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 2015

Four of the legislative proposals submitted by the Committee in 2015 were enacted into law, as well as a proposal similar to one submitted by the Committee. Each of these measures is summarized below.

1. **Severe child abuse and entry of orders of protection in child abuse and neglect cases onto the statewide registry of orders of protection [Laws of 2015, ch. 492; S 5054/A 7644]:** This measure, proposed by the Family Court Advisory and Rules Committee, fills a gap in the severe abuse statutes by authorizing the Family Court to render an enhanced finding by clear and convincing evidence with respect to a respondent in a Family Court Act Article 10 child abuse case who is not a parent of the child. The enhanced finding, which may later be used in a termination of parental rights action regarding the respondent's own child, may be made with respect to any individual against whom a child protective proceeding may be brought, including a non-parent who is deemed a "person legally responsible." Further, it amends Executive Law §221-a to require that all temporary and final orders of protection issued pursuant to Family Court Act §§1029 and 1056 be entered onto the statewide registry established as part of the New York State Police "NYSPIN" system, pursuant to the *Family Protection and Domestic Violence Intervention Act of 1994* [L. 1994, c. 222, 224], **Effective: Feb. 18, 2016**

2. Consideration of spousal maintenance in calculating child support in Supreme and Family Court proceedings [Laws of 2015, ch. 387; S 5691/A 7637]: This measure, proposed by the Family Court Advisory and Rules Committee, clarifies the treatment of spousal maintenance with respect to the income of both the recipient and the payor spouse in calculating orders of child support. It amends 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. Codifying several appellate cases, this addition would be based upon the 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. Further, the measure 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 that maintenance terminates, the income of either of the parties has changed in an amount that would qualify for a modification. The specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with Family Court Act §451(3) or Domestic Relations Law §236B(9)(b)(2). **Effective: Jan. 24, 2016.**

3. Persons in need of supervision and juvenile delinquency proceedings: procedures for admissions and violations of orders of disposition [Laws of 2015, ch. 499; S 5286/A 5897]: This measure, proposed by the Family Court Advisory and Rules Committee, clarifies the various provisions of Articles 3 and 7 of the Family Court Act regarding violations of orders of disposition by juveniles. First, it 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, it delineates 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,[1] the measure 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 provision in juvenile delinquency cases [Family Court Act §321.3]. **Effective: Feb. 18, 2016**

4. Roles, rights and responsibilities of non-respondent parents in child neglect and abuse proceedings in Family Court [Laws of 2015, ch. 567; A 6715-a/S 5018-b]: This measure inserts provisions into Article 10 of the Family Court Act that explicitly encourage earlier and greater identification and participation by non-respondent parents in abuse and neglect proceedings concerning their children. It amends Family Court Act §1012 to define "parent," "relative" and "suitable person" and amends Family Court Act §1017 to require notices regarding the pendency of the action to be provided to a broader group of individuals, including "notice fathers," that is, those listed on the putative father register and those who have a pending paternity petition or have been identified by the child's parent in a sworn written statement. Notices of pendency under Family Court Act §1035 must advise non-respondent parents of their right to counsel, including appointed counsel if indigent. *See Matter of Sasha S.*, 256 A.D.2d 468 (2d Dept., 1998). As in child custody cases, the Court must check the domestic violence registry, sex offender registry and the Family Court database for warrants for all persons caring for children under Family Court Act §1017, 1054 and 1056. Such individuals may be required to submit to the jurisdiction of the Family Court for purposes connected to the care of the children, including cooperation, *inter alia*, with court-ordered visits with parents, siblings and others, appointments with and in-person visits by caseworkers and appointments with the children's attorneys, clinicians and programs providing services to the children.

The measure reorganizes the dispositional provisions in Article 10 of the Family Court Act, making clear that a respondent may be placed under supervision while a child has been released to a non-respondent parent or placed directly with a relative or suitable person for a designated period. *See* Family Court Act §§1054, 1057. Both the period of release and the period of supervision of the respondent may be for up to one year, which may be extended for an additional year for good cause. Finally, it includes non-respondent parents in the provisions of Family Court Act §§1055-b and 1089-a through which a child abuse, neglect or permanency proceeding may be resolved through an order of custody in cases in which the Court determines that further involvement by the Family Court and local social services agency is not necessary. Conforming amendments are made to clarify that, while custody and child protective or permanency hearings may be held jointly, custody determinations are to be made in accordance with Family Court Act §651 and Domestic Relations Law §240 and applicable case law, including, *inter alia*, *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976). **Effective: June 20, 2016.**

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[1] *See, e.g., 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); *Matter of Tabitha E.*, 271 A.D.2d 719, 720 (3d Dept., 2000).

5. Authorization for pilot programs for obtaining orders of protection by video-conference [Laws of 2015, ch. 367; signed Oct. 21, 2015; S 6/ A 6262]: This measure, a component of the Governor's "Women's Equality Agenda" and similar to a proposal made by the Family Court Advisory and Rules Committee, amends section 212 of the Judiciary Law to authorize the Chief Administrator of the Courts to establish pilot programs in designated Family Courts for the filing of petitions for temporary orders of protection by electronic means and for the issuance of such orders by audio-visual means from remote locations, such as Family Justice Centers, senior centers and domestic violence programs. Family Court Act §153-c would delineate details of the pilot programs, definitions, consultation required and elements of proposed plans. While eliminating the need for the initial appearance, the fact-finding proceeding would ultimately need to be an in-person hearing in Family Court. 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.

This measure facilitates utilization of the "Advocate-Assisted Family Offense Petition Program," an easy-to-use, automated program, developed in conjunction with the New York State Courts Access to Justice Program, which 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 may be installed in remote sites, such as Family Justice Centers, senior centers and domestic violence programs. With video or computer equipment connected to judges or court attorney referees at courthouses, court proceedings may thus be convened on the record for the issuance of temporary orders of protection. **Effective: April 1, 2016**.

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

As a high priority, the Committee strongly supports the continued efforts, spearheaded by former Chief Judge Jonathan Lippman and continued by the Governor's Commission on Youth, Public Safety and Justice, to raise the age of criminal responsibility in New York State to 18 Additionally, the Committee is proposing a comprehensive legislative agenda, including 12 new and revised proposals and 15 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>Standing to request access to children by individuals with whom they have a parent-child relationship</u>: Striking an appropriate balance among the rights of children, third parties with whom children have developed a parent-child relationship and the children's birth or adoptive parents, the Committee is proposing a new section 74-a of the Domestic Relations Law to allow certain third parties to petition for access to the children. Three categories of third parties who have lived in the same household as the children for a significant period of time are included: former and current step-parents, former intimate

partners of the legal parent and individuals who had a prior order of custody or guardianship. These individuals must establish that, with the consent of the parent, they developed a parent/child relationship with the children and that attempts to resolve the disagreements with the parents have been unsuccessful. They must plead with specificity both the grounds to establish standing and the bases for the court to determine that access to the children is in the children's best interests. If these burdens are met, the measure provides that the court must then consider whether the children would be adversely affected if contact is not awarded and that "the basis for denying contact proffered by the parent is unreasonable and not in the child[ren]'s best interest." Finally, "the extent and nature of the contact must be consistent with the child[ren]'s best interests, safety and welfare."

2. Contact with siblings in child protective, permanency and termination of parental rights proceedings: Reflecting the increasing emphasis in both Federal and State law of the importance to children of maintaining relationships with their siblings, the Family Court Advisory and Rules Committee is proposing a measure that would clarify the criteria and procedures for youth to seek sibling visitation and/or contact. Similar to a regulation of the New York State Office of Children and Family Services, Family Court Act §1027-a would be amended to impose a presumption that where siblings are not placed together, the agency must arrange "appropriate and regular" contact unless contact would not be in the child's or the child's siblings' best interests. Further, the proposal amends Family Court Act §§1027-a and 1081 to afford specific standing to youth to seek an order for visitation or contact with siblings and, concomitantly, for siblings to seek orders for visitation or contact with youth in care.[2] Siblings are defined to include "half-siblings and those who would be deemed siblings or half-siblings but for the termination of parental rights or death of a parent." Notice and an opportunity to be heard must be afforded to the respondent and other parent or parents of the youth, the parents or persons having care and custody of the children with whom the youth is seeking visitation or contact, the social services agency, the siblings themselves, if ten years of age or older, and the siblings' attorneys, if any. The measure provides that placement and permanency hearing orders, issued pursuant to Family Court Act §§1055(c) and 1089(d)(2)(viii)(F), respectively, may incorporate §§1027-a or 1081 access orders. Finally, it amends Social Services Law §384-b to codify the case law that provides that termination of parental rights (and by extension, adoption) does not terminate sibling relationships.

3. Simplification of the notification to victims of domestic violence in criminal and family court proceedings: Recognizing the high incidence of unrepresented litigants in family law-related matters in New York State courts, the 2010, 2014 and 2015 *Reports to the Chief Judge of the Task Force [now Permanent Commission] to Expand Access to Civil Legal Services in New York* included simplification of forms among its recommendations. Utilization of plain English is particularly important for victims of domestic violence, who may be experiencing trauma as a result of the alleged abusive incident or incidents, trauma that itself makes it more difficult for victims to understand their options and to make the often difficult decisions required at the outset of abuse cases. The Family Court Advisory and Rules Committee is thus submitting a measure to amend Family Court Act §812 and Criminal Procedure Law §530.11 by substantially simplifying the language contained in the notice given to alleged victims of domestic violence without compromising the breadth of information it provides. The proposal adds

[2] This provision fills the gap noted by Professor Merril Sobie, in his McKinney's Practice Commentary to Family Court Act §1085, that is, that "[u]nmentioned in the statutory visitation series [Family Court Act §1081, *et seq.*] is the fact that the child and her siblings also enjoy reciprocal visitation rights [see, e.g., § 1055(c)]."

flexibility by providing that the notice use substantially the language provided and that it be made available, at minimum, in plain English and Spanish. Using five generally accepted means of measurement of the grade level of the language used, the proposed notice averages 6.7 (middle school) in grade level compared to the 14.0 (college level) average of the existing notice and its readability score is almost twice that of the current notice. *See* www.readability-score.com.

4. Video recording of custodial interrogations of juveniles in juvenile delinquency proceedings: The rapidly growing national consensus in favor of recording custodial interrogations is particularly pronounced regarding juveniles, whose brains are still developing. The Family Court Advisory and Rules Committee, therefore, is proposing a measure requiring video recording of all custodial interrogations of accused juvenile delinquents where such interrogations take place in law enforcement facilities approved for the questioning of youth. The Committee's measure amends sections 305.2 and 344.2 of the Family Court Act to require video recording of entire custodial interrogations of juveniles, including the provision of *Miranda* warnings and the waiver, if any, of rights by the juveniles. The requirement applies to interrogations that take place in law enforcement facilities which, pursuant to Family Court Act §305.2(4) and section 205.20 of the *Uniform Rules of the Family Court*, must be in rooms that have been inspected and approved by the Chief Administrator of the Courts for the questioning of youth. The recording must ensure that all persons in the recording are identifiable, that the speech is intelligible and that it complies with rules to be promulgated by the New York State Division of Criminal Justice Services (DCJS). As is applicable to other statements by juveniles, the recording would be subject to discovery pursuant to Family Court Act §331.2. Further, like other factors in juvenile delinquency *Huntley* hearings, including the presence or absence of parents, location of questioning and the validity of any waiver of rights, the fact and quality of the recording would be among the factors comprising the totality of circumstances affecting the admissibility of accused juveniles' statements.

5. Substitution of the phrase "intellectual disability" for "mental retardation" in juvenile delinquency and termination of parental rights proceedings: Continuing the trend in both Federal and State law, as well as in the recent publication of the Fifth Edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), to retire the anachronistic phrase "mental retardation" from the legal and clinical lexicon, the Family Court Advisory and Rules Committee is submitting a proposal to incorporate the modern, clincally accepted phrase "intellectual disability" into the Family Court Act, Domestic Relations Law and Social Services Law. With the caveat that case law regarding use of the phrase "mental retardation" would remain applicable to the term "intellectual disability," the Committee's measure amends the provisions in these statutes regarding grounds for termination of parental rights. It further amends the provisions of the Family Court Act regarding the determination of whether a commitment of a child is necessary and of the capacity of an accused juvenile delinquent to stand trial. Additionally, the measure amends the Family Court Act, Executive Law and Social Services Law to correct the name of the State agency to the Office for People With Developmental Disabilities. .

6. Conditional restoration of driving privileges in child support proceedings: The threat of suspension of a driver's license is effective in motivating many child support obligors to meet their obligations. However, the actual imposition of a license suspension, when done administratively be a local child support collection unit (SCU) or in court by a judge or support magistrate, may have the anomalous effect of impeding the ability of delinquent support obligors to make necessary payments. The Family Court Advisory and Rules Committee is thus submitting a measure designed to mitigate this

counterproductive effect by authorizing the Family or Supreme Court to order conditional restoration of driver's licenses contingent upon payment of support obligations by a designated date. The measure would amend Domestic Relations Law § 244-b and Family Court Act § 458-a to allow a Family or Supreme Court in limited circumstances to temporarily reinstate licenses where a finding is made that the suspension, whether ordered by the Court or by the SCU, limits the ability of a non-custodial parent to make child support payments. The proposal requires the Court in such circumstances to monitor the obligor's employment search for a designated period of time and, if the obligor finds and maintains employment, the Court may issue a final order lifting the suspension. If the obligor fails to make substantial efforts to find employment, the Court is required to reinstate the suspension.

7. Duration of spousal support in Family Court proceedings and calcaulation of the spousal maintenance "cap": The new spousal maintenance guidelines statute [Laws of 2015, ch. 269] is silent with respect to the duration of Family Court spousal support orders, while at the same time allowing the Supreme Court to set an end-date to temporary maintenance. The omission of a duration provision appears to be based on an incorrect assumption that Family Court spousal support orders are short-term and are quickly superseded by Supreme Court maintenance orders issued in the context of divorce proceedings The result of this omission will be that support orders which would have reasonable time limits in Supreme Court, based upon the length of the marriage, will be infinite in length if issued by the Family Court. Since there is no provision in the deviation grounds to consider the length of the marriage, the lower earning spouse in a one-month marriage would be granted non-durational support in Family Court at the same level as a spouse in a 20-year marriage. The Family Court Advisory and Rules Committee is submitting a proposal to address this anomaly in the spousal maintenance statute by authorizing jurists in Family Court to specify a duration in its orders of spousal maintenance. Orders would be presumed not to be time-limited unless so specified, but the Family Court, in its discretion, as in Supreme Court, would be able to set a duration based upon a consideration of the length of the marriage. Additionally, the proposal would amend Family Court Act §412(10) and Domestic Relations Law §236B(5-a)(b)(5) and §236B(6)(b)(4) to fix the date of the biennial adjustment of the spousal maintenance "cap" at March 1st, rather than January 31st, and would commence the adjustment process in 2018, rather than 2016. This would conform the adjustment date to that already in effect for the child support income "cap," self-support reserve and poverty level.

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

9. 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 and requiring these orders to be entered onto the statewide domestic violence registry. 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.

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 an 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. 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.

12. 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, 2017) 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.

C. Previously Endorsed Measures

The Committee is recommending resubmission of the following 15 proposals:

1. 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.

2. 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 require 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 problems noted by the Supreme Court, Appellate Divisions, First and Second Departments in Georgette D.W. v. Gary N.R., - A.D.3d - , 2015 WL 7726357 (1st Dept., 2015) and Matter of Savini *v.* Burgaleta, 34 A.D.3d 686 (2d Dept., 2006), respectively, the proposal would provide that, unless precluded by the Supreme Court, the Family Court would be deemed 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*.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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].

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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 over 40 official Family Court forms for pleadings, process and orders. The forms and court rules are posted on the Internet for easy access by attorneys, litigants and the public. *See* http://www.nycourts.gov.

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

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

1. Standing to request access to children by individuals with whom they have developed a parent-child relationship (D.R.L. §74-a)

Rapidly changing mores in society have spawned major alterations in traditional family structures. Many children live in households where a step-parent or intimate partner of their parent is, with the wholehearted support of the parent, acting in a parental role. Such an individual, who has no legally recognized status regarding the child, has often developed a significant relationship with the child. The bonds between the child and this third party may run very deep and indeed this person may be the most significant person in the child's life after the parent. Problems often arise, however, when the relationship between the parent and the third party ends. While sometimes the separation may be amicable and the parent may permit the third party to have continued contact with the child for a period of time, it is not uncommon for contact to be denied. The abrupt cessation of contact with this important person in the child's life may be extremely harmful to the child, exacerbating the trauma the child may be experiencing as a result of dissolution of the family unit and causing lasting psychological harm.

