children before the Family Court is paramount, Executive Law §221-a should be amended to reverse the explicit exclusion of orders of protection issued under Article 10 of the Family Court Act from entry onto the statewide automated registry of orders of protection and warrants. The Committee's proposal would require all temporary and final orders of protection issued pursuant to Family Court Act §§1029 and 1056 to be entered onto the statewide registry. 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. 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.

With approximately 2.7 million orders of protection in the database,[1] 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 cases involving family and intimate partner violence. 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 serious child 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 child protective proceedings, the child could 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 *See* L.2008, c. 595; L.2009, c. 295. All orders, including those in child protective 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 compliance with past orders of protection.

The importance of inclusion of these orders on the registry cannot be overstated. Domestic violence is often inextricably linked with child abuse and victims of domestic violence in child abuse and neglect cases, including victims who may be respondents in these proceedings, require as much protection from their abusers as in other proceedings.[2] If a child neglect proceeding is brought against the abuser, the order of protection issued to protect both the abuse victim and the children 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%.[3] Research has estimated that children are abused at a rate 1,500 times higher than the

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[1] Source: NYS Office of Court Administration Division of Technology (Dec., 2014).

[2] Victims of domestic violence may not be charged with child neglect by reason of their children's exposure to domestic violence, unless they have failed to exercise a minimum degree of care and unless the child is thereby placed in imminent risk of impairment. Nicholson *v.* Scoppetta, 3 N.Y.3d 357 (2004). However, there are respondents in neglect and abuse proceedings, who are themselves also victims of family offenses, who should be able to obtain protection for themselves and their children without the burden of initiating separate family offense proceedings in order to obtain this relief.

[3] *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

national average in homes where domestic violence is also present.[4] Significantly, child sexual abuse has also been closely correlated with domestic violence.[5]

Protection of children against severe abuse demands that the Family Court be able to render findings of severe abuse against all individuals against whom child protective proceedings may be filed, including "persons legally responsible," as well as parents. Further, inclusion of orders of protection in such cases, as well as in all child protective cases, on the statewide registry is essential to advance the Legislature's goal of providing an integrated response in all family violence cases and of protecting all victims of domestic abuse, both parents and children, from suffering further harm.

Proposal

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

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

Section 1. Subdivision (e) of section 1051 of the family court act, as amended by chapter 430 of the laws of 2013, is amended to read as follows:

(e) If the court makes a finding of abuse, it shall specify the paragraph or paragraphs of subdivision (e) of section one thousand twelve of this act which it finds have been established. If the court makes a finding of abuse as defined in paragraph (iii) of subdivision (e) of section one thousand twelve of this act, it shall make a further finding of the specific sex offense as defined in article one hundred thirty of the penal law. In addition to a finding of abuse, the court may enter a finding of severe abuse or repeated abuse, as defined in subparagraphs (i), (ii) and (iii) of paragraph (a) or subparagraphs (i) and (ii) of paragraph (b) of subdivision eight of section three hundred eighty-four-b of the social services law, which shall be admissible in a proceeding to terminate parental rights pursuant to paragraph (e) of subdivision four of section three hundred eighty-four-b of the social services law; provided, however, that a finding of severe or repeated abuse under this section may be

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Perspective on Child Abuse," 18 *Int'l. J. Health Services* 1:97 (1988); L. McKibben, *et al.*, "Victimization of Mothers of Abused Children: A Controlled Study," 84 *Pediatrics* #3 (1989); L. Walker, *The Battered Woman Syndrome* 59 (1984)].

[4] "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)].

[5] L. Hoff, *Battered Women as Survivors* 240 (1990); M. Roy, *Children in the Crossfire* 89-90 (1988); Hewitt and Friedrich, "Effects of Probable Sexual Abuse on Preschool Children," in M.Q. Patton, ed., *Family Sexual Abuse* 59-74 (1991) [cited in J. Zorza, *supra*, at 424-425].

made against any respondent as defined in subdivision (a) of section one thousand twelve of this act. If the court makes such additional finding of severe abuse or repeated abuse, the court shall state the grounds for its determination, which shall be based upon clear and convincing evidence.

§2. Subdivision 1 of section 221-a of the executive law, as amended by sections 14 and 67 of part A of chapter 56 of the laws of 2010, is amended to read as follows:

1. The superintendent, in consultation with the division of criminal justice services, office of court administration, the office of probation and correctional alternatives, and the office for the prevention of domestic violence, 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 of the family court act, 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 [and ten] 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.

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

2. Consideration of spousal maintenance in calculating orders of child support in Supreme and Family Court proceedings [F.C.A. §413(1)(b)(5); D.R.L. §240(1-b)(b)(5)]

The *Child Support Standards Act* has promoted uniformity and fairness through application of presumptive percentages and enumerated factors to be considered in the calculation of income, deductions from income and the bases for departures from the presumptive percentages. However, one source of persistent confusion has been the treatment of spousal maintenance in the calculation of child support with respect to the income of both the recipient and the payor spouse. The Family Court Advisory and Rules Committee is submitting a measure to clear up the ambiguity as to the implications for both parties.

First, the measure would amend Family Court Act §413(1)(b)(5)(iii) and Domestic Relations Law §240(1-b)(5)(iii) to add a new subclause (I) to each that would provide that alimony or spousal maintenance actually paid to a spouse who is a party to the action must be added to the recipient spouse's income, provided that the order contains an automatic adjustment to take effect upon the termination of the maintenance award. This addition would be based upon an amount already paid, e.g., an amount reported on the recipient spouse's last income tax return and would not simply be an estimate of future payments. In that respect it codifies several appellate cases. *See, e.g.*, Simon v. Simon, 55 A.D.3d 477, 867 N.Y.S.2d 55 (1st Dept., 2008); Krukencamp *v.* Krukencamp, 54 A.D.3d 345, 862 N.Y.S.2d 571 (2nd Dept., 2008); Lee *v.* Lee, 79 A.D.3d 473 (2nd Dept.2005); Huber *v* Huber, 229 A.D.2d 904 (4th Sept., 1996).

Second, the proposal amends the existing provision in both Family Court Act §413(1)(b)(5)(vii)(C) and Domestic Relations Law §240(1-b)(5)(vii) (C) to clarify that where spousal maintenance payments are deducted from the payor's income, the order must contain a specific provision adjusting the child support amount automatically upon the termination of the spousal maintenance award. This relieves the custodial parent of the burden of moving for a modification of the child support order upon the termination of maintenance but leaves open the possibility for either or both parties to seek a modification of the automatic adjustment if at the point where maintenance terminates, the income of either of the parties has changed in an amount that would qualify for modification under Family Court Act §451(2)(b)(ii), e.g., in excess of 15% or a lapse of three years or more, One commentator has observed that the Legislature simply failed to consider the ambiguity of the statutory provision and his suggestion for the courts would apply with greater force if the Committee's measure is enacted:

> It is suggested that the court might comply with the requirement that there be a specific adjustment by making same in accordance with existing income levels, so long as either party is free to seek modification at any time upon a change in circumstances. This approach permits compliance with the statutory proviso without casting the prospective adjustment in stone because it keeps the courthouse door open to either party in the event that the prospective adjustment is out of line with actual income levels.

See T. Tippins, *New York Matrimonial Law and Practice* §7:33 (Updated Nov., 2014).

Numerous cases have held that durational spousal maintenance payments should not be deducted from the payor's income unless the order specifies some mechanism for an adjustment upon termination of the maintenance. *See, e.g.*, Zufall *v.* Zufall, 109 A.D.3d 1135, 972 N.Y.S.2d 749 (4th Dept., 2013); Schmitt *v.* Schmitt, 107 A.D.3d 1529, 968 N.Y.S.2d 284 (4th Dept., 2013); Kerrigan *v.* Kerrigan, 71 A.D.3d 737, 896 N.Y.S.2d 443 (2nd Dept., 2010); Smith *v* Smith, 1 A.D.3d 870, 872-3, 769 N.Y.S.2d 306 (3rd Dept.,2003)(citing Matter of Baker v Baker, 291 AD2d 751, 752-753 [3rd Dept., 2002] and Kessinger v Kessinger, 202 AD2d 752, 753-754 [3rd Dept., 1994]). By including not only a mechanism, but also a specific adjustment, in a child support order to take effect upon the termination of the maintenance award, the Committee's measure would enhance the long-term fairness of the order.

The statutory provisions for child support should reflect the fact that spousal maintenance is money no longer available as income to the payor, but constitutes income to the payee so long as the order or agreement for such maintenance lasts. New York State and Federal tax codes incorporate these concepts by allowing tax deductions for the payor and requiring that it be considered as income to the payee. There is no reason to distinguish the implications of maintenance when calculating child support in both Supreme and Family Court cases.

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to spousal maintenance and child support in supreme and family court

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

Section 1. Sub-clauses (G) and (H) of clause (iii) of subparagraph 5 of paragraph (b) of subdivision 1 of section 413 of the family court act, as added by chapter 567 of the laws of 1989, are amended and a new sub-clause (I) is added to read as follows:

(G) fellowships and stipends, [and]

(H) annuity payments, and

(I) alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse;

§2. Sub-clause (C) of clause (vii) of subparagraph 5 of paragraph (b) of subdivision 1 of section 413 of the family court act, as added by chapter 567 of the laws of 1989, is amended to read as follows:

(C) alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, [provided] in which event the order or agreement

[provides] shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse,

§3. Sub-clauses (G) and (H) of clause (iii) of subparagraph 5 of paragraph (b) of subdivision 1-b of section 240 of the domestic relations law, as added by chapter 567 of the laws of 1989, are amended and a new sub-clause (I) is added to read as follows:

(G) fellowships and stipends, [and]

(H) annuity payments, and

(I) alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse;

§4. Sub-clause (C) of clause (vii) of subparagraph 5 of paragraph (b) of subdivision 1-b of section 240 of the domestic relations law, as amended by chapter 567 of the laws of 1989, is amended to read as follows:

(C) alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, [provided] in which event the order or agreement [provides] shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse,

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

3. 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, -A.D.3d-, 995 N.Y.S.2d 317, 2014 NY Slip Op. 07222 (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 [2009]. " 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 Stuart LL *v.* Amy KK,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 Stuart L.L. 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.

4. Use of restraints on children appearing before the Family Court [F.C.A. §162-a]

A growing national consensus is emerging to restrict the routine use of hardware restraints upon children when they appear in court. Recognizing the particular vulnerability of children, at least 12 states have imposed a presumption against restraints either by statute, court rule or case law. 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."[6] 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 18 when they appear in all categories of Family Court proceedings.

The Committee's proposal provides that restraints must presumptively be removed "upon entry of the juvenile into the courtroom"[7] 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; (2) disruptive courtroom behavior, as evidenced by a history of behavior that presented a substantial risk of physical harm to the child or another person; or (3) flight from the courtroom, as evidenced by a history of absconding." 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.

The measure closely mirrors the presumption, exception factors and right to be heard in the Florida court rule, 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 New Hampshire, North Carolina and South Carolina.[8] It is similar to the court rules in Massachusetts, Washington and New Mexico,[9] as well as the orders that resulted from challenges to restraints in California, North Dakota, Oregon and Illinois.[10] It reflects the criticisms articulated in, and

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[6] *See In Re Amendment to Fla. Rules of Juvenile Procedure*, 26 So.2d 552, 556 (Fl., 2009).

[7] 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).

[8] *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); N.H. R.S.A. §126-U:13 (2010); N.C. Gen. Stat. §7B-2402 (2013); S.C. Code Ann. §63-19-1435 (2014).

[9] *See* 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).

[10] *See* Tiffany A. *v.* Superior Court, 150 Cal. App. 4th 1334 (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).

recommendations by, myriad commentators[11] and, most recently, in a Report and Resolution, sponsored by the American Bar Association Criminal Justice Section, that is pending before the House of Delegates for approval at its midyear meeting in February, 2015.[12] 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.[13] Nor has implementation presented any significant burdens upon the courts as requests for restraints are rare and the hearings, when held, are brief.[14]

Restrictions upon the use of mechanical restraints upon 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 State 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:

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[11] *See*, *e.g.*, P. Puritz, "Shackling Juvenile Offenders can do permanent damage to our kids," *Wash. 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 Necessary," *Juvenile* 16 *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).*

[12] American Bar Association, *Resolution and Report #107AI (*pending, House of Delegates, Feb., 2015)(www.americanbar,org, checked Dec. 29, 2014).

[13] 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 11, and ABA, *supra,* note 12. And no incidents were reported by Judge Daniel Murphy regarding ten years of experience in Linn County, Oregon. *See* Rubin, *supra*, note 11 at 11.

[14] 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 the 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 recently enacted 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 to enact a presumption against the use of restraints upon juveniles appearing before the 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, 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 11.

The Committee's proposal 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 are 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. The recognition by the Untied States Supreme Court and New York Court of Appeals of the need to protect adult criminal defendants from the adverse effects of restraints renders ever 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 eighteen, including, but not limited to, handcuffs, chains, shackles, irons or straitjackets, shall be removed upon entry of children into the courtroom.

(b) Exception. A particular form of restraint 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 available alternative necessary to prevent:

(1) physical injury to the child or another person;

(2) disruptive courtroom behavior, as evidenced by a history of behavior that presented a substantial risk of physical harm to the child or another person; or

(3) flight from the courtroom, as evidenced by a history of absconding.

§2. This act shall take effect immediately.

5. Orders for spousal maintenance in family offense proceedings [F.C.A. §§828, 842]

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. Although separate child support proceedings, with attendant notice to the support obligor and an opportunity to be heard, are necessary for final orders of support to be issued, 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 a similar emergency 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.

Consistent with measures in at least 36 other states,[15] the Family Court Advisory and Rules Committee is submitting a measure to remedy that 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 order temporary spousal maintenance. As is the case with temporary orders of child support issued in conjunction with orders of protection, the measure reflects the fact that financial disclosure will most often not yet have taken place. It thus permits issuance of a temporary order of spousal support "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.

[15] The American Bar Association Commission on Domestic and Sexual Violence has identified the following states as explicitly authorizing orders of temporary spousal support to be issued in conjunction with civil protection orders: Alabama, Alaska, Arkansas, California, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wyoming. *See Domestic Violence Civil Protection Orders (CPOs) By State* (American Bar Association, (March, 2014), available at: http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20CPO%20Availability%20Chart.authcheckdam.pdf (reviewed Dec. 19, 2014).

The measure limits the duration of the temporary spousal maintenance that can be ordered in a family offense proceeding to the earlier of 90 days following the entry of the temporary order or the entry of a temporary or permanent spousal support order either in a Family Court proceeding filed under Article 4 or in a Supreme Court matrimonial proceeding pursuant to section 236 of the Domestic Relations Law. Additionally, as is the case with temporary orders of child support, the measure reflects the fact that financial disclosure will most often not yet have taken place. It thus permits issuance of a temporary order of spousal support "notwithstanding that information with respect to income and assets of the respondent may be unavailable."

As was recognized by the Legislature in enacting the recent legislation (chapter 526 of the Laws of 2013), 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 recently 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.[16] 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 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. The Committee's measure would thus provide much-needed emergency relief.

Proposal

AN ACT to amend the family court act, in relation to orders for temporary spousal support in conjunction with temporary and final orders of protection in family court

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

Section 1. 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 for temporary spousal support in accordance with article four of this act. The court may make an order for temporary

[16] *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).

spousal support notwithstanding that information with respect to income and assets of the respondent may be unavailable. Upon making an order for temporary spousal support pursuant to this subdivision, the court shall shall set the spousal support matter down for further proceedings in accordance with article four of this act. §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 child 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 for temporary spousal support in accordance with article four of this act. The court may make an order for temporary spousal support notwithstanding that information with respect to income and assets of the respondent may be unavailable. Upon making an order for temporary spousal support pursuant to this subdivision, the court shall set the spousal support matter down for further proceedings in accordance with article four of this act.

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.

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

6. Dispositions of conditional discharge and probation in proceedings for willful violations of orders of child support in Family Court [F.C.A. §§454, 456, 456-a]

To realize the statutory goal of providing adequate support to New York's children, the Family Court must be able to rigorously enforce its orders. To do that, it must be able to secure compliance through imposition of a diverse array of sanctions that are appropriate in severity and responsive to the individual problems presented. License suspensions, Department of Taxation and Finance referrals, lottery and tax refund interceptions, sequestration of property, imposition of income deduction orders and referrals to rehabilitative or work programs, where available, are all useful tools in particular cases. *See* Family Court Act §454, *et seq*. However, in particularly intractable cases of willful violations of court orders for child support, including those involving child support obligors who are self-employed or who are paid in cash or "off the books," the ultimate sanction of incarceration may be the only meaningful sanction currently available to the Court. Clearly, incarceration, which at least temporarily cuts off a support obligor's earning capacity altogether, is a costly and sometimes self-defeating option that must be reserved for cases in which lesser sanctions have been exhausted or are not efficacious. The Family Court Advisory and Rules Committee is proposing a measure that would expand the range of sanctions available to the Family Court to address violations of orders that it issues.

First, the measure would authorize the Family Court to direct that programs to which the Court refers support violators, including job training and other rehabilitative programs, must report to the Court regarding the party's compliance. Moreover, the measure recognizes that some cases warrant conditions that may include, but may also go beyond, a single requirement that a support violator attend a designated program. Thus, similar to a provision in the juvenile delinquency statute [Family Court Act §353.1], the proposal would add a new disposition of "conditional discharge" to the Family Court Act. This option is particularly important for the many counties in New York State in which local probation departments, already stretched thin, are unable to provide services or supervision in Family Court child support cases.

For those counties able to provide probation services in cases involving child support, the benefits cannot be overstated. Compliance with support obligations may be greatly enhanced by regular, in-person monitoring by someone in authority who can compel a change of behavior under threat of a more serious sanction and who may be able, at the same time, to provide services and rehabilitative assistance to the support obligor. While explicitly authorized in the Family Court Act, probation has been only sporadically utilized in Family Court child support cases, frequently in some counties and not at all in others. Moreover, there is no authorization in the Family Court Act to combine either a probation sanction or a requirement to participate in a rehabilitative program with a sentence of incarceration, even though such a combination may present the most promise in some cases to compel the change of an offender's behavior necessary to correct the violation and ensure consistent, future provision of child support to the offender's family. Without mandating any probation departments to provide services in child support cases, the Family Court Advisory and Rules Committee's measure would ease several statutory impediments to the effective use of probation in child support cases.

In order to ease the burden for local probation departments and to ensure fairness to the probationers, the proposal would impose a limit on the duration of probation more commensurate with probation in other contexts. Alone among probation provisions in both the Family Court Act and

Criminal Procedure Law, Family Court Act §456 permits a child support obligor to be placed on probation for an extended period of time, *i.e.*, the entire duration of a child support or visitation order or order of protection. Since a child support order may last until the youngest child reaches the age of 21, this may mean more than two decades of probation – four times greater than the duration of probation for all but the most serious felonies. *Cf.*, Penal Law §65(3). This disproportionate degree of supervision is beyond the capacity of most local probation departments to provide, particularly in times of fiscal constraint, and may explain the reluctance of probation departments to become involved in child support matters. The Committee's proposal, therefore, would impose the same time limit that exists for orders of protection in family offense cases in Family Court – *i.e.*, not more than two years or, where the court finds aggravating circumstances, a period of not more than five years. *Cf.*, Family Court Act §842. This period may be extended, after notice to the support obligor and an opportunity to be heard, for an additional year upon a finding of exceptional circumstances.

Moreover, the proposal would provide the needed flexibility to the menu of sanctions available for willful violations of child support orders by adding an authorization to combine a sentence of conditional discharge, probation or a direction to participate in a rehabilitative program with a sentence of incarceration. Family Court Act §454(3)(a) already permits a sentence of intermittent incarceration to be imposed, including, for example, weekend incarceration so that an offender may work or seek gainful employment during the week. The effectiveness of this sanction, as well as sanctions of short periods of incarceration, would be significantly enhanced if the Family Court had the ability to combine it with the other sanctions available.

Finally, the measure addresses the procedures to be followed in the event of a violation of conditional discharge or probation. With respect to conditional discharge, a violation petition may be brought by the custodial parent or, upon good cause, the matter may be calendared by the Court for a hearing so long as the alleged violator receives notice and an opportunity to be heard. The latter situation may, for example, apply where a program to which the Court has referred a support obligor reports to the court that the obligor has willfully not complied with the order. The custodial parent would not have the burden of filing a violation petition, particularly since the parent would often not have the information regarding the support obligor's alleged non-compliance.

Again without burdening the custodial parent, the proposal provides that, with respect to willful violations of probation, the local probation department would file a verified probation violation petition and would provide an opportunity for the probationer and parties to be to be heard as prerequisites to revocation of probation. The procedures delineated are comparable to violations of probation in juvenile delinquency and criminal cases. Providing a mechanism consistent with due process to bring alleged child support violators to the attention of the Family Court affords essential fairness to the support obligor and benefits the families as well – taking the onus off of custodial parents to initiate and prosecute violation proceedings that should instead be handled by local probation departments.

The proposal further provides that the period of conditional discharge or probation would be tolled as of the date of filing of the violation petition, a provision similar to juvenile and criminal probation violations. *See* Penal Law §65.15(2); Family Court Act §§360.2(4), 779-a. In the event that the violation petition is not sustained, the tolling period would be credited to the period of conditional discharge or probation.

Enactment of this proposal would afford the Family Court essential, flexible tools with which to address willful violation of its child support orders so as to spur violators to modify their behavior and

live up to their obligations to support their children. It would add a vital new dispositional option – conditional discharge – that is already available to courts in criminal and juvenile delinquency proceedings and would explicitly provide authority for the Court to direct programs to report on compliance by parties referred to them. Significantly, for those probation departments that are able to provide supervision in Family Court child support cases, it would make probation a viable alternative by limiting its duration and delineating procedures to be utilized in the event of a violation of its terms and conditions. Further, the proposal would augment the effectiveness of each of these sanctions by authorizing them to be combined with sentences or suspended sentences of incarceration. In so doing, the proposed statute would improve the collection of child support for the children in the State, would make the probation provisions fairer for support obligors and would greatly enhance the Family Court's capacity to respond effectively to serious instances of willful violations of child support that are so detrimental to New York State's children.

Proposal

AN ACT to amend the family court act, in relation to dispositions of conditional discharge and probation for willful failure to comply with court orders for child support

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

Section 1. Paragraphs (b) and (c) of subdivision 3 of section 454 of the family court act is amended and new paragraphs (d) and (e) are added to such subdivision to read as follows:

(b) require the respondent to participate in a rehabilitative program if the court determines that such participation would assist the respondent in complying with such order of support and access to such a program is available. Such rehabilitative programs shall include, but are not [be] limited to, work preparation and skill programs, non-residential alcohol and substance abuse programs and educational programs. The court may direct the administrator of a program that the respondent is directed to participate in pursuant to this subdivision to report to the court periodically and at the conclusion of the program with respect to the respondent's compliance with the program; or

(c) place the respondent on probation [under] pursuant to section four hundred fifty-six of this article upon such conditions as the court may determine and in accordance with the provisions of the criminal procedure law; or

(d) conditionally discharge the respondent pursuant to section four hundred fifty-six-a of this article upon such conditions as the court may determine; or

(e) combine a sentence or a suspended sentence of incarceration pursuant to paragraph (a) of this subdivision with a requirement that the respondent participate in a rehabilitative program, be placed on

probation or be conditionally discharged pursuant to paragraph (b), (c) or (d) of this subdivision, respectively.

§2. Section 456 of the family court act, as added by chapter 809 of the laws of 1963, is amended to read as follows:

§456. Probation. (a) No person may be placed on probation under this article unless the court makes an order to that effect, either at the time of the making of an order of support or under section four hundred fifty-four. The order of probation may contain such conditions as the court may determine.

(b) The maximum period of probation may [continue so long as an order of support, order of protection or order of visitation applies to such person

(b) The court may at any time, where] be not greater than two years or, where the court finds that aggravating circumstances [warrant it, revoke an] exist, a period not greater than five years.

(i) If the court finds, at the conclusion of the original period, upon notice and an opportunity to be heard, that exceptional circumstances require an additional year of probation, the court may continue probation for a period not greater than one year.

(ii) For purposes of this section, "aggravating circumstances" shall mean circumstances indicating that a longer period of supervision is necessary to ensure long term continuing compliance with the order of support, including, but not be limited to: (A) a prior adjudication for a willful violation of a child support order or a prior order of probation in conjunction with a proceeding under this article or article five of this act; (B) a prior incident or incidents of the respondent concealing his or her whereabouts and being produced involuntarily pursuant to the issuance of a warrant; or (C) accumulation of arrearages in excess of six months.

(c) Where the respondent is alleged to have willfully violated a term or condition of the order of probation[. Upon such revocation, the probationer shall be brought to court, which may, without further hearing], a petition alleging such violation may be filed that shall be duly served upon the parties.

(i) The petition shall be verified and subscribed to by the probation service or the appropriate government agency and shall contain a reasonable description of the time, place, and manner in which

the violation occurred, provided, however, that the court may, upon good cause, proceed in the absence of a verified petition so long as the respondent receives notice and an opportunity to be heard. Non-hearsay allegations or allegations made upon information and belief of the factual part of the petition or of any supporting deposition must establish, if true, every violation charged.

(ii) If the court finds that the respondent has willfully violated any term or condition of the order of probation, the court, after giving notice and an opportunity to be heard to the parties and the attorney for the child, if any, may revoke the order of probation and may make any order [that might have been made at the time the order of probation was made] authorized by section four hundred fifty-four of this article.

(iii) The period of probation shall be deemed tolled as of the date of filing of the probation violation petition, but, in the event that the court does not find that the order of probation was willfully violated, the period of such interruption shall be credited to the period of probation.

§3. The family court act is amended to add a new section 456-a to read as follows:

§456-a. Conditional discharge: a) Upon a finding of a willful violation of child support, the court may make an order of conditional discharge upon such conditions as the court shall determine The conditions may include, but are not limited to, an order to participate in a rehabilitative program in accordance with paragraph (b) of subdivision (3) of section four hundred fifty-four of this article Where the order contains a direction to participate in such a program, the court may direct the administrator of the program to report to the court periodically and at the conclusion of the program with respect to the respondent's compliance with the program.

(b) An order of conditional discharge under this section may last for a maximum period of one year where the respondent has been found to be in arrears of six months or less and up to a maximum period of three years where the respondent has been found to be in arrears in excess of six months.

(c) Where the respondent is alleged to have willfully violated a term or condition of the order of conditional discharge, a petition alleging such violation may be filed that shall be duly served upon the parties.

(i) The petition shall be verified, shall be duly served upon the parties and shall contain a reasonable description of the time, place, and manner in which the violation occurred; provided, however, that the court may, upon good cause, proceed in the absence of a verified petition so long as the respondent receives notice and an opportunity to be heard Non-hearsay allegations or allegations made upon information and belief of the factual part of the petition or of any supporting deposition must establish, if true, every violation charged.

(ii) If the court finds, after a hearing, that the respondent has willfully violated any term or condition of the order of conditional discharge, the court, after giving notice and an opportunity to be heard to the parties and the attorney for the child, if any, may revoke the order of conditional discharge and may make any order authorized by section four hundred fifty-four of this article.

(iii) The period of the conditional discharge shall be deemed tolled as of the date of filing of the violation petition, but, in the event that the court does not find that the order of conditional discharge was willfully violated, the period of such interruption shall be credited to the period of the conditional discharge.

§4. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to

petitions for willful violation of child support filed on or after such date.

