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 2020

Because of the Covid-19 pandemic, the 2020 New York State legislative session was truncated and virtually no new judiciary program proposals were introduced. Nonetheless, one of the signature achievements of the legislative session devoted to policing reform was the enactment of the Committee's long-standing proposal requiring video-recording of most juvenile delinquency interrogations. *See* L.2020, c. 299. Expanding on the video-interrogation provisions enacted as part of chapter 59 of the laws of 2017, which applied only to interrogations regarding the most serious crimes, this measure, effective November 1, 2021, amends sections 305.2 and 344.2 of the Family Court Act to require video recording of entire interrogations of all accused juvenile delinquents, including the provision of Miranda warnings and the waiver, if any, of rights by the juveniles, where such interrogations take place in law enforcement facilities approved by the judiciary for the questioning of youth. The recordings must conform to regulations to be promulgated by the New York State Division of Criminal Justice Services and must ensure that all persons in the recordings are identifiable and that the speech is intelligible. As is applicable to other statements by juveniles, the recordings would be subject to discovery pursuant to Family Court Act §331.2 and the fact and quality of the recordings would be among the factors comprising the totality of circumstances affecting the admissibility of accused juveniles' statements.

Additionally, three other enactments by the Legislature in 2020 contained provisions included in, or similar to, proposals submitted by the Committee. First, the gestational surrogacy statute, enacted in conjunction with the New York state budget, incorporated several of the provisions in the Committee's parentage proposal to substitute gender-neutral terminology for "paternity" in various statutes. *See* L.2020, c. 56, Part L. Second, also enacted in conjunction with the New York State Budget, the comprehensive reform of the law regarding the State Central Registry of Child Abuse and Maltreatment, enacted in conjunction with the New York State budget, incorporated the Committee's long-standing proposal to amend the administrative fair hearing provisions to require such proceedings to be stayed if a Family Court proceeding is still pending, in order to ensure implementation of the irrebuttable presumption Social Services Law §422(8)(b) in the event that a Family Court finding is made. *See.* L.2020, c.56, Part R. Finally, the measure allowing waiver of all fees and surcharges in criminal cases involving youth was similar to the Committee's proposal in that regard, an expansion in its applicability to youth under the age of 21, while narrower in making the waiver discretionary. *See* L.2020, c. 144.

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

The Committee is proposing a comprehensive legislative agenda, including ten new and revised proposals and 16 proposals previously recommended, including the proposals submitted in 2020 but not introduced. 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 ten new and revised proposals include the following:

1. Financial disclosure in child support proceedings in Family Court: This measure addresses two aspects of the financial disclosure required by Family Court Act §424-a when child and spousal support issues arise in child support, paternity or *Uniforn Interstate Family Support Act* cases. First, it facilitates admission into evidence of financial documents submitted so that they will be available for review, both by objections to Family Court judges and on appeal. The affidavits of net worth would automatically be entered into evidence and official documents, such as W-2 wage and tax statements, current and representative pay stubs and health insurance documents, which are filled out by employers, insurance companies and other businesses, if appearing regular on their face, would be admissible as business records under section 4518 of the Civil Practice Law and Rules, without the need for witnesses to lay the evidentiary foundation. State and federal tax returns may also be admitted "if accompanied by sworn written statements or sworn statements on the record by the taxpayer that the documents are true copies of returns actually submitted, as applicable, to the United States Internal Revenue Service or state taxation authority." Consistent with due process requirements, all documents admitted into evidence would require that the party submitting the document be subject to cross-examination by the opposing party.

Second, the measure adds needed uniformity and flexibility to the procedures applicable when either party fails to comply with the financial disclosure requirements without good cause. Subdivision (b) of section 424-a currently requires that, in cases in which the respondent fails to comply without good cause, the Family Court must either grant the relief requested in the petition or preclude the respondent from presenting evidence as to his or her financial condition. The Committee's proposal would make the two options discretionary and would add a third option, that is, an authorization for the Court, either *sua sponte* or on motion, to adjourn the proceeding to allow the respondent additional time in which to submit the required documents. Concomitantly, in cases in which a petitioner is non-compliant, recognizing that the sole remedy in subdivision (c) of Family Court Act §424-a of adjourning the proceedings may be futile and cause unnecessary delays, the measure would add an option for the Court to dismiss the proceeding in cases involving a request for a modification of support.