Additionally, there are situations where a court has given legal custody or guardianship to a third party, permitting the third party to develop a close and loving relationship with the child. At some future point, possibly after a number of years has elapsed, the child is returned to the parent. If the parent objects to continued contact with the child's former custodian or guardian, that person has no legal recourse to obtain contact. The sole exceptions under New York law are situations in which the former custodian or guardian is a sibling or grandparent of the child, who may seek access and visitation, respectively, under sections 71 or 72 of the Domestic Relations Law.

Third parties have attempted, without success, to use the courts to try to obtain an order of contact over the objections of parents. In Alison D. v. Virginia M., 77 N.Y. 2d 651 (1991), the Court of Appeals, denied the right of a *de facto* parent to seek court ordered visitation. The third party seeking visitation in that case was the parent's former live-in, same-sex partner who had a close and loving relationship with the child. More recently, in Debra H. v Janice R.,14 N.Y.3d 567 (2010), the Court of Appeals, while affording comity to a Vermont civil union, reiterated that New York statutes preclude standing for a third party who, with the consent of the biological parent, had been acting in a parental role. In both cases, the Court of Appeals noted that this preclusion of contact could only be modified through legislative action.[3] *See also* Arriaga *v.* Dukoff, 123 A.D.3d 1023 (2nd Dept., 2014), *lve. app. granted sub nom* Estralita A. *v.* Jennifer L.D. 26 N.Y.3d 901 (2015); Barone *v.* Chapman-Cleland, 129 A.D.3d 1578 (4th Dept., 2015), *lve. app. granted sub nom* Brooke S.B. *v.* Elizabeth A.C.C.,, 26 N.Y.3d 901 (2015).

Consistent with the holdings by the Court of Appeals that the issue of third-party access may only be addressed legislatively, the Family Court Advisory and Rules Committee is submitting a measure that

[3] In contrast to the holding that legislative action is required, the highest courts of New Jersey, Massachusetts and Wisconsin have provided access by case law to third parties deemed to be *de facto* or psychological parents. *See* In Re V.C. *v.* M.J.B., 748 A.2d 529 (N.J., 2000); E.N.O. *v.* L.M.M. 711 N.E.2d 886 (Mass., 1999); In Re Custody of H.S.H.-K, 533 N.W.2d 419 (Wis., 1995).

provides a legal mechanism for the Supreme or Family Court to grant contact between third parties and children under certain specific situations. The proposed new section 74-a of the Domestic Relations Law is finely tailored in its scope and is intended to ensure that both the best interests of children and the constitutional rights of their parents are protected.

The persons who may seek access under this proposed statute are limited to three categories of third parties who have lived in the same household as the child for a significant period of time: former and current step-parents, former intimate partners of the legal parent and individuals who had a prior order of custody or guardianship. To obtain standing to seek access with the child, these individuals must establish that, with the consent of the parent, they developed a parent/child relationship with the child. All of these third parties must first establish that attempts to resolve the disagreements with the parents have been unsuccessful before they are granted standing. They must plead with specificity both the grounds to establish standing and the bases for the court to determine that access to the child is in the child's best interests. If these burdens are met, the measure provides that the court must then consider whether the child would be adversely affected if contact is not awarded and that "the basis for denying contact proffered by the parent is unreasonable and not in the child's best interest." Finally, "the extent and nature of the contact must be consistent with the child's best interests, safety and welfare."

Significantly, the measure fully recognizes and protects the constitutional right of birth and adoptive parents to rear their children. *See* Troxel v. Granville; 530 U.S. 57 (2000); ES. *v* P.D.; 8 N.Y. 3rd 150, 159 (2007). The proposed statute gives significant weight to the wishes of the parents. First, the relationship between the third party and the child must have been established with the consent of the parents or there must have been a prior court order of custody or guardianship. Second, the third party must have attempted to resolve the dispute with the parents before coming to court. Third, before contact will be ordered, the court must determine, *inter alia,* that the parents' reasons for denying contact are unreasonable and contrary to the child's best interests.

Neither the possibility of adoption of the child by the third party, nor marriage between the parties, notwithstanding their genders, obviates the need for the Committee's measure. Often adoption is unavailable, such as when the child already has two legal parents or when the biological parent does not consent to the adoption. Even where there had not been an obstacle to adoption, many third parties have not chosen to pursue an adoption either because of the cost or procedural difficulty. They may also have failed to consider the possibility of their relationship with the parent ending and contact with the child being withheld. Significantly, making distinctions regarding children based upon the marital status of their parents has long been held unconstitutional by the United States Supreme Court. *See, e.g.* Caban *v.* Mohammed, 99 S.Ct. 1760 (1978); Stanley *v.* State of Illinois*,* 92 S.Ct. 1208 (1972).

In enacting this measure, New York would join the numerous other states that have statutes allowing third parties to petition for access to children with whom they have relationships. For example, Virginia allows almost any person to apply if clear and convincing proof demonstrates access is in the child's best interests, with due regard to the rights of the parents [Va. Code Ann. §20-124-2 (West's, 2015)]. Connecticut affords access to third parties where clear and convincing proof demonstrates a parent-like relationship and where denial of access would cause significant harm to the child [Ct. Gen. Stat. §46b-50]. Oregon permits access where the third party has "established emotional ties creating a child-parent relationship" or has an "ongoing personal relationship" with the child [Ore. Rev. Stat.

§109.119]. Hawaii allows reasonable visitation rights to "any person interested" and provides that a *prima facie* case for custody may be made by any fit, proper third party who had de facto custody in a "stable and wholesome home" [Haw. Rev. Stat. §571-46]. Nevada permits a third party to petition for access if the child lived with and established a meaningful relationship with him or her and if the child's parent denied or restricted access [Nev. Rev. Stat. §125C.050]. The Court of Appeals, in Debra H. *v. Janice R., supra,* also cited statutes in Indiana, Colorado, Texas, Minnesota, Wyoming and the District of Columbia.[4]

Finally, enactment of the Committee's measure would also be consistent with model statutes reflecting the reality of the broadened modern family constellations. Like the Committee's proposal, the proposals of both the American Academy of Matrimonial Lawyers (AAML) and the National Conference of Commissioners on Uniform State Law (NCCUSL) are carefully structured to strike an appropriate balance among the rights of children to maintain significant relationships with third parties who have acted in a parent-like capacity, the third parties themselves and the children's birth or adoptive parents.[5]

Proposal

AN ACT to amend the domestic relations law, in relation to access by step-parents and intimate partners of parents to children with whom they have developed a parent-child relationship

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

Section 1. The domestic relations law is amended by adding a new section 74-a to read as follows:

§74-a. Visitation with, and access to, children by present or former step-parents, intimate partners of parents and prior legal custodians and guardians, with whom they have developed a parent-child relationship.

(a) Standing. In order to establish standing to seek visitation with, and access to, a child, a present or former step-parent, a former intimate partner of a parent, or a person who previously had a final order of custody or guardianship with respect to the child must plead with specificity and prove the following:

(i) he or she resided in the same household as the child; and

(ii) with the consent of a parent, he or she formed a parent-child relationship with the child for a substantial period of time; and

(iii) the parent has substantially interfered with such person's relationship with the child and efforts to resolve disagreements with the parent have been unsuccessful.

Paid care givers may not seek access or contact pursuant to this section.

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[4] *See* Ind Code Ann §§ 31-17-2-8.5; 31-9-2-35.5; Colo Rev Stat Ann § 14-10-123 [1] [c]; Tex Fam Code Ann § 102.003 [a] [9]; Minn Stat Ann § 257C.08 [4]; Wyo Stat Ann § 20-7-102 [a]; DC Code Ann § 16-831.01 [1].

[5] *See* "AAML Model Third-Party (Non-parental) Contact Statute (with commentary)," 18 *J. of Family Law* #1: 1 (2002)(www.aaml.org); NCCUSL. *Non-parental Rights to Child Custody and Visitation Act* (Discussion draft, 2015)(www.uniformlaws.org).

(b) A person seeking visitation with, and access to, a child must plead with specificity and prove that contact with the child would further the child's best interests and that the parent's basis for denying contact is unreasonable and not in the child's best interests.

(c) Disposition of petition. The court shall order contact between such person and the child if such person establishes that the basis for denying contact proffered by the parent is unreasonable and not in the child's best interests. The extent and nature of the contact must be consistent with the child's best interests, safety and welfare.

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

2. Contact with siblings in child protective, permanency and termination of parental rights proceedings (F.C.A. §§1027-a, 1081, 1089; S.S.L. §384-b)

An increasing recognition of the critical importance of maintaining and fostering sibling relationships has been reflected in both Federal and New York State child welfare laws. Sections 1055(c) and 1089(d)(2)(viii)(F) of the Family Court Act provide that placement and permanency hearing orders, respectively, "may include encouraging and facilitating visitation with the child by the child's siblings." Section 1027-a of the Family Court Act establishes a presumption that placement of siblings together is in the children's best interests unless "contrary to the child's health, safety or welfare." Regulations of the New York State Office of Children and Family Services (OCFS) reiterate this presumption [18 N.Y.C.R.R. §431.10] and a 1992 Administrative Memo issued by OCFS further provides that where siblings are placed in separate homes, bi-weekly visitation should be arranged. In 2008, the Federal *Fostering Connections to Success and Increasing Adoptions Act* [Public Law 110-351] requires child welfare agencies to exercise "reasonable efforts" to place siblings together when arranging temporary foster care, kinship guardianship or adoptive placements – and, if not, to arrange for frequent sibling visitation, unless contrary to the health, safety or well-being of the child or children. Most recently, the *Preventing Sex Trafficking and Strengthening Families Act* [Public Law 113-183], enacted in 2014, requires notification to parents of siblings of children removed into foster care, as well as notification to foster youth of their rights. To implement these provisions, in 2015, OCFS issued an Administrative Memo regarding sibling parent notification and included the following in its *Bill of Rights for Children and Youth in Foster Care*:

> As a child or youth in foster care in the State of New York, I have the right:
>
> * * *
>
> 4. To live with my brothers and sisters unless the court or my agency has determined it is not in my best interests or those of my brothers or sisters, and to visit with my brothers and sisters regularly if we do not live together unless a court or a caseworker has determined it is not in my best interests or those of one of my brothers or sisters, or their distance from me prevents visitation.

Notwithstanding these provisions, New York State law does not clearly delineate the standing of youth to seek visitation or contact with their siblings when either the youth or siblings are in foster care, kinship care or have been adopted. The Family Court Advisory and Rules Committee is proposing a measure that would clarify the criteria and procedures for such youth to seek visitation and/or contact with their siblings. Codifying the OCFS regulation, *supra*, Family Court Act §1027-a would be amended to impose a presumption that where siblings are not placed together, the agency must arrange "appropriate and regular" contact unless contact would not be in the child's or the child's siblings' best interests. Use of the term "contact," rather than the narrower term "visitation," acknowledges both the practical constraints presented where long distances separate siblings and the increasingly available and accessible possibilities for electronic contact in between in-person visits. Significantly, application of the best interests standard to the siblings to be visited or with whom contact is sought is consistent with the decision of the Appellate Division, First Department, in Keenan R. *v.* Julie L., 72 A.D.3d 542, 899 N.Y.S.2d 51 (1 Dept. 2010) (visitation denied where causing anxiety to the siblings, who had no meaningful relationship with applicant).

Further, the proposal amends both Family Court Act §§1027-a and 1081 to afford specific standing to youth to seek an order for visitation or contact with siblings and, concomitantly, for siblings to seek orders for visitation or contact with youth in care.[6] Similar to the definition in Public Law 113-183 and the OCFS Administrative Memo, siblings are defined to include "half-siblings and those who would be deemed siblings or half-siblings but for the termination of parental rights or death of a parent." Notice and an opportunity to be heard must be afforded to the respondent and other parent or parents of the youth, the parents or persons having care and custody of the children with whom the youth is seeking visitation or contact, the social services agency, the siblings themselves, if ten years of age or older, and the siblings' attorneys, if any. Affording due process to both the parents of the applicant-child and the parents of the siblings is consistent with the United States Supreme Court decision in Troxel *v.* Granville, 530 U.S. 57 (2000), which requires that weight be given to the constitutional rights of parents regarding the upbringing of their children. *See also,* Matter of Coccose *v.* Diane B., 8 Misc.3d 1020(A), 803 N.Y.S.2d 17 (Fam. Ct., Ulster Co., 2005)(in determining sibling access application, court must evaluate the bases of the parents' objections, in addition to the sibling relationship itself).

The measure provides that placement and permanency hearing orders, issued pursuant to Family Court Act §§1055(c) and 1089(d)(2)(viii)(F), respectively, may incorporate §§1027-a or 1081 access orders. Moreover, it amends Social Services Law §384-b to codify the case law that provides that termination of parental rights (and by extension, adoption) does not terminate sibling relationships. This removes any doubt that children may seek contact with siblings under the procedural vehicle of Domestic Relations Law §71, notwithstanding severance of the children's ties to their parents. This provision is consistent with the Court of Appeals holding in People *ex rel* Sibley *v.* Sheppard, 54 N.Y.2d 320, 445 N.Y.S.2d 420 (1981), that grandparent relationships are not severed by adoption, a holding extended to sibling relationships in Hatch on behalf of Angela J. *v.* Cortland County Dept. of Social Services, 199 A.D.2d 765, 605 N.Y.S.2d 428 (3rd Dept. 1993).

It has been estimated that two-thirds of children in foster care also have siblings in care,[7] many of whom are separated for a variety of reasons, including, *inter alia*, a large sibling group, or mental health, educational or other special needs of one of the siblings, or the fact that one of the siblings is over the age of 18. Approximately 60 to 73 percent of children adopted from foster care have siblings in care and approximately 40 percent are placed together, with visitation among those separated not provided consistently.[8]

For youth already suffering the trauma of child abuse or neglect and separation from their homes, maintenance of their relationships with their siblings may be a vital lifeline, a protective shield against

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[6] This provision fills the gap noted by Professor Merril Sobie, in his McKinney's Practice Commentary to Family Court Act §1085, that is, that "[u]nmentioned in the statutory visitation series [Family Court Act §1081, *et seq.*] is the fact that the child and her siblings also enjoy reciprocal visitation rights [see, e.g., § 1055(c)]."

[7] Sibling Issues in Foster care and Adoption" (Child Welfare Information Gateway, www.childwelfare.gov/pubPDFs/siblingissues.pdf) [cited in D.Post, S.McCarthy, R.Sherman and S.Bayimli, "Are You Still My Family?: Post-adoption Sibling Visitation," 43 *Cap.U.Law Rev*. 307, 336 (2015)].

[8] R. Mandelbaum, Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain their Relationships Post-Adoption," 41 *N.Mex.Law Rev*. 1, 6 (Spring, 2011)

further trauma, an aid in coping with loss and grief, and essential to development of normal attachments and self-esteem – significantly, often "the most stable and consistent relationship available." *See* R. Mandelbaum, Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain their Relationships Post-Adoption," 41 *N.Mex.Law Rev*. 1, 29-34 (Spring, 2011); D.Post, S.McCarthy, R.Sherman and S.Bayimli, "Are You Still My Family?: Post-adoption Sibling Visitation," 43 *Cap.U.Law Rev.* 307, 319-326 (2015). The "Beyond Permanency" Symposium, sponsored by the Children's Law Center at New York Law School on October 23, 2015, as well as the article by Dawn Post, *supra*, were replete with first-hand accounts of youth who struggled to maintain relationships with siblings, often mentor-type relationships that facilitate the successful adjustment of the siblings. Enactment of the Committee's proposal, therefore, will not only bring clarity to New York State law but will also provide substantial developmental benefits for the numerous sibling groups in the State's child welfare system.

Proposal

AN ACT to amend the family court act and social services law, in relation to contact by siblings in child protective, permanency and termination of parental rights proceedings

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

Section 1. Section 1027-a of the family court act, as added by chapter 854 of the laws of 1990, is amended to read as follows:

§ 1027-a. Placement of siblings; contact with siblings.

(a) When a social services official removes a child pursuant to this part, such official shall place such child with his or her minor siblings or half-siblings who have been or are being remanded to or placed in the care and custody of such official unless, in the judgment of such official, such placement is contrary to the best interests of the children. Placement with siblings or half-siblings shall be presumptively in the child's best interests unless such placement would be contrary to the child's health, safety, or welfare. If such placement is not immediately available at the time of the removal of the child, such official shall provide or arrange for the provision of such placement within thirty days.

(b)) If placement of a child removed pursuant to this part together with his or her minor siblings is not in the best interests of the child, the social services official shall arrange appropriate and regular contact by the child with his or her minor siblings and half-siblings unless such contact would not be in the child's and the siblings' best interests.