7. Roles, rights and responsibilities of non-respondent parents in child abuse and neglect and related custody proceedings in Family Court [F.C.A. §§651, 1012, 1017, 1022-a, 1027, 1035, 1052, 1054, 1055-b, 1057; D.R.L. §240]

Recent years have witnessed a sea-change in attitudes and policies concerning the role of non-respondent parents in child abuse and neglect proceedings under Article 10 of the Family Court Act: *viz.*, recognition that the other parents — those not charged in child protective proceedings — may, along with their extended families, provide vital resources for their children. While child protective officials once ignored or discouraged non-respondent parents from participating in child protective proceedings concerning their children, those officials, inspired by substantial statutory changes during the past decade, now reach out to such parents to engage them in planning for their children's care. While in the past, this category was often an absent parent who had little relationship with the children, more recently, in light of cases, such as Nicholson *v.* Scoppetta, 3 N.Y.3d 357 (2004), non-respondent parents frequently include custodial and other parents, who are involved in their children's lives but are not deemed culpable in their neglect or abuse.

As a statute initially drafted before these changes in attitude and policy, Article 10 of the Family Court Act, not surprisingly, contains a number of gaps and anomalies with respect to the treatment of non-respondent parents. This measure seeks to rectify some of the more obvious shortcomings in article 10 with respect to non-respondent parents and to enable their greater participation in abuse or neglect proceedings, as well as permanency hearings, concerning their children. It also expands the options available to Family Court judges to enable them to craft appropriate orders that respect the rights of non-respondent parents while assuring the safety and well being of the children who are the subjects of the proceedings.

First, this measure would add definitions of "parent," "relative" and "suitable person" to Family Court Act §1012. The definition of "parent," those legally recognized in New York, clarifies the range of persons who may assert a parent's superior rights to care and custody of a child under State and Federal law. *See, e.g.*, Bennett *v.* Jeffreys, 40 N.Y.2d 543 (1976)(state may not deprive parent of custody of child absent extraordinary circumstances); *Prince v.* Massachusetts, 321 U.S. 158 (1944)("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . ").

Second, Family Court Act §1017 would be amended to clarify that certain additional individuals should be identified, located and notified in writing of the pendency of child protective proceedings, although they do not have the rights of legal parents under State law. Analogous to the definition of "notice" fathers in Domestic Relations Law §§111-a(2)(f) and (h), this category would include persons who are listed on the putative father registry, have a pending paternity petition, or have been identified by the child's parent in a written sworn statement. To ensure uniformity in the information provided to those persons entitled to notice, this measure provides that the content of the notice will be set by a uniform statewide court rule.

Inclusion of these clarifications would establish a structure in Article 10 consistent with the framework applicable to adoption proceedings under the Domestic Relations Law, but expanded to be gender-neutral. A "parent" under this measure would be analogous to a "consent" father, whose consent is required for an adoption, and an additional individual identified would be analogous to a "notice"

father, who merely has a right to be heard as to the child's best interests. *See* Domestic Relations Law §§111, 111-a. By doing so, it also would expand the scope of potential resources for children who have been removed from their homes, and provide an opportunity for non-respondent, non-adjudicated birth fathers to take necessary steps to establish their paternity and plan for their children. Significantly, the measure requires the local social services department investigating possible resources for the child to report the results of the investigations to the court and all parties, including the attorney for the child.

The measure further defines "relative" as a person who is related to the child by blood, marriage or adoption, but who is not a parent of the child. This distinction between "parents" and "relatives" is significant as the rights of each to the care and custody of children are not identical under article 10 of the Family Court Act. Likewise, the measure includes "suitable person" in the definition section, since such an individual has rights distinct from those of parents, relatives and possible, but not adjudicated, parents.

The measure clarifies the language of Family Court Act § 1017 by referring specifically to "non-respondent parent, relative or suitable person" as potential resources a court may consider after determining that a child must be removed from his or her home. These resources may be utilized either through temporary, direct releases under section 1017(2)(a)(ii) or through temporary orders of Family Court Act article 6 custody or (in the case of relatives or suitable persons) guardianship under Family Court Act § 1017(2)(a)(i). In all such cases, as in custody petitions under article six, the court must review the orders of protection and sex offender registries, as well as child protective petitions and Family Court warrants regarding any such resources. Similar alternatives are provided for direct releases and Family Court Act article 6 custody at the final dispositional stage of the article 10 proceeding.

Moreover, section 1017(3) would be amended to require that, where a child is temporarily released to a non-respondent parent or temporarily placed in the care of a relative or suitable person, the caretaker must submit to the court's jurisdiction with respect to cooperation in meeting the needs of the child. Such temporary order may require such person, *inter alia*, to make the child available for court-ordered visitation with parents, siblings or others, as well as for appointments with and visits by the caseworker and for appointments with the child's attorney and clinicians and programs providing services to the child. The measure requires the court order of release or care under article 10 to specify the terms of such cooperation, as well as any actions that the social services agency must take.. The measure thus strikes a proper balance between intervention to ensure the child's well-being and respect for the non-respondent parent's or other caretaker's interests in minimal interference in their everyday child-rearing decisions, a delicate balance that has been held to be of constitutional magnitude.,[17]

Third, this measure contains several amendments to sections of article 10 of the Family Court Act relating to preliminary orders. It would amend section 1022-a to clarify that a non-respondent parent who

[17] In Matter of Damian D.; Clinton County Dept. of Social Services *v.* Travis D., -A.D.3d-, 2015 N.Y. Slip Op. 00265 (3rd Dept., Jan. 8, 2015),the Appellate Division, Third Department, held that requiring a non-respondent parent's visits with her two children to be supervised, in effect modifying a custody order without a full and fair opportunity to be heard, violated her due process. Additionally, in Doe *v.* Mattingly, 2006 WL 3498564 (E.D.N.Y., 2006)(Unpub.), the Federal District Court required a court order, absent an emergency, as a prerequisite to a caseworker entering the home of a non-respondent parent and conducting a body search of the baby in her care. Significantly, the Supreme Court of Michigan, in In Re Sanders, 495 Mich. 294, 852 N.W.2d 524 (Sup.Ct., MI, 2014) recently struck down as an unconstitutional violation of due process its "one-parent" rule whereby if one parent is found to have neglected or abused a child, both parents would automatically be subject to the court's jurisdiction. The Court reversed restrictions imposed upon a non-offending parent absent a showing of unfitness.

qualifies for assignment of counsel under section 262 is eligible for such assignment, unless waived, at pre-petition hearings held pursuant to section 1022. Section 1027(d) would be amended to provide that a court may release a child to his or her parent or other person legally responsible for his or her care pending a final order of disposition. It further deletes the reference to section 1054 as the source of the court's authority to do this, since that section only addresses dispositional orders, and instead substitutes a reference to section 1017, which pertains as well to pre-dispositional orders. Additionally, with the aim of facilitating the participation of non-respondent parents in proceedings regarding their children, section 1035 would be modified to require that notices of pendency of child protective proceedings that are sent to non-respondent parents also must advise them that they have a right to counsel, including assigned counsel, if they are indigent, unless waived. *See* Matter of Sasha S., 256 A.D.2d 468 (2nd Dept., 1998)(required notice to non-respondent father of the right to counsel, including the right to appointment of counsel if he is indigent).

Fourth, the measure reorganizes the dispositional options available with respect to releases of children and supervision of respondent parents. Sections 1052(a)(ii) and 1054 are revised to cover solely the release of children to persons who are not respondents in the child protective proceeding, including parents, legal custodians or guardians. Such orders of release, in contrast to orders of custody under Article 6 of the Family Court Act, are time-limited, that is, up to one year, which may be extended for one additional year for good cause.This time-limited period of release to a non-respondent parent is intended to give the respondent parent an opportunity to complete a program or take steps to meet the conditions necessary for reunification with the child. Unless otherwise ordered by the court, the agency would be required to submit a report no later than 90 days after issuance of the order and 60 days prior to its expiration. Again, striking an appropriate constitutional balance,[18] the caretaker would be required to submit to the jurisdiction of the court to the same limited extent as in orders of temporary release under proposed section 1017. An order releasing a child may, therefore, require the caretaker to cooperate in making the child available, *inter alia*, for court-ordered visitation with parents, siblings or others, for appointments with and visits by the caseworker and for appointments with the child's attorney and clinicians and programs providing services to the child.

In conjunction with release of a child to a non-respondent parent, the Family Court may, as under current law, order supervision of the respondent under a revised and expanded Family Court Act § 1057. Like the release of the child, the supervision of the respondent parent may be for an initial period of one year but may be extended upon good cause for one additional year. Since Family Court Act § 1015-a applies to any phase of a child protective proceeding, the court also may order services to be provided to the respondent. This measure would thus address the situation where the child's interests would best be served by residing with a non-respondent parent for a time-limited period while the respondent parent receives services that would promote the child's eventual return to that parent. If during the period of the dispositional order, the respondent parent successfully completes the services or programs ordered, the court may, if appropriate, utilize Family Court Act § 1061 to modify the order releasing the child to the non-respondent parent to provide for an earlier date for return of the child to the respondent parent.

Sections 1052(a)(v) and 1057 of the Family Court Act would be amended to cover two dispositional options, which may be ordered singly or together. A child may be released to a respondent for a time-limited period of up to one year, which may be extended for good cause for one more year. A report would be required no later than 90 days after issuance of the order and 60 days prior to its

[18] *See* mote 17, s*upra.*

expiration, unless dispensed with by the Family Court. Additionally, in conjunction either with such a release or, as noted, with release of the child to a non-respondent parent, placement of the child or issuance of an order of protection, the respondent may be placed under the supervision of the child protective agency, social services official or authorized agency. Such supervision also would be time-limited — up to one year, with an extension for one additional year for good cause — and, unless dispensed with, a report would be required no later than 90 days after issuance of the order and 60 days prior to its expiration.

Finally, the measure amends section 1055-b to clarify the procedures applicable when petitions for custody or guardianship are brought in conjunction with or are pending at the same time as a child protective proceeding. It would resolve a serious inconsistency between sections 1055-b and 1017. Section 1017(2)(a)(i) currently provides that when a court determines that a child may reside with a suitable non-respondent parent, it may "grant an order of custody or guardianship to such non-respondent parent . . . pursuant to section one thousand fifty-five-b." However, as currently drafted, section 1055-b only pertains to "[c]ustody or guardianship with relatives or suitable persons pursuant to Article 6 of [the Family Court Act]" and does not mention non-respondent parents; nor does it specify the standard by which to determine respondent or non-respondents parents' requests for custody in this context.

The measure thus would insert respondent parents into the list of persons who may be granted article 6 custody pursuant to section 1055-b, add two additional subdivisions regarding custody to non-respondent parents pursuant to article 6 and incorporate these alternatives into the dispositional options delineated in Family Court Act §1052. It further makes clear that if a third party, *i.e.*, someone other than the child's parents, contests the custody petition of a respondent parent, the court must grant the order of custody to the parents in the absence of a showing of extraordinary circumstances pursuant to Bennett *v.* Jeffreys, *supra*. Similar amendments are made to analogous provisions of the permanency hearing statute (Family Court Act § 1089-a). Finally, Family Court Act §651 and Domestic Relations Law §240 are amended to underscore that custody standards apply in cases where custody and visitation petitions brought under these sections are heard jointly with child protective dispositional or permanency hearings in Family Court.

Questions regarding the rights of, and procedures applicable to, non-respondent parents in child protective and related proceedings have persisted in light of lingering ambiguities in the applicable statutes. Enactment of this measure will provide a clear road-map that will afford needed clarity to this increasingly important aspect of child welfare cases.

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to non-respondent parents in child protective and permanency proceedings in family court

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

Section 1. Section 651 of the family court act is amended by adding a new subdivision (c-1) to read as follows:

(c-1) Where a proceeding filed pursuant to article ten or ten-a of this act is pending at the same time as a proceeding brought in the family court pursuant to this article, the court presiding over the proceeding under article ten or ten-a may jointly conduct the hearing on the custody and visitation petition under this article and the dispositional hearing on the petition under article ten or the permanency hearing under article ten-a; provided, however, the court must determine the custody and visitation petition in accordance with the terms of this article.

§2. Section 1012 of the family court act is amended by adding three new subdivisions (l), (m) and (n) to read as follows:

(l) "Parent" means a person who is recognized under the laws of the state to be the child's legal parent.

(m) "Relative" means any person who is related to the child by blood, marriage or adoption and who is not a parent, putative parent or relative of a putative parent of the child.

(n) "Suitable person" means any person who plays or has played a significant positive role in the child's life or in the life of the child's family and who may be a potential resource to care for the child.

§3. Subdivision 1, paragraph (a) of subdivision 2 and subdivision 3 of section 1017 of the family court act, subdivision 1 and paragraph (a) of subdivision 2 as amended by section 10 of part A of chapter 3 of the laws of 2005, the opening paragraph of subdivision 1 as separately amended by chapter 671 of the laws of 2005, subparagraphs (i) and (ii) of paragraph (a) of subdivision 2 as amended and subdivision 3 as added by chapter 519 of the laws of 2008, are amended to read as follows:

1. In any proceeding under this article, when the court determines that a child must be removed from his or her home, pursuant to part two of this article, or placed, pursuant to section one thousand fifty-five of this article[,]:

(a) the court shall direct the local commissioner of social services to conduct an immediate investigation to locate any non-respondent parent of the child and any relatives of the child, including all of the child's grandparents, all [suitable] relatives or suitable persons identified by any respondent parent or any non-respondent parent and any relative identified by a child over the age of five as a relative who plays or has played a significant positive role in his or her life[, and]. The local commissioner shall

inform them in writing of the pendency of the proceeding and of the opportunity for [becoming foster parents or for seeking custody or care] non-respondent parents to seek temporary release of the child[, and that the child may be adopted by foster parents if attempts at reunification with the birth parent are not required or are unsuccessful] under this article or custody under article six of this act or for relatives to seek to become foster parents or to provide free care under this article or to seek custody pursuant to article six of this act; or for suitable persons to become foster parents or provide free care under this article or to seek guardianship pursuant to article six of this act. Uniform statewide rules of court shall specify the contents of the notice consistent with the provisions of this section. The local commissioner of social services shall [record] report the results of such investigation or investigations to the court and parties, including the attorney for the child. The local commissioner shall also record the results of the investigation or investigations, including, but not limited to, the name, last known address, social security number, employer's address and any other identifying information to the extent known regarding any non-respondent parent, in the uniform case record maintained pursuant to section four hundred nine-f of the social services law. For the purpose of this section, "non-respondent parent" shall include a person entitled to notice of the pendency of the proceeding and of the right to intervene as an interested party pursuant to subdivision (d) of section one thousand thirty-five of this article, and a non-custodial parent entitled to notice and the right to enforce visitation rights pursuant to subdivision (e) of section one thousand thirty-five of this article.

(b) The court shall also direct the local commissioner of social services to conduct an investigation to locate any person who is not recognized to be the child's legal parent and does not have the rights of a legal parent under the laws of this state but who: (i) has filed with a putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law, or (ii) has a pending paternity petition, or (iii) has been identified as a parent of the child by the child's other parent in a written sworn statement. The local commissioner of social services shall report the results of such investigation to the court and parties, including the attorney for the child.

(c) The court shall determine:

[(a)](i) whether there is a [suitable] non-respondent parent [or other person related to the child], relative or suitable person with whom such child may appropriately reside; and

[(b)](ii) in the case of a relative or suitable person, whether such [relative] individual seeks approval as a foster parent pursuant to the social services law for the purposes of providing care for such child, or wishes to provide free care [and custody] for the child during the pendency of any orders pursuant to this article.

(a) where the court, after a review of the reports of the sex offender registry established and maintained pursuant to section one hundred sixty-eight-b of the correction law, reports of the statewide computerized registry of orders of protection established and maintained pursuant to section two hundred twenty-one-a of the executive law, related decisions in court proceedings under this article and all warrants issued under this act, determines that the child may appropriately reside with a [suitable] non-respondent parent or other relative or [other] suitable person, either:

(i) grant [an] a temporary order of custody or guardianship to such non-respondent parent, [other] relative or [other] suitable person pursuant to a petition filed under article six of this act pending further order of the court, or at disposition of the proceeding, grant a final order of custody or guardianship to such non-respondent parent, relative or suitable person pursuant to article six of this act and section one thousand fifty-five-b of this article; or

(ii) [place] temporarily release the child directly [in the custody of] to such non-respondent parent[, other] or temporarily place the child with a relative or [other] suitable person pursuant to this article during the pendency of the proceeding or until further order of the court, whichever is earlier and conduct such other and further investigations as the court deems necessary. The court may direct the commissioner of social services, pursuant to regulations of the office of children and family services, to commence an investigation of the home of such non-respondent parent, relative or suitable person within twenty-four hours and to report the results to the court and the parties, including the attorney for the child. If the home of a non-respondent parent, relative or suitable person is found unqualified for the temporary release or placement of the child under this article, the local commissioner shall report such fact and the reasons therefor to the court and the parties, including the attorney for the child, forthwith; or

(iii) remand or place the child, as applicable, with the local commissioner of social services and direct such commissioner to have the child reside with such relative or [other] suitable person and further direct such commissioner pursuant to regulations of the office of children and family services, to commence an investigation of the home of such relative or other suitable person within twenty-four

hours and thereafter approve such relative or other suitable person, if qualified, as a foster parent. If such home is found to be unqualified for approval, the local commissioner shall report such fact and the reasons thereafter to the court and the parties, including the attorney for the child, forthwith.

3. An order [placing] temporarily releasing a child [with] to a non-respondent parent or parents, or temporarily placing a child with a relative or relatives or other suitable person or persons pursuant to subparagraph (ii) of paragraph (a) of subdivision two of this section or remanding or placing a child with a local commissioner of social services to reside with a relative or relatives or suitable person or persons as foster parents pursuant to subparagraph (iii) of paragraph (a) of subdivision two of this section may not be granted unless the [relative or other suitable] person [consents] or persons to whom the child is released or with whom the child is placed submits to the jurisdiction of the court with respect to the child. The [court] order shall set forth the terms and conditions applicable to such person or persons and child protective agency, social services official and duly authorized agency with respect to the child and may [place the person with whom the child has been directly placed under supervision during the pendency of the proceeding. Such supervision shall be provided by a] include, but may not be limited to, a direction for such person or persons to cooperate in making the child available for court-ordered visitation with respondents, siblings and others and for appointments with and visits by the child protective agency, social services official or duly authorized agency, and for appointments with the child's attorney, clinicians or other individuals or programs providing services to the child during the pendency of the proceeding. The court also may issue a temporary order of protection under subdivision (f) of section one thousand twenty-two, section one thousand twenty-three or section one thousand twenty-nine of this article and an order directing that services be provided pursuant to section one thousand fifteen-a of this article. [An order of supervision issued pursuant to this subdivision shall set forth the terms and conditions that the relative or suitable person must meet and the actions that the child protective agency, social services official or duly authorized agency must take to exercise such supervision.]

§4. Section 1022-a of the family court act, as added by chapter 336 of the laws of 1990, is amended to read as follows:

§1022-a. Preliminary orders; notice and appointment of counsel. At a hearing held pursuant to section [ten hundred] one thousand twenty-two of this [act] article at which the respondent is present,

the court shall advise the respondent and any non-respondent parent who is present of the allegations in the application and shall appoint counsel for [the respondent pursuant to] each in accordance with section two hundred sixty-two of this act [where the respondent is indigent], unless waived.

§5. Subparagraph (C) of paragraph (i) of subdivision (b) and subdivision (d) of section 1027 of the family court act, subparagraph (C) of paragraph (i) of subdivision (b) as amended by chapter 671 of the laws of 2005 and subdivision (d) as added by chapter 962 of the laws of 1970, are amended to read as follows:

(C) [in the custody of] with a relative or suitable person other than the respondent.

(d) Upon such hearing, the court may, for good cause shown, release the child to [the custody of] his or her parent or other person legally responsible for his or her care, pending a final order of disposition, in accord with subparagraph (ii) of paragraph (a) of subdivision two of section one thousand [fifty-four] seventeen of this article.

§6. The opening paragraph of subdivision (d) of section 1035 of the family court act, as amended by chapter 526 of the laws of 2003, is amended to read as follows:

Where the respondent is not the child's parent, service of the summons and petition shall also be ordered on both of the child's parents; where only one of the child's parents is the respondent, service of the summons and petition shall also be ordered on the child's other parent. The summons and petition shall be accompanied by a notice of pendency of the child protective proceeding advising the parents or parent of the right to appear and participate in the proceeding as an interested party intervenor for the purpose of seeking temporary and permanent release of the child under this article or custody of the child under article six of this act, and to participate thereby in all arguments and hearings insofar as they affect the temporary release or custody of the child during fact-finding proceedings, and in all phases of dispositional proceedings. The notice shall also advise the parent or parents of the right to counsel, including assigned counsel, pursuant to section two hundred sixty-two of this act, and also indicate that:

§7. Subdivision (a) of section 1052 of the family court act, as amended by chapter 519 of the laws of 2008, is amended to read as follows:

(a) At the conclusion of a dispositional hearing under this article, the court shall enter an order of disposition directing one or more of the following:

(i) suspending judgment in accord with section one thousand fifty-three of this part; or

(ii) releasing the child to [the custody of his] a non-respondent parent or parents or [other person legally responsible] legal custodian or custodians or guardian or guardians, who is not or are not respondents in the proceeding, in accord with section one thousand fifty-four of this part; or

(iii) placing the child in accord with section one thousand fifty-five of this part; or

(iv) making an order of protection in accord with section one thousand fifty-six of this part; or

(v) releasing the child to the respondent or respondents or placing the respondent or respondents under supervision, or both, in accord with section one thousand fifty-seven of this part; or

(vi) granting custody of the child to a respondent parent or parents, a relative or relatives or a suitable person or persons pursuant to article six of this act and section one thousand fifty-five-b of this part; or

(vii) granting custody of the child to a non-respondent parent or parents pursuant to article six of this act.

However, the court shall not enter an order of disposition combining placement of the child under paragraph (iii) of this subdivision with a disposition under paragraph (i) or (ii) of this subdivision. An order granting custody of the child pursuant to paragraph (vi) or (vii) of this subdivision shall not be combined with any other disposition under this subdivision.

§8. Section 1054 of the family court act, as amended by chapter 1039 of the laws of 1973, subdivision (a) as amended by chapter 41 of the laws of 2010 and subdivision (b) as amended by chapter 458 of the laws of 1989, is amended to read as follows:

§1054. Release to [custody of] non-respondent parent or [other person responsible for care; supervision or order of protection] legal custodian or guardian. (a) [If the] An order of disposition [releases] may release the child for a designated period of up to one year to [the custody of his or her] a non-respondent parent or [other] parents or a person [legally responsible for his or her care] or persons

who had been the child's legal custodian or guardian at the time of the filing of the petition, [the] and who is not or are not respondents in the proceeding under this article. An order under this section may be extended upon a hearing for a period of up to one year for good cause.

(b) The court may [place] require the person or persons to [whose custody] whom the child is released under [supervision of a] this section to submit to the jurisdiction of the court with respect to the child for the period of the disposition or any extension thereof. The order may include, but is not limited to, a direction for such person or persons to cooperate in making the child available for court-ordered visitation with respondents, siblings and others and for appointments with and visits by the child protective agency, social services official or duly authorized agency and for appointments with the child's attorney, clinicians or other individuals or programs providing services to the child. The order shall set forth the terms and conditions applicable to such non-respondent and child protective agency, social services official and duly authorized agency with respect to the child.

(c) In conjunction with an order releasing the child to a non-respondent parent, legal custodian or guardian under this subdivision, the court may also issue any or all of the following orders: an order of supervision of a respondent parent under section one thousand fifty seven, an order directing that services be provided to the respondent parent under section one thousand fifteen-a or [may enter] an order of protection under section one thousand fifty six[, or both] of this article. An order of supervision of the respondent entered under this [section shall set forth the terms and conditions of such supervision that the respondent must meet and the actions that the child protective agency, social services official or duly authorized agency must take to exercise such supervision] subdivision may be extended upon a hearing for a period of up to one year for good cause.

(d) 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 and no later than sixty days prior to the expiration of the order, unless the court determines that the facts and circumstances of the case do not require such report to be made.

[(b) Rules of court shall define permissible terms and conditions of supervision under this section. The duration of any period of supervision shall be for an initial period of no more than one year and the court may at the expiration of that period, upon a hearing and for good cause shown, make successive extensions of such supervision of up to one year each.]

§9. The section heading and subdivisions (a) and (b) of section 1055-b of the family court act, as amended by section 7 of part F of chapter 58 of the laws of 2010, are amended and two new subdivisions (a-1) and (a-2) are added to read as follows:

§1055-b. Custody or guardianship with a parent or parents, relatives or suitable persons pursuant to article six of this act or guardianship with [such a person] relatives or suitable persons pursuant to article seventeen of the surrogate's court procedure act. (a) Custody or guardianship with respondent parent or parents, relatives or suitable persons. At the conclusion of the dispositional hearing under this article, the court may enter an order of disposition granting custody or guardianship of the child to a respondent parent or parents, as defined in subdivision (1) of section one thousand twelve of this article, or a relative or relatives or other suitable person [under] or persons pursuant to article six of this act or an order of guardianship of the child to [such] a relative or relatives or suitable person or persons under article seventeen of the surrogate's court procedure act if the following conditions have been met:

(i) the respondent parent or parents, relative or relatives or suitable person or persons has or have filed a petition for custody or guardianship of the child pursuant to article six of this act or, in the case of a relative or relatives or suitable person or persons, a petition for guardianship of the child under article seventeen of the surrogate's court procedure act; and

(ii) the court finds that granting custody or guardianship of the child to [the relative or suitable] such person or persons is in the best interests of the child and that the safety of the child will not be jeopardized if the respondent or respondents under the child protective proceeding are no longer under supervision or receiving services. In determining whether the best interests of the child will be promoted by the granting of guardianship of the child to a relative who has cared for the child as a foster parent, the court shall give due consideration to the permanency goal of the child, the relationship between the child and the relative, and whether the relative and the social services district have entered into an agreement to provide kinship guardianship assistance payments for the child to the

relative under title ten of article six of the social services law, and, if so, whether the fact-finding hearing pursuant to section one thousand fifty-one of this part and a permanency hearing pursuant to section one thousand eighty-nine of this chapter [has] have occurred and whether compelling reasons exist for determining that the return home of the child and the adoption of the child are not in the best interests of the child and are, therefore, not appropriate permanency options; and

(iii) the court finds that granting custody or guardianship of the child to the respondent parent, relative or suitable person under article six of this act or granting guardianship of the child to the relative or [other] suitable person under article seventeen of the surrogate's court procedure act will provide the child with a safe and permanent home; and

(iv) all parties to the child protective proceeding consent to the granting of custody or guardianship under article six of this act or the granting of guardianship under article seventeen of the surrogate's court procedure act; or

[(v)], if any of the parties object to the granting of custody or guardianship, the court has made the following findings after a [consolidated] joint dispositional hearing on the child protective petition and the petition under article six of this act or under article seventeen of the surrogate's court procedure act[;]:

(A) if a relative or relatives or suitable person or persons have filed a petition for custody or guardianship and a parent or parents fail to consent to the granting of [custody or guardianship under article six of this act or] the [granting of guardianship under article seventeen of the surrogate's court procedure act] petition, the court finds that the relative or relatives or suitable person or persons have demonstrated that extraordinary circumstances exist that support granting an order of custody or guardianship to the relative or relatives or suitable person or persons and that the granting of the order will serve the child’s best interests; or

(B) if a relative or relatives or suitable person or persons have filed a petition for custody or guardianship and a party other than the parent or parents [fail] fails to consent to the granting of [custody or guardianship under article six of this act or] the petition [granting of guardianship under article seventeen of the surrogate's court procedure act], the court finds that granting custody or

guardianship of the child to the relative or relatives or suitable person or persons is in the best interests of the child; or

(C) if a respondent parent has filed a petition for custody under article six of this act and a party who is not a parent of the child objects to the granting of the petition, the court finds either that the objecting party has failed to establish extraordinary circumstances, or, if the objecting party has established extraordinary circumstances, that granting custody to the petitioning respondent parent would nonetheless be in the child's best interests; or

(D) if a respondent parent has filed a petition for custody under article six of this act and the other parent objects to the granting of the petition, the court finds that granting custody to the petitioning respondent parent is in the child's best interests.