2. Time-limit for the filing of objections to Support Magistrate determinations in child support, paternity and parentage proceedings in Family Court: In order to provide continued access to justice during the recent Covid-19 public health emergency, the Unified Court System, including the Family Courts, rapidly escalated its use of technology for all aspects of proceedings. Pleadings, exhibits and other documents have been transmitted to the Family Courts electronically, in many cases for the first time, and the Courts, in turn, have transmitted its orders electronically to litigants and attorneys. Recognizing the importance of giving clear guidance regarding applicable deadlines in support cases to litigants, most of whom have no attorneys, the Committee is proposing a measure providing that where orders are transmitted to litigants electronically, they would have up

to thirty-five days from the date of transmission in which to file objections.

3. Expiration dates in orders of protection and duration of temporary orders of protection issued prior to the filing of petitions in juvenile delinquency proceedings in Family Court: Although it is well established that all orders of protection – civil and criminal, temporary and final – must contain expiration dates in order to be enforceable through contempt, Family Court Act §154-c only articulates the mandate regarding orders of protection in support, paternity, custody and family offense cases. The Committee's measure would thus add orders in juvenile delinquency, Persons ion Need of Supervision, child abuse and neglect and permanency planning hearing cases to the requirement of "plainly" stating an expiration date. Additionally, the measure would amend Family Court Act §304.2 to ensure that temporary orders of protection issued prior to the filing of juvenile delinquency petitions would be strictly time-limited and subject to court review. A temporary order in such a case may last for an initial period of up to thirty days and may be extended by the Court for good cause, upon notice to the juvenile, for a period of up to thirty days or for a period coincident with the period during which local probation departments are attempting to adjust or divert the juvenile's case.

4. Procedural requirements for parentage proceedings regarding children conceived through assisted reproduction or surrogacy agreements: Like many comprehensive legislative changes, the new law on gestational surrogacy and parentage, enacted in conjunction with the New York State budget, contains a few minor drafting errors, internal inconsistencies and gaps. [L.2020, c.56, Part L]. The Family Court Advisory and Rules Committee is submitting a proposal to address these issues. The measure includes the following:

• Family Court Act § 581-202(c) would require the court to actually make a determination of the truthfulness of the allegations, whether by hearing or otherwise, rather than simply make a finding based upon the allegations alone.

• Instead of making it optional, Family Court Act § 581-202(d)(2)(a) would require that the record of a gamete donation be signed before a notary public, two witnesses who are not the intended parents or a healthcare practitioner.

• Family Court Act §581-202(e) would require that, in addition to the gamete donor, notice of parentage proceedings must also be given to the gestating intended parent, the non-gestating intended parent, if any, and the gestating intended parent's spouse, if any, each of whom are necessary parties.

• To correct a drafting error, Family Court Act § 581-202(g) would be amended to cross-reference subdivision (f), not (e), of section 581-202, and to require petitioners to provide notification to the court of the birth of child where the parentage judgment predated the birth..

• Instead of permitting parentage petitions to be filed any time after execution of the surrogacy contract, Family Court Act § 581-203(b) would be amended to allow a parentage petition to be filed only after pregnancy is achieved. Where the parentage judgment predated the birth, the petitioner would be required to provide notificataion to the court of the birth.

• In order to forestall any future challenges to parentage determinations in surrogacy contract cases, Family Court Act § 581-203(b) would be amended to include as necessary parties the surrogate; her spouse, if any; donors, if any; and all intended parents.

• To reconcile the inconsistency in residency requirements between sections 581-203(c)

(1) and 581-402, the measure would amend section 581-203(c) (1) to provide that at least one intended parent in a surrogacy arrangement must be a New York resident for at least six months at the time of the execution of the contract and if the other intended parent has not been a resident for the requisite period, the surrogate must have been a State resident for at least six months prior to the execution of the contract.

• In order for the court to have a meaningful role in determining the sufficiency of a surrogacy contract, § 581-203(c) would be amended to add a requirement that a copy of the contract be appended to the petition.