(c) If a child removed pursuant to this part is not placed together or afforded regular contact with his or her siblings, the child, through his or her attorney or through a parent on his or her behalf, may move for an order regarding placement or contact. The motion shall be served upon: (i) the respondent in the proceeding under this article; (ii)the local social services official having the care of the child; (iii)

other persons having care, custody and control of the child, if any; (iv) the parents or other persons having care, custody and control of the sibling to be visited or with whom contact is sought; (v) any non-respondent parent in the proceeding under this article; (vi) such sibling himself or herself if ten years of age or older; and (vii) such sibling's attorney, if any. For purposes of this section, "siblings" shall include half-siblings and those who would be deemed siblings or half-siblings but for the termination of parental rights or death of a parent. The court may order that the child be placed together with or have regular contact with his or her siblings if the court determines it to be in the best interests of the child and his or her siblings.

§2. Subdivision (c) of section 1055 of the family court act, as amended by chapter 437 of the laws of 2006, is amended to read as follows:

(c) In addition to or in lieu of an order of placement made pursuant to subdivision (b) of this section, the court may make an order directing a child protective agency, social services official or other duly authorized agency to undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the best interests of the child. Such efforts shall include encouraging and facilitating visitation with the child by the parent or other person legally responsible for the child's care. Such order may include a specific plan of action for such agency or official including, but not limited to, requirements that such agency or official assist the parent or other person responsible for the child's care in obtaining adequate housing, employment, counseling, medical care or psychiatric treatment. Such order shall also include encouraging and facilitating visitation with the child by the non-custodial parent and grandparents who have obtained orders pursuant to part eight of this article, and may include encouraging and facilitating visitation with the child by the child's siblings. The order may incorporate an order, if any, issued pursuant to subdivision (c) of section one thousand twenty-seven-a or one thousand eighty-one of this article, provided that such visitation or contact is in the best interests of the child and his or her siblings. For purposes of this section, "siblings" shall include half-siblings and those who would be deemed siblings or half-siblings but for the termination of parental rights or death of a parent. Nothing in this subdivision shall be deemed to limit the authority of the court to make an order pursuant to section two hundred fifty-five of this act.

§3. Section 1081 of the family court act, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

§ 1081. Visitation rights. 1. A non-custodial parent or grandparent shall have the visitation rights with a child remanded or placed in the care of a social services official pursuant to this article as

conferred by order of the family court or by any order or judgment of the supreme court, or by written agreement between the parents as described in section two hundred thirty-six of the domestic relations law, subject to the provisions of section one thousand eighty-two of this part.

2. (a) A non-custodial parent or any grandparent or grandparents who have not been afforded the visitation rights described in subdivision one of this section [,] shall have the right to petition the court for enforcement of visitation rights with a child remanded or placed in the care of a social services official pursuant to this article, as such visitation rights have been conferred by order of the family court or by any order or judgment of the supreme court, or by written agreement between the parents as described in section two hundred thirty-six of the domestic relations law.

(b) A child remanded or placed in the care of a social services official pursuant to this article shall have the right to move for visitation and contact with his or her siblings. The siblings of a child remanded or placed in the care of a social services official pursuant to this article shall have a right to petition the court for visitation and contact with such child. For purposes of this section, "siblings" shall include half-siblings and those who would be deemed siblings or half-siblings but for the termination of parental rights or death of a parent.

3. (a) The petition by a non-custodial parent shall allege that such parent has visitation rights conferred by order of the family court or by any order or judgment of the supreme court or by written agreement between the parents as described in section two hundred thirty-six of the domestic relations law, shall have a copy of such order, judgment or agreement attached thereto, shall request enforcement of such rights pursuant to this part, and shall state, when known by the petitioner, that visitation rights with the child by any grandparent or grandparents have been conferred by order of the supreme court or family court pursuant to section seventy-two or two hundred forty of the domestic relations law, and shall provide the name and address of such grandparent or grandparents.

(b) A petition by a grandparent or grandparents shall allege that such grandparent or grandparents have been granted visitation rights with the child pursuant to section seventy-two or two hundred forty of the domestic relations law, or subdivision (b) of section six hundred fifty-one of this act, shall have a copy of such order or judgment attached thereto, and shall request enforcement of such rights pursuant to this part.

(c) A motion by a child remanded or placed in the care of a social services official pursuant to this article or a petition by a sibling of such child shall allege that visitation and contact would be in the best interests of both the child who has been remanded or placed and the child's sibling.

4. [The] (a) A petition filed under paragraphs (a) or (b) of subdivision three of this section shall be served upon the respondent in a proceeding under this article, the local social services official having the care of the child, any grandparent or grandparents named in the petition as having visitation rights conferred by court order pursuant to section seventy-two or two hundred forty of the domestic relations law, and upon the child's attorney. The petition shall be served in such manner as the court may direct.

(b) A petition or motion filed under paragraph (c) of subdivision three of this section shall be served upon: (i) the respondent in the proceeding under this article; (ii) the local social services official having the care of the child; (iii) other persons having care, custody and control of the child, if any; (iv) the parents or other persons having care, custody and control of the sibling to be visited or with whom contact is sought; (v) any non-respondent parent in the proceeding under this article; (vi) such sibling himself or herself if ten years of age or older; and (vii) such sibling's attorney, if any. The petition or motion shall be served in such manner as the court may direct.

5. (a) Upon receipt of [such] a petition filed under paragraphs (a) or (b) of subdivision three of this section, the court shall, subject to the provisions of section one thousand eighty-two of this part, require that any order of a family court or order or judgment of the supreme court, or any agreement between the parents as described in subdivision one of this section, granting visitation rights to the non-custodial parent, grandparent or grandparents, be incorporated in any preliminary order or order of placement made under this article to the extent that such order, judgment or agreement confers visitation rights. In any case where a dispositional hearing has not been held or will not be held within thirty days of the filing of such petition, the court shall order the person, official, agency or institution caring for the child pursuant to this article to comply with such part of the order, judgment or agreement granting visitation rights.

(b) Upon receipt of a petition or motion filed under paragraph (c) of subdivision three of this section, the court shall determine, after giving notice and an opportunity to be heard to persons served under subdivision four of this section, whether visitation and contact would be in the best interests of the child and his or her sibling. The court's determination may be included in the dispositional order issued pursuant to section one thousand fifty-two of this article.

(c) Violation of [such] an order issued under this section shall be punishable pursuant to section seven hundred fifty-three of the judiciary law.

§4. Clause F of subparagraph (viii) of paragraph 2 of subdivision (d) of section 1089 of the family court act, as amended by chapter 56 of the laws of 2015, is amended to read as follows:

(F) The court may make an order directing a local social services district or agency to undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the best interests of the child and there has been no prior court finding that such efforts are not required. Such efforts shall include encouraging and facilitating visitation with the child by the parent or other person legally responsible for the child's care. Such order may include a specific plan of action for the local social services district or agency including, but not limited to, requirements that such agency assist the parent or other person legally responsible for the child's care in obtaining adequate housing, employment, counseling, medical care or psychiatric treatment. Such order shall also include encouraging and facilitating visitation with the child by the noncustodial parent and grandparents who have the right to visitation pursuant to section one thousand eighty-one of this act[, and] Such order may also include encouraging and facilitating visitation with the child by the child's siblings and may incorporate an order, if any, issued pursuant to section one thousand twenty-seven-a or one thousand eighty-one of this act. For purposes of this section, "siblings" shall include half-siblings and those who would be deemed siblings or half-siblings but for the termination of parental rights or death of a parent. Nothing in this subdivision shall be deemed to limit the authority of the court to make an order pursuant to section two hundred fifty-five of this act.

§5. Subparagraph (v) of paragraph (l) of subdivision 3 and subdivision 9 of section 384-b of the social services law, subdivision 3 as amended by chapter 113 of the laws of 2010 and subdivision 9 as amended by chapter 3 of the laws of 2005, are amended to read as follows:

(v) For the purposes of clause (D) of subparagraph (i) of this paragraph, an assessment of whether a parent maintains a meaningful role in his or her child's life shall be based on evidence, which may include the following: a parent's expressions or acts manifesting concern for the child, such as letters, telephone calls, visits, and other forms of communication with the child; efforts by the parent to communicate and work with the authorized agency, [law guardian] attorney for the child, foster parent, the court, and the parent's attorney or other individuals providing services to the parent, including correctional, mental health and substance abuse treatment program personnel for the purpose of complying with the service plan and repairing, maintaining or building the parent-child relationship; a positive response by the parent to the authorized agency's diligent efforts as defined in paragraph (f) of subdivision seven of this section; and whether the continued involvement of the parent in the child's life is in the child's best interest. In assessing whether a parent maintains a meaningful role in his or her child's life, the authorized agency shall gather input from individuals and agencies in a reasonable

position to help make this assessment, including but not limited to, the authorized agency, [law guardian] attorney for the child, parent, child, foster parent or other individuals of importance in the child's life, and parent's attorney or other individuals providing services to the parent, including correctional, mental health and substance abuse treatment program personnel. The court may make an order directing the authorized agency to undertake further steps to aid in completing its assessment.

9. Nothing in this section shall be construed to terminate, upon commitment of the guardianship and custody of a child to an authorized agency or foster parent, any rights and benefits, including but not limited to rights relating to contact with siblings, inheritance, succession, social security, insurance and wrongful death action claims, possessed by or available to the child pursuant to any other provision of law. For purposes of this section, "siblings" shall include half-siblings and those who would be deemed siblings or half-siblings but for the termination of parental rights or death of a parent. Notwithstanding any other provision of law, a child committed to the custody and guardianship of an authorized agency pursuant to this section shall be deemed to continue in foster care until such time as an adoption or another planned permanent living arrangement is finalized. Where the disposition ordered is the commitment of guardianship and custody pursuant to this section, an initial freed child permanency hearing shall be held pursuant to section one thousand eighty-nine of the family court act.

§6. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to petitions filed on or after such date

3. Simplification of the notification of rights to victims of domestic violence in criminal and family court proceedings (F.C.A. §812; C.P.L. §530.11)

The amendments to Family Court Act §812 and Criminal Procedure Law §530.11, contained in the comprehensive domestic violence statute enacted in 1994 [L. 1994, c. 222, 224], included important protections for alleged victims of domestic violence. The statutes placed a collective responsibility upon law enforcement, prosecutors and the courts to ensure that victims would be made aware of their rights, of the expectations they may have to obtain assistance from both the civil and criminal justice systems and of the remedies and resources available to them. The notice must be in writing in both English and Spanish and must recite the statutory language verbatim. Law enforcement has provided the notice as part of the victims' copy of the "Domestic Incident Report" and the court system has made the notices available in eight languages. *See* www.nycourts.gov. However, the required language in the notice is overly complex and, particularly where alleged victims of domestic violence are unrepresented, has impeded the statutory goal of making the justice system fully responsive to the needs of victims of abuse.

The Family Court Advisory and Rules Committee is submitting a measure to amend Family Court Act §812 and Criminal Procedure Law §530.11 by substantially simplifying the language contained in the notice without compromising the breadth of information it provides. The proposal adds flexibility by providing that the notice use substantially the language provided and that it be made available at minimum in plain English and Spanish. As the chart below indicates, using five generally accepted means of measurement of the grade level of the language used, the proposed notice averages 6.7 (middle school) in grade level compared to the 14.0 (college level) average of the existing notice and its readability score is almost twice that of the current notice:[9]

Measurement Formula	Existing Notice	Proposed Notice
Flesch-Kincaid Grade Level	13.9	5.5
Gunning-Fog Score	17.7	8.8
Coleman-Liau Index	11.5	7.8
SMOG Index	13.3	7.0
Automated Readability Index	13.8	4.3
Average Grade Level	**14.0**	**6.7**
Text Statistics		
Character Count	2363	1591
Syllable Count	820	528
Word Count	510	396
Sentence Count	19	29
Characters per Word	4.6	4.0
Syllables per Word	1.6	1.3
Words per Sentence	26.8	13.7
Readability Score	**43.6**	**80.2**
[Flesch-Kincaid; scale: 1 to 100]		

[9] *See* www.readability-score.com. [visited Dec. 20, 2015].

The language in the proposed notice mirrors the basic principles of writing in plain English, in particular, the use of short, declarative sentences, use of personal pronouns, use of active voice, avoidance of legal terms and organization into easy-to-read bullets. *See, e.g., Federal Plain Language Guidelines* [www.plainlanguage.gov]; *Writing for Self-represented Litigants: A Guide for Maryland Courts and Legal Services Providers* (Md. Access to Justice Commission, Nov., 2012). As indicated on the web-site www.writeclearly.org :

> Roughly 50% of native English-speaking Americans are unable to read at the 8th grade level; another 20% are only functionally literate.
>
> Limited English speakers find it particularly difficult to navigate legal texts that contain strange words and describe unfamiliar procedures. These readers are substantially disadvantaged in accessing legal information.

Research has demonstrated that where documents are too complex for readers, they generally stop reading. *See* W.H. DuBay, "Principles of Readability, Readability and Reader Persistence," at 30 [National Adult Literacy Database, 2004; www.nald.ca].

Utilization of plain English is particularly important for victims of domestic violence, who may be experiencing trauma as a result of the alleged abusive incident or incidents, trauma that itself makes it more difficult for victims to understand their options and to make the often difficult decisions required at the outset of abuse cases. Significantly, victims are most often not represented by counsel either at the point of a law enforcement response to a call to 911 or upon their first appearances in Family Court seeking temporary orders of protection. Noting the high incidence of unrepresented litigants in family law-related matters in New York State courts, the 2010, 2014 and 2015 *Reports to the Chief Judge of the Task Force [now Permanent Commission] to Expand Access to Civil Legal Services in New York* included simplification of forms among the recommendations. In drastically reducing the complexity of the statutorily required notice to victims of domestic violence, the Committee's proposal would fulfill those recommendations and would enhance the capacity of the justice system to respond effectively to victims' needs.

Proposal:

AN ACT to amend the family court act and the criminal procedure law, in relation to notification of rights of victims of domestic violence in criminal and family court proceedings

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

Section 1. Subdivision 5 of section 812 of the family court act, as amended by chapter 224 of the laws of 1994, is amended to read as follows:

5. Notice. Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of the criminal procedure law, the

family court act and the domestic relations law. Such notice shall be available, at minimum, in plain English and Spanish and, if necessary, shall be delivered orally and shall include but not be limited to substantially the following statement:

["If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a family member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you.

You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection.

The forms you need to obtain an order of protection are available from the family court and the local criminal court (the addresses and telephone numbers shall be listed). The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be listed and space shall be provided for local domestic violence hotline telephone numbers).

Filing a criminal complaint or a family court petition containing allegations that are knowingly false is a crime."] "Are you the victim of domestic violence? If you need help now, call 911. The police will come right away. This is what the police can do:

They can protect you and your children.

They can get you and your children to a safe place such as a family or friend's house or a shelter in your community.

They can help you get to a hospital or clinic for medical care.

They can help you get your personal belongings.

They can get you a copy of the police report for free.

They may and sometimes must arrest the person who harmed you if you are the victim of a crime.

If you have been abused or threatened, this is what you can ask for:

You can ask the court for an order of protection.

You can ask the district attorney or the police officer to file a criminal complaint.

You can file a petition in Family Court and ask for an order of protection there.

If you go to Family Court, you have these rights:

To have your Family Court petition filed the same day you go to court.

To have your request heard in court the same day you file or the next day court is open.

You can ask for an order of protection in criminal court or Family Court. (Insert addresses and contact information for courts). That order may include these things:

That the other person stay away from you and your children.

That you have custody of your children.

That the other person pay child support for now.

You can go right now to a criminal court to ask for an order of protection if the Family Court is closed because it is nighttime, a weekend, or a holiday.

You do not need a lawyer to ask for an order of protection. But it is a good idea, especially if you have children. If you cannot pay for a lawyer, the Family Court may appoint one for you.

You can get the forms you need to ask for an order of protection at Family Court and at your local criminal court. You can also get them online: www.NYCourts.gov/forms.

You can call a hot-line for help (Insert hot-line numbers).

It is a crime to file a criminal complaint or a family court petition which says things that you know are false."

The division of criminal justice services in consultation with the state office for the prevention of domestic violence shall prepare the form of such written notice consistent with the provisions of this section and distribute copies thereof to the appropriate law enforcement officials pursuant to subdivision nine of section eight hundred forty-one of the executive law. Additionally, copies of such notice shall be provided to the chief administrator of the courts to be distributed to victims of family offenses through the family court at such time as such persons first come before the court and to the state department of health for distribution to all hospitals defined under article twenty-eight of the public health law. No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.

§2. Subdivision 6 of section 530.11 of the criminal procedure law, as amended by chapter 224 of the laws of 1994, is amended to read as follows:

6. Notice. Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of the criminal procedure law, the family court act and the domestic relations law. Such notice shall be prepared, at minimum, in plain English and Spanish [and English] and if necessary, shall be delivered orally, and shall include but not be limited to substantially the following statement:

[“If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a family member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your

own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you.

You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection.

The forms you need to obtain an order of protection are available from the family court and the local criminal court (the addresses and telephone numbers shall be listed). The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be listed and space shall be provided for local domestic violence hotline telephone numbers).