(a-1) Custody and visitation petition of non-respondent parent under article six of this act. Where a proceeding filed by the non-respondent parent pursuant to article six of this act is pending at the same time as a proceeding brought in the family court pursuant to this article, the court presiding over the proceeding under this article may jointly hear the dispositional hearing on the child protective petition under this article and the hearing on the custody and visitation petition under article six of this act; provided however, the court must determine the non-respondent parent's custody and visitation petition filed under article six of this act in accordance with the terms of that article.

(a-2) Custody and visitation petition of non-respondent parent under section two hundred forty of the domestic relations law. Where a proceeding brought in the supreme court involving the custody of, or right to visitation with, any child of a marriage is pending at the same time as a proceeding brought in the family court pursuant to this article, the court presiding over the proceeding under this article may jointly hear the dispositional hearing on the child protective petition under article ten of this act and, upon referral from the supreme court, the hearing to resolve the matter of custody or visitation in the proceeding pending in the supreme court; provided however, the court must determine the non-respondent parent's custodial rights in accordance with the terms of paragraph (a) of subdivision one of section two hundred forty of the domestic relations law.

(b) An order made in accordance with the provisions of this section shall set forth the required findings as described in subdivision (a) of this section where applicable, including, if the guardian and the local department of social services have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under title ten of article six of the social services law, that a fact-finding hearing pursuant to section one thousand fifty-one of this part and a permanency hearing pursuant to section one thousand eighty-nine of this chapter [has] have occurred, and the compelling reasons that exist for determining that the return home of the child and the adoption of the child are not in the best interests of the child and are, therefore, not appropriate permanency options for the child, and shall constitute the final disposition of the child protective proceeding. Notwithstanding any other provision of law, the court shall not issue an order of supervision nor may the court require the local department of social services to provide services to the respondent or respondents when granting custody or guardianship pursuant to article six of this act under this section or granting guardianship under article seventeen of the surrogate's court procedure act.

§10. Section 1057 of the family court act, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

§1057. [Supervision] Release of the child to the respondent or respondents; supervision of the respondent or respondents.

(a) The court may release the child to the respondent or respondents for a period of up to one year, which may be extended pursuant to subdivision (d) of this section.

(b) In conjunction with an order releasing a child under this section or an order under paragraph (ii), (iii) or (iv) of subdivision (a) of section one thousand fifty-two of this part, the court may place the respondent or respondents under supervision of a child protective agency or of a social services official or duly authorized agency. An order of supervision entered under this section shall set forth the terms and conditions of such supervision that the respondent or respondents must meet and the actions that the child protective agency, social services official or duly authorized agency must take to exercise such supervision.

(c) Except as provided for herein, in any order issued pursuant to subdivision (a) or (b) of 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 and no later than sixty days prior to the expiration of the order, unless the court determines that the facts and circumstances of the case do not require such report to be made. [Rules] Uniform statewide rules of court shall define permissible terms and conditions of supervision of the respondent or respondents under this section.

(d) The duration of any period of release of the child to the respondent or respondents or supervision of the respondent or respondents or both shall be for an initial period of no more than one year [and the]. The court may at the expiration of that period, upon a hearing and for good cause shown, [make successive extensions of] extend such release or supervision or both for a period of up to one year [each].

§11. The section heading and subdivisions (a), (b) and (c) of section 1089-a of the family court act, as amended by section 8 of part F of chapter 58 of the laws of 2010, are amended and two new subdivisions (a-1) and (a-2) are added to read as follows:

§1089-a. Custody or guardianship with a parent or parents, a relative or relatives or a suitable person or persons pursuant to article six of this act or guardianship of a relative or relatives or a suitable person or persons pursuant to article seventeen of the surrogate's court procedure act. (a) Where the permanency plan is placement with a fit and willing relative or a respondent parent, the court may issue an order of custody or guardianship in response to a petition filed by a respondent parent, relative or suitable person seeking custody or guardianship of the child under article six of this act or an order of guardianship of the child under article seventeen of the surrogate's court procedure act [at]. A petition for custody or guardianship may be heard jointly with a permanency hearing held pursuant to this article [and terminate]. An order of custody or guardianship issued in accordance with this subdivision will result in termination of all pending orders issued pursuant to this article or article ten of this act if the following conditions have been met:

(i) the court finds that granting custody to the respondent parent or parents, relative or relatives or suitable person or persons or guardianship of the child to the relative or relatives or

suitable person or persons is in the best interests of the child and that the termination of the order placing the child pursuant to article ten of this act will not jeopardize the safety of the child. In determining whether the best interests of the child will be promoted by the granting of guardianship of the child to a relative who has cared for the child as a foster parent, the court shall give due consideration to the permanency goal of the child, the relationship between the child and the relative, and whether the relative and the local department of social services have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under title ten of article six of the social services law, and, if so, whether a fact-finding hearing pursuant to section one thousand fifty-one of this chapter has occurred, and whether compelling reasons exist for determining that the return home of the child and the adoption of the child are not in the best interests of the child and are, therefore, not appropriate permanency options; and

(ii) the court finds that granting custody to the respondent parent or parents, relative or relatives or suitable person or persons or guardianship of the child to the relative or relatives or suitable person or persons will provide the child with a safe and permanent home; and

(iii) the parents, the attorney for the child, the local department of social services, and the foster parent of the child who has been the foster parent for the child for one year or more consent to the issuance of an order of custody or guardianship under article six of this act or the granting of guardianship under article seventeen of the surrogate's court procedure act and the termination of the order of placement pursuant to this article or article ten of this act; or [(iv)], if any of the parties object to the granting of custody or guardianship, the court has made the following findings after a [consolidated] joint hearing on the permanency of the child and the petition under article six of this act or article seventeen of the surrogate's court procedure act[;]:

(A) if a relative or relatives or suitable person or persons have filed a petition for custody or guardianship and a parent or parents fail to consent to the granting of [custody or guardianship under article six of this act or] the [granting of guardianship under article seventeen of the surrogate's court procedure act] petition, the court finds that the relative or relatives or suitable person or persons have demonstrated that extraordinary circumstances exist that support granting an order of custody or guardianship under article six of this act or the granting of guardianship under article seventeen of the surrogate's court procedure act to the

relative or relatives or suitable person or persons and that the granting of the order will serve the child's best interests; or

(B) if a relative or relatives or suitable person or persons have filed a petition for custody or guardianship and the local department of social services, the attorney for the child, or the foster parent of the child who has been the foster parent for the child for one year or more [fail to consent] objects to the granting of [custody or guardianship under article six of this act or the granting of guardianship under article seventeen of the surrogate's court procedure act] the petition, the court finds that granting custody or guardianship of the child to the relative or relatives or suitable person or persons is in the best interests of the child; or

(C) if a respondent parent has filed a petition for custody under article six of this act and a party who is not a parent of the child objects to the granting of the petition, the court finds either that the objecting party has failed to establish extraordinary circumstances, or, if the objecting party has established extraordinary circumstances, that granting custody to the petitioning respondent parent would nonetheless be in the child's best interests; or

(D) if a respondent parent has filed a petition for custody under article six of this act and the other parent fails to consent to the granting of the petition, the court finds that granting custody to the petitioning respondent parent is in the child's best interests.

(a-1) Custody and visitation petition of non-respondent parent under article six of this act. Where a proceeding filed by the non-respondent parent pursuant to article six of this act is pending at the same time as a proceeding brought in the family court pursuant to this article, the court presiding over the proceeding under this article may jointly hear the permanency hearing and the hearing on the custody and visitation petition under article six of this act; provided however, the court must determine the non-respondent parent's custody and visitation petition filed under article six of this act in accordance with the terms of that article.

(a-2) Custody and visitation petition of non-respondent parent under section two hundred forty of the domestic relations law. Where a proceeding brought in the supreme court involving the custody of, or right to visitation with, any child of a marriage is pending at the same time as a proceeding brought in the family court pursuant to this article, the court presiding over the proceeding under this article may jointly hear the permanency hearing and, upon referral

from the supreme court, the hearing to resolve the matter of custody or visitation in the proceeding pending in the supreme court; provided however, the court must determine the non-respondent parent's custodial rights in accordance with the terms of paragraph (a) of subdivision one of section two hundred forty of the domestic relations law.

(b) An order made in accordance with the provisions of this section shall set forth the required findings as described in subdivision (a) of this section, where applicable, including, if the guardian and the local department of social services have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under title ten of article six of the social services law, that a fact-finding hearing pursuant to section one thousand fifty-one of this chapter and a permanency hearing pursuant to section one thousand eighty-nine of this part has occurred, and the compelling reasons that exist for determining that the return home of the child are not in the best interests of the child and are, therefore, not appropriate permanency options for the child, and shall result in the termination of any orders in effect pursuant to article ten of this act or pursuant to this article. Notwithstanding any other provision of law, the court shall not issue an order of supervision nor may the court require the local department of social services to provide services to the respondent or respondents when granting custody or guardianship pursuant to article six of this act under this section or the granting of guardianship under article seventeen of the surrogate's court procedure act in accordance with this section.

(c) As part of the order granting custody or guardianship [to the relative or suitable person] in accordance with this section pursuant to article six of this act or the granting of guardianship under article seventeen of the surrogate's court procedure act, the court may require that the local department of social services and the attorney for the child receive notice of, and be made parties to, any subsequent proceeding to modify the order of custody or guardianship granted pursuant to the article six proceeding; provided, however, if the guardian and the local department of social services have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under title ten of article six of the social services law, the order must require that the local department of social services and the attorney for the child receive notice of, and be made parties to, any such subsequent proceeding involving custody or guardianship of the child.

§12. Paragraph (a) of subdivision 1 of section 240 of the domestic relations law, as amended by chapter 476 of the laws of 2009, is amended to read as follows:

(a) In any action or proceeding brought (1) to annual a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child and subject to the provisions of subdivision one-c of this section. Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances, and state on the record how such findings, facts and circumstances were factored into the direction. If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief. If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child, and shall state on the record how such findings were factored into the determination.

Where a proceeding filed pursuant to article ten or ten-a of the family court act is pending at the same time as a proceeding brought in the supreme court involving the custody of, or right

to visitation with, any child of a marriage, the court presiding over the proceeding under article ten or ten-a may jointly hear the dispositional hearing on the petition under article ten or the permanency hearing under article ten-a and, upon referral from the supreme court, the hearing to resolve the matter of custody or visitation in the proceeding pending in the supreme court; provided however, the court must determine custody or visitation in accordance with the terms of this section,

An order directing the payment of child support shall contain the social security numbers of the named parties. In all cases there shall be no prima facie right to the custody of the child in either parent. Such direction shall make provision for child support out of the property of either or both parents. The court shall make its award for child support pursuant to subdivision one-b of this section. Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties. Such direction as it applies to rights of visitation with a child remanded or placed in the care of a person, official, agency or institution pursuant to article ten of the family court act, or pursuant to an instrument approved under section three hundred fifty-eight-a of the social services law, shall be enforceable pursuant to part eight of article ten of the family court act and sections three hundred fifty-eight-a and three hundred eighty-four-a of the social services law and other applicable provisions of law against any person having care and custody, or temporary care and custody, of the child. Notwithstanding any other provision of law, any written application or motion to the court for the establishment, modification or enforcement of a child support obligation for persons not in receipt of public assistance and care must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section fifty-two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child

support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought or from the party ordered to pay child support to the other party. Such direction may require the payment of a sum or sums of money either directly to the custodial parent or to third persons for goods or services furnished for such child, or for both payments to the custodial parent and to such third persons; provided, however, that unless the party seeking or receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law. Every order directing the payment of support shall require that if either parent currently, or at any time in the future, has health insurance benefits available that may be extended or obtained to cover the child, such parent is required to exercise the option of additional coverage in favor of such child and execute and deliver to such person any forms, notices, documents or instruments necessary to assure timely payment of any health insurance claims for such child.

§13. This act shall take effect on the one hundred eightieth day after it shall have become a law.

8. 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.

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 shall not be made available to any person or public or private agency. Such records shall only be made available to the respondent or his or her designated agent.

(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 if 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 in writing by the clerk of the court 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 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 or subsequent to the filing of a petition under this article, the designated lead agency shall serve a certification of such diversion upon the appropriate probation service and police department or law enforcement agency. Upon receipt of such certification, 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.

(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 serve a certification of such determination upon the appropriate probation service and designated lead agency, 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 certification shall also be sent to the appropriate police department or law enforcement agency. Upon receipt of such certification, 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.

(v) A respondent in whose favor a proceeding was terminated prior to the effective date of the chapter of the laws of two thousand fifteen which amended this section 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 the chapter of

the laws of two thousand fifteen which amended this section, the respondent may apply to the designated lead agency, petitioner or presentment agency, as applicable, for a certification as described in such paragraphs granting the relief set forth therein and such certification 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.

9. Procedures for violations of probation and conditional discharges in juvenile delinquency cases and procedures for allocutions and for violations of probation and suspended judgments in persons in need of supervision cases
[F.C.A. §§353.3, 360.2, 735, 743, 776, 779, 779-a]

Significant gaps exist in the procedural framework governing juvenile delinquency and persons in need of supervision (PINS) cases, each in the area of violations of court orders. Further, a procedural gap is evident in the PINS statutory framework for the fact-finding stage of the proceeding, as has repeatedly been identified by appellate courts. The Family Court Advisory and Rules Committee is proposing legislation to eliminate these gaps by clarifying applicable procedures in cases of alleged violations of orders of probation and orders of conditional discharge in juvenile delinquency proceedings and with respect to allocutions for admissions and violations of suspended judgments and orders of probation in PINS cases.

With respect to violations of orders of probation and conditional discharge, the Committee's proposal effectuates the apparent intention of the Legislature to provide identical provisions to toll such dispositional orders while violation proceedings are pending. While sections 360.2 and 360.3 articulate a procedure governing violations of both probation and conditional discharge, references to conditional discharge appear to have been inadvertently omitted from two subdivisions of those sections. In Matter of Donald MM, 231 A.D.2d 810, 647 N.Y.S. 2d 312 (3d Dept., 1996), *lve. app. denied*, 89 N.Y.2d 804 (1996), the Appellate Division, Third Department, read into section 360.2(4) of the Family Court Act a requirement that the period of a conditional discharge be tolled during the pendency of a violation petition, as in probation violation cases. The Court held that the omission of the requirement was unintentional, as "it is apparent from a reading of all provisions of this statute that the Legislature did not intend for probationary periods and conditional discharges to be treated differently." The Committee's proposal incorporates this tolling requirement into subdivision four of section 360.2 of the Family Court Act. Using the same rationale, it remedies a similar gap in subdivision five of the same section, which requires credit for the period of pendency of a violation petition to be given in cases in which the violation has not been sustained.

With respect to PINS proceedings, the Committee's proposal adds a new section 743 to the Family Court Act, establishing a judicial allocution procedure for accepting admissions in PINS cases analogous to the allocution required in juvenile delinquency cases [Family Court Act §321.3]. The Committee's proposal would require the Family Court, before accepting an admission in a PINS case, to ascertain that the juvenile respondent committed the act or acts to which an admission is being entered, is voluntarily waiving his or her right to a hearing and is aware of the dispositional alternatives that may be ordered as a result of the adjudication that is the likely consequence of the admission. Additionally, the proposal corrects an apparently inadvertent omission of a phrase in subdivision (h) of section 735 of the Family Court Act.

The absence of an explicit allocution procedure in the PINS statute has generated extensive appellate litigation. In Matter of Tabitha L.L., 87 N.Y.2d 1009 (1996), the Court of Appeals held that it would be inappropriate to incorporate section 321.3 of the Family Court Act into Article 7 in the absence of specific legislative authorization. It did not determine whether an allocution procedure is constitutionally required, since that issue was not preserved for appellate review. In a subsequent case,

Matter of Tabitha E., 271 A.D.2d 719, 720 (3d Dept., 2000), however, the Appellate Division, Third Department, held it to be reversible error for the Family Court to accept an admission in a PINS proceeding without first advising the respondent of her right to remain silent. *Accord*, Matter of Ashley R., 42 A.D.3d 689 (3d Dept., 2007); Matter of Marquis S., 26 A.D.3d 757 (4th Dept., 2006); Matter of Steven Z., 19 A.D.3d 783 (3d Dept., 2005); Matter of Matthew RR, 9 A.D.3d 514 (3d Dept., 2004); Matter of Nichole A., 300 A.D.2d 947 (3d Dept., 2002); Matter of Jodi VV., 295 A.D.2d 659 (3d Dept., 2002); Matter of Shaun U., 288 A.D.2d 708 (3d Dept., 2001). The Committee submits that considerations of due process -- equally compelling in PINS as in juvenile delinquency cases -- militate in favor of equivalent protections and, therefore, urges the Legislature to enact a provision for PINS cases comparable to the allocution requirement applicable to juvenile delinquency proceedings.

The final two amendments to the PINS statutes would delineate procedures for violations of orders of suspended judgment and violations of probation, drawing upon existing juvenile delinquency procedures. *See* Family Court Act §§360.2, 360.3. Violations of both orders of probation and suspended judgment would require the filing of a verified petition, a hearing at which the juvenile is represented by counsel and a determination by competent proof that the juvenile committed the violation charged without just cause. Periods of dispositions of suspended judgment and probation would be tolled during the pendency of the violation petition. The juvenile must be advised of his or her rights. *See, e.g.*, Matter of Corey W.W., 93 A.D.3d 1130, 941 N.Y.S.2d 761 (3d Dept., 2012); Matter of Jessica GG., 19 A.D.3d 765 (3d Dept., 2005); Matter of Ashley A., 296 A.D.2d 627 (3d Dept., 2002).

Upon a finding of a violation, the Family Court would be authorized to adjourn the matter for a new dispositional hearing in accordance with subdivision (b) or (c) of section 749 of the Family Court Act or, at minimum, provide the juvenile with an opportunity to present evidence. *See* Matter of Casey V.V.., 3 A.D.3d 785 (3d Dept., 2004); Matter of Josiah RR, 277 A.D.2d 654 (3d Dept., 2000). The Court would be permitted to revoke, continue or modify the order of probation or suspended judgment. If the order is revoked, the Court must order a different dispositional alternative enumerated in section 754(a), to state the reasons for its determination and to make the findings required by section 754(b) of the Family Court Act. *See* Matter of Nathaniel JJ, 265 A.D.2d 660 (3d Dept., 1999), *after remittitur*, 270 A.D.2d 783 (3d Dept., 2000) (PINS probation violation matter remanded twice for specific findings, first with respect to the reasons for the disposition and second as to the 16-year old respondent's needs, if any, for independent living services).[19] In matters such as Nathaniel J.J., in which the juvenile was placed pursuant to Family Court Act §756, these findings would be mandated as well by the Federal and State *Adoption and Safe Families Acts* [Public Law 105-89; L. 1999, c.7; L.2000, c. 145].

Proposal

AN ACT to amend the family court act, in relation to adjudication, dispositional and violation procedures in juvenile delinquency and persons in need of supervision cases

[19] The final appeal in Matter of Nathaniel JJ, 274 A.D.2d 611 (3d Dept., 2000) was dismissed as moot, since the appellant had been released from placement.

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

Section 1. Subdivisions 2, 4 and 5 of section 360.2 of the family court act, as added by chapter 920 of the laws of 1982, are amended to read as follows:

2. The petition must be verified and subscribed to by the probation service or the appropriate presentment agency. Such petition must stipulate the condition or conditions of the order violated and a reasonable description of the time, place and manner in which the violation occurred. Non-hearsay allegations or allegations made upon information and belief of the factual part of the petition or of any supporting depositions must establish, if true, every violation charged.

4. If a petition is filed under subdivision one, the period of probation as prescribed by section 353.2 or conditional discharge as prescribed by section 353.1 shall be interrupted as of the date of the filing of the petition. Such interruption shall continue until a final determination as to the petition has been made by the court pursuant to a hearing held in accordance with section 360.3 or until such time as the respondent reaches the maximum age of acceptance into a division for youth facility.

5. If the court determines that there was no violation of probation or conditional discharge by the respondent, the period of interruption shall be credited to the period of probation or conditional discharge, as applicable.

§2. Subdivision (h) of section 735 of the family court act, as added by section 7 of part E of chapter 57 of the laws of 2005, is amended to read as follows:

(h) No statement made to the designated lead agency or to any agency or organization to which the potential respondent has been referred, prior to the filing of the petition, or if the petition has been filed, prior to the time the respondent has been notified that attempts at diversion will not be made or have been terminated, or prior to the commencement of a fact-finding hearing if attempts at diversion have not terminated previously, may be admitted into evidence at a fact-finding hearing or, if the proceeding is transferred to a criminal court, at any time prior to a conviction.

§3. The family court act is amended by adding a new section 743 to read as follows:

§743. Acceptance of an admission. (a) Before accepting an admission, the court shall advise the respondent of his or her right to a fact-finding hearing. The court shall also ascertain through allocution of the respondent and his or her parent or person legally responsible for his or her care, if present, that the respondent:

(i) committed the act or acts to which an admission is being entered;

(ii) is voluntarily waiving his or her right to a fact-finding hearing; and

(iii) is aware of the possible specific dispositional orders.

The provisions of this subdivision shall not be waived.

(b) Upon acceptance of an admission, the court shall state the reasons for its determination and shall enter a fact-finding order. The court shall schedule a dispositional hearing in accordance with subdivision (b) or (c) of section seven hundred forty-nine of this part.

§4. Section 776 of the family court act is amended to read as follows:

§776. Failure to comply with terms and conditions of suspended judgment. [If a] A respondent [is] brought before the court for failure to comply with reasonable terms and conditions of [a] an order of suspended judgment [issued under this article and if,] shall be subject to section seven hundred seventy-nine-a of this part. If, after hearing, the court [is satisfied] determines by competent proof that the respondent without just cause failed to comply with such terms and conditions, the court may adjourn the matter for a new dispositional hearing in accordance with subdivision (b) or (c) of section seven hundred forty-nine of this article. The court may revoke the [suspension] order of suspended judgment and proceed to make any order that might have been made at the time judgment was suspended.

§5. Section 779 of the family court act is amended to read as follows:

§779. [Failure] Jurisdiction and supervision of respondent placed on probation; failure to comply with terms of probation. [If a] (a) A respondent who is placed on probation in accordance with section seven hundred fifty-seven of this article shall remain under the legal jurisdiction of the court pending expiration or termination of the period of probation.

(b) The probation service shall supervise the respondent during the period of such legal jurisdiction.

(c) A respondent [is] brought before the court for failure to comply with reasonable terms and conditions of an order of probation issued under section seven hundred fifty-seven of this article [and if] shall be subject to section seven hundred seventy-nine-a of this article. If, after a hearing pursuant to such section, the court [is satisfied] determines by competent proof that the respondent without just cause failed to comply with such terms and conditions, the court may adjourn the matter for a new dispositional hearing in accordance with subdivision (b) or (c) of section seven hundred forty-nine of this article. The court may revoke the order of probation and proceed to make any order that might have been made at the time the order of probation was entered.

§6. Section 779-a of the family court act, as amended by chapter 309 of the laws of 1996, is amended to read as follows:

§779-a. [Declaration of delinquency concerning juvenile delinquents and persons in need of supervision.] Petition and hearing on violation of order of probation or suspended judgment. (a) If, at any time during the period of [a disposition of] probation, the [court] petitioner, probation service or appropriate presentment agency has reasonable cause to believe the respondent has violated a condition of the disposition, [it] the petitioner, probation service or appropriate presentment agency may [declare the respondent delinquent and] file a [written declaration of delinquency. Upon such filing, the respondent shall be declared delinquent of his disposition of probation and such disposition shall be tolled. The] violation petition.

(b) The petition must be verified and subscribed by the petitioner, probation service or the appropriate presentment agency. The petition must specify the condition or conditions of the order violated and a reasonable description of the date, time, place and manner in which the violation occurred. Non-hearsay allegations of the factual part of the petition or of any supporting depositions must establish, if true, every violation charged.

(c) Upon the filing of a violation petition, the court [then must promptly take reasonable and appropriate action] shall issue a summons or warrant in accordance with section seven hundred twenty-five of this article to cause the respondent to appear before [it for the purpose of enabling] the

court [to make a final determination with respect to the alleged delinquency. The]. Where the respondent is on probation pursuant to section seven hundred fifty-seven of this article, the time for prompt court action shall not be construed against the probation service when the respondent has absconded from probation supervision and the respondent's whereabouts are unknown. The court must be notified promptly of the circumstances of any such probationers.

(d) If a petition is filed under subdivision (a) of this section, the period of probation or suspended judgment prescribed by section seven hundred fifty-five or seven hundred fifty-seven of this article shall be interrupted as of the date of the filing of the petition. Such interruption shall continue until a final determination of the petition or until such time as the respondent reaches the maximum age of acceptance into placement with the commissioner of social services. If the court dismisses the violation petition, the period of interruption shall be credited to the period of probation or suspended judgment.

(e) Hearing on violation. (i) The court may not revoke an order of probation or suspended judgment unless the court has found by competent proof that the respondent has violated a condition of such order without just cause and that the respondent has had an opportunity to be heard. The respondent is entitled to a hearing promptly after a violation petition has been filed. The respondent is entitled to counsel at all stages of the proceeding and may not waive representation by counsel except as provided in section two hundred forty-nine-a of this act.

(ii) At the time of the respondent’s first appearance following the filing of a violation petition, the court must:

(A) advise the respondent of the contents of the petition and furnish a copy to the respondent;

(B) advise the respondent that he or she is entitled to counsel at all stages of a proceeding under this section and appoint an attorney pursuant to section two hundred forty-nine of this act if independent legal representation is not available to the respondent. If practicable, the court shall appoint the same attorney who represented the respondent in the original proceedings under this article;

(C) determine whether the respondent should be released or detained pursuant to section seven hundred twenty of this article; and

(D) ask the respondent whether he or she wishes to make any statement with respect to the violation. If the respondent makes a statement, the court may accept it and base its decision upon the statement. The provisions of section seven hundred forty-three of this article shall apply in determining whether a statement should be accepted. If the court does not accept the statement or if the respondent does not make a statement, the court shall conduct a hearing.

(iii) Upon request, the court shall grant a reasonable adjournment to the respondent to prepare for the hearing.

(iv) At the hearing, the court may receive any relevant, competent and material evidence. The respondent may cross-examine witnesses and present evidence on his or her own behalf. The court's determination must be based upon competent evidence.

(v) At the conclusion of the hearing, the court may adjourn the matter for a new dispositional hearing in accordance with subdivision (b) or (c) of section seven hundred forty-nine of this article. The court may revoke, continue or modify the order of probation or suspended judgment. If the court revokes the order, it shall order a different disposition pursuant to subdivision one of section seven hundred fifty-four of this article and shall make findings in accordance with subdivision two of such section. If the court continues the order of probation or suspended judgment, it shall dismiss the petition of violation.