• In providing that the Court make a judgment of parentage upon application by any "participant," as defined in Family Court Act §581-102(o), section 581-303(b) is in conflict with section 581-201(c), which also grants standing to a wider range of petitioners, including children and social services agencies. The measure would thus amend section 581-303(b) to conform to section 581-201(c).

• To address the ambiguity of the language in Section 581-403(a) and to add needed formality, the measure would amend the section to require that signatures to a surrogacy contract be acknowledged in the manner required for separation agreements under Domestic Relations Law §170(6) and for registration of deeds.

• Recognizing that many disputes regarding surrogacy contracts may involve a mix of contract and parentage issues, Family Court Act §581-409 would be amended to allow the Supreme Courts to transfer issues involving parentage to Family or Surrogate's Court where it determines that such bifurcation of the cases to be appropriate.

5. Substitution of determinations of parentage for paternity and filiation proceedings in Family Court: With the legalization of same-sex marriage and the broadened concepts of family, this measure would substitute "parentage" for "paternity" and "filiation," as well as incorporate gender neutral terminology, where appropriate, in various provisions of the Family Court Act, Domestic Relations Law, Social Services Law, CPLR and Education Law. It leaves intact, however, references to the "putative father registry," a term retained in chapter 56 of the laws of 2020. The measure also incorporates the provisions of the Committee's proposal, *infra*, that delineates a procedure to be followed when an individual, who was not a signatory to an acknowledgment of parentage, files a petition for parentage.

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

in addition to the petitioner, birth mother and child. Finally, the court would be required to issue an order vacating the AOP where a non-signatory has been adjudged to be a legal parent, even in the absence of a petition filed by a signatory.

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

8. Review of records of the sex offender and domestic violence registries and child protective records in family offense proceedings involving orders of child custody in Family Court: To insure that Supreme and Family Courts are fully informed prior to issuing custody and visitation orders, chapter 595 of the Laws of 2008 amended Family Court Act §651 and Domestic Relations Law §240(1)(a) to require the courts to check the sex offender registry, the statewide registry of orders of protection and the New York State Unified Court System's own records of child protective proceedings and warrants in all custody and visitation proceedings. However, the statutory framework governing the Family Court similarly lacks a records review requirement for another context in which the Court renders decisions regarding custody and visitation for which the information would be essential, that is, family offense proceedings under Article 8 of the Family Court. The Family Court Advisory and Rules Committee is, therefore, proposing a measure requiring a review of records in accordance with Family Court Act §651 prior to the issuance of temporary and final orders of protection in which custody is awarded to either parent or a relative in the second degree. The incorporation by reference of Family Court Act §651 ensures that in the rare cases in which the review is not feasible but in which an emergency custody order is critical, subdivisions five and six of section 651 would apply, thus permitting a temporary order of custody with a prompt review of records afterwards. Additionally, the measure would repeal the paragraph of Family Court Act §842 regarding orders to terminate leases or rental agreements that has been rendered obsolete in light of the substitution of an administrative procedure in chapter 694 of the Laws of 2019.

9. Reentry of juvenile delinquents and persons in need of supervision into foster care: Consistent with the decision of the Appellate Division, Second Department, in Matter of Jefry H., 102 A.D.3d 132, 955 N.Y.S.2d 90 (2nd Dept., 2012), as well as the interpretation by the New York

State Office of Children and Family Services, the Committee is submitting a measure to clarify an aspect of the foster care reentry statute that has caused some confusion, that is, the categories of former foster care youth to whom the statute applies. The proposal would amend Family Court Act §1091 to add a definition of "former foster care youth" that explicitly includes youth outside New York City placed in non-secure and limited secure care with the NYS Office of Children and Family Services, as well as youth throughout New York State placed in foster care with social services districts pursuant to juvenile delinquency, PINS, child protective or destitute child adjudications, voluntary placements and children freed for adoption but not yet adopted. The measure also includes eligibility for reentry orders for youth discharged prior to the age of 18, who file to reenter care at the age of 18 or older, who are or would be homeless and who otherwise meet the statutory criteria.