Filing a criminal complaint or a family court petition containing allegations that are knowingly false is a crime."] "Are you the victim of domestic violence? If you need help now, call 911. The police will come right away. This is what the police can do:

They can protect you and your children.

They can get you and your children to a safe place such as a family or friend's house or a shelter in your community.

They can help you get to a hospital or clinic for medical care.

They can help you get your personal belongings.

They can get you a copy of the police report for free.

They may and sometimes must arrest the person who harmed you if you are the victim of a crime.

If you have been abused or threatened, this is what you can ask for:

You can ask the court for an order of protection.

You can ask the district attorney or the police officer to file a criminal complaint.

You can file a petition in Family Court and ask for an order of protection there.

If you go to Family Court, you have these rights:

To have your Family Court petition filed the same day you go to court.

To have your request heard in court the same day you file or the next day court is open.

You can ask for an order of protection in criminal court or Family Court. (Insert addresses and contact information for courts). That order may include these things:

That the other person stay away from you and your children.

That you have custody of your children.

That the other person pay child support for now.

You can go right now to a criminal court to ask for an order of protection if the Family Court is closed because it is nighttime, a weekend, or a holiday.

You do not need a lawyer to ask for an order of protection. But it is a good idea, especially if you have children. If you cannot pay for a lawyer, the Family Court may appoint one for you.

You can get the forms you need to ask for an order of protection at Family Court and at your local criminal court. You can also get them online: www.NYCourts.gov/forms.

You can call a hot-line for help (Insert hot-line numbers) .

It is a crime to file a criminal complaint or a family court petition which says things that you know are false."

The division of criminal justice services in consultation with the state office for the prevention of domestic violence shall prepare the form of such written notice consistent with provisions of this section and distribute copies thereof to the appropriate law enforcement officials pursuant to subdivision nine of section eight hundred forty-one of the executive law.

Additionally, copies of such notice shall be provided to the chief administrator of the courts to be distributed to victims of family offenses through the criminal court at such time as such persons first come before the court and to the state department of health for distribution to all hospitals defined under article twenty-eight of the public health law. No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.

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

4. Video recording of custodial interrogations of juveniles in juvenile delinquency proceedings in Family Court (F.C.A. §§305.2, 344.2)

With the increasing recognition of the value of video recording of statements of the accused in enhancing the accuracy of criminal proceedings and with the proliferation of inexpensive recording technology, there has been a growing national consensus in favor of recording interrogations. Coupled with the advancing knowledge regarding the still-developing adolescent brain, the consensus has been particularly strong with respect to interrogations of youth. The Family Court Advisory and Rules Committee, therefore, is proposing a measure requiring video recording of all custodial interrogations of accused juvenile delinquents where such interrogations take place in law enforcement facilities approved for the questioning of youth.

The Committee's measure amends sections 305.2 and 344.2 of the Family Court Act to require video recording of entire custodial interrogations of juveniles, including the provision of *Miranda* warnings and the waiver, if any, of rights by the juveniles. The requirement applies to interrogations that take place in law enforcement facilities which, pursuant to Family Court Act §305.2(4) and section 205.20 of the *Uniform Rules of the Family Court*, must be in rooms that have been inspected and approved by the Chief Administrator of the Courts for the questioning of youth. The recording must ensure that all persons in the recording are identifiable, that the speech is intelligible and that it complies with rules to be promulgated by the New York State Division of Criminal Justice Services (DCJS). As is applicable to other statements by juveniles, the recording would be subject to discovery pursuant to Family Court Act §331.2. Further, like other factors in juvenile delinquency *Huntley* hearings, including the presence or absence of parents, location of questioning and the validity of any waiver of rights, the fact and quality of the recording would be among the factors comprising the totality of circumstances affecting the admissibility of accused juveniles' statements.

The emerging consensus favoring recording of custodial interrogations in criminal proceedings has been particularly evident in all sectors of the justice system in New York State. The New York State Justice Task Force, established by former Chief Judge Jonathan Lippman and chaired by Hon. Janet DiFiore, in January, 2012, issued " Recommendations Regarding Electronic Recording of Custodial Interrogations" as one means of ameliorating the problem of false confessions that has led to wrongful convictions:

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

Id. at p. 2.

While urging that recording be mandatory at least in certain circumstances, the Task Force noted the voluntary guidelines adopted in December, 2010, by the New York State District Attorneys Association that were developed in conjunction with the New York City Police Department, the New York State Police, the New York State Chiefs of Police Association, and the New York State Sheriffs' Association. *Id.* at p. 2, note 2. These *New York State Guidelines for Recording Custodial Interrogations of Suspects*, *inter alia,* at pps 6-7*,* noted that questioning of accused juvenile delinquents should be recorded in court-approved juvenile questioning rooms upon compliance with parental notification requirements and suggested that simplified *Miranda* warnings be used. Since 2007, State funds have been made available to assist prosecutors and law enforcement in communities both large and small to expand their capacities to record interrogations. *See* T. Sullivan, "Arguing for Statewide Uniformity in Recording Custodial Interrogations," 29 *Criminal Justice* 21 (Spring, 2014); K. Hamann, "Outside Counsel: Police and District Attorneys Endorse Video Recording of Interrogations," *N.Y.L.J.*, Aug. 8, 2011. In a press release, on July 15, 2013, announcing one million dollars in State funds to expand video recording throughout the State, Governor Cuomo indicated that 345 police agencies in 58 of the 62 counties were already video recording interrogations.[10]

The factors favoring video recording of interrogations of adults are magnified when applied to juveniles accused of acts of delinquency. The International Association of Chiefs of Police, in its publication, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation* (IACP, Sept., 2012; www.iacp.org), recommended video recording of juvenile interrogations on the ground that the lack of full development of the pre-frontal cortex in adolescents, which governs judgment, decision-making and understanding of consequences, makes them more vulnerable to making false confessions.[11] These adolescent development factors were central to the decisions of the United States Supreme Court in the cases outlawing the juvenile death penalty, limiting life without parole and requiring age to be considered a factor in determining whether a school-based police interrogation was custodial for purposes of assessing the voluntariness of the juvenile's waiver of the right to counsel. *See* Roper *v.* Simmons, 543 U.S. 551 (2005); Miller *v.* Alabama*,* 132 S.Ct. 2455 (2012)*;* J.D.B. *v.* North Carolina*,* 131 S.Ct. 2394 (2011); Graham *v.* Florida*,* 130 S.Ct. 2011 (2010).

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

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

The movement toward requiring video recording of custodial interrogations of juveniles has been advancing nationally. By 2012, when the IACP report was issued, there were 16 States that mandated recording by statute or case law, in addition to the many states with legislation pending. Particularly noteworthy among these statutes are those in Illinois and North Carolina .[12] Additionally, the Wisconsin Supreme Court, in In Re Jerrell C.J., 699 N.W. 2d 110 (Wis., 2005), used its supervisory authority to require video recording of juvenile interrogations.

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

Proposal:

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

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

Section 1. Subdivisions 5, 6, 7 and 8 of section 305.2 of the family court act are re-numbered by this section subdivisions 6, 7, 8 and 9, a new subdivision 5 is added and subdivision 9, as amended by chapter 398 of the laws of 1983, is amended to read as follows:

5. Where a respondent is subject to custodial interrogation by a police or peace officer at a facility designated by the chief administrator of the courts as a suitable place for the questioning of juveniles pursuant to subdivision four of this section, the entire custodial interrogation, including the giving of any required notice to the respondent as to his or her rights and respondent's waiver of any rights, shall be video recorded in accordance with standards established by rule of the division of

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

criminal justice services. The interrogation shall be recorded in a manner such that the persons in the recording are identifiable and the speech is intelligible. A copy of the recording shall be subject to discovery pursuant to section 331.2 of this article.

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

§2. Subdivision 3 of section 344.2 of the family court act is renumbered subdivision 4 and a new subdivision 3 is added to read as follows:

3. Where a respondent is subject to custodial interrogation by a police or peace officer at a facility designated by the chief administrator of the courts as a suitable place for the questioning of juveniles pursuant to in subdivision four of section 305.2 of this article, the entire custodial interrogation, including the giving of any required notice to the respondent as to his or her rights and respondent's waiver of any rights, shall be video recorded in accordance with standards established by rule of the division of criminal justice services. The interrogation shall be recorded in a manner such that the persons in the recording are identifiable and the speech is intelligible. A copy of the recording shall be subject to discovery pursuant to section 331.2 of this article.

§3. This act shall take effect on the first of November in the year next succeeding the year in which this act shall have become a law; and shall apply only to confessions, admissions or other statements made on or after such effective date; provided, further, that the division of criminal justice services shall promulgate rules necessary to implement this act in advance of its effective date.

5. Substitution of the phrase "intellectual disability" for "mental retardation" in juvenile delinquency and termination of parental rights proceedings in Family Court (D.R.L. §111; F.C.A. §§115, 231, 301.2, 322.2, 353.4. 380.1; Exec. L. §508, 509; S.S.L. §§384-b, 422, 424)

In 2010, the name of the New York State Office of Mental Retardation and Developmental Disabilities was changed to the Office for People With Developmental Disabilities and in 2011, various provisions of the Mental Hygiene Law were amended to reflect this change. *S*ee L.2010, c.168; L.2011, c.37. Likewise, in 2010, the Federal *Rosa's Law* was enacted, which substituted the term "intellectual disability" for "mental retardation" and discontinued the use of the term "mental retardation" throughout Federal health, education and labor policy. *See* Public Law 111-256. Significantly, the American Psychiatric Association revised the diagnosis of "mental retardation" to "intellectual disability" in the 2013 Fifth Edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), the standard manual used by clinicians and researchers to diagnose and classify mental disorders. The revised diagnosis addressed not only the name of the disorder, but also the comprehensive assessment required for its diagnosis, that is, the impact on the conceptual, social and practical domains of an individual's capacity to function. The change to "intellectual disability" brought the DSM-5 into accord with terminology used by the World Health Organization's International Classification of Diseases, the American Association on Intellectual and Developmental Disabilities and the U.S. Department of Education. *See* DSM-5, at pages 33-41 (Amer. Psychiatric Assoc., 2013); Fact Sheet: Intellectual Disability (Amer. Psychiatric Assoc., 2013). [13]

The provisions of New York State statutes, however, affecting Family Court and family law have not caught up with this advancing trend in both law and psychiatry. Most significantly, the term "mental retardation" remains a ground for termination of parental rights and is the criterion used to determine a child's legal capacity to be prosecuted as a juvenile delinquent. The Family Court Advisory and Rules Committee, therefore, is submitting a proposal to incorporate the modern terminology into the Family Court Act, Domestic Relations Law and Social Services Law. With the caveat that case law regarding use of the phrase "mental retardation" would remain applicable to the term "intellectual disability," the Committee's measure amends the provisions in the Family Court Act, Domestic Relations Law and Social Services Law regarding grounds for termination of parental rights. It further amends the provisions of the Family Court Act regarding the determination of whether a commitment of a child is necessary and of the capacity of an accused juvenile delinquent to stand trial. Additionally, the measure amends the Family Court Act, Executive Law and Social Services Law to correct the name of the State agency to the Office for People With Developmental Disabilities.

The continued, anachronistic use of the term "mental retardation" in New York State law means that the testimony by clinicians in Family Court cases regarding both termination of parental rights of adults and the capacity of children to stand trial no longer matches the statutes. Mental health experts, who have been called upon to testify since the publication of the DSM-5, are using the term"intellectual disability" and acknowledging that this diagnosis was formerly referred to as

[13] *See* www.dsm5.org/documents/intellectual%20disability%20fact%20sheet.pdf.

"mental retardation." As might be expected, this leads to confusion, since the fact-finding order still refers to mental retardation and is not cast in the DSM-5 framework of intellectual capacity in the three functional domains.[14] Moreover, as recognized in the bill memo supporting chapter 37 of the Laws of 2011, the terms "mental retardation" and "mentally retarded" are "outdated and offensive to persons with disabilities;" the supporting memo from O.P.W.D.D. notes that the terms are "derogatory or demeaning" and inconsistent with the "important" international trend to remove "retardation" from nomenclature. *See* Memo in Support of Assembly Bill 6840 and Memo of O.P.W.D.D. [N.Y. Bill Jacket 2011 A.B. 6840, Ch.37].

In upholding the constitutionality of section 384-b(4)(c) of the Social Services Law, which authorizes termination of parental rights on the ground of "mental retardation," the New York Court of Appeals stated that "The statutes provide significant procedural safeguards for the birth parent's rights and authorize termination of parental rights only when specific and definite criteria are met and when necessary in the best interest of the child," In the Matter of Guardianship and Custody of Nereida S., 57 NY2d 636, 640 (1982). Given the high court's emphasis on "specific and definite criteria," it is critically important for the clinical testimony and evidence to match the statutory criteria for the drastic remedy of parental rights termination and, in turn, for the statute to incorporate the medically accepted term "intellectual disability."

This proposed change in language will not only bring the statutes into conformity with current medical terminology, but it will also recognize the societal norm in defining persons with this mental disorder. Moreover, the proposed change will be invaluable to mental health experts, legal practitioners and jurists in their ability to accurately define, apply and make legal determinations concerning persons who are "intellectually disabled" within the meaning and criteria of the DSM-5.

Proposal:

AN ACT to amend the domestic relations law, the family court act, the executive law and the social services law, in relation to substitution of "intellectual disability" for "mental retardation" in proceedings in Family Court

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

Section 1. Paragraph (d) of subdivision 2 of section 111 of the domestic relations law, as added by chapter 666 of the laws of 1976, is amended to read as follows:

(d) who, by reason of mental illness or [mental retardation] intellectual disability, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether

[14] In the related guardianship context, a Surrogate judge recently indicated, in Matter of D.D., 2015 Slip Op 25364 (Surr.Ct., Kings Co., Oct. 28, 2015) that the term "intellectual disability" would be used, notwithstanding the fact that the Surrogates Court Procedure Act still refers to "mental retardation."

a parent is mentally ill or [mentally retarded] intellectually disabled shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law; or

§2. Paragraph (iv) of subdivision (a) of section 115 of the family court act, as amended by chapter 185 of the laws of 2006, is amended to read as follows:

(iv) proceedings to permanently terminate parental rights to guardianship and custody of a child: (A) by reason of permanent neglect, as set forth in part one of article six of this act and paragraph (d) of subdivision four of section three hundred eighty-four-b of the social services law, (B) by reason of mental illness, [mental retardation] intellectual disability and severe or repeated child abuse, as set forth in paragraphs (c) and (e) of subdivision four of section three hundred eighty-four-b of the social services law, and (C) by reason of the death of one or both parents, where no guardian of the person of the child has been lawfully appointed, or by reason of abandonment of the child for a period of six months immediately prior to the filing of the petition, where a child is under the jurisdiction of the family court as a result of a placement in foster care by the family court pursuant to article ten or ten-A of this act or section three hundred fifty-eight-a of the social services law, unless the court declines jurisdiction pursuant to section three hundred eighty-four-b of the social services law;

§3. Section 231 of the family court act, as added by chapter 853 of the laws of 1976, is amended to read as follows

§ 231. Jurisdiction over [mentally retarded] intellectually disabled children. If it shall appear to the court that any child within its jurisdiction is [mentally retarded] intellectually disabled, the court may cause such child to be examined as provided in the mental hygiene law and if found to be [mentally retarded] intellectually disabled as therein defined, may commit such child in accordance with the provisions of such law.

§4. Subdivision 13 of section 301.2 of the family court act, as added by chapter 920 of the laws of 1982, is amended to read as follows:

13. "Incapacitated person" means a respondent who, as a result of mental illness, [mental retardation] or intellectual or developmental disability as defined in subdivisions twenty, twenty-one and twenty-two of section 1.03 of the mental hygiene law, lacks capacity to understand the proceedings against him or her or to assist in his or her own defense.

§5. Subdivision 1 and paragraph (a) of subdivision 5 of section 322.2 of the family court act,

as amended by chapter 41 of the laws of 2010, are amended to read as follows:

1. Upon the receipt of examination reports ordered under section 322.1, the court shall conduct a hearing to determine whether the respondent is an incapacitated person. The respondent, the counsel for the respondent, the presentment agency and the commissioner of mental health or the commissioner of [mental retardation and] the office of people with developmental disabilities, as appropriate, shall be notified of such hearing at least five days prior to the date thereof and afforded an opportunity to be heard.