§7. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to petitions for violations of probation, conditional discharge and suspended judgment filed on or after such effective date

10. 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). These issues, however, are 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. 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).

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, with the New York State Office of Children and Family Services, 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. As in the child welfare permanency legislation, the proposal would require the Family Court to consider the services necessary to assist juveniles 14 and older, instead of 16 and older, to make the transition from foster care to independent living in juvenile delinquency and PINS cases. *See* Family Court Act §1089(d)(2)(vii)(G). Further, as in the permanency statute, for those juveniles who are neither returning home nor achieving permanence through adoption, the proposal would require that if the permanency planning goal is "another planned permanent living arrangement," it must include "a significant connection to an adult willing to be a permanency resource for the child." *See* Family Court Act §1089(d)(2)(i)(E). Significantly, the new Federal Law, Public Law 113-183, requires 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, requires youth fourteen and older to be integrally involved in planning for their futures and precludes the permanency goal of "another planned permanent living arrangement" for any youth under the age of sixteen. *Id*. at Subtitle B, §§11-113.

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 a suitable permanency resource 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], 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.

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 reenrollment 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 an extension of placement/ 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.[20]

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 ½ 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 9000 aggravated assaults in New York annually.[21]

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 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 may well, 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, 2005 N.Y. Slip Op. 50160 (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; a service plan designed to fulfill the permanency goal for the juvenile;[22] 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

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[20] *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).

[21] *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.

[22] 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.

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. 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.[23] That these amendments were 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 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 was 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) (Fam. Ct., Monroe Co., 2005)(Unreported opinion) provides a more positive example of a case where, at a combined

[23] 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 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.

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 nationally recognized guidelines approved by the National Council of Juvenile and Family Court Judges.[24] As one child welfare expert has written:[25]

> 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 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.
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> *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 312.1 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

[24] *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (National Council of Juvenile and Family Court Judges, March, 2005).

[25] V. Hemrich, "Applying *ASFA* to Delinquency and Status Offender Cases," 18 *ABA Child Law Practice* 9:129, 134 Nov., 1999).

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 between the respondent and his or her family;

(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, as amended by chapter 181 of the laws of 2000, are amended to read as follows:

(a) Where the respondent is placed pursuant to subdivision two [or], 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], 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], 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, to independent living 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 paragraphs (b) and (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 and paragraph (b) of subdivision 7 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 chapter 181 of the laws of 2000, 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, 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, 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 report that conforms to the requirements of subdivision (c) of section one thousand eighty-nine of this act.

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 parents of siblings of the respondent, 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.

(b) in the case of a respondent who has attained the age of [sixteen] fourteen, the services needed, if any, to assist the respondent to make the transition from foster care to independent living;

(d) with regard to the completion of placement ordered by the court pursuant to section 353.3 or 355.3 of this [article] part: whether and when the respondent: (i) will be returned to the parent or parents; (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 that includes a significant connection to an adult willing to be a permanency resource for the child if the office of children and family services or the local commissioner of social services has documented to the court a compelling reason for determining that it would 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

10. 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:

(a) a description of the plan to facilitate visitation between the respondent and his or her family;

(b) a service plan aimed at effectuating the permanency goal; 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, 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 federal law.

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 to independent living, 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.

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. 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. Subdivision (a) of section 756 of the family court act is amended by adding new paragraphs (iii) and (iv) to read as follows:

(iii) The local commissioner of social services or the relative or suitable person with whom the respondent has been placed under this section 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; provided, however, that 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 and shall be annexed to the petition.

(iv) The permanency hearing report submitted in accordance with paragraph (iii) of this subdivision shall conform to the requirements of subdivision (c) of section one thousand eighty-nine of this act and shall contain recommendations and such supporting data as is appropriate. The permanency hearing report, as well as the report submitted not later than thirty days prior to the conclusion of the placement shall include, but not be 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 (if the respondent has attained the age of sixteen) to another permanency alternative as provided in paragraph (iv) of subdivision (d) of section seven hundred fifty-six-a of this part. 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 anticipate 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.

§9. Section 756 of the family court act is amended by adding a new subdivision (d) 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;

(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 ninety 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 federal law.

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.

§10. Subdivision (a), subdivision (b) and the opening paragraph and paragraphs (ii), (iii) and (iv) of subdivision (d) of section 756-a of the family court act, subdivision (a) as amended by section 30 of chapter 309 of the laws of 1996, subdivision (b) and the opening paragraph and paragraphs (ii), (iii) and (iv) of subdivision (d) as amended by section 4 of part B of chapter 327 of the laws of 2007, are amended and a new paragraph (v) is added to such 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 report that conforms to the requirements of paragraph (iii) of subdivision (a) of section seven hundred fifty-six of this part.

(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 report shall be served on the respondent's attorney.

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:

(ii) in the case of a [child] respondent who has attained the age of [sixteen] fourteen, the services needed, if any, to assist the [child] respondent to make the transition from foster care to independent living;

(iii) in the case of a [child] respondent placed outside New York state, whether the out-of-state placement continues to be appropriate and in the best interests of the [child] respondent; [and]

(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 that includes a significant connection to an adult willing to be a permanency resource for the respondent if the social services official has documented to the court a compelling reason for determining that it would not be in the best interest of the [child] 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 where the [child] respondent will not be returned home, consideration of appropriate in-state and out-of-state placements[.]; and

(v) 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.

§11. Subdivisions (e) and (f) of section 756-a of the family court act are re-lettered subdivisions (f) and (g) and a new subdivision (e) is 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 visitation plan, including any plans for visitation 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 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.

A copy of the court's order and the service plan 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 foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

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

11. 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. L.. §358-a]

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 p3romptly 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. The second "Child and Family Service Review (CFSR)," conducted by the Administration for Children and Families of the United States Department of Health and Human Services (HHS) in 2008, concluded that New York State again ranked among the lowest scores in the nation and demonstrated how far New York needs to progress in order to achieve the Federal targets.[26] 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 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 recently issued policy directives of the New York State Office of Children and Family Services and

[26] As in 2001, New York State scored poorly 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) .

the New York City Administration for Children's Services, but would have the stronger force of statute.[27]

The measure adds two important requirements not contained in the new 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 new 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 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

[27] 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.

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 recent 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.

III. **Previously Endorsed Measures**

1. Putative fathers entitled to consent to adoptions and to notice of adoption, surrender and termination of parental rights proceedings [D.R.L. §§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 putative or non-marital 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,[28] 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 fathers to consent to adoptions and the criteria for those entitled to notice of, but not veto power over, adoptions.

1. Consent fathers [Domestic Relations Law §111]:

The Committee's proposal establishes a new, objective benchmark for determining the applicable criteria for assessing whether a putative father should be accorded the status of a "consent father." Current law establishes different criteria for determining whether a non-marital father is a "consent father," depending upon whether a child was less than or more than six months old when the child was "placed with the adoptive parents." *See* Domestic Relations Law §§111(1)(d), 111(1)(e). The Committee's proposal 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 phrases "placed with the adoptive parents" and "placed for adoption."[29]

The phrase "placed with the adoptive parents" has generated decades of confusion over whether it denotes the original placement with the particular adoptive family at a point where their status was not yet "adoptive" or the later point at which the adoptive parents signed an adoptive placement agreement or, alternatively, the hard-to-pinpoint moment at which foster parents were identified by the child care agency as the adoptive resources for the child. Interpretation of the phrase to connote the point at which the adoptive parents signed an adoptive placement agreement has been problematic since it, in effect, has rendered the six-month distinction inapplicable to the vast majority of foster children, virtually all of whom are over six months old at the point when the agreement has been signed. As the Appellate Division, First Department, recognized in dicta in Matter of Tasha M., 33 A.D.3d 387 (1st Dept., 2006), such an interpretation is not meaningful, since

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

[29] Inclusion of the filing of the adoption petition as one of the criteria addresses situations, more common in private adoptions, in which a child is freed for adoption within the adoption proceeding, with no prior actions filed.

the determination whether a person is a "consent father" is a "threshold issue" that must generally be determined well in advance of the signing of an adoptive placement agreement. In fact, statutes and regulations preclude the signing of the adoptive placement agreement until the child has already been freed for adoption, but the Family or Surrogate's Court is required to make a determination regarding "consent fathers" as a part of a termination of parental rights proceeding.[30] The Committee's proposal would instead articulate a far more readily-identifiable point in time for determining whether to apply the over-six-months or under-six-months criteria.

Using the new benchmark for those children who were over six months old, the Committee's proposal recognizes additional categories of non-marital fathers who should be accorded the right to consent to adoptions of their children.[31] Those criteria would include, *inter alia*, those named on a child's birth certificate or acknowledgment of paternity, those adjudicated as fathers in New York or another state or territory, those whose acknowledgment of paternity or order of filiation in another country is determined to be entitled to comity, those who maintained substantial and continuous or repeated contact with the child through visits at least twice per month or through regular communication, and those who lived with the child for six months immediately prior to the earlier point of the child's placement in foster care or placement for adoption.

Affording non-marital fathers named on the child's birth certificate or acknowledgment of paternity, or adjudicated as fathers in New York or another state or territory, the right to consent to the adoption of their children reflects the increasing recognition and utilization of these means of establishing fatherhood. The Federal *Personal Responsibility and Work Opportunities Recognition Act* [Public Law 104-193] required states, as a condition of receiving Federal child support funding under Title IV-D of the Social Security Act, to implement simple means of legally establishing paternity through voluntary acknowledgments, including hospital-based programs to encourage their use, and to accord full faith and credit to acknowledgments from other states – requirements that have sharply increased the use and recognition of acknowledgments nationally. Further, the Act required genetic testing to be admissible in paternity proceedings and to be presumptive proof of paternity, changes that have increased paternity adjudications and have reduced contested cases. *See* 42 U.S.C.A. §666(a)(5).[32] Taken together, these changes, accompanied by parallel increases in societal perceptions of the status of fathers of out-of-wedlock children, militate in favor of recognizing fathers whose paternity has been established through these means as "consent fathers."

Additionally, the Committee's proposal retains but, again, clarifies the alternative behavioral criteria for establishing the status of a "consent father." Apart from legally establishing paternity, non-marital fathers may demonstrate their entitlement to be "consent fathers" through maintaining "substantial and continuous or repeated contact with the child." This may be demonstrated by payment of child support, visiting the child, regularly communicating with the child or living with the child for a six-month period. The proposal would modify the visiting criterion to require visits

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[30] *See* Social Services Law §§384-b(12); 18 N.Y.C.R.R. §§421.1(d), 421.18(3)(1).

[31] The Committee's proposal does not address the "consent father" criteria applicable to children under six months old, the subject of a Committee proposal in prior years. *See* D.R.L. §111(1)(e). Since the Court of Appeals, in Matter of Racquel Marie X., 76 N.Y.2d 387(1990), *cert. denied,* 498 U.S. 984 (1991), ruled unconstitutional the criterion requiring the putative father to have lived with the mother for six months prior to the child's birth, criteria articulated in that decision, rather than the statutory criteria, have been applied to putative fathers of those children.

[32] Voluntary paternity acknowledgment procedures and full faith and credit requirements in New York are delineated in Public Health Law §4135-b, Social Services Law §111-k and Family Court Act §516-a.

twice per month, the 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). Further, with respect to the living-together criterion, it would substitute a six-month period "immediately preceding the earlier of the placement of the child for adoption or placement of the child in foster care" for the existing requirement of "six months within the one year period immediately preceding the placement of the child for adoption."[33]

Elevation of legally adjudicated and acknowledged fathers to "consent fathers" from their current status as "notice only" fathers is consistent with the mandates in the recently-enacted permanency legislation for early identification of suitable non-respondent parents, as well as relatives (both paternal and maternal), with whom children who are the subjects of child protective proceedings might reside. *See* Family Court Act §1017 [L.2005, c. 3]. Non-respondent parents must be given notice of the pendency of child protective proceedings and permanency hearings , information regarding where their children have been placed and how they can enforce their rights to visitation, and a warning that they are subject to possible termination of parental rights if they don't involve themselves in planning for their children on a timely basis. *See* Family Court Act §1035, 1089(b)(1)(i). Child protective and child care agencies' continuing obligations to identify and plan with the fathers of children in their care and to document those efforts are clear from the inception of children's placement in foster care – part of a salutary national trend to spur early identification and involvement of fathers.[34] Fathers who come forward promptly, cooperate in permanency planning efforts, maintain regular contact with their children and fulfill their roles as fathers clearly merit the entitlement afforded by the Committee's proposal to consent to the adoption of their children.

2. Notice-only fathers [Domestic Relations Law §111-a; Social Services Law §384-c]:

In addition to augmenting the alternatives for establishing status as a "consent father," the Committee's proposal would add two categories of individuals who would be entitled to notice of termination of parental rights, surrender and adoption proceedings and the opportunity in those proceedings to be heard regarding their children's best interests. The proposal would retain as "notice-only" fathers those named by mothers in written sworn statements and those who have merely filed an intent to claim paternity with the putative father registry. Both of those are unilateral actions, do not carry a support obligation, and are revocable at will, thus warranting retention of the more limited "notice-only" status.[35]

The first new category of "notice-only fathers" would include individuals who have filed custody or paternity petitions, served the petitions upon the mother or agency and thereafter appeared in

[33] Read literally, the existing six-month criterion could only apply to the father of a foster child if the child were surrendered for adoption virtually immediately upon placement in foster care. The minimum thresholds of time in foster care for involuntary termination of parental rights are six months for abandonment and one year for all other grounds, except severe or repeated child abuse.

[34] *See* NYS Office of Children and Family Services, *Locating Absent Fathers and Extended Family Guidance Paper* (Informational Letter 05-OCFS-INF-05, Sept., 2005); *What About the Dads? Child Welfare Agencies' Efforts to Identify, Locate and Involve Nonresident Fathers* (US HHS ACYF Children's Bureau, 2006).

[35] They thus stand in sharp contrast to paternity acknowledgments, pursuant to Public Health Law §4135-b, which must be signed by both parents and have strict Federal time-limits and criteria that must be met before they can be revoked. *See* 42 U.S.C.A. §666(a)(5)(D)(ii). *See also* Family Court Act §516-a(b); Social Services Law §111-k.

court on the petitions during their children's most recent stays in foster care, that is, petitions that are still pending at the time of the adoption or termination of parental rights proceeding. This category reflects concern for the right to be heard of a non-marital father, whose attempts to assert his status as father may have been frustrated by the mother's unavailability or the child care agency's unresponsiveness, but who nonetheless has taken some concrete action. The second new category would be comprised of individuals identified in an acknowledgment or order of paternity in another country that has been determined by the Family or Surrogate's Court not to be entitled to comity in New York State but for whom the Court has determined that notice should be given.

Advances in establishment of paternity and enhanced expectations concerning the role of non-marital fathers in their children's lives warrant a realignment both of the requirements for consent to adoption by fathers of children born out of wedlock and for notice to fathers of termination, surrender and adoption proceedings. The Family Court Advisory and Rules Committee's proposal provides that necessary realignment and in so doing will enhance the effectiveness of the permanency planning process for children before the Court.

Proposal

AN ACT to amend the domestic relations law and the social services law, in relation to notices to non-marital fathers in adoption, surrenders 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, 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:

(i) been named as the father on the child's birth certificate; or

(ii) been adjudicated as the father by a court in the state of New York; or

(iii) been 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; or

(iv) 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 or territory of the United States in which it was executed to have the force and effect of an order of paternity or filiation; or

(v) been identified as the father in an order of paternity or filiation or an acknowledgment of paternity in another country that has been determined by the court to be entitled to comity in this state; or

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

A. the father's 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 with the child or with the person or agency having the care or custody of the child, when physically and 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, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father 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 to perform the acts specified in this paragraph.

(vii) 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 earlier of the placement of the child for adoption or placement of the child in foster care 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] paragraph.

(e) Of the father, 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 adoption] 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: (i) such father 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; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

§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 to be the father 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) any person who is recorded on the child's birth certificate as the child's father;

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

[(g)] (d) any person 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) 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] (e) any person who, subsequent to the child's most recent entry into foster care, has filed a paternity or custody petition that remains pending, where such petition was served upon the mother or upon the agency having care and custody of the child, where such person stated in the petition that he is the child's father and where he appeared in court on that petition on the date for return of process; and

(f) any person identified as the father in an order of paternity or filiation or an acknowledgment of paternity in another country that has been determined by the court not to be entitled to comity in this

state, but for whom the court determines that such person should be provided with notice pursuant to this section.

§3. Subdivisions 1 and 2 of section 384-c of the social services law, as amended by chapter 371 of the laws of 2013, are amended 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] the child if the child was 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 to be the father 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) any person who is recorded on the child's birth certificate as the child's father;

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

[(g)] (d) any person 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) 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] (e) any person who, subsequent to the child's most recent entry into foster care, has filed a paternity or custody petition that remains pending, where such petition was served upon the mother or upon the agency having care and custody of the child, where such person stated in the petition that he is the child's father and where he appeared in court on that petition on the date for return of process; and

(f) any person identified as the father in an order of paternity or filiation or an acknowledgment of paternity in another country that has been determined by the court not to be entitled to comity in this state, but for whom the court determines that such person should be provided with notice pursuant to section 111-a of 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, approvals 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 law shall not apply to cases in which judicial determinations had been made prior to such effective date regarding putative fathers entitled to consent to adopt or to notice of adoption, termination of parental rights, approvals of extra-judicial surrenders or extra-judicial consents to adoption or applications to execute judicial surrenders.

2. Orders of protection in termination of parental rights proceedings, child protective proceedings and permanency hearings regarding children freed for adoption
[F.C.A. §§634, 1029; 1056, 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 should 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 or 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.

An additional 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 Kole HH, 84 A.D.3d 1518 (3d 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 hearing. Permanency 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. These time limits 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.

The Family Court Advisory and Rules Committee is proposing this measure to create a Family Court remedy for these deficiencies. First, the proposal would amend the termination of parental rights and permanent neglect statutes, Family Court Act §634 and Social Services Law §384-b, to add authority for the Family Court, for good cause after giving the birth parent notice and an opportunity to be heard, to issue an order of protection in conjunction with an order of disposition committing guardianship and custody of the child. The order of protection may, among other conditions, prohibit the birth parent from contact with the child and the child's foster or pre-adoptive parent and may last for a period of up to five years or until the date on which the youngest child turns eighteen, whichever is earlier. 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 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.

Fourth, similar to orders of protection in family offense cases, 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 aggravating circumstances or a violation of an order of protection, up to five years. 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. The duration of orders against non-parents and former members of the household, pursuant to subdivision four of section 1056 of the Family Court Act would be unchanged, but the proposal would explicitly permit the restrained party to return to court for modification or vacatur of the order of protection upon a showing of a substantial change of circumstances. Concomitantly, orders of protection in permanent neglect and other termination of parental rights proceedings would be authorized for periods of up to five years. These provisions for time-limited orders would, therefore, meet the criticisms voiced by the Court of Appeals in Matter of Sheena D., 8 N.Y.3d 136 (2007), regarding lengthy orders of protection not subject to judicial scrutiny.

Finally, to optimize their effectiveness, the proposal would require all of these orders of protection to be entered onto the statewide registry of orders of protection and warrants. 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 approximately 2.7 million orders of protection in the database,[36] 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

[36] Source: NYS Office of Court Administration Division of Technology (Dec., 2014).

orders of protection if the orders are not included on the registry, thus leaving victims and their families, even in cases of serious child 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 child protective proceedings, the child could 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 child protective, 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 fulfil its purpose of protecting all individuals, including children, from harm.

The importance of inclusion of these orders on the registry cannot be overstated. Domestic violence is often inextricably linked with child abuse and victims of domestic violence in child abuse and neglect cases, including victims who may be respondents in these proceedings, require as much protection from their abusers as in other proceedings .[37] If a child neglect proceeding is brought against the abuser, the order of protection issued to protect both the abuse victim and the children 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%.[38] Research has estimated that children are abused at a rate 1,500 times higher than the national average in homes where domestic violence is also present.[39] Significantly, child sexual abuse has also been closely correlated with domestic violence. Therefore, inclusion of orders of protection in such cases on the registry will significantly advance the Legislature's goal of providing an integrated

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[37] Victims of domestic violence may not be charged with child neglect by reason of their children's exposure to domestic violence, unless they have failed to exercise a minimum degree of care and unless the child is thereby placed in imminent risk of impairment. Nicholson *v.* Scoppetta, 3 N.Y.3d 357 (2004). However, there are respondents in neglect and abuse proceedings, who are themselves also victims of family offenses, who should be able to obtain protection for themselves and their children without the burden of initiating separate family offense proceedings in order to obtain this relief.

[38] *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 Mothers of Abused Children: A Controlled Study," 84 *Pediatrics* #3 (1989); L. Walker, *The Battered Woman Syndrome* 59 (1984)].

[39] "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)].

response in all family violence cases and of protecting all victims of domestic abuse, both parents and children, 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 regarding children freed for adoption

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

Section 1. Section 634 of the family court act, as amended by chapter 666 of the laws of 1976, is amended to read as follows:

§634. Commitment of guardianship and custody; further orders. The court may enter an order under section six hundred thirty-one committing the guardianship and custody of the child to the petitioner on such conditions, if any, as it deems proper. For good cause shown, the court may issue a temporary order of protection or, upon disposition, an order of protection to protect the child and the child's foster or pre-adoptive parent or parents and other designated members of the household in which the child resides. The order may direct the respondent to observe reasonable conditions that 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 or pre-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 and shall give the respondent notice and an opportunity to be heard. The court shall state its reasons on the record for issuing the order. An order of protection issued under this section may remain in effect for a period of up to five years or until the youngest child reaches the age of eighteen years of age, whichever is earlier. A violation of an order issued under this section may be addressed in accordance with subdivision two of section one thousand seventy-two of this chapter.

§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 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 may contain any of the provisions authorized on the making of an order of protection under section one thousand fifty-six of this article and must conform to all of the requirements of that section. 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. 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. The opening unlettered paragraph and paragraph (a) of subdivision 1, subdivisions 2 and 4 of section 1056 of the family court act, as amended by chapter 483 of the laws of 1995, are amended to read as follows:

1. The court may [make] issue an order of protection in assistance or as a condition of any other order made under this part. [Such] 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. An 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 aggravating circumstances as defined in paragraph (vii) of subdivision (a) of section eight hundred twenty-seven of this act or if the court finds that the respondent has violated an order of protection, a period of up to five years. The order of protection may be extended 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 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:

(a) to stay away from the home, school, business or place of employment of the other spouse, parent or person legally responsible for the child’s care, person with whom the child has been placed

or released by the court or the child, and to stay away from any other specific location designated by the court;

2. [The] Where the court [may also] has determined, in accordance with the requirements of section one thousand seventeen, part two or, as applicable, sections one thousand fifty-two and one thousand fifty-five of this article, to award custody of the child, during the term of the temporary order of protection or order of protection, as applicable, to [either] a suitable non-respondent parent[,] or [to an] other appropriate relative [within the second degree] or suitable person, this award of custody may be included in the order of protection or temporary 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. The court may enter an order of protection independently of any other order made under this part, against a person who was a member of the child's household or a person legally responsible for the child's care as defined in section one thousand twelve of this [chapter] article, and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household. An order of protection entered pursuant to this subdivision may be for any period of time up to the child's eighteenth birthday and upon such conditions as [the court deems necessary and proper to protect the health and safety of the child and the child's caretaker] are authorized by subdivision one of this section. The person restrained by the order of protection may, upon a showing of a substantial change of circumstances, move for modification or vacatur of the order.

§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 six hundred thirty-four, one thousand twenty-nine, one thousand fifty-six or one thousand eighty-nine of this article or subdivision thirteen of section three hundred eighty-four-b of the social services law, a motion or order to show cause may be filed that alleges that a parent or other person legally responsible for a child's care violated the terms and conditions of such order willfully and without just cause. If, after hearing, the court is satisfied by competent proof that the parent or other person 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 or eight hundred forty-six-a of this act.

§5. Clause (D) of subparagraph (viii) of paragraph 2 of subdivision (d) of section 1089 of the family court, as added by chapter 3 of the laws of 2005, is amended to read as follows:

D. [The] In the case of a child who has not been freed for adoption, the court may make an order of protection in the manner specified by section one thousand fifty-six of this [act] chapter in assistance or as a condition of any other order made under this section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified period of time by a person before the court for the protection of the child and the child's foster or pre-adoptive parent or parents

and other designated members of the household in which the child resides. 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 and the child. In the case of a child freed for adoption, the court, for good cause shown, may issue an order of protection directing a person whose parental rights had been terminated or surrendered to observe reasonable conditions enumerated therein in order to protect the child and the child's foster or pre-adoptive parent or parents and other designated members of the household in which the child resides. The conditions may include, among others, that such person shall stay away from the child and from the home, school, business or place of employment of the child or the child's foster or pre-adoptive parent or parents or other designated members of the household in which the child resides. The order may only be issued after the person or persons restrained by the order have been given notice and an opportunity to be heard. The court shall state its reasons on the record for issuing the order. In the case of a child freed for adoption or for whom a termination of parental rights proceeding is pending, the court may issue an order of protection or temporary order of protection, as applicable, in accordance with subdivision thirteen of section three hundred eighty-four-b of the social services law. A violation of an order issued under this section may be addressed in accordance with subdivision two of section one thousand seventy-two of this chapter.

§6. Section 384-b of the social services law is amended by adding a new subdivision 14 to read as follows:

14. For good cause shown, the court may issue a temporary order of protection or, upon disposition, an order of protection to protect the child and the child's foster or pre-adoptive parent or parents and other designated members of the household in which the child resides. The order may direct the respondent to observe reasonable conditions that 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 or pre-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 and shall give the respondent notice and an opportunity to be heard. The court shall state its reasons on the record for issuing the order. An order of protection issued under this section may remain in effect for a period of up to five years or until the youngest child reaches the age of eighteen years of age, whichever is earlier. A violation of

an order issued under this section may be addressed in accordance with subdivision two of section one thousand seventy-two of the family court act.

§7. Subdivision 1 of section 221-a of the executive law, as amended by sections 14 and 67 of part A of chapter 56 of the laws of 2010, 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, 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 [and ten] 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.

3. Conditional surrenders of parental rights in Family and Surrogate's Court

[D.R.L. §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 requires 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).[40]

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

[40] 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, 2015), 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) 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. 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, 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.

> 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.

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 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. Subdivision 1 of section 112-b of the domestic relations law, as amended by chapter 3 of the laws of 2005 and subdivision 2 of such section, 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, 2015, 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, 2015, 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, 2015, 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 adoption of the child; 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 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.

4. Adjournments in contemplation of dismissal and suspended judgments in child abuse and neglect 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 the 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 instead be ordered '[a]fter the entry of a fact-finding order but prior to the entry of a dispositional order" 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 Family Court 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 the adjournment, the Family Court would not be authorized to place the child pursuant to Family Court Act §1055 and the adjournment 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,[41] 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 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].

[41] *See* L. 2005, c. 3; L. 2006, c. 437.

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 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 section one thousand seventeen, or section one thousand fifty-five 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 and 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, 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, 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.

5. Stays of administrative fair hearings regarding reports of child abuse or maltreatment
[F.C.A. §§1039, 1051; Soc. Serv. L.§§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.