5. (a) If the court finds that there is probable cause to believe that the respondent committed a felony, it shall order the respondent committed to the custody of the commissioner of mental health or the commissioner of [mental retardation and] the office of people with developmental disabilities for an initial period not to exceed one year from the date of such order. Such period may be extended annually upon further application to the court by the commissioner having custody or his or her designee. Such application must be made not more than sixty days prior to the expiration of such period on forms that have been prescribed by the chief administrator of the courts. At that time, the commissioner must give written notice of the application to the respondent, the counsel representing the respondent and the mental hygiene legal service if the respondent is at a residential facility. Upon receipt of such application, the court must conduct a hearing to determine the issue of capacity. If, at the conclusion of a hearing conducted pursuant to this subdivision, the court finds that the respondent is no longer incapacitated, he or she shall be returned to the family court for further proceedings pursuant to this article. If the court is satisfied that the respondent continues to be incapacitated, the court shall authorize continued custody of the respondent by the commissioner for a period not to exceed one year. Such extensions shall not continue beyond a reasonable period of time necessary to determine whether the respondent will attain the capacity to proceed to a fact finding hearing in the foreseeable future but in no event shall continue beyond the respondent's eighteenth birthday.

§6. Subdivisions 1, 2 and 3 of section 353.4 of the family court act, as added by chapter 920 of the laws of 1982, are amended to read as follows:

1. If at the conclusion of the dispositional hearing and in accordance with section 352.2 the court finds that the respondent has a mental illness, [mental retardation] or intellectual or developmental disability, as defined in section 1.03 of the mental hygiene law, which is likely to result in serious harm to himself or herself or others, the court may issue an order placing such respondent with the [division for youth] office of children and family services or, with the consent of

the local commissioner, with a local commissioner of social services. Any such order shall direct the temporary transfer for admission of the respondent to the custody of either the commissioner of mental health or the commissioner of [mental retardation and] the office of people with developmental disabilities who shall arrange the admission of the respondent to the appropriate facility of the department of mental hygiene. The director of a hospital operated by the office of mental health may, subject to the provisions of section 9.51 of the mental hygiene law, transfer a person admitted to the hospital pursuant to this subdivision to a residential treatment facility for children and youth, as that term is defined in section 1.03 of the mental hygiene law, if care and treatment in such a facility would more appropriately meet the needs of the respondent. Persons temporarily transferred to such custody under this provision may be retained for care and treatment for a period of up to one year and whenever appropriate shall be transferred back to the [division for youth] office of children and family services pursuant to the provisions of section five hundred nine of the executive law or transferred back to the local commissioner of social services. Within thirty days of such transfer back, application shall be made by the [division for youth] office of children and family services or the local commissioner of social services to the placing court to conduct a further dispositional hearing at which the court may make any order authorized under section 352.2, except that the period of any further order of disposition shall take into account the period of placement hereunder. Likelihood to result in serious harm shall mean (a) substantial risk of physical harm to himself or herself as manifested by threats or attempts at suicide or serious bodily harm or other conduct demonstrating he or she is dangerous to himself or herself or (b) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious bodily harm.

2. (a) Where the order of disposition is for a restrictive placement under section 353.5 if the court at the dispositional hearing finds that the respondent has a mental illness, [mental retardation] or intellectual or developmental disability, as defined in section 1.03 of the mental hygiene law, which is likely to result in serious harm to himself or herself or others, the court may, as part of the order of disposition, direct the temporary transfer, for a period of up to one year, of the respondent to the custody of the commissioner of mental health or of [mental retardation and] the office of people with developmental disabilities who shall arrange for the admission of the respondent to an appropriate facility under his or her jurisdiction within thirty days of such order. The director of the facility so designated by the commissioner shall accept such respondent for admission.

(b) Persons transferred to the office of mental health or [of mental retardation and] the office of people with developmental disabilities, pursuant to this subdivision, shall be retained by such office for care and treatment for the period designated by the court. At any time prior to the expiration of such period, if the director of the facility determines that the child is no longer mentally ill or no longer in need of active treatment, the responsible office shall make application to the family court for an order transferring the child back to the [division for youth] office of children and family services. Not more than thirty days before the expiration of such period, there shall be a hearing, at which time the court may:

(i) extend the temporary transfer of the respondent for an additional period of up to one year to the custody of the commissioner of mental health or the commissioner of [mental retardation and] the office of people with developmental disabilities pursuant to this subdivision; or

(ii) continue the restrictive placement of the respondent in the custody of the [division for youth] office of children and family services.

(c) During such temporary transfer, the respondent shall continue to be under restrictive placement with the [division for youth] office of children and family services. Whenever the respondent is transferred back to the [division] office of children and family services, the conditions of the placement as set forth in section 353.5 shall apply. Time spent by the respondent in the custody of the commissioner of mental health or the commissioner of [mental retardation and] the office of people with developmental disabilities shall be credited and applied towards the period of placement.

3. No dispositional hearing at which proof of a mental disability as defined in section 1.03 of the mental hygiene law is to be offered shall be completed until the commissioner of mental health or commissioner of [mental retardation and] the office of people with developmental disabilities, as appropriate, have been notified and afforded an opportunity to be heard at such dispositional hearing.

§7. Subdivision 4 of section 380.1 of the family court act, as added by chapter 7 of the laws of 2007, is amended to read as follows:

4. Notwithstanding any other provision of law, where a finding of juvenile delinquency has been entered, upon request, the records pertaining to such case shall be made available to the commissioner of mental health or the commissioner of [mental retardation and] the office of people with developmental disabilities, as appropriate; the case review panel; and the attorney general pursuant to section 10.05 of the mental hygiene law.

§8. Subdivision 9 of section 508 of the executive law, as amended by chapter 7 of the laws of

2007, is amended to read as follows:

9. Notwithstanding any provision of law, including section five hundred one-c of this article, the office of children and family services shall make records pertaining to a person convicted of a sex offense as defined in subdivision (p) of section 10.03 of the mental hygiene law available upon request to the commissioner of mental health or the commissioner of [mental retardation and] the office of people with developmental disabilities, as appropriate; a case review panel; and the attorney general; in accordance with the provisions of article ten of the mental hygiene law.

§9. Paragraph (b) of subdivision 1 and subdivision 4 of section 509 of the executive law, as amended by chapter 465 of the laws of 1992, are amended to read as follows:

(b) The office of [mental retardation and] people with developmental disabilities may receive, treat and otherwise care for such a child pursuant to article nine or fifteen of the mental hygiene law if suitable for admission thereunder.

4. Whenever the commissioner of mental health or the director of a residential treatment facility for children and youth, or the commissioner of [mental retardation and] the office of people with developmental disabilities finds that care and treatment of a child transferred pursuant to this section or section 353.4 of the family court act is no longer suitable under the mental hygiene law, he or she shall forthwith so certify and discharge the child to the custody of the child himself or herself, his or her parents, his or her legal guardian, [his] the local department of social services or the [division for youth] office of children and family services, as appropriate, except that so long as there is a valid order of the family court placing the child with the [division for youth] office of children and family services, or a valid order of a criminal court sentencing a child to the [division for youth] office of children and family services, the child shall be returned to the care and custody of the [division] office of children and family services. The duration of the placement or sentence with [the division] such office of a child transferred pursuant to this section shall not be extended or increased by reason of any such transfer.

§10. Paragraph (c) of subdivision 4 and paragraph (b) of subdivision 6 of section 384-b of the social services law, as amended by chapter 911 of the laws of 1983, are amended to read as follows:

(c) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, are presently and for the foreseeable future unable, by reason of mental illness or [mental retardation] intellectual disability, to provide proper and adequate care for a child who has been in the care of an authorized

agency for the period of one year immediately prior to the date on which the petition is filed in the court; or

(b) For the purposes of this section, ["mental retardation"] "intellectual disability" means subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act; provided, however, that case law regarding use of the phrase "mental retardation" under this section shall be applicable to the term "intellectual disability.".

§11. Subparagraph (n) of paragraph (A) of subdivision 4 of section 422 of the social services law, as amended by chapter 12 of the laws of 1006, is amended to read as follows:

(n) chief executive officers of authorized agencies, directors of day care centers and directors of facilities operated or supervised by the department of education, the [division for youth] office of children and family services, the office of mental health or the office of [mental retardation and] people with developmental disabilities, in connection with a disciplinary investigation, action, or administrative or judicial proceeding instituted by any of such officers or directors against an employee of any such agency, center or facility who is the subject of an indicated report when the incident of abuse or maltreatment contained in the report occurred in the agency, center, facility or program, and the purpose of such proceeding is to determine whether the employee should be retained or discharged; provided, however, a person given access to information pursuant to this subparagraph (n) shall, notwithstanding any inconsistent provision of law, be authorized to redisclose such information only if the purpose of such redisclosure is to initiate or present evidence in a disciplinary, administrative or judicial proceeding concerning the continued employment or the terms of employment of an employee of such agency, center or facility who has been named as a subject of an indicated report and, in addition, a person or agency given access to information pursuant to this subparagraph (n) shall also be given information not otherwise provided concerning the subject of an indicated report where the commission of an act or acts by such subject has been determined in proceedings pursuant to article ten of the family court act to constitute abuse or neglect;

§12. The final paragraph of section 424 of the social services law, as added by chapter 634 of the laws of 1988, is amended to read as follows:

The provisions of this section shall not apply to a child protective service with respect to reports involving children in facilities or programs subject to the provisions of subdivision eleven of

section four hundred twenty-two of this title or reports involving children in homes operated or supervised by the [division for youth] office of children and family services, the office of mental health, or the office of [mental retardation and] people with developmental disabilities subject to the provisions of section four hundred twenty-four-b of this title.

§13. This act shall take effect immediately.

6. Conditional restoration of driving privileges in child support proceedings (F.C.A. §458-a; D.R.L. §244-b)

Of the many mechanisms for child support enforcement required by Federal law and embodied in New York State law, suspension of driver's licenses as a penalty for accumulation of more than four months of unpaid arrears has been widely recognized as an effective deterrent. The threat of a suspension propels many support obligors to pay their outstanding obligations. However, in cases where the suspension is actually imposed, it often has the effect of undermining its statutory goal of promoting payment. The Congressional Research Service, in a report issued in 2011, noted that, according to census data, approximately 76 percent of employees nationally commute to work in private vehicles and 11 percent commute by car-pool; many entry-level jobs require driver's licenses and many jobs are inaccessible by public transportation, especially in suburban and rural areas.[15] The report indicated that suspensions may be particularly punitive for low-income support obligors, "may lessen a person's ability to keep a job or find work, and thus impede a noncustodial parent's ability to fulfill his or her child support obligation."[16] The Family Court Advisory and Rules Committee is submitting a measure designed to mitigate this counterproductive effect by authorizing the Family or Supreme Court to order conditional restoration of driver's licenses contingent upon payment of support obligations by a designated date.

Pursuant to Title IV-D of the Federal *Social Security Act*, all State plans, as a condition for eligibility for 66 percent Federal reimbursement for State child support programs, must include procedures to "withhold or suspend, or to restrict the use of driver's licenses, professional and occupational licenses, and recreational and sporting licenses of individuals owing overdue support or failing, after receiving appropriate notice, to comply with subpoenas or warrants relating to paternity or child support proceedings." *See* 42 USC § 666(a)(16). Congress afforded states "a great deal of flexibility in implementing license suspension programs"[17] and did not mandate specific procedures for the suspension and reinstatement of such licenses. New York laws thus prescribe two methods for suspending drivers' licenses of child support obligors who have accumulated more than four months of unpaid arrears:

• A Family or Supreme Court may order the New York State Department of Motor Vehicles (DMV) to suspend an obligor's license in the context of an enforcement proceeding pursuant to Domestic Relations Law § 244-b(a) and Family Court Act § 458-a(a). The court may later order DMV to restore an obligor's driving privileges upon full or partial payment of arrears.

• The Support Collection Unit (SCU) of a local Department of Social Services may administratively direct DMV to suspend an obligor's license under Social Services Law § 111-b(12). An obligor in default is provided notice that the SCU intends to direct the

[15] Congressional Research Service, *Child Support Enforcement and Driver's License Suspension Policies* (CRS Report #41762, Apr. 11, 2011) at pages 2,5.

[16] *Id.* at page 11.

[17] Congressional Research Service, *supra* note 14, at p.6. .

suspension and the obligor has 45 days to challenge the determination. Among the bases for a successful challenge are: the arrears have been paid in full; the obligor is in receipt of public assistance or Supplemental Security Income (SSI), the obligor's income is below the self-support reserve, or that the obligor is able to make a satisfactory payment arrangement with the SCU. A satisfactory payment arrangement requires, among other things, a confession of judgment and payments of support and arrears pursuant to an income execution. The SCU has up to 75 days to review the obligor's challenge. If after the review, the obligor disagrees with the SCU determination, he or she may file objections with the Family Court pursuant to Family Court Act § 454(5). The review is based on written submissions and unless the Family Court finds that the SCU's decision to suspend the driver's license was "based upon a clearly erroneous determination of fact or error of law," the court must deny the objections.

While both methods can be effective in promoting collection of support arrears, they often have the perverse effect noted above of preventing obligors from finding and maintaining employment, thus hampering their ability to make support payments. The suspension provisions in Domestic Relations Law § 244-b(a) and Family Court Act § 458-a(a) require the obligor to make a full or partial payment toward arrears prior to license reinstatement, a condition that many unemployed or underemployed obligors simply cannot meet. Similarly, under Social Services Law § 111-b(12), an unemployed or underemployed obligor may not be able to reach a satisfactory repayment agreement with the SCU in order to avoid or terminate the suspension. In the SCU-initiated suspensions, an obligor whose license has been suspended will not have the license reinstated until he or she has a job with support being deducted via an income execution.

In both cases, an obligor can apply for a restricted use license under section 530 of the Vehicle and Traffic Law which is limited to travel to and from his or her place of employment. An obligor with a restricted license is unable to operate a commercial vehicle or a vehicle for hire as part of that employment and may not drive as an element of his or her employment. Family Courts are routinely faced with obligors who report that they are unable to find and maintain employment as a result of license suspensions. Without the ability to address what may be a root cause of a non-custodial parent's unemployment, the Court has only two options – either lower the support obligation or continue the order, which will ultimately result in greater arrears and possible incarceration – neither of which achieves the goal of increasing support payments to custodial parents for the benefit of their children.

The Family Court Advisory and Rules Committee proposes to afford the courts a third option by amending Domestic Relations Law § 244-b and Family Court Act § 458-a to allow a Family or Supreme Court in limited circumstances to temporarily reinstate licenses where a finding is made that the suspension, whether ordered by the Court or by the SCU, limits the ability of a non-custodial parent to make child support payments. The proposal requires the Court in such circumstances to monitor the obligor's employment search for a designated period of time and, if the obligor finds and maintains employment, the Court may issue a final order lifting the suspension. If the obligor fails to make substantial efforts to find employment, the Court is required to reinstate the suspension.

New York would not be alone in enacting a measure utilizing the flexibility afforded by Federal law to blunt the adverse effects of license suspensions as an enforcement tool. The National Conference of State Legislatures reported in 2014 that:

> States are continuing to make changes during each legislative session, with a number of states easing up on driver's license restrictions in particular in order to allow the obligor[s] to continue working so that they can meet their support obligation in the future.[18]

Indiana law, for example, authorizes a person "whose driving privileges have been suspended by the [B]ureau [of Motor Vehicles] by an administrative action and not by a court order [to] petition a court for specialized driving privileges". [19] West Virginia permits an obligor to avoid a court-ordered license suspension if it would cause significant hardship to "the person . . . the person's employees, or to persons, businesses or entities to whom the person provides goods or services, " the obligor must pay a portion of the arrears and establish a payment plan for the remainder, which must be paid within one year.[20] California and Louisiana permit restricted-use licenses to be in effect for a designated period without limiting their use to the commute to and from work.[21] Consistent with this growing national trend, enactment of the Committee's proposal would increase the effectiveness of driver's license suspensions as a tool to promote, rather than impede, child support payments.

Proposal:

AN ACT to amend the family court act and the domestic relations law, in relation to the suspension of driver's licenses for non-payment of child support

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

Section 1. Section 458-a of the family court act, as amended by chapter 624 of the laws of 2002, is amended to read as follows:

§458-a. Enforcement of arrears; [Suspension] suspension of driving privileges; conditional restoration of driving privileges. (a) If the [respondent] support obligor has accumulated support arrears equivalent to or greater than the amount of support due pursuant to court order for a period of four months, the court may order the department of motor vehicles to suspend the [respondent's] obligor's driving privileges, and if such order issues, the [respondent] obligor may apply to the department of motor vehicles for a restricted use license pursuant to section five hundred thirty of the

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[18] National Conference of State Legislatures, *License Restrictions for Failure to Pay Child Support* (Jan. 30, 2014) at page 1.

[19] Such privileges are determined by the court and can require using "ignition interlock devices" and only driving "during certain hours of the day" or "between specific locations and the person's residence;operation of vehicles requiring commercial driver's licenses are specifically excluded." *See* Indiana Code §§ 9-30-16-3, 9-30-16-4.

[20] *See* W. Va. Code § 48-15-209.

[21] *See* Cal. Fam. Code §17520); La. Stats. Ann.-R.S. 9:315.33.

vehicle and traffic law. The court may at any time upon payment of arrears or partial payment of arrears by the [respondent] obligor order the department of motor vehicles to terminate the suspension of [respondent's] the obligor's driving privileges. For purposes of determining whether a support obligor has accumulated support arrears equivalent to or greater than the amount of support due for a period of four months, the amount of any retroactive support, other than periodic payments of retroactive support which are past due, shall not be included in the calculation of support arrears pursuant to this section.

(b) If [the respondent] a support obligor, after receiving appropriate notice, fails to comply with a summons, subpoena or warrant relating to a paternity or child support proceeding, the court may order the department of motor vehicles to suspend the [respondent's] obligor's driving privileges. The court may subsequently order the department of motor vehicles to terminate the suspension of the [respondent's] obligor's driving privileges; however, the court shall order the termination of such suspension when the court is satisfied that the [respondent] obligor has fully complied with the requirements of all summonses, subpoenas and warrants relating to a paternity or child support proceeding. Nothing in this subdivision shall authorize the court to terminate the [respondent's] obligor's suspension of driving privileges except as provided in this [subdivision] section.

(c) The provisions of subdivision (a) of this section shall not apply to:

(i) [respondents] obligors who are receiving public assistance or supplemental security income; or

(ii) [respondents] obligors whose income as defined by subparagraph five of paragraph (b) of subdivision one of section four hundred thirteen of this act falls below the self-support reserve as defined by subparagraph six of paragraph (b) of subdivision one of section four hundred thirteen of this act; or

(iii) [respondents] obligors whose income as defined by subparagraph five of paragraph (b) of subdivision one of section four hundred thirteen of this act remaining after the payment of the current support obligation would fall below the self-support reserve as defined by subparagraph six of paragraph (b) of subdivision one of section four hundred thirteen of this act.

(d) In addition to the remedies provided in subdivision twelve of section one hundred eleven-b of the social services law, a support obligor may petition the court to terminate a suspension of driving privileges pursuant to this section or under subdivision twelve of section one hundred eleven-

b of the social services law if the suspension limits the ability of the obligor to find and, if found, maintain employment to enable him or her to make required child support payments, The petition shall be on notice to the obligee and the support collection unit. If the court finds that the suspension limits the ability of a support obligor to make required child support payments, the court may make a temporary order directing the department of motor vehicles to terminate the suspension of the obligor's driving privileges. In such an event, the court shall adjourn the petition to monitor the obligor's employment search and status. If the court determines that the obligor is not making substantial efforts to find and, if found, maintain employment, the court shall order the department of motor vehicles to reinstate the suspension of the obligor's driving privileges. If the court finds that the obligor has found and, if found, has maintained employment and is making consistent payments toward the support and/or arrears, the court may make a final order directing the department of motor vehicles to terminate the suspension of the obligor's driving privileges.

(e) The court's discretionary decision not to suspend driving privileges shall not have any res judicata effect or preclude any other agency with statutory authority to direct the department of motor vehicles to suspend driving privileges.

§2. Section 244-b of the domestic relations law, as amended by chapter 624 of the laws of 2002, is amended to read as follows:

§244-b. Child support proceedings and enforcement of arrears; suspension of driving privileges; conditional restoration of driving privileges. (a) In any proceeding for the enforcement of a direction or agreement, incorporated in a judgment or order, to pay any sum of money as child support or combined child and spousal support, if the court is satisfied by competent proof that the [respondent] support obligor has accumulated support arrears equivalent to or greater than the amount of support due pursuant to such judgment or order for a period of four months, the court may order the department of motor vehicles to suspend the [respondent's] obligor's driving privileges, and if such order issues, the [respondent] obligor may apply to the department of motor vehicles for a restricted use license pursuant to section five hundred thirty of the vehicle and traffic law. The court may at any time upon payment of arrears or partial payment of arrears by the [respondent] obligor order the department of motor vehicles to terminate the suspension of [respondent's] the obligor's driving privileges. For purposes of determining whether a support obligor has accumulated support arrears equivalent to or greater than the amount of support due for a period of four months, the amount of any retroactive support, other than periodic payments of retroactive support which are past

due, shall not be included in the calculation of support arrears pursuant to this section.

(b) If [the respondent] a support obligor, after receiving appropriate notice, fails to comply with a summons, subpoena or warrant relating to a paternity or child support proceeding, the court may order the department of motor vehicles to suspend the [respondent's] obligor's driving privileges. The court may subsequently order the department of motor vehicles to terminate the suspension of the [respondent's] obligor's driving privileges; however, the court shall order the termination of such suspension when the court is satisfied that the [respondent] obligor has fully complied with the requirements of all summonses, subpoenas and warrants relating to a paternity or child support proceeding.

(c) The provisions of subdivision (a) of this section shall not apply to:

(i) [respondents] obligors who are receiving public assistance or supplemental security income; or

(ii) [respondents] obligors whose income as defined by subparagraph five of paragraph (b) of subdivision one-b of section two hundred forty of this chapter falls below the self-support reserve as defined by subparagraph six of paragraph (b) of subdivision one-b of section two hundred forty of this chapter; or

(iii) [respondents] obligors whose income as defined by subparagraph five of paragraph (b) of subdivision one-b of section two hundred forty of this chapter remaining after the payment of the current support obligation would fall below the self-support reserve as defined by subparagraph six of paragraph (b) of subdivision one-b of section two hundred forty of this chapter.

(d) In addition to the remedies provided in subdivision twelve of section one hundred eleven-b of the social services law, a support obligor may petition the court to terminate a suspension of driving privileges pursuant to this section or under subdivision twelve of section one hundred eleven-b of the social services law if the suspension limits the ability of the obligor to find and, if found, maintain employment to enable him or her to make required child support payments, The petition shall be on notice to the obligee and the support collection unit. If the court finds that the suspension limits the ability of a support obligor to make required child support payments, the court may make a temporary order directing the department of motor vehicles to terminate the suspension of the obligor's driving privileges. In such an event, the court shall adjourn the petition to monitor the obligor's employment search and status. If the court determines that the obligor is not making substantial efforts to find and, if found, maintain employment, the court shall order the department of

motor vehicles to reinstate the suspension of the obligor's driving privileges. If the court finds that the obligor has found and, if found, has maintained employment and is making consistent payments toward the support and/or arrears, the court may make a final order directing the department of motor vehicles to terminate the suspension of the obligor's driving privileges.

(e) The court's discretionary decision not to suspend driving privileges shall not have any res judicata effect or preclude any other agency with statutory authority to direct the department of motor vehicles to suspend driving privileges.

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

7. Calculation of the spousal maintenance "cap" and duration of spousal maintenance orders in Family Court (F.C.A. §412; D.R.L. §§236B(5-a), 236B(6))

The new spousal maintenance guidelines statute [L.2015, c. 269] is silent with respect to the duration of Family Court spousal support orders, while at the same time allowing the Supreme Court to set an end-date to temporary maintenance. The omission of a duration provision appears to be based on an assumption that Family Court spousal support orders are short-term and are quickly superseded by Supreme Court maintenance orders issued in the context of divorce proceedings For many Family Court litigants, this is simply not the case. Many Family Court litigants have scant resources to follow through on a divorce. Hiring an attorney is simply not an option for many of the litigants and even if they file on their own, there are significant filing fees. Even with the current no-fault grounds, pro se divorces are still too difficult for many people and many litigants oppose divorce on religious or cultural grounds. There is no justification for distinguishing between Family and Supreme Court with respect to the authority to set a duration for an order of spousal support.

Significantly, many spousal support petitions are filed in Family Court because local departments of social services require them to be filed in order for the petitioner to qualify for public assistance when no children are involved. These are usually disposed of quickly by the Family Court when the respondent spouses demonstrate that they have little ability to pay spousal support. Although they are currently empowered to do so (Social Services Law §§ 102, 111-b(2)), the local departments of social services do not as a rule appear and prosecute the cases. Even when they file against spouses for child support, they do not generally seek spousal support awards. The creation of spousal support standards may very well encourage local departments to appear on behalf of recipients and aggressively seek spousal support. As counties seek to reduce their public assistance burden, they are increasingly likely to seek spousal support orders against litigants who often have little means or ability to follow through with a divorce.

The result will be that support orders which would have reasonable time limits in Supreme Court, based upon the length of the marriage, will be infinite in length if issued by the Family Court. Since there is no provision in the deviation grounds to consider the length of the marriage, the lower earning spouse in a one-month marriage would be granted non-durational support in Family Court at the same level as a spouse in a 20-year marriage.

The Family Court Advisory and Rules Committee is submitting a proposal to address this anomaly in the spousal maintenance statute by authorizing jurists in Family Court to specify a duration in orders of spousal maintenance. Orders would be presumed not to be time-limited unless so specified, but the Family Court, in its discretion, as in Supreme Court, would be able to set a duration based upon consideration of the length of the marriage. Additionally, the proposal would amend Family Court Act §412(10) and Domestic Relations Law §236B(5-a)(b)(5) and §236B(6)(b)(4) to fix the date of the biennial adjustment of the spousal maintenance "cap" at March 1st, rather than January 31st, and would commence the adjustment process in 2018, rather than 2016. This would conform the adjustment date to that already in effect for the child support income "cap,"

self-support reserve and poverty level.[22]

Proposal:

AN ACT to amend the family court act and the domestic relations law, in relation to the date of adjustment of the spousal maintenance cap and awards of spousal maintenance in family court

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

Section 1. Paragraph (d) of subdivision 2 and subdivision 10 of section four hundred twelve of the family court act, as amended by chapter 269 of the laws of 2015, are amended to read as follows:

(d) "income cap" shall mean up to and including one hundred seventy-five thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] March first, two thousand [sixteen] eighteen and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

10. (a) Unless otherwise specified, a spousal support order shall be non-durational. The court may in its discretion set the duration of spousal support by considering the length of the marriage.

(b) The court may modify an order of spousal support, including its duration, upon a showing of a substantial change in circumstances. Unless so modified, any order for spousal support issued pursuant to this section shall continue until the earliest to occur of the following: [a.](i) a written stipulation or agreement between the parties;

[b.](ii) an oral stipulation or agreement between the parties entered into on the record in open court;

[c.](iii) issuance of a judgment of divorce or other order in a matrimonial proceeding:

[d.](iv) the death of either party.

§2. Subparagraph (5) of paragraph (b) of subdivision 5-a of part B of section 236 of the domestic relations law, as amended by chapter 269 of the laws of 2015, is amended to read as

[22] Prior to submission to the Legislature, the measure will be modified to reflect the adjustment, if any, to the "cap" that will be made on January 31, 2016.

follows:

(5) "Income cap" shall mean up to and including one hundred seventy-five thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] March first, two thousand [sixteen] eighteen and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI–U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

§3. Subparagraph (4) of paragraph (b) of subdivision 6 of part B of section 236 of the domestic relations law, as amended by chapter 269 of the laws of 2015, is amended to read as follows:

(4) "Income cap" shall mean up to and including one hundred seventy-five thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] March first, two thousand [sixteen] eighteen and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI–U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

§4. This act shall take effect immediately.

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

A rapidly escalating national consensus is emerging to restrict the routine use of hardware restraints upon children when they appear in court. Two major national organizations– the National Council of Juvenile and Family Court Judges and the American Bar Association – adopted resolutions in 2015 calling for states to enact presumptions against the use of restraints, reserving their use only for cases in which the child poses a demonstrated safety risk to himself or herself or others.[23] Recognizing the particular vulnerability of children, at least 21 states have imposed a presumption against restraints either by statute, court rule or case law; fourteen states have statutes requiring an individualized judicial finding prior to use of restraints and ten of these afford youth a right to be heard. [24]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."[25] Following this trend, the Family Court Advisory and Rules Committee is proposing to amend the Family Court Act to create a new section 162-a, applicable to youth under the age of 21 when they appear in all categories of Family Court proceedings.

The Committee's proposal provides that restraints are prohibited and thus must presumptively be removed upon entry of the juvenile into the courtroom[26] unless the Family Court determines and explains on the record why restraints are "necessary to prevent: (1) physical injury to the child or another person by the child; (2) physically disruptive courtroom behavior by the child, as evidenced by a recent history of behavior that presented a substantial risk of physical harm to the child or another person, where such behavior indicates a substantial likelihood of current physically disruptive courtroom behavior by the child; or (3) flight from the courtroom by the child, as evidenced by a recent history of absconding from the court." The particular restraints permitted must be the "least restrictive available alternative" and, in order to ensure due process, the child must be given an opportunity to be heard regarding a request to impose restraints.

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

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[23] *See* National Council of Juvenile and Family Court Judges, *Resolution Regarding Shackling of Children in Juvenile Court* (Adopted July 15, 2015; www.ncjfcj.org); American Bar Association, *Resolution and Report to the House of Delegates* (Adopted by the House of Delegates, February, 2015); www.americanbar.org).

[24] Campaign to End Indiscriminate Juvenile Shackling, *Shackling Reform Statewide Court Rules, Policies, Administrative Orders & Statutes* [June, 2015; http://njdc.info/campaign-against-indiscriminate-juvenile-shacklin; *Juvenile Justice in a Developmental Framework: A 2015 Status Report* (MacArthur Fdtn., 2015) at p. 30.

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

[26] 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).

Hampshire, North Carolina and South Carolina.[27] It is similar to the court rules in Massachusetts, Washington, New Mexico and, most recently, Maryland.[28] It is consistent with the orders that resulted from challenges to restraints in California, North Dakota, Oregon and Illinois.[29] It reflects the criticisms articulated in, and recommendations by, myriad commentators[30] and, most recently, in the resolutions by the National Council of Juvenile and Family Court Judges and the American Bar Association noted above. Estimating that over 100,000 children are shackled in court, the National Campaign to End Indiscriminate Shackling of Youth noted that since its campaign began in August, 2014, Indiana, Nebraska, Alaska, Utah, Nevada and the District of Columbia have prohibited indiscriminate use of restraints.[31] Significantly, reports of the implications of shackling limitations in Miami-Dade County, Florida, and Linn County, Oregon, two and five years, respectively, after the imposition of the limitations have indicated no adverse effects on courtroom safety and decorum.[32] Nor has implementation presented any significant burdens upon the courts as requests for restraints

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[27] *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).

[28] *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); *Resolution Regarding Shackling of Children in Juvenile Court* (Adopted by Md. Judiciary and Chief Judge of Court of Appeals, Sept. 21, 2015).

[29] *See* Tiffany A. *v.* Superior Court, 150 Cal. App. 4th 1344 (2007); In Re R.W.S., 728 N.W.2d 326 (N.D. 2007); In Re Millican, 906 P.2d 857 (Or. Ct.App., 1995); In Re Staley, 364 N.E.2d 72 (Ill., 1977).

[30] *See*, *e.g., B*. Schatz, "A Court Put a Nine-year Old in Shackles for Stealing Chewing Gum– an Outrage that Happens Every Single Day: Research Shows that Shackling is Bad for Kids and Unnecessary for Courtroom Safety. So Why Do Judges Keep Doing It?," *Mother Jones* (Feb., 2015; www.motherjones.com/politics/2015/02/courts-shackle-juvenile-children-ABA); S. Marsh, "OP-ED: Indiscriminate Shackling of Children in Juvenile Court Should End*,"* Juvenile Justice Information Exchange, www.jjie.org, 2015); J. Abdul-Alim, "Justice Advocates Fight to Limit Shackles, Seclusion for Juveniles," (Juvenile Justice Information Exchange, June 18, 2015, www.jjie.org); G. Gately, "Why Do We Still Shackle Kids?", *The Crime Report*, (June 15, 2015); R.May, "Why Do We Still Put Kids In Shackles When They Go To Trial? Murder Suspects Come to Court in Suits. Kids Who Steal Gum Arrive in Belly Irons and Belly Chains," *Washington Post*, (OpEd, May 8, 2015); P. Puritz, "Shackling Juvenile Offenders can do permanent damage to our kids," *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," 16 *Juvenile Justice Update* #1:1 (Feb./March, 2010); Zeno, "Shackling Children During Court Appearances: Fairness and Security in Juvenile Courtrooms," 12 *J.Gender Race & Just.* 257 (2009); Perlmutter, "Unchain the Children: *Gault, Therapeutic Jurisprudence and Shackling," 5 Barry L. Rev.* 1(2007).

[31] B. Schatz, *supra,* note 30*;* G.Gateky, *supra*.

[32] 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 30, and ABA, *supra,* note 23. And no incidents were reported by Judge Daniel Murphy regarding ten years of experience in Linn County, Oregon. *See* Rubin, *supra*, note 30 at 11.

are rare and the hearings, when held, are brief.[33]

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, 19 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:

> 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

[33] See, e.g., e-mail from Hon. Jay D. Blitzman, First Justice, Massachusetts Juvenile Court, Middlesex Division, dated Nov. 26, 2014.