6. Orders for genetic testing in child protective proceedings
[F.C.A. §§532, 564, 1035, 1089]

Family Court Act §564 permits the Family Court, in proceedings other than paternity proceedings, such as child abuse, child neglect and permanency proceedings, to adjudicate paternity where both parents are before the court, the putative father waives the right to the filing of a separate paternity petition and the right to a hearing and the court is satisfied as to the child's paternity based upon sworn statements or testimony. Where these conditions are not met, the court may direct either party, the child, the child's guardian or other person authorized under Family Court Act §522 to file a separate verified paternity petition. However, the statute is silent regarding any authority for the Family Court to direct genetic testing of any party or the child. This gap in the law has created a roadblock for permanency planning for many children in child protective and permanency proceedings by impeding the early identification both of children's fathers and of paternal grandparents and other relatives who may be suitable resources for the children. The rapidly expanding kinship guardianship (Kin-GAP) program in New York State underscores the importance of the identification of paternal relatives.

The Family Court Advisory and Rules Committee is therefore proposing this measure that would address this problem. It would amend sections 532 and 564 of the Family Court Act to authorize the court to order genetic testing in non-paternity proceedings upon the consent of both parents. Where consent is not obtained, the court would be permitted to direct any party to file a verified paternity petition. Where the mother's consent is not forthcoming by reason of her absence from the court, the court would be authorized to direct genetic testing so long as she had received notice and an opportunity to be heard. DNA testing can now be performed with a high degree of scientific accuracy with samples taken solely from the child and putative father, a procedure commonly known as a "motherless calculation." As in paternity cases, no test would be ordered in cases where the court has made a written finding that testing would not be in the child's best interests by reason of res judicata, equitable estoppel or the presumption of legitimacy. Further, Family Court Act §564 would be amended to permit the Family Court to adjudicate paternity on the basis of genetic testing, not simply on the basis of sworn statements or testimony. Corresponding amendments would be made to child protective and permanency provisions of the Family Court Act [Family Court Act §§1035, 1089].

Enactment of a procedural vehicle for the expeditious establishment of paternity of children who are the subjects of child protective and permanency proceedings is of the utmost importance. It would further the legislative goal of early identification of non-respondent fathers and of the pool of paternal grandparents and other relatives who may provide far better alternatives for children than stranger foster care. The legislature's passage of the *Adoption and Safe Families Act* in 1999, the permanency legislation in 2005 and the various amendments to Family Court Act §1017, 1035 and related provisions all reflect an acknowledgment of the vital role that can and should be played by fathers and their kin in furthering permanency for children, particularly those who would otherwise require stranger foster care. Where neglect or abuse petitions have been filed or where voluntary placement instruments have been executed, the Family Court Act and Social Services Law require social service agencies to attempt to identify, locate and notify non-respondent parents and relatives. Facilitating adjudications of paternity would substantially assist in the fulfillment of these mandates.

The issue of paternity arises frequently in child protective and permanency proceedings in light of the large number of children before the Family Court who come from non-marital families and who may be the products of transitory or intermittent relationships. Often a person believing himself to be the father or a paternal grandparent or another paternal relative comes to court and seeks to care for or plan for an allegedly abused or neglected child. Sometimes more than one possible father appears. If paternity has not already been legally established through execution of an acknowledgment of paternity or through a judicial order of filiation, the court entertaining the child protective case must resolve the issue as soon as possible so that the child can be placed with the father or other family members and so that permanency planning for the child can proceed with dispatch. If the requirements of current Family Court Act §564 are not met – if, for example, the mother is not before the court or the court doubts the veracity of the mother's statement concerning paternity – the court's only alternative is to direct one of the parents to file a paternity petition. All too often this direction is not followed or the alleged father is unable to serve the petition on the mother whose whereabouts may be unknown. In such situations, the child's paternity may remain undetermined while the child lingers in foster care even though genetic testing, including the "motherless calculation" that can be performed in the mother's absence, could have swiftly resolved the issue.

Permitting the court to order genetic testing in the context of a child protective or permanency proceeding would provide a quick answer to questions regarding a child's paternity and would thus eliminate a significant roadblock on the child's path to a safe, healthy and permanent home. Identification of a child's parentage would not only permit location of relatives who may be resources for the child, but may also serve to identify siblings who may be able to develop significant relationships with the child. Equally significant, establishment of paternity would benefit the child by widening the availability of medical and other genetic information and by establishing the child's right to child support, medical and other insurance and inheritance from the father. Significant benefits to children, their immediate and extended families, social services agencies and the Family Court would thus result from enactment of the Committee's proposal.

Proposal

AN ACT to amend the family court act, in relation to paternity testing and adjudications 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 532 of the family court act is amended by adding a new subdivision (d) to read as follows:

(d) 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 of a child, who is a subject of the proceeding but paternity has not been established, the court may, upon the consent of the alleged father and mother, make an order for the alleged father, mother and child to submit to one or

more genetic marker or DNA tests, in accordance with the provisions of this section. Where the mother or alleged father of the child does not consent to the testing, the court may direct any party empowered under section five hundred twenty-two of this article to file a verified petition under section five hundred twenty-three of this article to establish paternity. If the mother is not before the court, the court may nonetheless make an order for genetic marker or DNA testing if the court finds that she has been given notice and an opportunity to be heard, 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.

§2. Subdivisions (b) and (c) of section 564 of the family court act, as added by chapter 440 of the laws of 1978, are amended to read as follows:

(b) The court may make such an order of filiation if:

(1) both parents are before the court, and

(2) the father 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] thirty-one of this act, and

(3) the court is satisfied as to the paternity of the child from the testimony or sworn statements of the parents or from the results of genetic testing performed in accordance with section five hundred thirty-two of this act. If the mother is not before the court, the court may make an order of filiation based upon the results of genetic testing ordered pursuant to subdivision (d) of section five hundred thirty-two of this act.

(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. The court may in any such proceeding, upon its own motion or upon the motion of either parent or alleged parent or the child, direct the alleged father, mother and child to submit to one or more genetic marker or DNA tests, in accordance with the provisions of section five hundred thirty-two of this act. 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.

§3. Section 1035 of the family court act is amended by adding a new subdivision (g) to read as follows:

(g) In any case in which paternity has not been established regarding a child who is the subject of a petition under this article and an alleged father is before the court, the court may direct genetic testing in accordance with section five hundred thirty-two of this act, may direct the filing of a paternity petition in accordance with section five hundred twenty-three of this act or may adjudicate paternity pursuant to section five hundred sixty-four of this act.

§4. Subparagraph (viii) of paragraph (2) of subdivision (d) of section 1089 of the family court act is amended by adding a new clause (I) to read as follows:

(I) In any case in which paternity has not been established regarding a child who is the subject of a hearing under this article and an alleged father is before the court, the court may direct genetic testing in accordance with section five hundred thirty-two of this act, may direct the filing of a paternity petition in accordance with section five hundred twenty-three of this act or may adjudicate paternity pursuant to section five hundred sixty-four of this act.

§5. This act shall take effect immediately.

7. Truancy allegations in child protective and persons in need of supervision (PINS) proceedings in Family Court
[F.C.A.§§735, 742, 1012, 1035]

The enactment of a statutory presumption for diversion of Persons in Need of Supervision (PINS) proceedings in 2005 has succeeded in linking troubled youth and their families to services without the need for court intervention in thousands of cases statewide. In cases alleging truancy and school misbehavior brought by a school district or local educational agency, the legislation contained an important requirement for the designated lead county PINS diversion agency to "review the steps taken by the school district or local educational agency to improve the youth's attendance and/or conduct in school and attempt to engage the school district or local educational agency in further diversion attempts, if it appears from review that such attempts will be beneficial to the youth." [Family Court Act §735(e)(iii)]. This requirement has had the salutary effect of engaging school officials in the process of resolving school problems, thus obviating unnecessary court involvement. Neither diversion agencies nor ultimately the Family Court can be expected to resolve educational problems without the involvement of educators.

However, the pleading and documentation mandate regarding truancy and other school-related problems only applies to cases in which the potential petitioner is a school district or local educational agency and thus has had no applicability in New York City, where parents, not school officials, initiate PINS proceedings. This has created a serious disparity in treatment of youth depending upon where in the State they reside, a disparity of constitutional magnitude. Compliance with the requirement for PINS petitioners to plead and to attach documentation from the lead diversion agency regarding diligent efforts to resolve PINS problems, including truancy, has been held to be a non-waivable jurisdictional defect requiring dismissal and, at the appellate stage, reversal. *See* In the Matter of Sage G., -A.D.3d-, 2014 WL 5350471 (2nd Dept., Oct. 22, 2014); In the Matter of James L., 74 A.D.3d 1775 (4th Dept., 2010); In the Matter of Joseph C.E., 99 A.D.3d 1245, 951 N.Y.S.2d 450 (4th Dept., 2012); In the Matter of Nicholas R.Y., 91 A.D.3d 1321, 937 N.Y.S.2d 654 (4th Dept., 2012); In the Matter of Leslie H. *v.* Carol M.D., 47 A.D.3d 716, 849 N.Y.S.2d 612 (2nd Dept., 2008); In the Matter of Rajan M., 35 A.D.3d 863 (2d Dept., 2006). Thus, PINS petitions containing identical truancy or school misbehavior allegations, but deficient regarding pleading and documentation of diversion efforts, are subject to dismissal if filed outside New York City but not if filed in New York City. Equally important, youth with alleged school-related problems outside New York City have the right to the involvement of the local school district or educational agency both in taking steps to prevent the filing of a PINS petition and, if those efforts have not proven successful, in working with the lead diversion agency on further diversion efforts deemed beneficial to the juveniles.

The lack of education officials to initiate PINS petitions in New York City has been long-standing and has had the side effect of increasing the filing of educational neglect proceedings against parents. As the Vera Institute noted, in its report, *Rethinking Educational Neglect for Teenagers: New Strategies for New York State* (Nov., 2009) at p. 20, "Only 405 attendance officers and 3,004 guidance counselors serve more than one million school children in the city." *See also, Getting Teenagers Back to School*: *Rethinking New York State's Response to Chronic Absence* (Vera Inst.,Oct., 2010) at p. 6. Parents of New York City youth, working with the local PINS diversion

agency, thus bear the burden of addressing their children's truancy or school misbehavior without any responsibility on the part of professional educators to make prior efforts to alleviate the problems. Parents who fail to file a PINS petition as suggested by a school official or whose attempts to resolve a school-related problem are unsuccessful all too often find themselves the subject of educational neglect petitions, as the filing of an educational neglect petition is often threatened as a consequence of parental failure to file a PINS petition against his or her child. The Vera Institute report, in fact, documented that educational neglect petitions are more prevalent in New York City. Nineteen percent of children reported to the state child abuse and maltreatment hotline in New York City in 2008 included an allegation of educational neglect, compared to ten percent statewide. *Rethinking Educational Neglect for Teenagers, supra,* p. 4. Child protective agencies, like PINS diversion agencies, cannot resolve school-related problems without the engagement of educators. Clearly, a comprehensive response to both education-related PINS and educational neglect cases statewide that will bring educators to the table as part of the solution, both pre- and post-petition, is warranted .

The Family Court Advisory and Rules Committee is proposing this measure to amend both Article 7 and Article 10 of the Family Court Act. With respect to PINS proceedings, the proposal would remedy the geographic disparity by amending Family Court Act §735 to require designated lead PINS diversion agencies to review and document efforts by school districts to resolve truancy or school misbehavior in all PINS proceedings containing such allegations. Since this would apply regardless of who is the potential petitioner, the 2005 statutory requirement would become applicable statewide. Second, again regardless of who is the potential petitioner, the measure requires the lead diversion agency to notify the local school district or educational agency of conferences, so that educators can provide assistance in resolving the problems, whether through school transfers, evaluations or other efforts. Moreover, where these efforts have proven unsuccessful and a PINS petition has been filed alleging truancy or other school-related problem, Family Court Act §736 would be amended to require that the school district or local educational agency must be notified of the court proceeding and may be joined as a necessary party and enlisted to provide assistance "where the court determines that such participation and /or assistance would aid in the resolution of the petition." Significantly, flexibility may be afforded to school officials so that the assistance they provide to the lead diversion agency at the diversion stage, as well as their participation in court proceedings where warranted, would not unduly interfere with their schedules.

Further, in a provision affecting PINS proceedings statewide, the measure would amend Family Court Act §742 to permit the Family Court to refer PINS proceedings to diversion agencies not simply upon the juvenile's initial court appearance but at <u>any</u> stage in the proceeding. Frequently, the potential for diversion of a PINS proceeding without adjudication appears subsequent to the juvenile's first appearance. Allowing flexibility for the Family Court to refer a matter for diversion at any point will fulfill the statutory goal of the 2005 PINS diversion statute, that is, to avoid unnecessary PINS adjudications and costly placements.

In order to minimize the unnecessary filing of educational neglect petitions against parents, the measure would add similar provisions that, in effect, would establish a rebuttable presumption in favor of diversion. Child protective agencies would enlist the aid of education officials in resolving educational neglect problems without the need for court intervention and, if court intervention is nonetheless required, the Family Court would be authorized to engage them in the process of resolving the petitions. First, the definition of educational neglect in Family Court Act §1012(f)

would be amended to require proof of parental failure to provide educational services to the child "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," thus making the failure to resolve educational problems through diversion a prerequisite to filing. Second, Family Court Act §1031 would require that these efforts be recited in the petition, along with "the grounds for concluding that the educational problems could not be resolved absent the filing of a petition." As allegations in the petition, they would, therefore, need to be proven by a preponderance of the evidence in accordance with Family Court Act §1046(b). Finally, a notice of pendency of the petition in accordance with Family Court Act §1035 would have to be sent to the local educational agency or school district identified by the child protective agency. As in proposed Family Court Act §736, in order that the education agency or school district may be enlisted in appropriate cases to provide necessary assistance, Family Court Act §1035 would be amended to authorize the Family Court to join the school district or local educational agency as a necessary party "where the court determines that such participation and /or assistance would aid in the resolution of the petition."

Many schools already make efforts to resolve children's truancy and misbehavior without either PINS or educational neglect proceedings and for these schools the measure would simply require them to indicate what these efforts are in the increasingly rare cases in which such efforts fail. The 2009 Vera Institute report provides encouraging evidence of success in addressing school-related problems in jurisdictions in which the professional educational community takes an active role. Public School 55 in Bronx County was cited as an example where a comprehensive approach taken by a school principal has resulted in an impressive 94% attendance rate. *Id*. at pages 20-21. Likewise, where PINS, neglect and juvenile delinquency petitions have been filed, Erie County Family Court has a dedicated judge who, with a team comprised of representatives of the school system and the departments of probation, mental health and social services, as well as treatment providers, has had success in improving children's school attendance and grades, while sharply minimizing out-of-home placements. *Id*. at pages 14-15.

At the same time, the 2009 Vera Institute report, as well as the October, 2010 follow-up report, document the ineffectiveness of placing the burden solely upon child protective agencies and parents to address children's educational problems through the Family Court. Child protective workers generally lack "specialized skills, relationships, or experience required to navigate the education system, diagnose learning needs, and advocate for the educational rights of youth." Further, "only a few counties have preventive services programs that focus on engaging teenagers in school; where these services exist, the need far exceeds the programs' capacities." *Getting Teenagers Back to School, supra*, p. 2.

While both the 2009 and 2010 Vera Institute reports suggest that the educational neglect statute should be repealed as it applies to youth 13 and older, the Committee is concerned that such a step would simply result in the youth being relabelled as PINS without necessarily providing professional assistance in resolving their educational problems. Far more effective – and consistent with other recommendations in the reports – would be approaches to both PINS and educational neglect cases that make educators partners in the resolution of the problems they identify, preferably without the need for court intervention. In recommending blended funding among social services and education agencies to address teen truancy, the 2010 Vera report suggests that the mechanism "should be flexible and avoid involving the family in the child protective or PINS systems." *Id.* at p.6. Concomitantly, as the tragic case of Nixzmary Brown demonstrated, educational problems

reported to the State child abuse and maltreatment hotline sometimes reflect just the "tip of the iceberg," thus warranting investigation and possible intervention by the child protective system and, if necessary, the Family Court where the initial school-related complaint turns out to be only a hint of a much larger, more complex problem of child maltreatment.

The Committee's proposal recognizes that a comprehensive approach that amends both the education PINS and educational neglect statutes is needed in order to avoid unnecessary court intervention and effectively resolve children's educational problems. Educators must play a vital role in both the PINS and child protective processes and must be available to be called upon to assist in diverting both categories of cases from the court system where possible. Where petitions are filed in Family Court, education officials must be notified and, in appropriate cases, joined as parties so that they may be enlisted to participate in resolving education issues. The Committee's proposal, which would enhance both the diversion and the Family Court processes on a statewide basis for education-related PINS and educational neglect proceedings, would be enormously helpful in ensuring that professional educators become part of the solution for educational problems.

Proposal

AN ACT to amend the family court act, in relation to truancy allegations in persons in need of supervision and child protective proceedings in family court

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

Section 1. Paragraph (iii) of subdivision (d), paragraph (ii) of subdivision (g) and subdivision (h) of section 735 of the family court act, as amended by chapter 57 of the laws of 2005, are amended to read as follows:

(d)(iii) where the entity seeking to file a petition is a school district or local educational agency or where the parent or other potential petitioner indicates that the proposed petition will include truancy and/or conduct in school as an allegation, the designated lead agency shall review the steps taken by the school district or local educational agency to improve the youth's attendance and/or conduct in school and attempt to engage the school district or local educational agency in further diversion attempts, if it appears from review that such attempts will be beneficial to the youth. Where the school district or local educational agency is not the potential petitioner, the designated lead agency shall provide notice to it of any conference with the potential petitioner in order to enable the school district or local educational agency to assist the designated lead agency to resolve the truancy or school behavioral problems of the youth so as to obviate the need to file a petition or, at minimum, to resolve the education-related allegations of the proposed petition.

(g) (ii) The clerk of the court shall accept a petition for filing only if it has attached thereto the following:

(A) if the potential petitioner is the parent or other person legally responsible for the youth, a notice from the designated lead agency indicating there is no bar to the filing of the petition as the potential petitioner consented to and actively participated in diversion services; and

(B) a notice from the designated lead agency stating that it has terminated diversion services because it has determined that there is no substantial likelihood that the youth and his or her family will benefit from further attempts, and that the case has not been successfully diverted; and

(C) where the proposed petition contains allegations of truancy and/or school misbehavior, whether or not the school district or local education agency is the proposed petitioner, a notice from the designated lead agency regarding the diversion efforts undertaken and/or services provided by the designated lead agency and/or by the school district or local educational agency to the youth and the grounds for concluding that the educational problems could not be resolved absent the filing of a petition under this article.

(h) No statement made to the designated lead agency or to any agency or organization to which the potential respondent has been referred, prior to the filing of the petition, or if the petition has been filed, prior to the time the respondent has been notified that attempts at diversion will not be made or have been terminated, or prior to the commencement of a fact-finding hearing if attempts at diversion have not terminated previously, may be admitted into evidence at a fact-finding hearing or, if the proceeding is transferred to a criminal court, at any time prior to a conviction.

§2. Section 736 of the family court act is amended by adding a new subdivision 4 to read as follows:

(4) Where the petition contains allegations of truancy and/or school misbehavior and where the school district or local educational agency is not the petitioner, the court shall cause a copy of the petition and notice of the time and place to be heard to be sent to the school district or local educational agency identified by the designated lead agency in its notice pursuant to subparagraph

(C) of paragraph (ii) of subdivision (g) of section seven hundred thirty-five of this article. Where the court determines that participation and /or assistance by the school district or local educational agency would aid in the resolution of the petition, the school district or local educational agency may be joined by the court as a necessary party and may be asked to provide assistance in accordance with section two hundred fifty-five of this act.

§3. Subdivision (b) of section 742 of the family court act, as amended by chapter 57 of the laws of 2005, is amended to read as follows:

(b) At the initial appearance of the respondent, the court shall review any termination of diversion services pursuant to such section, and the documentation of diligent attempts to provide appropriate services and determine whether such efforts or services provided are sufficient [and]. The court may, at any time, subject to the provisions of section seven hundred forty-eight of this article, order that additional diversion attempts be undertaken by the designated lead agency. The court may order the youth and the parent or other person legally responsible for the youth to participate in diversion services. If the designated lead agency thereafter determines that [the] a case referred for diversion efforts under this section has been successfully resolved, it shall so notify the court, and the court shall dismiss the petition.

§4. Subparagraph (A) of paragraph (i) of subdivision (f) of section 1012 of the family court act, as amended by chapter 469 of the laws of 1971, is amended to read as follows:

(A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so, or, in the case of an alleged failure of the respondent to provide education to the child, 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; or

§5. Section 1031 of the family court act is amended by adding a new subdivision (g) to read as follows:

(g) Where a petition under this article contains an allegation of a failure by the respondent to provide education to the child in accordance with article sixty-five of the education law, regardless of

whether such allegation is the sole allegation of the petition, the petition shall recite the efforts undertaken by the petitioner and the school district or local educational agency to ameliorate such alleged failure prior to the filing of the petition and the grounds for concluding that the educational problems could not be resolved absent the filing of a petition under this article.

§6. Section 1035 of the family court act is amended by adding a new subdivision (g) to read as follows:

(g) Where the petition filed under this article contains an allegation of a failure by the respondent to provide education to the child in accordance with article sixty-five of the education law, the court shall cause a copy of the petition and notice of the time and place to be heard to be sent to the school district or local educational agency identified by the petitioner in the petition in accordance with subdivision (g) of section one thousand thirty-one of this article, Where the court determines that such participation and /or assistance would aid in the resolution of the petition, such school district or local educational agency may be joined by the court as a necessary party and may be asked to provide assistance in accordance with section two hundred fifty-five of this act.

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

8. Authorization for pilot programs for obtaining Family Court temporary orders of protection by video-conference [F.C.A. § 153-c; Jud. Law §212]

Consistent with the recommendations of the Chief Judge's Task Force to Expand Access to Civil Legal Services and the New York State Courts Access to Justice Program, the New York State Unified Court System has been expanding its "CourtHelp" web-site and related programs to assist the large number of unrepresented litigants to obtain needed relief from the courts. This is especially important when litigants are in need of temporary, emergency relief at moments of crisis in their lives.

One of the most noteworthy of these is the "Advocate-Assisted Family Offense Petition Program," developed by the New York State Unified Court System in conjunction with the Center for Court Innovation and ProBono.Net. Originated in 2011, refined in 2012 and piloted in Family Court, Bronx County, this easy-to-use, automated program permits an applicant for a temporary order of protection, with the aid of a trained domestic violence advocate, to prepare a family offense petition and, if needed, an address confidentiality affidavit, for filing in Family Court.[42] The program is available at courthouse locations and is suitable for expansion to remote sites, such as Family Justice Centers, senior centers and domestic violence shelters. With video equipment connected to judges or court attorney referees at courthouses, this program can be used in conjunction with actual court proceedings on the record for the issuance of temporary orders of protection. Use of video technology for this purpose has also been used successfully on a pilot basis by the Erie County Family Court and its local Family Justice Center.

The potential of this technology to expand access to the Family Courts for victims of domestic violence in need of emergency relief can not be over-stated. To that end, the Family Court Advisory and Rules Committee is submitting a measure seeking codification of its nascent programs. The measure would amend section 212 of the Judiciary Law to authorize the Chief Administrator of the Courts to "establish pilot programs for the filing of petitions for temporary orders of protection by electronic means and for the issuance of such orders by audio-visual means." It further directs the Chief Administrator, in developing such pilot programs, to "strive for regional diversity and [to] take into consideration, among other factors, the availability of public transportation, population density and the availability of facilities for conducting such programs." In order that prospective litigants, as well as law enforcement and other "first responders" in domestic violence cases, would be aware of any such programs near them, the Chief Administrator would be required to maintain a publicly available, up-to-date list of the programs.

Details of the pilot programs are delineated in proposed amendments to Family Court Act §153-c. Similar to the requirements for electronic appearances in criminal cases, pursuant to Article 182 of the Criminal Procedure Law, definitions are provided of "electronic means," "independent audio-visual system" and "electronic appearances." Analogous to the process for the development of electronic filing pilot programs, the measure requires consultation with "one or more local programs

[42] New York State Courts Access to Justice Program, *2012 Report*, at p. 34 [http://www.nycourts.gov/ip/nya2j/pdfs/NYA2J_2012report.pdf].

providing assistance to victims of domestic violence, the office for the prevention of domestic violence, and attorneys who represent family offense litigants." The plan for each proposed program must:

• identify sites and certified, licensed programs that have advocates who can be trained to assist litigants in preparing and filing documents, as well as equipment that is compatible with equipment at the local Family Court;

• identification of the existing resources available in local family courts for the implementation and oversight of the pilot program;

• delineation of procedures for the filing of the petitions and related documents, if any, such as address confidentiality affidavits, by electronic means, as well as procedures for the court proceedings themselves, including the swearing in of the petitioners and any witnesses, preparation of a verbatim transcription of testimony presented and a record of evidence adduced and prompt transmission of any orders issued to the petitioners;

• a timetable for implementation of the pilot program and plan for informing the public of its availability; and

• a description of data to be collected in order to facilitate effective evaluations of the programs in order that recommendations for improvements can be made.

With due regard for due process and fairness, participation in the program is strictly voluntary, requires the consent of the petitioner on the record and is limited to *ex parte* applications for temporary orders of protection. Proceedings must be on the record and preserved for transcription and documentary evidence, if any, must be electronically transmitted and formally introduced into evidence. Existing laws requiring personal service of process and confidentiality of, as well as the parties' access to, records would not in any way be altered. The Family Court would be required to state on the record its reasons for granting or denying a petitioner's request for an electronic appearance as part of the program.

In short, this measure would take advantage of rapidly developing technology that already has shown promise in assisting victims of domestic violence to easily obtain the emergency assistance they require.

Proposal

AN ACT to amend the family court act and the judiciary law, in relation to establishing a pilot program for the filing of petitions for temporary orders of protection by electronic means and for issuance of such orders ex parte by audio-visual means

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

Section 1. Section 153-c of the family court act, as added by chapter 416 of the laws of 1981, is amended to read as follows:

§ 153-c. Temporary order of protection. (a) Any person appearing at family court when the court is open requesting a temporary order of protection under any article of this act shall be entitled to file a petition without delay on the same day such person first appears at the family court, and a hearing on that request shall be held on the same day or the next day that the family court is open following the filing of such petition.

(b) as provided in this section, the chief administrator of the courts, with the approval of the administrative board of the courts, may promulgate rules to establish and implement one or more pilot programs for the filing of petitions for temporary orders of protection by electronic means and for the issuance of such orders ex parte by audio-visual means in order to provide access to the courts for litigants in need of emergency relief.

(1) Definitions. As used in this section:

(i) "Electronic means" means any method of transmission of information between computers or other machines designed for the purpose of sending and receiving such transmissions, and which allows the recipient to reproduce the information transmitted in a tangible medium of expression.

(ii) "Independent audio-visual system" means an electronic system for the transmission and receiving of audio and visual signals, encompassing encoded signals, frequency domain multiplexing or other suitable means to preclude the unauthorized reception and decoding of the signals by commercially available television receivers, channel converters, or other available receiving devices.

(iii) "Electronic appearance" means an appearance in which one or more of the parties are not present in the court, but in which, by means of an independent audio-visual system, all of the participants are simultaneously able to see and hear reproductions of the voices and images of the judge, counsel, parties, witnesses, if any, and other participants.

(2) Development of a pilot program. A plan for a pilot program pursuant to this section shall be developed by the chief administrator in consultation with one or more local programs providing assistance to victims of domestic violence, the office for the prevention of domestic violence, and attorneys who represent family offense litigants. The plan shall include, but not be limited to:

(i) identification of one or more family justice centers or organizations or agencies or other sites outside of the local family court that are equipped with, or have access to, an independent audio-visual system and electronic means for filing documents that are compatible with the equipment in the local family court, with consideration given to the location of such site or sites and available resources; and

(ii) identification of one or more licensed and certified organizations, agencies or entities with advocates for victims of domestic violence who are trained and available to assist petitioners in preparing and filing petitions for temporary orders of protection and in their electronic appearances before the family court to obtain such orders; and

(iii) identification of the existing resources available in local family courts for the implementation and oversight of the pilot program; and

(iv) delineation of procedures for filing of the petitions and related documents, if any, by electronic means, swearing in the petitioners and any witnesses, preparation of a verbatim transcription of testimony presented and a record of evidence adduced and prompt transmission of any orders issued to the petitioners; and

(v) a timetable for implementation of the pilot program and plan for informing the public of its availability; and

(vi) a description of data to be collected in order to evaluate and, if necessary, make recommendations for improvements to the pilot program.

(3) Filing by electronic means. In conjunction with an electronic appearance under this section, petitioners for ex parte temporary orders of protection may, with the assistance of trained advocates, commence the proceedings by filing petitions by electronic means.

(i) A petitioner who seeks a temporary order of protection ex parte by use of an electronic appearance must file an application in advance of such electronic appearance to authorize such appearance and may do so by electronic means. The petitioner shall set forth the grounds for seeking authorization for an electronic appearance. In granting or denying the relief sought by the petitioner, the court shall state the names of all participants, and whether it is granting or denying an appearance by electronic means and the basis for such determination; provided, however, that nothing in this

section shall be construed to compel a party to file a petition or other document by electronic means or to testify by means of an electronic appearance.

(ii) Nothing in this section shall affect or change any existing laws governing the service of process, including requirements for personal service, or the sealing and confidentiality of court records in family court proceedings, or access to court records by the parties to such proceedings.

(4) (i) All electronic appearances by petitioners seeking temporary orders of protection ex parte under this section shall be strictly voluntary and the consent of such petitioners shall be given on the record at the commencement of each appearance.

(ii) Appearances taken through the use of an electronic appearance under this section shall be recorded and preserved for transcription. Documentary evidence, if any, referred to by a party or witness or the court shall be transmitted, submitted and introduced by electronic means.

§ 2. Subdivision 2 of section 212 of the judiciary law is amended by adding a new paragraph (s) to read as follows:

(s) Have the power to establish pilot programs for the filing of petitions for temporary orders of protection by electronic means and for the issuance of such orders by audio-visual means pursuant to subdivision (b) of section one hundred fifty-three-c of the family court act. The chief administrator shall maintain an up-to-date and publicly-available listing of the sites, if any, at which such applications for ex parte temporary orders of protection may be filed and at which electronic appearances in support of such applications may be sought, in accordance with such section one hundred fifty-three-c. In developing such pilot programs, the chief administrator shall strive for regional diversity and shall take into consideration, among other factors, the availability of public transportation, population density and the availability of facilities for conducting such programs.

§3. This act shall take effect on the 180th day following the date upon which it shall have become a law.

9. Conditions of orders of protection in matrimonial proceedings and procedures and remedies for violations of orders of protection, including probation, in Family Court and matrimonial proceedings [F.C.A. §§430, 446-a, 550, 552, 655, 656-a, 841, 846-a; D.R.L. §§240, 252]

The *Family Protection and Domestic Violence Intervention Act of 1994* was accompanied by a legislative finding that "there are few more prevalent or more serious problems confronting the families and households of New York than domestic violence. ...The victims of family offenses must be entitled to the fullest protections of the civil and criminal laws." L.1994, c. 222, §1. To that end, concurrent civil and criminal jurisdiction was provided both for initial issuance and for enforcement of orders of protection. In addition to enhancing criminal penalties for violations of orders of protection, subsequent amendments strengthened civil enforcement remedies, both in Family and Supreme Courts, most recently, the firearms license and surrender remedies contained in the recently enacted "SAFE" Act. *See, e.g.*, L.1996, c. 644; L.1999, c. 606, 635; L. 2013, c.1. However, fragmentation and gaps in the civil enforcement provisions of both the Family Court Act and the Domestic Relations Law impede fulfillment of the promise of the 1994 legislation as well as the effectiveness of later enactments.

The Family Court Advisory and Rules Committee has developed a legislative proposal designed to ensure equity and provide a clear road map for civil enforcement of orders of protection in both Family and Supreme Courts. The proposal clarifies that all of the violation procedures and consequences contained in Article 8 of the Family Court Act govern violations of orders of protection and temporary orders of protection issued in family offense, child support, paternity, child custody, visitation, divorce and other matrimonial proceedings, thus building upon the incorporation in chapter 1 of the laws of 2013 of firearms license and suspension remedies into these provisions of the Family Court Act and Domestic Relations Law. Significantly, it would incorporate conditions of orders of protection contained in the Family Court family offense and custody provisions that had been omitted from the conditions enumerated for orders of protection in matrimonial orders of protection, specifically, conditions regarding participation in batterers' education programs and compensation for medical care and treatment.

Additionally, consistent with chapter 579 of the Laws of 2003, the proposal would amend Family Court Act §841(c) to authorize the Family Court to place a respondent on probation for a period of up to two years or, where an order of protection pursuant to Family Court Act §842 has been issued for five years, a period of up to five years. Since Family Court Act §841 explicitly authorizes concurrent issuance of both an order of probation and an order of protection as a disposition of an Article 8 family offense proceeding, consistency in the law dictates that the duration of both orders should be the same. Indeed, when the Family Court Act was first enacted in 1962, both the duration of probation and of orders of protection were set at one year. *See* L.1962, c. 686. Clearly, the duration of probation supervision over a respondent in a family offense matter should be coextensive with the duration of the order of protection, i.e., coextensive with the period of time determined by the Family Court as the period necessary to protect a victim of family violence from suffering further violence.

Violation procedures would be clarified by the incorporation by reference in sections 430, 446-a, 550, 552, 655 and 656-a of the Family Court Act of the following:

• the procedures contained in Family Court Act §846 for filing a violation petition, serving notice upon, and, if necessary, apprehending the respondent, and obtaining either a determination in Family Court or a transfer of the matter to a criminal court;

• the remedies contained in Family Court Act §§842-a and 846-a that are available to the Family Court once a willful violation of an order of protection or temporary order of protection has been found;[43] and

• the options contained in Family Court Act §847 for a victim of an alleged act constituting a family offense to seek the filing of an accusatory instrument in a criminal court,[44] as well as to file a new family offense petition or a violation petition.

Further, section 846-a of the Family Court Act would be amended to more clearly delineate the powers of the Family Court to impose sanctions upon a finding of a willful violation of an order of protection or temporary order of protection and to modify or issue a new order of protection or temporary order of protection. The Court's authority to place a violator on probation and to require, as a condition of probation, *inter alia*, that the violator participate and pay the costs of a batterer's education program would be articulated – a recommendation consistent with the statutorily-required evaluation of the 1994 legislation by the New York State Office for the Prevention of Domestic Violence and Division of Criminal Justice Services.[45] Where a violator is already on probation, the Court would be authorized to revoke or modify the order of probation and order any other remedy. Additionally, the proposal would clarify the Court's power to compel payment of the protected party's legal fees and costs, fees and costs for the child's attorney, restitution and medical expenses, as well as the Court's authority to suspend an order of visitation or require that visitation be supervised. None of these are new powers; all are powers currently exercised by the Courts. *See, e.g.*, Matter of Ch.B. *v.* J.U., 5 Misc.3d 1004, 2004 WL 2334311 (Sup. Ct., N.Y. Co., 2004)(Unrep.) (supervised visitation ordered).

Finally, consolidating several provisions, the proposal would also enumerate the options available to the Court to commit the violator to jail for up to six months per violation,[46] revoke or suspend a firearms license, order a violator ineligible to receive a firearms license and direct the surrender of firearms. A similar enumeration of enforcement remedies would be enumerated in section 240(3-d) and incorporated by reference in section 252(9) of the Domestic Relations Law.

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[43] In child support and paternity cases, these remedies would be available in addition to those already provided for violations of child support orders pursuant to Article 4, Part 5 of the Family Court Act.

[44] This option is, of course, circumscribed by considerations of prosecutorial discretion and, if the elements of the crime alleged are identical to those alleged in a Family Court violation petition, by constitutional double jeopardy principles. *See* United States *v.* Dixon, 509 U.S. 688 (1993); People *v.* Wood, 95 N.Y.2d 509 (2000); People *v* Arnold, 174 Misch.2d 585 (Sup. Ct., Kings Co., 1997). Pursuant to chapter 125 of the L. 1999, a complainant's election to proceed in Family Court does not divest a criminal court of jurisdiction to proceed.

[45] *Family Protection and Domestic Violence Intervention Act of 1994: Evaluation of the Mandatory Arrest Provisions: Third Interim Report to the Governor and the Legislature* (Oct., 2000), pp. 14, 30.

[46] Consecutive terms may be imposed for each violation incident. Walker *v.* Walker, 86 N.Y.2d 624 (1995).

With increased issuance of temporary and permanent orders of protection in matrimonial proceedings, specificity in the Domestic Relations Law with respect to the consequences for violations is absolutely critical. Section 7(b) of Article 6 of the New York State Constitution accords to the Supreme Court the powers of the Family Court, thereby conferring authority upon the Supreme Court to apply the provisions in Article 8 of the Family Court Act in matrimonial proceedings. However, the explicit articulation in the Domestic Relations Law of the full range of powers of the Supreme Court with respect to violations of orders of protection and temporary orders of protection would add needed clarity to the statutory framework and would facilitate a more effective response to domestic violence incidents occurring in the context of matrimonial proceedings.

By prescribing the procedures and remedies for violations of orders of protection and by authorizing Family Court probation periods to be coextensive with the duration of family offense orders of protection, this proposal will significantly enhance the capacity of Family and Supreme Courts to provide strong civil remedies – meaningful alternatives to criminal prosecutions – to protect victims of domestic violence and provide accountability for their abusers.

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to conditions of orders of protection in matrimonial proceedings and violations of orders of protection and temporary orders of protection and probation in matrimonial and family court proceedings

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

Section 1. Section 430 of the family court act is amended by adding a new subdivision (d) to read as follows:

(d) If a respondent is brought before the court for failure to obey a temporary order of protection issued pursuant to this section, such alleged violation shall be governed by sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act; provided, however, that an alleged violation consisting of nonpayment of support in violation of an order issued under this article shall be governed by parts five and seven of this article.

§2. Section 446-a of the family court act, as added by chapter 1 of the laws of 2013, is amended to read as follows:

§446-a. Firearms; surrender and license suspension, revocation and ineligibility; issuance or violation of order of protection or temporary order of protection. Upon the issuance of an order of

protection or temporary order of protection, or upon a violation of such order, the court shall make a determination regarding the suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of firearms in accordance with section eight hundred forty-two-a of this act. If a respondent is brought before the court for failure to obey an order of protection issued pursuant to this article, such alleged violation shall be governed by sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act; provided, however, that an alleged violation consisting of nonpayment of support in violation of an order issued under this article shall be governed by parts five and seven of this article.

§3. Section 550 of the family court act is amended by adding a new subdivision (d) to read as follows:

(d) If a respondent is brought before the court for failure to obey a temporary order of protection issued pursuant to this section, such alleged violation shall be governed by sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act; provided, however, that an alleged violation consisting of nonpayment of support in violation of an order issued under this article or article four of this act shall be governed by parts five and seven of article four of this act.

§4. Section 552 of the family court act, as added by chapter 1 of the laws of 2013, is amended to read as follows:

§552. Firearms; surrender and license suspension, revocation and ineligibility; issuance or violation of order of protection or temporary order of protection. Upon the issuance of an order of protection or temporary order of protection, or upon a violation of such order, the court shall make a determination regarding the suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of firearms in accordance with section eight hundred forty-two-a of this act. If a respondent is brought before the court for failure to obey an order of protection issued pursuant to this article, such alleged violation shall be subject to sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act; provided, however, that an alleged violation consisting of nonpayment of support in violation of an order issued under this article or article four of this act shall be governed by parts five and seven of article four of this act.

§5. Section 655 of the family court act is amended by adding a new subdivision (e) to read as follows:

(e) If a respondent is brought before the court for failure to obey a temporary order of protection issued pursuant to this section, such alleged violation shall be governed by sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act.

§6. Section 656-a of the family court act, as added by chapter 1 of the laws of 2013, is amended to read as follows:

§656-a. Firearms; surrender and license suspension, revocation and ineligibility; issuance or violation of order of protection or temporary order of protection. Upon the issuance of an order of protection or temporary order of protection, or upon a violation of such order, the court shall make a determination regarding the suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of firearms in accordance with section eight hundred forty-two-a of this act. If a respondent is brought before the court for failure to obey an order of protection issued pursuant to this article, such alleged violation shall be governed by sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act.

§7. Subdivision (c) of section 841 of the family court act, as amended by chapter 222 of the laws of 1994, is amended to read as follows:

(c) placing the respondent on probation for a period not exceeding [one year] two years or, if an order of protection has been issued for five years pursuant to section eight hundred forty-two of this article, a period not exceeding five years, and requiring respondent to participate in a batterer's education program designed to help end violent behavior, which may include referral to drug and alcohol counseling, and to pay the costs thereof if respondent 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; or

§8. 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. 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] shall do one or more of the following:

1. modify an existing order or temporary order of protection to add reasonable conditions of behavior to the existing order or temporary order of protection [,] or make a new order of protection or temporary order of protection in accordance with section eight hundred forty-two of this part, [may] or 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];

2. place the respondent on probation in accordance with subdivision (c) of section eight hundred forty-one of this article upon such conditions as the court shall direct, which may include, but not be limited to, a direction that the respondent participate in a batterer's education program designed to help end violent behavior, which may include referral to drug and alcohol counseling, and to pay the costs thereof if the respondent has the means to do so, provided, however, that nothing in this subdivision shall be deemed to require payment of the costs of any such program by the petitioner, the state or any political subdivision thereof;

3. if the respondent is already on probation pursuant to such section, revoke such order of probation, modify the conditions of such probation and/or order any other remedy under this section, provided, however, that pending the determination of a violation of probation, the period of probation shall be tolled as of the date of filing of the violation petition or motion;

4. order the respondent to pay restitution in accordance with subdivision (e) of section eight hundred forty-one of this article or, if the respondent has already been so ordered and has violated such order, modify such order of restitution and/or order any other remedy under this section;

5. order the respondent to pay the [petitioner's] reasonable and necessary counsel fees and disbursements of any other party or parties and/or the child's attorney in connection with the violation petition [where the court finds that the violation of its order was wilful, and may];

6. order the respondent 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 or its violation;

7. suspend or modify an order of visitation between respondent and his or her child or children or direct that such visitation be supervised by a person or agency designated by the court and under conditions specified by the court;

8. commit the respondent to jail for a term not to exceed six months. Such commitment may be served upon certain specified days or parts of days as the court may direct, and the court may, at any time within the term of such sentence, revoke such [suspension] direction and commit the respondent for the remainder of the original sentence, or suspend the remainder of such sentence[. If]; and

9. in accordance with subdivision three of section eight hundred forty-two-a of this article, immediately revoke any license possessed by respondent to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law, order the respondent ineligible for such a license, and 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, 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]. 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] any of the behaviors or actions enumerated in paragraph (a) or (b) of subdivision three of section 842-a of this article, 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, 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.

§9. Subparagraphs 7 and 8 of paragraph (a) of subdivision 3 of section 240 of the domestic relations law are renumbered 9 and 10 and new subparagraphs 7 and 8 are added to such paragraph to read as follows:

(7) 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 party or parties protected by the order, the state or any political subdivision thereof;

(8) 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;

§10. Paragraph (h) of subdivision 3 of section 240 of the domestic relations law, as amended by chapter 1 of the laws of 2013, is amended and a new subdivision 3-d is added to such section to read as follows:

h. Upon issuance of an order of protection or temporary order of protection or upon a violation of such order, the court shall make a determination regarding the suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of firearms in accordance with sections eight hundred forty-two-a and eight hundred forty-six-a of the family court act, as applicable. Upon issuance of an order of protection pursuant to this section [or upon a finding of a violation thereof], the court also may direct payment of restitution in an amount not to exceed ten thousand dollars in accordance with subdivision (e) of section eight hundred forty-one of such act; provided, however, that in no case shall an order of restitution be issued where the court determines that the party against whom the order would be issued has already compensated the injured party or where such compensation is incorporated in a final judgment or settlement of the action.

Upon a finding of a willful violation of an order of protection or temporary order of protection, the court shall make an order in accordance with subdivision three-d of this section.

3-d. If a party is brought before the court for failure to obey an order of protection or temporary order of protection issued by the court or 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 such party has willfully failed to obey such order, the court shall do one or more of the following:

a. modify an existing order of protection or temporary order of protection to add reasonable conditions of behavior to the existing order or temporary order or make a new order of protection or temporary order of protection in accordance with subdivision three of this section;

b. place the party found to have violated the order of protection or temporary order of protection on probation in accordance with subdivision (c) of section eight hundred forty-one of the family court act upon such conditions as the court shall direct, which may include, but not be limited to, a direction that the party found to have violated the order of protection or temporary order of protection participate in a batterer's education program designed to help end violent behavior, which may include referral to drug and alcohol counseling, and to pay the costs thereof if the party has the means to do so; provided, however, that nothing in this subdivision shall be deemed to require payment of the costs of any such program by any other party, the state or any political subdivision thereof;

c. if the party found to have violated the order of protection or temporary order of protection is already on probation pursuant to such section, revoke such order of probation, modify the conditions of such probation and/or order any other remedy under this subdivision, provided, however, that pending the determination of a violation of probation, the period of probation shall be tolled as of the date of filing of the violation petition or motion;

d. order the party found to have violated the order of protection or temporary order of protection to pay restitution in accordance with paragraph h of subdivision three of this section or, if such party has already been so ordered and has violated such order, modify such order and/or order any other remedy under this subdivision;

e. order the party found to have violated the order of protection or temporary order of protection to pay the reasonable and necessary counsel fees and disbursements of any other party or parties and/or the child's attorney in connection with the violation petition;

f. order the party found to have violated the order of protection or temporary order of protection 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 or its violation;

g. suspend or modify an order of visitation between the party found to have violated the order of protection or temporary order of protection and his or her child or children or direct that such visitation be supervised by a person or agency designated by the court and under conditions specified by the court;

h. commit the party found to have violated the order of protection or temporary order of protection to jail for a term not to exceed six months. Such commitment may be served upon certain specified days or parts of days as the court may direct, and the court may, at any time within the term of such sentence, revoke such direction and commit such party for the remainder of the original sentence, or suspend the remainder of such sentence; and

i. in accordance with subdivision three of section eight hundred forty-two-a of the family court act, suspend or revoke any license of the party found to have violated the order to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law immediately, order such party ineligible to receive such a license and order 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 party owns or possesses.

§12. Paragraphs (g) and (h) of subdivision 1 of section 252 of the domestic relations law are relettered (i) and (j) and two new paragraphs (g) and (h) are added to such subdivision to read as follows:

(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 party or parties protected by the order, 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;

§11. Subdivision 9 of section 252 of the domestic relations law, as added by chapter 606 of the laws of 1999, is amended to read as follows:

9. Upon issuance of an order of protection or temporary order of protection [or upon a violation of such order], the court [may take] shall, where applicable**,** make an order in accordance with section eight hundred forty-two-a of the family court act directing the surrender of firearms, revoking or suspending a

party's firearms license, and/or directing that such party be ineligible to receive a firearms license. Upon issuance of an order of protection pursuant to this section [or upon a finding of a violation thereof], the court also may direct payment of restitution in an amount not to exceed ten thousand dollars in accordance with subdivision (e) of section eight hundred forty-one of such act; provided, however, that in no case shall an order of restitution be issued where the court determines that the party against whom the order would be issued has already compensated the injured party or where such compensation is incorporated in a final [judgement] judgment or settlement of the action. Upon a finding of a willful violation of an order of protection or temporary order of protection, the court shall make an order in accordance with subdivision three-d of section two hundred forty of this chapter.

§12. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to violations of orders of protection and temporary orders of protection committed on or after such date.

10. Transfers of identification documents

[F.C.A. §§446, 551, 656, 842, 1056; D.R.L. §§240, 252; C.P.L. §530.12]

In response to the endemic problem of economic abuse, an all too pervasive form of domestic violence, the legislature enacted chapter 526 of the Laws of 2013. In addition to adding identity theft, coercion and grand larceny to the list of offenses for which family and criminal courts exercise concurrent jurisdiction, the legislation delineates a procedure for domestic violence victims to request return or transfer of "identification documents" as a condition of a temporary or final order of protection. Recognizing that the courts may include such transfers as a general condition that furthers the purposes of protection, the legislation's sponsors stated, in the Supporting Memorandum, "by specifically permitting the return of documents to victims of abuse this proposal will help provide meaningful relief to overcome some of the barriers to economic self-sufficiency imposed by the abuser." *See* Memorandum in Support of A 7400.

In order to better fulfill the legislative purpose of chapter 526, the Family Court Advisory and Rules Committee is submitting a measure to augment and clarify the identification document transfer procedure in two respects. First, the measure would add to the definition of identification document "any identification document in the name of a protected child who is in the care of a protected party." Clearly, the documents required for a domestic violence victim, along with his or her child, to escape to a place of safety may well include passports, immigration documents and other documents in the name of the child.

Second, the measure excludes from the transfer procedure those documents that are at issue in ongoing litigation either in a Family Court child support proceeding or a matrimonial proceeding in Supreme Court. This provision is essential to prevent abuse of the procedure as a means of manipulation of the court process, that is, to prevent litigants from doing an "end-run" around the courts presiding over litigation regarding marital property and other assets. Significantly, it is critically important so as not to undermine Domestic Relations Law §236B (2)(b), the equally important legislation enacted in 2009, that requires automatic orders to be served with summonses in matrimonial proceedings that provide the following:

> (1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.
>
> (2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court; except that any party who is already in pay status may continue to receive such payments thereunder.

(3) Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

Domestic Relations Law §236B(2)(b)[Laws of 2009, c. 72; modified by Laws of 2010, c. 32 to exclude transfers of retirement plan assets to pensioners in active "pay status."]. Where matrimonial proceedings are pending, the Supreme Court presiding over the action, rather than a local criminal or Family Court, should be the arbiter of the assets covered by the above orders and, importantly, of the equitable distribution of marital property. This is especially true in light of the limited knowledge that a Family or local criminal court will have regarding the assets, particularly when such courts are issuing temporary orders of protection on an *ex parte* basis.

The procedure for return or transfer of identification documents delineated in chapter 526 provides an important safety valve for victims of domestic violence in their ability to implement a safety plan, to be able to begin anew with their children in a new place free from violence. The Committee's proposal will facilitate fulfilment of that goal without interfering with ongoing litigation regarding the allocation of child support and marital property.

Proposal

AN ACT to amend the family court act, in relation to orders for transfers of identification documents in temporary and final orders of protection in family court

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

Section 1. Subdivision (i) of section 446 of the family court act, as amended by chapter 526 of the laws of 2013, is amended to read as follows:

(i) 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, including any identification document in the name of a protected child who is in the care of a protected party;

3. Returns or transfers of identification documents under this subdivision shall not constitute an adjudication of the rights of the parties with respect to equitable distribution of marital property under the domestic relations law or child support or spousal maintenance under the domestic relations law or this article; and

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

(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, including any identification document in the name of a protected child who is in the care of a protected party;

3. Returns or transfers of identification documents under this subdivision shall not constitute an adjudication of the rights of the parties with respect to equitable distribution of marital property under the domestic relations law or child support or spousal maintenance under the domestic relations law or article four of this act; and

§3. Subdivision (j) of section 656 of the family court act, as amended by chapter 526 of the laws of 2013, is amended to read as follows:

(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, including any identification document in the name of a protected child who is in the care of a protected party;

3. Returns or transfers of identification documents under this subdivision shall not constitute an adjudication of the rights of the parties with respect to equitable distribution of marital property under the

domestic relations law or child support or spousal maintenance under the domestic relations law or article four of this act; and

§4. Subdivision (j) of section 842 of the family court act, as amended by chapter 526 of the laws of 2013, is amended to read as follows:

(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, including any identification document in the name of a protected child who is in the care of a protected party;

3. Returns or transfers of identification documents under this subdivision shall not constitute an adjudication of the rights of the parties with respect to equitable distribution of marital property under the domestic relations law or child support or spousal maintenance under the domestic relations law or article four of this act; and

§5. Paragraph (h) 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:

(h) 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, including any identification document in the name of a protected child who is in the care of a protected party;

3. Returns or transfers of identification documents under this subdivision shall not constitute an adjudication of the rights of the parties with respect to equitable distribution of marital property under the domestic relations law or child support or spousal maintenance under the domestic relations law or article four of this act; and

§6. Subparagraph (8) of paragraph (a) of subdivision 3 of section 240 of the domestic relations law, as amended by chapter 526 of the laws of 2013, is amended to read as follows:

(8) 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, including any identification document in the name of a protected child who is in the care of a protected party;

3. Returns or transfers of identification documents under this subdivision shall not constitute an adjudication of the rights of the parties with respect to equitable distribution of marital property under this article or child support or spousal maintenance under this article or the family court act; and

§7. Paragraph (h) of subdivision 1 of section 252 of the domestic relations law, as amended by chapter 526 of the laws of 2013, is amended to read as follows:

(h) 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, including any identification document in the name of a protected child who is in the care of a protected party;

3. Returns or transfers of identification documents under this subdivision shall not constitute an adjudication of the rights of the parties with respect to equitable distribution of marital 0property under this article or child support or spousal maintenance under this article or the family court act; and

§8. Subparagraph (7) of paragraph (a) of subdivision 1 of section 530.12 of the criminal procedure law, as amended by chapter 526 of the laws of 2013, is amended to read as follows:

(7) (A) 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: (i) 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 (ii) specify the manner in which such return shall be accomplished.

(B). For purposes of this subdivision, "identification document"shall mean any of the following: (i) 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 (ii) 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, including any identification document in the name of a protected child who is in the care of a protected party;

(C). Returns or transfers of identification documents under this subdivision shall not constitute an adjudication of the rights of the parties with respect to equitable distribution of marital property under the domestic relations law or child support or spousal maintenance under the domestic relations law or family court act; and

§9. This act shall take effect immediately.

11. Reentry of juvenile delinquents and persons in need of supervision 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,[47] 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 clarify one aspect of the statute that has caused some confusion, that is, the categories of former foster 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 §§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 not include juvenile delinquents discharged from placement with the New York State Office of Children and Family Services (NYS OCFS).

The Committee's proposal would codify the only appellate ruling on the statute to date and is consistent with the position taken by the New York State Office of Children and Family Services, 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 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

[47] 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].

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 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).

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 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 these youth – increased incidence of school drop-out, homelessness, unemployment, criminality and teen pregnancy[48] – are even more likely to afflict the vulnerable juvenile justice population upon

[48] *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

discharge from care. In its memos to the Governor regarding Chapter 342, both the Division of the Budget and 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 OCFS General Counsel, Bill Jacket, L. 2010 c. 342. Codification of Matter of Jefry H. through enactment of the Committee's proposal, therefore, will provide a cost-effective avenue to support a particularly vulnerable population as they make the difficult transition to independent adulthood.