Development and Juvenile Justice. *See* www.adjj.org. Children's characters are not fully formed until well into adulthood and their sense of self-esteem is especially vulnerable to the harm caused by indiscriminate use of shackles. As Patricia Puritz, former Executive Director of the National Juvenile Defender Center, noted, it is well-documented that "young people are less likely to re-offend when they perceive that the juvenile justice system has treated them fairly":

> Shackling is simply incompatible with the rehabilitative mission of the juvenile court. Children report feeling like a slave, an animal or a criminal when shackled. This experience does not frighten them into compliance. On the contrary, child psychiatrists say that shackling is so damaging to a child's developing sense of self that it may well push him or her into further criminality.

Puritz, *supra,* note 30.

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 twenty-one, including, but not limited to, handcuffs, chains, shackles, irons or straitjackets, are prohibited in the courtroom.

(b) Exception. Permissible physical restraint consisting of handcuffs or footcuffs that shall not be joined to each other may be used in the courtroom during a proceeding before the court only if the court determines on the record, after providing the child with an opportunity to be heard, why such restraint is the least restrictive alternative necessary to prevent:

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

(2) physically disruptive courtroom behavior by the child, as evidenced by a recent history of behavior that presented a substantial risk of physical harm to the child or another person, where such behavior indicates a substantial likelihood of current physically disruptive courtroom behavior by the child; or

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

§2. This act shall take effect immediately.

9. 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; S.S.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 (3rd Dept., 2011); Matter of Patricia B., 61 A.D.3d 861 (2d Dept., 2009), *lve. app. denied*, 13 N.Y.3d 713 (2009); Matter of Andrew Y., 44 A.D.3d 1063 (2d Dept., 2007); Matter of Candace S., 38 A.D.3d 786 (2d Dept., 2007), *lve. app. denied*, 9 N.Y.3d 805 (2007); Matter of Amanda WW., 43 A.D.3d 1256 (3d Dept., 2007); Matter of Collin H., 28 A.D.3d 806 (3d Dept., 2006). Dispositions in child protective cases include, *inter alia*, release of a child under supervision for one year, subject to a one-year extension, or placement of a child until the next permanency 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, just as orders of protection in child abuse and neglect proceedings must be entered onto the statewide registry of orders of protection and warrants, pursuant to chapter 492 of the Laws of 2015, in order to maximize their effectiveness, the proposal would require that orders of protection in termination of parental rights and permanency proceedings be entered as well. The registry, established pursuant to the *Family Protection and Domestic Violence Intervention Act of 1994* [L. 1994, c. 222, 224], has become an invaluable tool both for law enforcement and the courts. With well over 2.7 million orders of protection in the database,[34] 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

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

of domestic violence cases. All too often, law enforcement does not take seriously reports of violations of orders of protection if the orders are not included on the registry, thus leaving victims and their families, even in cases of severe abuse, without the shield of protection that the order should provide. Further, if a court, in determining whether an individual is suitable as a placement or custodial resource for a child or should be able to visit with the child in a neglect, abuse, custody or visitation case, is not made aware of orders of protection issued against the individual in all child welfare proceedings, the child may suffer serious harm. Significantly, legislation enacted in 2008 and amended in 2009 requires the registry to be checked in all Family and Supreme Court cases of child custody and visitation, thus making the registry a critically important resource in these cases as well. *See* L.2008, c. 595; L.2009, c. 295. All orders, including those in permanency, permanent neglect and other termination of parental rights proceedings, must be entered onto the registry in order for it to provide the protection necessary for all victims of family violence. Law enforcement and courts need to have confidence in the completeness and accuracy of the responses to their inquiries regarding both the existence of outstanding orders, including possibly conflicting orders, and the parties' histories of orders of protection. It is essential that the registry be complete – that is, that it include all orders of protection issued by all courts in family and intimate partner violence cases – in order for it to 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 .[35] 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%.[36] 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.[37] Significantly, child sexual abuse

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[35] 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.

[36] *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)].

[37] "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

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 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

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Homelessness," *Clearinghouse Review* (Special Issue, 1991)].

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, subdivision 1 as amended by chapter 526 of the laws of 2013, and subdivisions 2 and 4 of section 1056 of the family court act, subdivisions 2 and 4 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 temporary order of protection or order of protection, as applicable. Nothing in this section gives the court power to place or board out any child or to commit a child to an institution or agency. In making orders of protection, the court shall so act as to insure that in the care, protection, discipline and guardianship of the child his or her religious faith shall be preserved and protected.

4. 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 curcumstances, 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 act 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 chapter 492 of the laws of 2015, is amended to read as follows:

1. The superintendent, in consultation with the division of criminal justice services, office of court administration, the state office for the prevention of domestic violence and the division for women, shall develop a comprehensive plan for the establishment and maintenance of a statewide computerized registry of all orders of protection issued pursuant to articles four, five, six [and], eight[, and] ten and ten-a of the family court act, section 384-b of the social services law, section 530.12 of the criminal

procedure law and, insofar as they involve victims of domestic violence as defined by section four hundred fifty-nine-a of the social services law, section 530.13 of the criminal procedure law and sections two hundred forty and two hundred fifty-two of the domestic relations law, and orders of protection issued by courts of competent jurisdiction in another state, territorial or tribal jurisdiction, special orders of conditions issued pursuant to subparagraph (i) or (ii) of paragraph (o) of subdivision one of section 330.20 of the criminal procedure law insofar as they involve a victim or victims of domestic violence as defined by subdivision one of section four hundred fifty-nine-a of the social services law or a designated witness or witnesses to such domestic violence, and all warrants issued pursuant to sections one hundred fifty-three and eight hundred twenty-seven of the family court act, and arrest and bench warrants as defined in subdivisions twenty-eight, twenty-nine and thirty of section 1.20 of the criminal procedure law, insofar as such warrants pertain to orders of protection or temporary orders of protection; provided, however, that warrants issued pursuant to section one hundred fifty-three of the family court act pertaining to articles three and seven of such act and section 530.13 of the criminal procedure law shall not be included in the registry. The superintendent shall establish and maintain such registry for the purposes of ascertaining the existence of orders of protection, temporary orders of protection, warrants and special orders of conditions, and for enforcing the provisions of paragraph (b) of subdivision four of section 140.10 of the criminal procedure law.

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

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.[38]

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[38] *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*

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 9,000 aggravated assaults in New York annually.[39]

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;[40] a direction that the parent or other person legally responsible be notified of, and be invited to be present at, any planning conferences convened by the placement agency with respect to the child; and a warning that if the juvenile remains in placement for 15 out of 22 months, the agency may be required to file a petition to terminate parental rights. A copy of the court order and service plan must be provided to the juvenile, his or her attorney and the juvenile's parent or other legally responsible individual. *Cf*., Family Court Act §§1089(d)(2)(vii)(A), 1089(e).

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).

[39] *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.

[40] 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.

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.[41] 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 were provided to the mother, who was not involved in the child's transition planning, and no plan was in place to ensure that the child's mental health needs would be met upon her release. Concomitantly, Matter of Donovan Z., 6 Misc.3d 1023(A) (Fam. Ct., Monroe Co., 2005)(Unreported opinion) provides a more positive example of a case where, at a combined permanency/extension of placement hearing, the Family Court was able to ascertain that both the juvenile's and his mother's needs to facilitate his ultimate release home were being met by OCFS.

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[41] 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.

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.[42] As one child welfare expert has written:[43]

> 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.
>
> *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 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.

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

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

§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, paragraphs (a) and (b) as amended by chapter 6 of part 6 of chapter 58 of the laws of 2010, and paragraph (c) as amended by section 16 of part L of chapter 56 of the laws of 2015, are amended to read as follows:

(a) Where the respondent is placed pursuant to subdivision two [or], 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, or to another permanency alternative as provided in paragraph (d) of subdivision seven of section 355.5 of this part. For purposes of this paragraph, "placement agency" shall refer to the office of children and family services, the commissioner of social services or the authorized agency under contract with the office of children and family services or commissioner of social services with whom the respondent has been placed. The release or conditional release plan shall provide as follows:

(i) If the respondent is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the respondent is placed has taken and will be taking in conjunction with the local education agency to [facilitate] ensure the immediate enrollment of the respondent in [a]

an appropriate school or educational program leading to a high school diploma [following] within five days of release, or, if such release occurs during the summer recess, immediately upon the commencement of the next school term. The placement agency shall ascertain the school calendar from the school district and shall, to the extent possible, work with the school district so that the timing of respondent's release from the program and enrollment in school are minimally disruptive for the respondent and further his or her best interests. Not less than fourteen days prior to the respondent's release, the placement agency shall notify the school district where the respondent will be attending school and transfer all necessary records, including, but not limited to the respondent's course of study, credits earned and academic record.

(ii) If the placement agency has reason to believe that the respondent may have a disability or if the respondent had been found eligible to receive special education services prior to or during the placement, in accordance with article eighty-nine of the education law, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking to ensure that the local education agency makes any necessary referrals or arranges for special educational evaluations or services, as appropriate, and provides necessary records immediately in accordance with state and federal law.

(iii) If the respondent is not subject to article sixty-five of the education law and does not elect to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the respondent is placed has taken and will be taking to assist the respondent to become gainfully employed or enrolled in a vocational program following release.

§5. The opening paragraph of subdivision 2, the opening paragraph of subdivision 3, subdivision 5, subdivision 6 and paragraph (d) of subdivision 7 of section 355.5 of the family court act, the opening paragraph of subdivision 2 and the opening paragraph of subdivision 3 as amended by chapter 145 of the laws of 2000, subdivision 5 as added by chapter 7 of the laws of 1999, subdivision 6 as amended by section 1 of part B of chapter 327 of the laws of 2007, and paragraph (d) of subdivision 7 as amended by section 18 of part L of chapter 56 of the laws of 2015, are amended and a new subdivision 10 is added to such section to read as follows:

Where a respondent is placed with a commissioner of social services or the office of children and family services pursuant to subdivision two, 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 the respondent's parents and 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. (d) with regard to the completion of placement ordered by the court pursuant to section 353.3 or 355.3 of this part: whether and when the respondent: (i) will be returned to the parent or parents; (ii) should be placed for adoption with the local commissioner of social services filing a petition for termination of parental rights; (iii) should be referred for legal guardianship; (iv) should be placed permanently with a fit and willing relative; or (v) should be placed in another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the respondent if the respondent is age sixteen or older and (A) the office of children

and family services or the local commissioner of social services has documented to the court : (1) the intensive, ongoing, and, as of the date of the hearing, unsuccessful efforts made to return the respondent home or secure a placement for the respondent with a fit and willing relative including adult siblings, a legal guardian, or an adoptive parent, including through efforts that utilize search technology including social media to find biological family members for children, (2) the steps being taken to ensure that (i) the respondent's foster family home or child care facility is following the reasonable and prudent parent standard in accordance with guidance provided by the united states department of health and human services, and (ii) the respondent has regular, ongoing opportunities to engage in age or developmentally appropriate activities including by consulting with the respondent in an age-appropriate manner about the opportunities of the respondent to participate in activities; and (b) the office of children and family services or the local commissioner of social services has documented to the court and the court has that there are compelling reasons for determining that it continues to not be in the best interest of the respondent to return home, be referred for termination of parental rights and placed for adoption, placed with a fit and willing relative, or placed with a legal guardian; and (C) the court has made a determination explaining why, as of the date of this hearing, another planned living arrangement with a significant connection to an adult willing to be a permanency resource for the respondent is the best permanency plan for the respondent; and

10. (a) If the order resulting from the permanency hearing extends the respondent's placement pursuant to section 355.3 of this part in a foster home or non-secure or limited secure facility or if the respondent continues in such placement under a prior order of placement or an extension thereof, the order or an attachment to the order incorporated into the order by reference shall include:

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

(ii) a service plan aimed at effectuating the permanency goal; and

(iii) a direction that the parent or parents or other person or persons legally responsible for the respondent 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.

(b) Where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would further the respondent's needs and best interests and the need for

protection of the community and would make it possible for the respondent to safely return home or to make the transition 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.

(c) A copy of the court's order and the attachments shall be given to the respondent and his or her attorney and to the respondent's parent or parents or other person or persons legally responsible for the respondent. 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 participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking to assist the respondent to become gainfully employed or to be enrolled in a vocational program immediately upon release.

§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 (iv) and (v) of subdivision (d) of section 756-a of the family court act, subdivision (a) as amended by chapter 309 of the laws of 1996, subdivision (b) and the opening paragraph of subdivision (d) as amended by section 4 of part B of chapter 327 of the laws of 2007 and paragraphs (iv) and (v) of subdivision (d) as amended by section 23 of part L of chapter 56 of the laws of 2015, are amended and a new paragraph (vi) is added to subdivision (d) to read as follows:

(a) In any case in which the [child] respondent has been placed pursuant to section seven hundred fifty-six, the [child] respondent, the person with whom the [child] respondent has been placed or the commissioner of social services may petition the court to extend such placement. Such petition shall be

filed at least sixty days prior to the expiration of the period of placement, except for good cause shown, but in no event shall such petition be filed after the original expiration date. The petition shall be accompanied by a permanency 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 and upon the respondent's parent or parents.

At the conclusion of the permanency hearing, the court may, in its discretion, order an extension of the placement for not more than one year, which may include a period of post-release supervision and aftercare, or may direct that the respondent be placed on probation for not more than one year, pursuant to section seven hundred fifty-seven of this part, or may order that the petition for an extension of placement be dismissed. The court must consider and determine in its order:

(iv) whether and when the [child] respondent: (A) will be returned to the parent; (B) should be placed for adoption with the social services official filing a petition for termination of parental rights; (C) should be referred for legal guardianship; (D) should be placed permanently with a fit and willing relative; or (E) should be placed in another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the child if the child is age sixteen or older and (1) the social services official has documented to the court [a]: (i) intensive, ongoing, and, as of the date of the hearing, unsuccessful efforts made by the social services district to return the child home or secure a placement for the child with a fit and willing relative including adult siblings, a legal guardian, or an adoptive parent, including through efforts that utilize search technology including social media to find biological family members for children, (ii) the steps the social services district is taking to ensure that (a) the child's foster family home or child care facility is following the reasonable and prudent parent standard in accordance with guidance provided by the united states department of health and human services, and (b) the child has regular, ongoing opportunities to engage in age or developmentally appropriate activities including by consulting with the child in an age-appropriate manner about the opportunities of the child to participate in activities; and (2) the social services district has documented to the court and the court has determined that there are compelling reasons for determining that it continues to not be in the best interest of the child to return home, be referred for

termination of parental rights and placed for adoption, placed with a fit and willing relative, or placed with a legal guardian; and (3) the court has made a determination explaining why, as of the date of the hearing, another planned living arrangement with a significant connection to an adult willing to be a permanency resource for the child is the best permanency plan for the child; and

(v) where the child will not be returned home, consideration of appropriate in-state and out-of-state placements]; and

(vi) with regard to the placement or extension of placement ordered by the court pursuant to section seven hundred fifty-six of this part, the steps that must be taken by the agency with which the respondent is placed to implement the plan for release submitted pursuant to paragraphs (iii) and (iv) of subdivision (a) of such section, the adequacy of such plan and any modifications that should be made to such plan.

§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. 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; S.S.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 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.[44]

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;

• 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

[44] *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).

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.[45]

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.[46] Consistent with these recommendations, the Committee's proposal would authorize the Family Court to direct that an adjudicated juvenile delinquent or PINS, who would otherwise be placed, be required to participate in an intensive supervision program for all or part of the period of 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

[45] *Ibid*.

[46] *Ibid*.

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.[47] Nationally, such programs are recognized as providing cost-effective, safe alternatives to residential placement.[48] 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[49] 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 $3,743 per child for Enhanced Supervision, $13,000 for Esperanza and $17,000 for the Juvenile Justice Initiative.[50] 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

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[47] *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).

[48] *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.

[49] *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).

[50] *See* note 45, *supra*.

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.[51] Community-based alternatives have demonstrated far lower recidivism.[52]

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.[53] 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].[54] 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 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

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[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) at page 85, n. 5.

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

[53] *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).

[54] 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.

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.[55] Several other states utilize this option as a vital component of a dispositional plan in juvenile delinquency cases[56] 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.[57] As the Department of Justice findings letter indicated, all too often, professional diagnoses and treatments are not provided and psychotropic medication is not professionally monitored.[58] The *Child Welfare Watch* report specifically recommended

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

[56] *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).

[57] *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.

[58] 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.

deployment of psychiatrists and psychiatric nurses to youth facilities.[59]

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,[60] 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 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

[59] *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.

[60] 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.

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, as amended by chapter 465 of the laws of 1992, are amended 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;

(f) obtain permission from the probation officer for any absence from respondent's residence in excess of two weeks; and

(g) with the consent of the [division for youth] office of children and family services or, in a district with a close to home program, such district, spend a specified portion of the probation period, not exceeding one year, in a non-secure facility provided by the [division for youth] office of children and family services pursuant to article nineteen-G of the executive law or, in a district with a close to home program, a non-secure facility operated in such program.