Proposal

AN ACT to amend the family court act, in relation to reentry of former foster 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:

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 was 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 and who was discharged from foster care on or after the date on which the child attained the age of eighteen due to a failure to consent to the continuation of placement, 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.

§ 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

Brief #115 (Dec., 2007).

services district pursuant to section seven hundred fifty-six of this chapter and who was discharged from foster care on or after the date on which he or she attained the age of eighteen due to a failure to consent to continuation of placement 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 under the age of twenty-one who was discharged from foster care on or after attaining the age of eighteen due to a failure to consent to continuation in foster care and who had been: (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 has been conditionally granted pursuant to paragraph (iii) of subdivision (b) of section six hundred thirty-seven of this act.

(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 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 local social services or, if applicable, an authorized agency official upon the consent of such former foster care youth, if there is a compelling reason for such former foster care youth to return to foster care[; provided however, that the].

(c) The court shall not entertain a motion filed after twenty-four months from the date of the first final discharge that occurred on or after the former foster care youth's eighteenth birthday.

[(a)] (d) A motion made pursuant to this [section] article by [a] an appropriate local social services official or, in the case of a child freed for adoption, an appropriate local social services official or official of the authorized agency into whose custody and guardianship the child has been placed, shall be made by order to show cause. Such motion shall show by affidavit or other evidence that:

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

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

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

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

[(b)](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 social services official or, in the case of a child freed for adoption, the social services official or official of the authorized agency into whose custody and guardianship the child has been placed. Such motion shall show by affidavit or other evidence that:

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

(2) (i) the [applicable] appropriate local social services [district] official or, if applicable, official of the authorized agency consents to the re-entry of such former foster care youth, or [if]

(ii) the [applicable] appropriate local social services [district] official or, if applicable, official of the authorized agency 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 appropriate local commissioner of social services or [other officer, board or department authorized to receive children as public charges], in the case of a child freed for adoption, the appropriate local commissioner of social services or authorized agency into whose custody and guardianship the child has been placed, 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] , if applicable, such authorized agency.

(2) Where the appropriate local social services district or, if applicable, the authorized agency, 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 appropriate local commissioner of social services or [other officer, board or department authorized to receive children as public charges] or if applicable, the authorized agency, 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. Orders for recoupment of over-payments of child support in Family and Supreme Court proceedings
[F.C.A. §451; D.R.L. §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. *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 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). . While none of these cases explain the rationale or roots of this public policy, it is 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.[49]

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

[49] *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).

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 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.

13. Stipulations and agreements for child support in Family Court and matrimonial proceedings [F.C.A. §413(1)(h); D.R.L. §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 and receipt 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 and render agreements not in compliance with these requirements void, not simply voidable. *See* Scheinberg, "Inconsistent Appellate Enforcement of the Recital Requirements in DRL §240(1-b)(h)," 39 *Fam. Law Rev.* #3:3 (NYS Bar Assoc., Summer/Fall, 2007). However, the law is silent regarding the procedures to be followed and the remedies for noncompliance with these mandates, which has led to disparate interpretations in different parts of New York State. 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, it 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,[50] 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 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

[50] *See, e.g.,* Matter of Dox *v.* Tynon, 90 N.Y. 2d 166, 659 N.Y.S.2d 231 (1997).

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.

Additionally, the proposal would remedy the gap noted by the Appellate Division, Second Department in Matter of Savini v. Burgaleta, 34 A.D.3d 686 (2d Dept., 2006), *i.e.*, that, unless precluded by the Supreme Court, the Family Court should be considered a court of competent jurisdiction that would have 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 *Child Support Standards Act*. *See* Schub, "Outside Counsel: Family Court: Challenging Illegal Child Support Facts?," *N.Y. Law Journal*, Apr. 2, 2007, p.4, col. 4; Scheinberg, *supra*, at 5-6.

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 *Child Support Standards Act*, 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 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 added 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) An agreement, stipulation or court order which a court finds fails to comply with any of the provisions of this paragraph shall be deemed void as of 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.

(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 hold a hearing and determine the child support obligations of the parties pursuant to this section de novo from 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. For the 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.

(8) 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.

§2. Paragraph (h) of subdivision 1-b of section 240 of the domestic relations law, as added 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) An agreement, stipulation or court order which fails to comply with any of the provisions of this paragraph shall be deemed void as of 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.

(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 hold a hearing and determine the child support obligations of the parties pursuant to this section de novo from 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. For the 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.

(8) The provisions of this paragraph shall not constitute a defense to non-payment of a child support obligation for any period 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.

§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 that date.

14. Services for youth in juvenile delinquency and persons in need of supervision proceedings in Family Court [F.C.A. §§352.2, 353.2, 355.3, 355.4, 754, 756, 756-a, 757; Ed. L. §112; Soc. Serv. L. §409-e; Exec. L. §243]

In both juvenile delinquency and Persons in Need of Supervision (PINS) cases, youth in out-of-home care represent an ever-shrinking proportion of youth adjudicated in Family Courts in New York State, appropriately reflecting the increased trend toward utilization of effective evidence-based community alternatives. But for those youth who require placement – and there is a minority of youth in both categories who do – provision of adequate services, both in the facilities and in the youth's communities to aid in their reintegration upon release, is absolutely essential. The "Close to Home" initiative enacted in 2012 through which juvenile delinquents adjudicated by the New York City Family Court, who require placement in non-secure facilities, must be placed with the New York City Administration for Children's Services for group home facilities in or near the City is a salutary step. However, provisions with statewide applicability, as well as provisions regarding PINS, are critically needed. Enhancement of the statutory provisions regarding services for PINS and delinquent youth statewide would provide a crucial element of the comprehensive response needed to the ameliorate the disturbing picture of the New York State juvenile justice system conveyed in the reports of the Governor's Task Force on Transforming Juvenile Justice, the Citizen's Committee for Children, Child Welfare Watch and the United States Department of Justice.[51]

The Family Court Advisory and Rules Committee is, therefore, submitting a proposal to ensure necessary services and to increase the alternatives available to the Family Courts both at the dispositional stage and later when faced with applications for extensions of placement in juvenile delinquency and PINS proceedings. If the Family Court is to be able to meet its responsibilities to order the "least restrictive available alternative" that fulfills the needs and best interests of the juveniles and, in juvenile delinquency proceedings, that strikes an appropriate balance of these factors with the need for protection of the community, the Court must be able to order needed services and have a wide-range of dispositional and post-dispositional options available. Without these services and supports, New York State's investments in placement are lost. The proposal includes, inter alia:

• delineation of the responsibility for the Family Court not only to consider, but also to craft, a case-specific order, that meets the needs and best interests of the juveniles and, in juvenile delinquency cases, that balances these factors with the need for protection of the community;

• authorization for the Family Court to be able to order specific services that are necessary to facilitate the juveniles' successful return home;

[51] *See* Governor's Task Force on Transforming Juvenile Justice, *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State* (Dec., 2009); Citizens' Committee for Children of New York, *Inside Out: Youth's Experiences Inside New York State's Placement System* (Dec., 2009); *A Need for Correction: Reforming New York's Juvenile Justice System*, 18 *Child Welfare Watch* (Fall, 2009); U.S. Dept. of Justice, "Investigation of Lansing Residential Center, Lou Gossett, Jr. Residential Center, Tryon Residential Center and Tryon Girls Center" (Findings Letter, dated Aug. 14, 2009).

• discretion for the Family Court to order intensive supervision, which may include participation in a community-based rehabilitative program, in conjunction with probation as a disposition for adjudicated juvenile delinquents and PINS who would otherwise be placed and, in juvenile delinquency cases, to include electronic monitoring as a condition of the order;

• authorization for the Family Court to order that, in lieu of extending placement in juvenile delinquency and PINS cases, juveniles may be placed on probation for up to one year or that, in juvenile delinquency cases, juveniles may be conditionally discharged;

• a requirement that "[r]outine, emergency or other mental health treatment, including administration of psychotropic medication, shall be provided by licensed mental health professionals as authorized by law;" and

• a requirement that the New York State Education Department develop and implement standards to promote school stability for youth in out-of-home care, to require that facility educational programs meet State standards and generate credits for youth that will be recognized by local school districts and to require local school districts to promptly enroll youth in school upon their release.

The critical elements of the proposal can be summarized as follows:

1. Responsibility of the Family Court at disposition: The proposal requires the Family Court not only to consider, but also to craft, a case-specific order that meets the needs and best interests of the juveniles and, in juvenile delinquency cases, that balances these factors with the need for protection of the community. Analogous to section 1015-a of the Family Court Act, if the Court determines that there are particular services that would facilitate the juveniles' successful return home, the Court would be empowered, as part of a disposition, extension of placement or permanency order, to direct that the appropriate agency arrange for or furnish them and provide the Court and parties with progress reports. As in Family Court Act §1015-a, the scope of these orders with respect to social services officials would be limited by the county child and family services plan then in effect. The order must further provide that youth under 21, who do not yet have high school diplomas, must be provided with educational services that comport with the Education Law and regulations so that credits achieved would be transferable and, further, that special education services must be provided if required by the youth's Individualized Education Plan. The juvenile, his or her attorney and his or her parent or guardian must be given a copy of the order. Clearly, as recent reports have demonstrated, if juveniles do not receive these supports, the community, not just the juveniles, will suffer.[52]

2. Expansion of alternatives to placement: Foremost among the recommendations in the recent reports on New York's juvenile justice system is the need to reduce the often ineffective and costly placements in favor of increased development and utilization of community-based alternatives.[53] Consistent with these recommendations, the Committee's proposal would authorize the Family Court to direct that an adjudicated juvenile delinquent or person in need of supervision, who would otherwise be placed, be required to participate in an intensive supervision program for all or part of the period of

[52] *Ibid*.

[53] *Ibid*.

probation to the extent available in the county. Such a program may require participation in a community-based rehabilitative program, including, among others, the evidence-based programs, such as functional family therapy and multi-systemic therapy, that have proven successful in many parts of the State. Explicit inclusion of intensive supervision, including community-based programs, effectuates the mandate for both PINS and juvenile delinquency cases that the Family Court direct utilization of the "least restrictive available alternative" and that reasonable efforts be made to prevent placements. *See* Family Court Act §§352.2(2); 754(2)(a).

Further, in an effort to minimize unnecessary extensions of placement in both juvenile delinquency and PINS cases, the proposal would authorize the Family Court to order that juveniles may be placed on probation for up to one year or that, in juvenile delinquency cases, juveniles may be conditionally discharged in lieu of extending or continuing placement. These options may be useful where a local probation department, often in conjunction with a community-based agency, is able to provide aftercare or reentry services for a juvenile not available through the placement agency. No fiscal mandates are imposed by the provision. Local probation departments that do not have or do not elect to provide such services would not be required to do so. Nor would it relieve placement agencies from their responsibilities to engage the youth and his or her family in release planning early in the placement.

Intensive supervision, especially coupled with evidence-based community programs, is a critically-needed dispositional alternative. Enhanced State reimbursement has been available for several years for intensive probation supervision for adults, but far smaller amounts have been afforded to juvenile programs. That use of intensive probation and community programs can be an effective means of addressing juvenile justice cases, while at the same time saving considerable sums of money, has been clearly demonstrated in programs such as Esperanza, Enhanced Supervision and the Juvenile Justice Initiative in New York City, as well as a variety of programs in Erie County.[54] Nationally, such programs are recognized as providing cost-effective, safe alternatives to residential placement.[55] Evidenced-based programs, such as functional family therapy and multi-systemic therapy, which are increasingly in use throughout New York State, have been shown to be far more effective than costly placements in advancing constructive youth development and community safety[56] The alternative – placement in facilities operated by the New York State Office of Children and Family Services or contract agencies – has become increasingly expensive, averaging over $200,000 per juvenile per year, as compared to $3743 per child for

[54] *See* Governor's Task Force on Transforming Juvenile Justice, *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State* (Dec., 2009) at 27; K. Hurley, "Homes for Teens, Not Lock-ups: New York City Experiments with Keeping Lawbreakers in the Community," in *A Need for Correction: Reforming New York's Juvenile Justice System*, 18 *Child Welfare Watch* 14, 18, 21 (Fall, 2009); "Alternative to Jail Programs for Juveniles Reduce City Costs," *Inside the Budget*, #148 (NYC Independent Budget Office; July 11, 2006).

[55] *See generally*, Home-based Services for Serious and Violent Offenders, Center for the Study of Youth Policy (Oct., 1994); M. Jones and B. Krisberg, *Images and Reality: Juvenile Crime, Youth Violence and Public Policy*, National Council on Crime and Delinquency (June, 1994), p. 37; *Comprehensive Strategy for Serious, Violent and Chronic Offenders: Program Summary*, U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention (Dec., 1993), p. 21.

[56] *See, e.g.*, P. Greenwood, *Changing Lives: Crime Prevention as Crime Control Policy* (U.Chi. Press, 2006); *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (National Council of Juvenile and Family Court Judges, 2005).

Enhanced Supervision, $13,000 for Esperanza and $17,000 for the Juvenile Justice Initiative.[57] The enormous investment in out-of-home placement has not paid off; a study of a large sample of youth released from NYS OCFS facilities from 1991 to 1995 revealed that 89% of the boys and 81% of the girls had been rearrested by the time they reached the age of 28, 85% of the boys and 69% of the girls had been convicted and 52% of the boys and 12% of the girls had been incarcerated by that age.[58] Community-based alternatives have demonstrated far lower recidivism.[59]

With respect to PINS, the need for this proposal is underscored by the conclusions reached by the Vera Institute of Justice in its two studies that were commissioned by the New York State Office of Children and Family Services in 2001 and 2004.[60] The earlier study characterized detention and placement as the "most expensive" and "least satisfying" pre-dispositional and dispositional options for the juveniles, their families and the system as a whole – options that have not been demonstrated to improve either the truancy or absconding problems that form the gravamen of most PINS petitions and that have drained resources away from more promising solutions –and the follow-up study highlighted the efficacy of the use of creative alternatives to detention and placement for PINS.

Significantly, not only does intensive supervision save money, but it may also facilitate access to Federal dollars. Funds from the Federal child welfare programs can be made available to localities for these programs if the Office of Probation and Correctional Alternatives within the New York State Division of Criminal Justice Services and local probation departments work in partnership with the New York State Office of Children and Family Services and local social services districts. If intensive supervision services that are provided to youth in order to prevent placement are explicitly included in the statewide plan for child welfare services, Federal reimbursement would be available as a preventive service under Title IV-B of the Social Security Act. 42 U.S.C.A. §§622, 623 [Social Security Act, Title IV-B].[61] Federal reimbursement for child welfare services to prevent placement of juvenile delinquents is contemplated so long as the facilities where the youth would have been placed are eligible for Federal foster care funding – *i.e.*, that the facilities are not secure detention centers or forestry camps or training schools housing over 25 juveniles. *See* 42 U.S.C. §672(c) [Social Security Act, Title IV-E].

With respect to juvenile delinquents, as is now authorized for pretrial detention [L. 2008, c. 57], so, too, the Committee's proposal authorizes, but does not require, electronic monitoring as a dispositional

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[57] *See* note 38, *supra*.

[58] *See* Governor's Task Force on Transforming Juvenile Justice, *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State* (Dec., 2009) at page 85, n. 5.

[59] *See, e.g.*, Fight Crime, Invest in Kids, *Getting Juvenile Justice Right in New York: Proven Interventions Will Cut Crime and Save Money (2007).*

[60] *Changing the PINS System in New York: A Study of the Implications of Raising the Age Limit for Persons in Need of Supervision* (PINS) (Vera Inst., Sept., 2001) at pages 34, 38; *Changing the Status Quo for Status Offenders: New York State's Efforts to Support Troubled Teens* (Vera Inst., Dec., 2004).

[61] Reimbursable "child welfare services" are defined as "public social services," directed, *inter alia*, at "preventing or remedying, or assisting in the solution of problems which may result in the neglect, abuse, exploitation or delinquency of children." 42 U.S.C. §625(a)(1)(B) [Social Security Act, Title IV-B]. The Federal regulations implementing the Act enumerate counseling and other services determined to be "necessary and appropriate," including "intensive, home-based family services." 45 C.F.R. §1357.15.

condition of an intensive probation regimen. This would be an adjunct to, but not a replacement for, the in-person contacts so vital to the success of probation, particularly as applied to juveniles. In light of the requirement in section 303.1(a) of the Family Court Act that Criminal Procedure Law provisions be "specifically prescribed" in the Family Court Act in order to be applicable, this provision would provide the necessary analogue to section 65.10(4) of the Criminal Procedure Law, the statutory response to the decision of the Court of Appeals in People *v*. McNair, 87 N.Y.2d 772 (1996). *See* L.1996, c. 653. Enactment of an authorization for electronic monitoring in New York is long overdue. Significantly, the New York State Office of Children and Family Services uses it in its aftercare supervision.[62] Several other states utilize this option as a vital component of a dispositional plan in juvenile delinquency cases[63] and the Appellate Division, Third Department has endorsed its use as a reasonable condition of probation in a PINS proceeding. *See* Matter of Kristian CC., 24 A.D.3d 930 (3d Dept., 2005), *lve. app. denied*, 6 N.Y.3d 710 (2006).

To ensure quality programs, the proposal requires the New York State Office of Probation and Correctional Alternatives to promulgate regulations permitting and guiding the operation by local probation departments of both electronic monitoring and intensive supervision programs, addressing such issues as: maximum probation officer caseloads; special training requirements for intensive supervision officers; nature and frequency of the contacts with the juveniles, schools and other agencies; and the level and type of supervision, treatment and other program components. Further, in order to allow adequate time for programs to be developed, the dispositional alternatives would not take effect until the following fiscal year.

3. Mental health services for juveniles in out-of-home care: The proposal would amend Family Court Act §§354 and 756 to require that "[r]outine, emergency or other mental health treatment, including administration of psychotropic medication, shall be provided by licensed mental health professionals as authorized by law." The recent investigation by the United States Department of Justice, as well as the Governor's Task Force and *Child Welfare Watch* reports, underscore the need for this provision. The Governor's Task Force Report noted that 48% of delinquent youth screened by the New York State Office of Children and Family Services upon admission are assessed to have mental health needs and estimates from national experts indicate that as many as two-thirds of juveniles in placement facilities nationwide have significant mental health needs.[64] As the Department of Justice findings letter indicated, all too often, professional diagnoses and treatments are not provided and psychotropic medication is not professionally

[62] *See* NYS OCFS, *Electronic Monitoring Program* (June, 2002)[www.ocfs.state.ny.us, accessed Jan. 7, 2010].

[63] *See, e.g.*, Ariz. Rev. Stat., Tit. 8, c. 3, Art. 3, §8-341 (1999); Ark. Stat. Ann. Tit. 9, Subtit. 3, C. 27, Subc. 3, §9-27-330 (1997); West's Fla. Stat. Ann. §985.231 (1999); Official Code of Ga. Ann., Tit. 49, C. 4A, §49-4A-13 (1999); Baldwin's Ohio Rev. Code Ann., Tit. XXI, §2151.355 (1999); Rev. Code Wash., Tit. 13, C. 13.40, §13.40.210(3)(b)(1999).

[64] *See* Governor's Task Force on Transforming Juvenile Justice, *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State* (Dec., 2009) at 59, 85 n. 10 [citing S. Moore, "Mentally Ill Offenders Strain Juvenile Justice System," *NY Times*, Aug. 9, 2009.

monitored.[65] The *Child Welfare Watch* report specifically recommended deployment of psychiatrists and psychiatric nurses to youth facilities.[66]

4. Educational services and release planning**:** To realize the goals of the release planning and educational services provisions for both PINS and juvenile delinquents and consistent with the recommendation of the Governor's Task Force,[67] the proposal amends section 112 of the Education Law to require the New York State Department of Education to establish and enforce standards to require educational programs in placement facilities to provide credits to juveniles that are then transferred to schools upon their release and that all school districts accept and recognize such credits.

Proposal

AN ACT to amend the family court act, the education law and the executive law, in relation to dispositional options and services for juvenile delinquents and persons in need of supervision

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

Section 1. Paragraphs (a) and (b) of subdivision 2 of section 352.2 of the family court act, paragraph (a) as amended by chapter 880 of the laws of 1985 and paragraph (b) as amended by chapter 145 of the laws of 2000, are amended to read as follows:

(a) In determining an appropriate order, the court shall consider and direct a disposition that specifically meets the needs and best interests of the respondent as well as the need for protection of the community. If the respondent has committed a designated felony act, the court shall determine the appropriate disposition in accord with section 353.5. In all other cases, the court shall order the least restrictive available alternative enumerated in subdivision one which is consistent with the needs and best interests of the respondent and the need for protection of the community. Where appropriate, the court shall include in its order a direction for a local social services, mental health, developmental disabilities or probation official or an official of the office of children and family services, office of mental health or office of persons with developmental disabilities, as applicable, to provide or arrange for the provision of

[65] U.S. Dept. of Justice, "Investigation of Lansing Residential Center, Lou Gossett, Jr. Residential Center, Tryon Residential Center and Tryon Girls Center" (Findings Letter, dated Aug. 14, 2009), at pages 6.15 - 6.26.

[66] *A Need for Correction: Reforming New York's Juvenile Justice System*, 18 *Child Welfare Watch* (Fall, 2009), at p. 3. *See also,* Citizens' Committee for Children of New York, *Inside Out: Youth's Experiences Inside New York State's Placement System* (Dec., 2009) at p. 5.

[67] Governor's Task Force on Transforming Juvenile Justice, *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State* (Dec., 2009) at pages 62, 77.

services or assistance to the respondent and his or her family to further the goals of this section. 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.

(b) In an order of disposition entered pursuant to section 353.3 or 353.4 of this chapter, or where the court has determined pursuant to section 353.5 of this chapter that restrictive placement is not required, which order places the respondent with the commissioner of social services or with the office of children and family services for placement with an authorized agency or class of authorized agencies or in such facilities designated by the office of children and family services as are eligible for federal reimbursement pursuant to title IV-E of the social security act, the court in its order shall determine (i) that continuation in the respondent's home would be contrary to the best interests of the respondent; or in the case of a respondent for whom the court has determined that continuation in his or her home would not be contrary to the best interests of the respondent, that continuation in the respondent's home would be contrary to the need for protection of the community; (ii) that where appropriate, and where consistent with the need for protection of the community, reasonable efforts were made prior to the date of the dispositional hearing to prevent or eliminate the need for removal of the respondent from his or her home, or if the [child] respondent was removed from his or her home prior to the dispositional hearing, where appropriate and where consistent with the need for safety of the community, whether reasonable efforts were made to make it possible for the [child] respondent to safely return home. If the court determines that reasonable efforts to prevent or eliminate the need for removal of the [child] respondent from the home were not made but that the lack of such efforts was appropriate under the circumstances, or consistent with the need for protection of the community, or both, the court order shall include such a finding; and (iii) in the case of a [child] respondent who has attained the age of [sixteen] fourteen, the services needed, if any, to assist the [child] respondent to make the transition from foster care to independent living. Where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would make it possible for the respondent to safely return home or to make the transition to

independent living, the court may include in its order a direction for such services or assistance in accordance with paragraph (a) of this subdivision. Any order of placement pursuant to section 353.3 of this article shall provide that any respondent under twenty-one years of age, who has not received a high school diploma, be accorded educational services, including special educational services, if applicable, in accordance with the education law and regulations promulgated by the commissioner of education in order that any credits accrued shall be transferable to any school to which the respondent is transferred following the placement.

§2. Paragraphs (e) and (f) of subdivision 3 of section 353.2 of the family court act are re-lettered paragraphs (f) and (g) and a new paragraph (e) is added to such subdivision to read as follows:

(e) cooperate with a program of intensive supervision by the probation department during the period of probation or a specified portion thereof, to the extent available in the county, upon a finding on the record by the court that, absent cooperation with such a program, placement of the respondent would be necessary. Such a program shall be conducted in accordance with regulations to be promulgated by the division of probation and correctional alternatives and may require the respondent, among other conditions, to comply with a community-based rehabilitative program and/or a program of electronic monitoring to the extent available in the county, as provided by subdivision one of section two hundred forty-three of the executive law;

§3. Subdivision 6 of section 353.2 of the family court act, as amended by chapter 920 of the laws of 1982, is amended to read as follows:

6. The maximum period of probation shall not exceed two years, which may include intensive supervision in cooperation with a community-based rehabilitative program, in accordance with paragraph (e) of subdivision three of this section, to the extent available up to the term of probation. If the court finds at the conclusion of the original period and after a hearing that exceptional circumstances require an additional year of probation, the court may continue the probation for an additional year.

§4. Subdivisions 2 and 4 of section 355.3 of the family court act, subdivision 2 as added by chapter 920 of the laws of 1982 and subdivision 4 as amended by chapter 454 of the laws of 1995, are amended to read as follows:

2. The court shall conduct a hearing concerning the need for continuing the placement. The respondent, the presentment agency and the agency with [whom] which the respondent has been placed shall be notified of such hearing and shall have the opportunity to be heard [thereat]. If the petition is filed within sixty days prior to the expiration of the period of placement, the court shall first determine at such hearing whether good cause has been shown. If good cause is not shown, the court shall dismiss the petition.

4. At the conclusion of the 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 353.2 of this part, or may direct that that the respondent be conditionally discharged for not more than one year, pursuant to section 353.1 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:

(i) that where appropriate, and where consistent with the need for the protection of the community, reasonable efforts were made to make it possible for the respondent to safely return to his or her home;

(ii) in the case of a respondent who has attained the age of [sixteen] fourteen, the services needed, if any, to assist the child to make the transition from foster care to independent living; and

(iii) in the case of a child placed outside New York state, whether the out-of-state placement continues to be appropriate and in the best interests of the child.

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 to independent living, the court may include in its order a direction for such services or assistance in accordance with paragraph (a) of subdivision two of section 352.2 of this part. 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. The order shall provide that any respondent under twenty-one years of age, who has not received a high school diploma, be accorded educational services, including special educational services, if applicable, in accordance with the education law and regulations promulgated by the commissioner of education in order that any credits accrued shall be transferable to

any school to which the respondent is transferred following the placement. Where the hearing on the extension of placement has been held in conjunction with a permanency hearing, pursuant to subdivision two of section 355.5 of this part, the court order shall include the requirements of subdivision seven of such section.

§5. Subdivision 3 of section 355.4 of the family court act is amended to read as follows:

3. Subject to regulations of the department of health, routine medical, dental and mental health services and treatment is defined for the purposes of this section to mean any routine diagnosis or treatment, including without limitation the administration of medications or nutrition, the extraction of bodily fluids for analysis, and dental care performed with a local anesthetic. Routine mental health treatment shall not include [psychiatric] administration of psychotropic medication unless it is part of an ongoing mental health plan or unless it is otherwise authorized by law. Routine, emergency or other mental health treatment, including administration of psychotropic medication, shall be provided by licensed mental health professionals as authorized by law.

§6. Paragraph (a) of subdivision 2 of section 754 of the family court act, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

(a) In determining an appropriate order, the court shall consider and direct a disposition that specifically meets the needs and best interests of the respondent. The order shall state the court's reasons for the particular disposition. If the court places the [child] respondent in accordance with section seven hundred fifty-six of this part, the court in its order shall determine: (i) whether continuation in the [child's] respondent's home would be contrary to the respondent's best interest [of the child] and where appropriate, that reasonable efforts were made prior to the date of the dispositional hearing held pursuant to this article to prevent or eliminate the need for removal of the [child] respondent from his or her home and, if the [child] respondent was removed from his or her home prior to the date of such hearing, that such removal was in the [child's] respondent's best interest and, where appropriate, reasonable efforts were made to make it possible for the [child] respondent to return safely home. If the court determines that reasonable efforts to prevent or eliminate the need for removal of the [child] respondent from the home were not made but that the lack of such efforts was appropriate under the circumstances, the court order shall include such a finding; and (ii) in the case of a [child] respondent who has attained the age of

[sixteen] fourteen, the services needed, if any, to assist the [child] respondent to make the transition from foster care to independent living. Where appropriate, including, but not limited to, where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would make it possible for the respondent to safely return home or to make the transition to independent living, the court shall include in its order a direction for a local social services, mental health, developmental disabilities or probation official or an official of the office of mental health or office of persons with developmental disabilities, as applicable, to provide or arrange for the provision of services or assistance to the respondent and his or her family to further the goals of this section. 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 program 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. Nothing in this subdivision shall be construed to modify the standards for directing detention set forth in section seven hundred thirty-nine of this article.

§7. Subdivision (a) of section 756 of the family court act is amended by adding a new paragraph (iii) to read as follows:

(iii) The order shall provide that any respondent under the age of twenty-one be accorded educational services, including special educational services, if applicable, in accordance with the education law and regulations promulgated by the commissioner of education in order that any credits accrued shall be transferable to any school to which the respondent is transferred following the placement. The order shall further provide that any routine, emergency or other mental health treatment, including administration of psychotropic medication, if any, shall be provided by licensed mental health professionals as authorized by law.

§8. Section 756-a of the family court act is amended by adding a new subdivision (d-2) to read as follows:

(d-2)(i) The order shall provide that any respondent under the age of twenty-one years be accorded educational services, including special educational services, if applicable, in accordance with the education law and regulations promulgated by the commissioner of education in order that any credits accrued shall

be transferable to any school to which the respondent is transferred following the placement. The order shall further provide that any routine, emergency or other mental health treatment, including administration of psychotropic medication, if any, shall be provided by licensed mental health professionals as authorized by law.

(ii) Where appropriate, including, but not limited to, where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would make it possible for the respondent to safely return home or to make the transition to independent living, the court shall include in its order a direction for a local social services, mental health, developmental disabilities or probation official or an official of the office of mental health or office of persons with developmental disabilities, as applicable, to provide or arrange for the provision of services or assistance to the respondent and his or her family to further the goals of this section. 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.

§9. Subdivision (b) of section 757 of the family court act, as amended by chapter 920 of the laws of 1982, is amended and a new subdivision (e) is added to such section to read as follows:

(b) The maximum period of probation shall not exceed one year, which may include intensive supervision in cooperation with a community-based rehabilitative program, in accordance with subdivision (e) of this section, to the extent available, during all or part of the term of probation. If the court finds at the conclusion of the original period that exceptional circumstances require an additional year of probation, the court may continue probation for an additional year.

(e) If the respondent has been found to be a person in need of supervision, and if the court further finds that, absent intensive supervision, the respondent would be placed pursuant to section seven hundred fifty-six of this part, the court may direct the respondent to cooperate with a program of intensive supervision, which may include compliance with a community-based rehabilitative program, during all or part of the term of probation. The local probation department may provide intensive supervision to

respondents so directed pursuant to this subdivision in accordance with regulations to be promulgated by the state division of probation and correctional alternatives pursuant to subdivision one of section two hundred forty-three of the executive law.

§10. Subdivisions 1 and 2 of section 112 of the education law, as amended by section 62 of part A of chapter 3 of the laws of 2005, are amended to read as follows:

1. The department shall establish and enforce standards of instruction, personnel qualifications and other requirements for education services or programs, as determined by rules of the regents and regulations of the commissioner, with respect to the individual requirements of children who are in full-time residential care in facilities or homes operated or supervised by any state department or agency or political subdivision and shall require that credits accrued by children in programs that conform to such standards shall be transferable to any school to which the child is transferred following the residential care. The regulations shall direct the school district to cooperate, to the extent possible, with the agency with which the child is placed to coordinate the timing of the child's release from the program with enrollment in school so as to be minimally disruptive for the child and further his or her best interests. The department shall cooperate with the office of children and family services, the department of mental hygiene and local departments of social services with respect to educational and vocational training programs for children placed with, committed to or under the supervision of such agencies. The department shall promulgate regulations requiring the cooperation of local school districts in facilitating the [prompt] enrollment within no more than five business days of children who are released or conditionally released from residential facilities operated by or under contract with the office of children and family services, the department of mental hygiene and local departments of social services and in implementing plans for release or conditional release submitted to the family court pursuant to paragraph (c) of subdivision seven of section 353.3 and paragraphs (iii) and (iv) of subdivision (a) of section seven hundred fifty-six of the family court act and the educational components of permanency hearing reports submitted pursuant to section one thousand eighty-nine of the family court act. Such regulations regarding the educational components of permanency hearing reports submitted pursuant to section one thousand eighty-nine of the family court act shall be developed in conjunction with the office of children and family services. Such regulations shall facilitate the retention of children placed or remanded into foster care in their original schools and, if that is not feasible or determined to be in the child's best interests, require the enrollment of the children in

school and transfer of necessary records within no more than five business days of receipt by the original school of notice of the child's placement into foster care. Nothing herein contained shall be deemed to apply to responsibility for the provision or payment of care, maintenance or other services subject to the provisions of the executive law, mental hygiene law, social services law or any other law.

2. The commissioner shall prepare a report and submit it to the governor, the speaker of the assembly and the temporary president of the senate by December thirty-first, nineteen hundred ninety-six and on December thirty-first of each successive year. Such report shall contain, for each facility operated by or under contract with the office of children and family services that provides educational programs, an assessment of each facility's compliance with the rules of the board of regents, the regulations of the commissioner, and this chapter. Such report shall include, but not be limited to: the number of youth receiving services under article eighty-nine of this chapter; the office's activities undertaken as required by subdivisions one, two, four and eight of section forty-four hundred three of this chapter; the number of youth receiving bilingual education services; the number of youth eligible to receive limited English proficient services; interviews with facility residents conducted during site visits; library services; the ratio of teachers to students; the curriculum; the length of stay of each youth and the number of hours of instruction provided; instructional technology utilized; the educational services provided following the release and conditional release of the youth, including, but not limited to, the implementation of requirements for the prompt enrollment of such youth in school contained in plans for release and conditional release submitted to the family court pursuant to paragraph (c) of subdivision seven of section 353.3 and paragraphs (iii) and (iv) of subdivision (a) of section seven hundred fifty-six of the family court act and in the education components of permanency hearing reports submitted pursuant to section one thousand eighty-nine of the family court act and the compliance by local school districts with the regulations promulgated pursuant to subdivision one of this section; and any recommendations to ensure compliance with the rules of regents, regulations of the commissioner, and this chapter.

§11. The opening paragraph of subdivision 1 of section 409-e of the social services law, as amended by section 60 of part A of chapter 3 of the laws of 2005, is amended to read as follows:

With respect to each child who is identified by a local social services district as being considered for placement in foster care as defined in section one thousand eighty-seven of the family court act by a

social services district, such district, within thirty days from the date of such identification, shall perform an assessment of the child and his or her family circumstances. Where a child has been removed from his or her home and placed into foster care as defined in section one thousand eighty-seven of the family court act, detention or placement pursuant to article seven of the family court act or nonsecure or limited secure placement pursuant to article three of the family court act, within thirty days of such removal, detention or placement, the local social services district shall perform an assessment of the child and his or her family circumstances, or update any assessment performed when the child was considered for placement. Any assessment shall be in accordance with such uniform procedures and criteria as the office of children and family services shall by regulation prescribe. Such assessment shall include the following:

§12. Subdivision 1 of section 243 of the executive law, as amended by part A of chapter 56 of the laws of 2010, is amended to read as follows:

1. The office shall exercise general supervision over the administration of probation services throughout the state, including probation in family courts and shall collect statistical and other information and make recommendations regarding the administration of probation services in the courts. The office shall endeavor to secure the effective application of the probation system and the enforcement of the probation laws and the laws relating to family courts throughout the state. After consultation with the state probation commission, the office shall recommend to the commissioner general rules which shall regulate methods and procedure in the administration of probation services, including investigation of defendants prior to sentence, and children prior to adjudication, supervision, case work, record keeping, and accounting, program planning and research so as to secure the most effective application of the probation system and the most efficient enforcement of the probation laws throughout the state. Such rules shall permit the establishment of a program of intensive supervision for juveniles directed to receive such services pursuant to paragraph (e) of subdivision three of section 353.2 or subdivision (e) of section seven hundred fifty-seven of the family court act, which may require participation by the juveniles in community-based rehabilitative programs. Such rules shall include, but not be limited to: specification of the maximum caseload levels and training required for intensive supervision probation officers; the frequency and nature of probation contacts with juveniles in the program, schools and other agencies; and supervision, treatment and other services to be provided to such juveniles. Such rules shall further provide for the establishment of a program of electronic monitoring for juveniles who are the subjects of juvenile

delinquency petitions and would otherwise be detained prior to disposition pursuant to subdivision three of section 320.5 of the family court act and for adjudicated juvenile delinquents placed on probation on condition of cooperation with a program of electronic monitoring pursuant to paragraph (e) of subdivision three of section 353.2 of the family court act. Such rules shall provide that the probation investigations ordered by the court in designated felony act cases under subdivision one of section 351.1 of the family court act shall have priority over other cases arising under articles three and seven of such act. When duly adopted by the commissioner, such rules shall be binding upon all probation officers and when duly adopted shall have the force and effect of law, but shall not supersede rules that may be adopted pursuant to the family court act. The office shall keep informed as to the work of all probation officers and shall from time to time inquire into and report upon their conduct and efficiency. The office may investigate the work of any probation bureau or probation officer and shall have access to all records and probation offices. The office may issue subpoenas to compel the attendance of witnesses or the production of books and papers. The office may administer oaths and examine persons under oath. The office may recommend to the appropriate authorities the removal of any probation officer. The office may from time to time publish reports regarding probation including probation in family courts, and the operation of the probation system including probation in family courts and any other information regarding probation as the office may determine provided expenditures for such purpose are within amounts appropriated therefor.

§13. This act shall take effect on the first day of April after it shall have become a law; provided, however, that any regulations necessary for the implementation of this act shall be promulgated on or before such effective date.

15. Dispositional and pre-sentence investigations in family offense proceedings and penalties for unauthorized access to the statewide registry of orders of protection and warrants
[F.C.A. §835; CPL §§390.20, 390.30; Exec. Law §221-a]

In enacting the *Family Protection and Domestic Violence Intervention Act of 1994* [L. 1994, c. 222, 224], the New York State Legislature demonstrated its intent to assure a more rigorous response by law enforcement agencies and the courts to domestic violence. Victims of domestic violence are afforded easy access to either or both Family and criminal courts for prosecution of family offense cases. In addition, offenders are subject to mandatory arrest and face heightened consequences for abusive acts in both courts. Local probation departments serving both family and criminal courts, therefore, require sufficient information regarding both the offense and the offender in order to assist the courts in responding effectively to these legislative changes.

One of the most important features of the statute was its establishment of an automated statewide registry of orders of protection and warrants. The registry, which commenced operations on October 1, 1995, ensures that courts and law enforcement officials have available a system that will provide timely and accurate information relating to pending and prior orders of protection and warrants. It currently comprises an enormous and rapidly growing database; according to the Office of Court Administration, and contains approximately 2.7 million orders of protection inn its database.[68] However, the registry lacks critical safeguards to prevent unauthorized access to the sensitive information contained in its database.

Adequate security is a crucial component of any computer system, but it is especially important in a system, such as the registry, that contains highly sensitive information, much of it bearing statutory confidentiality protections. Misuse of the information in the registry may not only place intimate information inappropriately before the public eye, but it also may place domestic violence victims and their children in serious jeopardy if data is released to individuals who pose a threat to them. Security protections are also essential in light of the large number of authorized individuals with legitimate access to the system -- law enforcement officials statewide, court officials and others -- who must take seriously their mandate to preserve the confidentiality of the information.

The Committee's proposal would amend section 221-a of the Executive Law to create criminal and civil penalties for unauthorized disclosure of data from the registry.[69] Under the revised proposal,

[68] Source: NYS Office of Court Administration Division of Technology (Dec., 2014).

[69] This proposal was revised in 1996 to address the concerns raised by the Governor with respect to similar legislation that was vetoed in 1995 [S 3940, Veto Message #21]. However, the Committee's original 1995 version was again passed by the Legislature and vetoed by the Governor in 1996 [A 9809, Veto Message #11]. No action has been taken on this matter by the Legislature since 1996, notwithstanding the new Federal statutory mandates.

knowing and willful disclosure of information to individuals not authorized to receive it would subject violators to prosecution for a class A misdemeanor, the same criminal penalty that applies to the unauthorized willful disclosure of statewide child abuse registry and confidential HIV-related information. *See* Social Services Law §422(12); Public Health Law §2783(2). Such violators may be subject to a civil fine of up to $5,000, as would be persons who, through gross negligence, release or permit the release of information from the registry to individuals not authorized to receive it.

Recognizing the importance of security to the operation of computer systems, the Family Court Advisory and Rules Committee recommends enactment of civil and criminal penalties for unauthorized disclosure of information from the statewide automated registry of orders of protection and warrants. Enactment of penalties is compelled by the requirement, contained in the Federal *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* [Public Law 104-193, §303], for all states to have safeguards in place by October 1, 1997 against unauthorized disclosure of information with respect to paternity establishment or child support, or with respect to the whereabouts of a party for whom a protective order has been issued or as to whom the State has reason to believe physical or emotional harm might result from such disclosure. It is also consistent with the confidentiality requirements of the 2005 amendments to the Federal *Violence Against Women Act* [Public Law 109-162; 18 U.S.C. §2265(d) and Subtitle K, §41102], which, *inter alia*, restrict use of registry information to “protection order enforcement purposes.”

Much of the information to be contained in the registry is derived from records that would otherwise be shielded from such disclosure. Various forms of confidential, identifying information regarding the parties must be included, particularly where, for example, in matrimonial and Family Court cases, fingerprint identification is not available. The system includes court action information, an indication of the date process was served, the date of expiration of the order and the terms and conditions of the order, and requires that all statutes governing confidentiality of court records apply equally to information on the registry. *See* Executive Law §221-a. Subdivision one of section 235 of the Domestic Relations Law provides that matrimonial records must be kept confidential for 100 years and may not be disclosed to non-parties or their attorneys without a court order. Section 166 of the Family Court Act protects Family Court records against "indiscriminate public inspection."[70] However, while requiring these provisions to be followed with respect to information on the registry, the Legislature provided no sanction against unauthorized disclosure.

Further, the Committee’s measure enhances the effectiveness of family offense proceedings in both criminal and family courts at the dispositional and sentencing phases. In Family Court family offense proceedings, it articulates the court’s discretion to order local probation departments to prepare investigations and reports prior to disposition, an authority currently implied but not explicit. While not limiting the scope of the information that can be requested in such an investigation, the proposal enumerates four areas of inquiry. First, the proposal permits inquiry into "the presence or absence of aggravating circumstances," since the court may order up to a three-year, rather than a one-year, order of protection where such circumstances, as defined in section 827(a)(vii) of the Family Court Act, have been

[70] Section 205.5 of the *Uniform Rules for the Family Court* gives definition to this statute by enumerating parties, their attorneys, agencies with which children are placed, and, by amendment in 1994, prosecutors insofar as necessary for a pending criminal investigation, as those who are authorized to have access to Family Court records without first obtaining a court order.

found. Second, it permits investigation of "the extent of injuries or out-of-pocket losses to the victim which may form the basis for an order of restitution," a dispositional order authorized pursuant to subdivision (e) of section 841 of the Family Court Act. Third, in order to prevent issuance of inconsistent orders and provide insight as to the respondent's record of compliance, the proposal permits inquiry into "the history of the respondent with respect to family offenses and orders of protection in this or other courts." Significantly, if the completion of the fact-finding stage coincides with the first appearance of both parties before the Family Court, this investigation may assist the court in fulfilling its duty, pursuant to subdivision six of section 821-a of the Family Court Act, to "inquire as to the existence of any other orders of protection between the parties." Fourth, the proposal permits inquiry into whether the respondent is licensed to possess and is in fact in possession of firearms, an inquiry that will aid the court in setting conditions for orders of protection and, in cases of serious violation, will facilitate enforcement of the laws authorizing and, under certain circumstances, requiring suspension or revocation of firearms licenses and surrender of firearms. *See* Family Court Act §§842-a, 846-a; L. 1996, c. 644.

In criminal proceedings, the proposed legislation allows criminal courts to obtain assistance from local probation departments to conduct pre-sentence investigations where relevant to the issuance of an order of protection, including in proceedings in which such investigations are not required under the Criminal Procedure Law. Some family offenses currently require pre-sentence investigations, while others do not. Section 390.20 of the Criminal Procedure Law requires pre-sentence investigations in felony cases and in misdemeanor cases carrying enumerated penalties. While not altering the courts' discretion with respect to ordering pre-sentence investigations in non-mandated cases, this proposal explicitly adds an authorization for the courts to order such inquiries for the purpose of "issuance of an order of protection" pursuant to section 530.12 of the Criminal Procedure Law.

Where the family offense conviction is not for a felony, which requires a full-scale pre-sentence investigation, the proposal treats family offense convictions, whether for misdemeanors or violations, as misdemeanors eligible for "abbreviated investigations and short form reports," in accordance with section 390.30(4) of the Criminal Procedure Law. While not providing an exhaustive list of permissible areas of inquiry, the proposal enumerates the factors which the court must consider in determining whether an order of protection should issue, pursuant to subdivision (a) of section 530.12 of the Criminal Procedure Law -- specifically, the offender's access to weapons, abuse of controlled substances or alcohol and the offender's history of injury or threat of injury to family members. As in Family Court proceedings, the inclusion of inquiries regarding firearms will enhance the court's ability to frame appropriate conditions for orders of protection and, in cases involving serious violations, will afford the courts information necessary to enforce the provisions regarding firearms license suspension or revocation and firearms surrender. *See* Criminal Procedure Law §§530.12, 530.14; L. 1996, c. 644; L. 1993, c. 498.

Enactment of this proposal will significantly enhance the ability of courts, both civil and criminal, to make informed decisions in cases involving domestic violence and will, at the same time, enhance the protection of victims of that violence by protecting the integrity of the statewide order of protection database.

Proposal

AN ACT to amend the executive law, the family court act and the criminal procedure law, in relation to the statewide automated registry of orders of protection and pre-dispositional and pre-sentence investigations in criminal and family courts

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

Section 1. The section heading and subdivision (a) of section 835 of the family court act, such subdivision as amended by chapter 529 of the laws of 1963, are amended to read as follows:

Sequence of hearings; probation investigations and reports. (a) Upon completion of the fact-finding hearing, the dispositional hearing may commence immediately after the required findings are made. In aid of its disposition, the court may adjourn the proceeding for an investigation and report by a local probation department. For the purposes of this article, the probation investigation and report may include, but is not limited to: the presence or absence of aggravating factors as defined in paragraph (vii) of subdivision (a) of section eight hundred twenty-seven of this article, the extent of injuries or out- of-pocket losses to the victim which may form the basis for an order of restitution pursuant to subdivision (e) of section eight hundred forty-one of this article, the history of the respondent with respect to family offenses and orders of protection in this or other courts, whether the respondent is in possession of any firearms and, if so, whether the respondent is licensed or otherwise authorized to be in possession of such firearms.

§2. Subdivision 3 of section 390.20 of the criminal procedure law, as added by chapter 652 of the laws of 1974, is amended to read as follows:

3. Permissible in any case. For purposes of sentence or issuance of an order of protection pursuant to subdivision five of section 530.12 of this chapter, the court may, in its discretion, order a pre-sentence investigation and report in any case, irrespective of whether such investigation and report is required by subdivision one or two.

§3. Subdivision 4 of section 390.30 of the criminal procedure law, as amended by chapter 56 of the laws of 2010, is amended to read as follows:

4. Abbreviated investigation and short form report. In lieu of the procedure set forth in subdivisions one, two and three of this section, where the conviction is of a misdemeanor or family offense, as defined in subdivision one of section 530.11 of this law, other than a felony, the scope of the

pre-sentence investigation may be abbreviated and a short form report may be made. The use of abbreviated investigations and short form reports, the matters to be covered therein and the form of the reports shall be in accordance with the general rules regulating methods and procedures in the administration of probation as adopted from time to time by the commissioner of the division of criminal justice services pursuant to the provisions of article twelve of the executive law. No such rule, however, shall be construed so as to relieve the agency conducting the investigation of the duty of investigating and reporting upon:

(a) the extent of the injury or economic loss and the actual out-of-pocket loss to the victim, including the amount of restitution and reparation sought by the victim, after the victim has been informed of the right to seek restitution and reparation, or

(b) in a case involving a family offense, as defined in subdivision one of section 530.11 of this chapter, the defendant's history of family offenses and orders of protection, including violations, in proceedings or actions in this or other courts, the extent of injuries or threats of injury to the complainant or members of complainant's family or household, the use or threatened use of dangerous instruments against the complainant or members of complainant's family or household, whether the defendant is in possession of any firearms and, if so, whether defendant is licensed or otherwise authorized to be in possession of such firearms, the extent to which the defendant poses an immediate and ongoing danger to the complainant or members of the complainant's family or household and any other information relevant to the issue of whether an order of protection, in addition to any other disposition, should be issued in accordance with subdivision five of section 530.12 of this chapter, or

(c) any matter relevant to the question of sentence or issuance of an order of protection that the court directs to be included in particular cases.

§4. Subdivision 5 of section 221-a of the executive law, as amended by chapter 107 of the laws of 2004, is amended and such section is amended by adding a new subdivision 7 to read as follows:

5. [In] Except as provided in subdivision seven of this section, in no case shall the state or any state or local law enforcement official or court official be held liable for any violations of rules and regulations promulgated under this section, or for damages for any delay or failure to file an order of protection or special order of conditions, or to transmit information to the law enforcement communication network

pertaining to such orders or related family court arrest warrants, or for acting in reliance upon such information. For purposes of this subdivision law enforcement official shall include but not be limited to an employee of a sheriff's office, or a municipal police department or a peace officer acting pursuant to his or her special duties.

7. Any person who knowingly and willfully releases or permits the release of any data or information contained in the statewide registry to persons or agencies not authorized by law or regulations to receive it shall be guilty of a class A misdemeanor. Any person who knowingly and willfully or through gross negligence releases or permits the release of any data or information contained in the statewide registry to persons or agencies not authorized by law or regulations to receive it shall be subject to a civil penalty of up to five thousand dollars.

§5. 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 productive year in 2014. Additionally, the Committee recommended significant rules revisions, as well as approximately 40 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).

Most important, recognizing that only New York and North Carolina automatically consider juveniles to be adults as soon as they reach the age of sixteen, the Committee will support the efforts of Chief Judge Lippman, as well as the anticipated recommendations of the Governor's Commission on Youth, Public Safety and Justice, to raise the age of criminal responsibility in New York State to eighteen. In addition to reviewing legislative proposals, the Committee will also continue its comprehensive review of the Family Court rules with a view towards recommending possible revisions. In addition to these efforts, the Committee's six subcommittees are expected to be actively engaged in the following projects, among others, during the coming year:

• Child Welfare: Implementation of the new Federal statute, the *Preventing Sex Trafficking and Strengthening Families Act* [Public Law 113-183] will form a major focus of the Subcommittee's work during 2015, as the statute contains requirements with respect to permanency hearings, care of foster youth, involvement of youth in planning for their futures, notification of parents of siblings regarding hearings and successor guardians in subsidized kinship guardianship (Kin-Gap) cases. The Subcommittee will continue to explore means of simplifying and 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 fathers, as well as practices in other states that use continuous dockets for child protective, permanency and termination of parental rights proceedings. It will also pursue its efforts regarding notice to, and participation of, children in court proceedings and will continue to monitor implementation of significant legislation in the child welfare area, including, *inter alia*, the Federal *Indian Child Welfare Act* and State statutes regarding subsidized kinship guardianship, destitute children, reentry into foster care, restoration of parental rights and the "Family Assessment Response" (differential case management) pilot projects in various counties statewide.

• Guardianship and "Special Immigrant Juvenile Status:" Particularly in light of the recent influx into New York State of several thousand unaccompanied, undocumented immigrant children from Central America, the Subcommittee will explore means of improving the handling of requests for "Special Immigrant Juvenile Status" judicial findings in Family Court. Among the issues to be considered are appointment of and access to counsel, timing of hearings and various questions regarding the guardianship cases that most often accompany these requests, such as who should be notified and how, how to obtain information regarding the suitability of proposed guardians and what should be addressed at the hearings. The Subcommittee is working with the Child Welfare Court

Improvement Project and an expert researcher from the National Center for State Courts in an effort to gather and analyze information on statewide practices and challenges.

• Juvenile Justice: The Subcommittee will consider the recommendations of the Governor's Commission on Youth, Public Safety and Justice, particularly with respect to the issue noted above regarding the age of criminal responsibility. Additionally, the Subcommittee will continue its efforts regarding the implementation of the "Close to Home" initiative in New York City, including the anticipated expansion to include limited secure facility placements, as well as the requirements enacted in 2011 and 2012 regarding use of risk assessment instruments in making detention and placement decisions. 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. The Subcommittee will explore means of reducing unwarranted collateral consequences of juvenile delinquency adjudications, *e.g.*, by developing a mechanism by which records may be sealed after an adjudicated youth has not had a juvenile or criminal case for a designated period of time. The Subcommittee will continue to work with the Legislature to enhance the effectiveness of responses to truancy both as persons in need of supervision and as educational neglect proceedings. 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 greater support for Family Court probation and community-based alternatives to detention and placement.

• Child Support and Paternity: The Subcommittee will continue to work with the New York State Office of Temporary and Disability Assistance to seek common ground on legislative, regulatory and forms proposals, most particularly those in response to the *Affordable Care Act* and the recent Federal statute [Public Law 113-183], which requires enactment of the 2008 amendments to the *Uniform Interstate Family Support Act*. The Subcommittee will also continue to explore possible improvements to inter-county transfers of cases and approaches to child support proceedings involving non-wage income and self-employed individuals, as well as the implications of the proposed maintenance guidelines in Family Court.

• Custody, Visitation and Domestic Violence: The Subcommittee will continue to address issues regarding forensic evaluations, commenting upon proposed legislation and expanding upon the court rules it proposed regarding access by parties and counsel to the reports. The Subcommittee will explore development of judicial training and guidelines for determining when forensic evaluations should be ordered, as well as uniform forms for appointment of forensic examiners and protection of the reports. It will also review and comment upon ongoing efforts by the Legislature to address issues regarding standing of third parties (non-parents) to seek custody or visitation and will consider means of reducing delays and fragmented trials in custody cases. 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 consider means of protecting abuse victims from contact with abusers in court-related programs.

• Forms and Technology: The Subcommittee will propose revisions of uniform forms as necessitated by new legislation and will consider any forms-related issues raised by the increase in

digitalization of court records and e-filing initiatives. It will continue its efforts to simplify the current forms to enhance access to justice for self-represented litigants as has been recommended by the Chief Judge's Task Force to Expand Access to Civil Legal Services in New York.

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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 2014 and with the substantial agenda described above, the Committee hopes to compile a similar record of achievement in 2015 as it grapples with the many difficult issues within its jurisdiction during these most difficult of times.

In conclusion, the Committee pledges its continuing deep dedication in 2015 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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