§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 section 20 of part L of chapter 56 of the laws of 2015, 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 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.

12. Conditional surrenders of parental rights in Family and Surrogate's Court
[D.R.L. §112-b; F. 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).[61]

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 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

[61] 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).

an extra-judicial surrender executed on or after the effective date of the statute (January 1, 2017), 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.

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Matter of Kaylee O. *v.* Michael O. and Matter of the Adoption of Jack *ex rel.* David B., regrettably, were not isolated cases. Apparently, side agreements never presented to any court for approval have become common practice statewide and clearly thwart the clear intent of the Legislature in enacting the conditional surrender provisions of Social Services Law §§383-c and 384, as well as the requirements for post-adoption contact agreements in Domestic Relations Law §112-b. Enactment of the Committee's proposal would ensure necessary judicial oversight, thereby protecting both the fairness of the surrender process for all parties and the best interests of the children involved.

Proposal

AN ACT to amend the domestic relations law and 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, 2017, 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, 2017, 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.

III. Previously Endorsed Measures

1. 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.

2. 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 of child support. Validly executed agreements and stipulations entered into by the parties and presented to the Supreme or Family Court for incorporation into orders or judgments must include a statement that the parties were advised of the provisions of the Child Support Standards Act (CSSA), as well as a statement that the "basic child support obligation" (application of the CSSA percentages to the parties' combined parental income) would "presumptively result in the correct amount of child support to be awarded." Where the agreement or stipulation is at variance with the basic child support obligation, a statement must also be included of what the presumptive amount would have been and why the deviation from that amount is appropriate. These protections are not waivable by the parties or their attorneys. All four Judicial Departments have held that agreements not in compliance with these requirements are invalid and unenforceable. David v. Cruz, 103 A.D.3d 394 (1st Dept., 2013); Jefferson v. Jefferson, 21 A.D.3d 879 (2nd Dept., 2005); Usenza v. Swift, 52 A.D.3d 876 (3rd Dept., 2008); Panzarella v. Panzarella, 106 A.D.3d 1527 (4th Dept., 2013). However, they have not agreed on the procedures to be followed and the remedies for noncompliance with these mandates. The Family Court Advisory and Rules Committee is proposing legislation to supply necessary clarity to this area.

The Committee's proposal would amend both Family Court Act §413(1)(h) and Domestic Relations Law §240(1-b)(h) to provide that if an agreement or stipulation fails to comply with any of the three provisions, 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,[62] 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 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.

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

Finally, the proposal provides that unless the Supreme Court has retained exclusive jurisdiction to enforce or modify the agreement, the Family Court would have subject matter jurisdiction to review, and, where necessary, set a new child support obligation in cases in which a divorce judgment did not conform to the CSSA. While the Third Department has held that the Family Court has the authority to make such an order, Matter of Du Bois v. Swisher, 306 A.D.2d 610 (2nd Dept., 2003), the First and Second Departments have decided that in the absence of statutory authority, the Family Court has no jurisdiction to make a new order of support where it finds that the underlying order did not comply with the *CSSA*. Georgette D.W. v. Gary N.R., - A.D.3d - , 2015 WL 7726357 (1st Dept., 2015); Savini v. Burgaleta, 34 A.D.3d 686 (2d Dept., 2006). If a Family Court in one of these jurisdictions finds that the support order is unenforceable, it has no choice but to dismiss the petition and direct the parties to return to Supreme Court, an often time-consuming and expensive option. And since the order is invalid, the Family Court cannot even direct a support obligor to pay arrears that may have accrued under the order to the custodial parent.

In light of the ambiguity surrounding the law in this area and, in particular, the varying approaches taken by the courts regarding the treatment of agreements and stipulations deemed not to comply with the CSSA, the Committee's proposal will provide needed clarification. In so doing, it will spur greater compliance with the CSSA, thus fulfilling the legislative intent of providing appropriate support for children.

Proposal

AN ACT to amend the family court act and 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.

3. 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,[63] 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.

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

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[63] 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).

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.[64] 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 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

[64] *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).

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.

4. 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.

5. 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; S.S.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 promptly of all events affecting child safety, especially indicated reports of abuse or maltreatment. Recognizing that children in foster care are at significant risk of becoming victims of human trafficking, Public Law 113-183 reinforces that conclusion, in particular, with respect to children who abscond.

Equally as important, the Federal *ASFA* measures success in terms of outcomes, *i.e.*, the States' ability to reach Federally-established targets for timely achievement of permanency for children. 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.[65] 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 the New York City

[65] 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) .

Administration for Children's Services, but would have the stronger force of statute.[66]

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 discharge of the

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[66] 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.

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.

6. 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,[67] 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

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

eradicate the finding. [Citation omitted].

Matter of MN, 16 Misc.3d 499, 506 (Fam. Ct., Monroe Co., 2007). Significantly, it is the requirement of this procedural step, *i.e.*, the motion under Family Court Act §1061, that distinguishes the outcome of a successful suspended judgment from that of an adjournment in contemplation of dismissal. A suspended judgment may thus be an appropriate disposition in cases in which the Court determines that a full dismissal of the proceedings, including vacatur of the fact-finding, should not be automatic.

Concomitantly, the Committee's proposal amends the procedures to be followed in the event that the parent does not comply with the conditions of a suspended judgment. While chapter 519 of the Laws of 2008 amended Family Court Act §1052(a) to clarify that a disposition of suspended judgment may not be combined with that of placement of a child, there may be cases where a temporary removal of a child may be necessary pending the outcome of a motion or order to show cause alleging a violation of a suspended judgment. Thus, just as a Family Court may remove a child from home if necessary for the child's protection pending disposition of a child protective proceeding, pursuant to Family Court Act §1027(a)(iii), so, too, the Committee's proposal would permit the convening of a hearing and, if needed, the temporary removal of child from his or her home pending the resolution of a violation proceeding.

The Committee's proposal provides needed clarity to both the provisions regarding adjournments in contemplation of dismissal and the disposition of suspended judgment, thus enhancing the usefulness of these options for the resolution of child abuse and neglect proceedings in Family Court. Both of these options are critically important to promote and preserve the well-being of children and their families by providing opportunities for families to access services in order to repair the problems that precipitated court action without the disruption and, all too often, the trauma of out-of-home placement.

Proposal

AN ACT to amend the family court act, in relation to adjournments in contemplation of dismissal and suspended judgments in child protective proceedings in the family court

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

Section 1. Section 1039 of the family court act, as amended chapter 707 of the laws of 1975, subdivisions (a), (b), (c), (d) and (e) as amended by chapter 41 of the laws of 2010 and subdivision (f) as amended by chapter 601of the laws of 1985, is amended to read as follows:

§1039. Adjournment in contemplation of dismissal. (a) (i) Prior to [or upon] the entry of a fact-finding [hearing] order, the court may, upon a motion by [the petitioner with the consent of the respondent and] any party or the child's attorney with the consent of all parties and the child's attorney, or upon its own motion with the consent of [the petitioner, the respondent] all parties and the child's attorney, order that the proceeding be ["]adjourned in contemplation of dismissal.[" Under no circumstances shall the court order any party to consent to an order under this section]

(ii) After entry of a fact-finding order but prior to the entry of a dispositional order, the court may, with consent of the respondent and upon motion of any party or the child's attorney or upon its own motion without requiring the consent of the petitioner or attorney for the child, order that the proceeding be adjourned in contemplation of dismissal. The petitioner, respondent and attorney for the child 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.

7. Stays of administrative fair hearings regarding reports of child abuse or maltreatment [F.C.A. §§1039, 1051; S.S.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.

8. 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.

9. 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

10. 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,[68] 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) – a category of youth who, with the expansion of the "Close to Home" program in New York City, is sharply reduced in number. Almost none of the youth placed with NYS OCFS would be eligible for reentry into care in any event since almost all are either placed restrictively or are in placement for shorter periods concluding long before they reach the age of 18.

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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

[68] 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].

eligible to receive foster care assistance under Title IV-E of the *Social Security Act* identically, the NYS OCFS, in its administrative memorandum to local social services districts, indicated that the statute applied to all former foster 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[69] – are even more likely to afflict the vulnerable juvenile justice population upon discharge from care. In its memos to the Governor regarding Chapter 342, both the Division of the Budget and 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

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[69] *See, e.g.,* Citizen's Committee for Children of New York, *Young and Homeless: A Look at Homeless Youth in New York City* (2006), pages 5, 8; M. Freundlich, *Time Running Out: Teens in Foster Care* (Children's Rights, Inc., Legal Aid Society and Lawyers for Children, Nov., 2003), pages 43-46; M. Courtney, A. Dworsky & H. Pollack, *When Should the State Cease Parenting? Evidence from the Midwest Study* (Chapin Hall, Univ. of Chicago, Issue Brief #115 (Dec., 2007).

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 in juvenile delinquency and Persons in Need of Supervision cases

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 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.

11. 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.

12. 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;[70] 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,[71] 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.[72] 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,[73] 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.

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

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[70] 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.

[71] 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.

[72] *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.

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

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.

13. 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 ovr 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.[74] While none of these cases explain the rationale or roots of this public policy, it is

[74] *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).

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.[75]

The circumstances that give rise to overpayments of child support are varied. Notably, where a mother obtained a child support order in New York after a Connecticut order of support had expired upon the child's eighteenth birthday, the Court of Appeals, in Spencer *v.* Spencer, 10 N.Y.3d 60, 853 N.Y.S.2d 274 (2008), reversed the New York order on the ground that Connecticut possessed exclusive, continuing jurisdiction under the *Uniform Interstate Family Support Act.* The Court remanded the matter, inter alia, for a determination regarding recoupment. Perhaps the most common situation where recoupment has been approved by courts has been where a court has ordered a downward modification of a child support order, but the Support Collection Unit of the county Department of Social Services has not immediately reduced the previously applicable automatic income deduction order. *See, e.g.,* Francis *v*. Francis, 156 A.D.2d 637, 548 N.Y.S.2d 816 (2d Dep't 1989). Recoupment has also been approved where an appellate court reversed a lower court order for child support on the ground that it involved a misapplication of, or faulty mathematical calculation under, the *Child Support Standards Act* . *See*, *e.g.*, People *ex rel*. Breitstein *f.k.a.*. Aaronson *v*. Aaronson, 3 A.D. 3d 588, 771 N.Y.S. 2d 159 (2d Dep't 2004); F.S. *v.* K.O.*,* 42 Misc.3d 466 (Fam. Ct., Albany Co., 2013). It has also been permitted where a parent prepaid child support for a period in which the child no longer lived with the recipient of the payments. *See*, e.g., Aulov *v.* Yukhananova, 31 Misc.3d 1226(A), 929 N.Y.S.2d 198, 2011 WL 1833263, 2011 N.Y. Slip Op. 50853(U) (Sup. Ct., Queens Co., 2011). The Appellate Division, Second 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.

[75] *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).

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.

14. 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 in its database.[76] 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.[77] Under the revised proposal, 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

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

[77] 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.

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."[78] 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 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

[78] 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.

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.

15. Compensation of guardians ad litem appointed for children and adults in civil proceedings out of public funds [CPLR §1204]

While attorneys for children assigned to represent children under Judiciary Law §35 or Family Court Act §249 are remunerated out of State funds, where independent means are not available, no analogous provision for compensation from public funds exists for guardians ad litem appointed for children and impaired adults in civil proceedings pursuant to section 1204 of the Civil Practice Law and Rules (CPLR). The Family Court Advisory and Rules Committee, with the support of the Chief Administrative Judge's Advisory Committee on Civil Practice, is proposing this measure to redress that inequity.

There are a variety of situations in which children and adults may be deemed by judges to require the protection afforded by a guardian ad litem. For example, in Family Court, the respondent in a child protective proceeding (the parent of the child who is allegedly mistreated) may be under 18 years of age. An adult may require appointment of a guardian ad litem if his or her mental capacity is challenged, for instance, in termination of parental rights proceedings based on the parental mental illness or developmental disability. Additionally, a guardian ad litem is occasionally appointed in matrimonial proceedings in Supreme Court in lieu of a an attorney for a child.

While judges now have the authority to make these appointments, they are reluctant to do so because they cannot guarantee that the guardian ad litem will receive any payment. Section 1204 of the CPLR authorizes payment for the services of a guardian ad litem by "any other party or from any recovery had on behalf of the person whom such guardian represents or from such person's other property." Neither the Family Court Act nor the CPLR provide for payment where there is no monetary corpus from which payment can be made, and the courts have ruled that no public funds may be used in such circumstances. *See* Matter of Wood *v.* Cordello, 91 A.D. 2d 1178 (4th Dept. 1983). *See also* Matter of Baby Boy O., 298 A.D.2d 677 (3d Dept., 2002)(County Commissioner of Social Services could not be ordered to pay for guardian ad litem as he was not a party). In Family Court proceedings, the parties are often indigent and thus unable to compensate the guardian ad litem.

This proposal would authorize payment for the services of the guardian ad litem out of public funds, as a state charge, where the guardian served on behalf of a child, and as a county charge, if the guardian served on behalf of an adult, consistent with the present statutory sources of funding for assignment of attorneys for children and counsel for indigent adults. By virtue of section 165 of the Family Court Act, section 1204 of the CPLR, as amended, would apply to Family Court proceedings. In addition, if the proceeding is one in which there is a subsequent monetary recovery, the funds could to be recovered pursuant to section 1103 of the CPLR.

Proposal

AN ACT to amend the civil practice law and rules, in relation to compensation of guardians ad litem

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

Section 1. Section 1204 of the civil practice law and rules is amended to read as follows:

§1204. Compensation of guardian ad litem. A court may allow a guardian ad litem a reasonable compensation for [his] the guardian's services to be paid in whole or part by any other party or from any recovery had on behalf of the person whom such guardian represents or from such person's other property, or if there is no such source, compensation for services shall be from state funds appropriated to the judiciary in the same amounts established by subdivision three of section thirty-five of the judiciary law, if the guardian ad litem has been appointed for an infant, and out of county funds in the same amounts established by section seven hundred twenty-two-b of the county law, if appointed for an adult. No order allowing compensation shall be made except on an affidavit of the guardian or [his] the guardian's attorney showing the services rendered.

§2. This act shall take effect immediately.

IV. Future Matters:

Under the leadership of the Committee's co-chairs, Hon. Michele Pirro Bailey, Judge of the Family Court, Onondaga County, and Hon. Peter Passidomo, Judge of the Family Court, Bronx County, the Family Court Advisory and Rules Committee had a remarkably productive year in 2015. In addition to its legislative achievements, the Committee recommended significant rules revisions, as well as approximately 42 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 among the Committee's prioroties for 2016, the Committee will continue to support the efforts initiated by former Chief Judge Lippman and continued by Governor Cuomo and his Commission on Youth, Public Safety and Justice, to raise the age of criminal responsibility to 18. 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: The Subcommittee will examine the laws and practices regarding diligent efforts and dispositions in termination of parental rights cases brought on grounds of mental illness and intellectual disability and will address anomalies in the statutory structure regarding putative fathers entitled to either notice of, or to consent to, adoptions. The Subcommittee will also 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 *Every Student Succeeds Act, Preventing Sex Trafficking and Strengthening Families Act* [Public Law 113-183] and the *Indian Child Welfare Act*, as well as 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 continue its efforts to establish guidelines and best practices to improve the handling of requests for "Special Immigrant Juvenile Status" judicial findings in Family Court. Among the issues under review are appointment of and access to counsel, timing of hearings and various questions regarding the guardianship cases that most often accompany these requests, including, *inter alia*, 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: In addition to its efforts to raise the age of criminal responsibility, the Subcommittee will continue its efforts regarding the implementation of the "Close to Home" initiative in New York City, including the recent 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: A major challenge for the Subcommittee in 2016 will be the implementation of the new spousal maintenance guidelines statute, which will apply a spousal support formula in the Family Court for the first time. The Subcommittee will also 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 to facilitate implementation of the recent enactment of the 2008 amendments to the *Uniform Interstate Family Support Act*, as required by Federal statute [Public Law 113-183]. The Subcommittee will also continue to explore possible improvements to procedures regarding drivers' license suspensions, inter-county transfers of cases and approaches to child support proceedings involving non-wage income and self-employed individuals.

• Custody, Visitation and Domestic Violence: With a focus upon custody and visitation cases involving parents with mental health issues, the Subcommittee will continue to address issues regarding forensic evaluations, commenting upon proposed legislation 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. In the area of domestic violence, the Subcommittee will continue to monitor service, concurrent criminal jurisdiction, implementation of firearms statutes and other issues regarding orders of protection, as well as means of protecting abuse victims from contact with abusers in court-related programs.

• Forms and Technology: The Subcommittee will 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 Commission 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 2015 and with the substantial agenda described above, the Committee hopes to compile a similar record of achievement in 2016 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 2016 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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