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

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

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

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

C. Previously Endorsed Measures

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

1. Discovery in juvenile delinquency proceedings in Family Court: The legislation expanding and expediting discovery in criminal cases, enacted as part of the 2019 budget [L. 2019, c. 59, part JJJ], failed to address a significant segment of the justice system, namely, young people prosecuted as juvenile delinquents in Family Court, including the 16- and 17-year old juveniles accused of misdemeanors and non-violent felonies whose cases are either initiated in or removed to Family Court under the recent raise-the-age law [L. 2017, c. 59, part www]. Subdivision one of section 303.1 of the Family Court Act specifically provides that "[t]he provisions of the criminal procedure law shall not apply to proceedings under this [juvenile delinquency] article unless the applicability of such provisions are specifically prescribed by this [Family Court] act." Thus, without either an incorporation of the new law by reference or specific enactment in the Family Court Act, the new Article 245 of the Criminal Procedure Law, with its attendant disclosure obligations for both the defense and prosecution, has no applicability in juvenile delinquency proceedings. Those proceedings remain governed by the Family Court Act version of the now-obsolete Article 240 of the Criminal Procedure Law. The Family Court Advisory and Rules Committee has developed a proposal to address this gap by adapting the new Article 245 of the CPL into Article 3 of the Family Court Act. In addition to substituting Family Court terminology, because juvenile delinquency cases proceed far quicker than criminal cases, the adaptation chiefly requires shortening several of the time-frames.

2. Restraint of juveniles appearing before the Family Court: Following an escalating national trend, the Committee is proposing a measure to restrict the use of mechanical restraints against children under the age of 18 appearing in all categories of Family Court proceedings. Both the National Council of Juvenile and Family Court Judges and the American Bar Association have adopted resolutions urging states to enact measures similar to the Committee's proposal and at least

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

3. Sealing and expungement of records in Persons in Need of Supervision proceedings: Passage of the juvenile delinquency statute over three decades ago ironically left youth charged as Persons in Need of Supervision (PINS) with fewer protections than either their juvenile delinquent or adult counterparts. This measure would remedy one of the most glaring disparities by providing sealing and expunction provisions for PINS cases that are comparable to Family Court Act §§375.1 - 375.3 and Criminal Procedure Law §160.50. The measure would amend Family Court Act §783 to provide that court records in actions terminated favorably to the accused -- that is, cases that had been diverted (addressed without the filing of a petition), withdrawn or dismissed -- would automatically be sealed and, in cases involving a PINS adjudication, the juvenile would be permitted to make a motion for sealing of the record in the interests of justice. In light of the amendment to Criminal Procedure Law §160.50(3) in chapter 131 of the Laws of 2019, providing that convictions for violation-level marijuana possession under Penal Law §221.05 are deemed to be terminations of actions in favor of the accused requiring mandatory sealing, PINS findings for violations of Penal Law §221.05 would be subject to automatic sealing following the conclusion of any disposition or period of extension. Likewise, since the Federal *Trafficking Victims Protection Act* defines "severe forms of trafficking in persons," *inter alia*, as "sex trafficking in which ...the person induced to perform such act has not attained 18 years of age,"[1] the measure would require sealing at the conclusion of any disposition or extension based upon a finding for a prostitution offense under Penal Law §230.00. As in Family Court Act §375.3, the Family Court would retain its inherent authority to expunge, rather than simply seal, its records. Finally, recognizing that PINS behavior consists of conduct that would not be criminal if committed by adults, sections 783 and 784 of the Family Court Act would be amended to preclude use of PINS records in other courts.

4. Execution of warrants in juvenile delinquency cases when Family Courts are not in session: Among the most salutary features of the "raise the age" legislation enacted as part of the Fiscal Year 2017-2018 New York State budget are the provisions that require accused juvenile delinquents to be brought before available accessible magistrates, designated by the Appellate Division, for pre-petition hearings during evening, weekend and holiday hours when Family Courts are not in session. *See* Family Court Act §§305.2(4), 307.3(4) [L. 2017, c. 59, part www, §§63, 65]. However, the statute lacks a provision similar to Criminal Procedure Law §190.20(5-a), which directs that juvenile and adolescent offenders be brought before accessible magistrates when Youth Parts are closed. This measure would amend Family Court Act §312.2 to require

[1] 22 U.S.C. §7102(11)(A).

that juvenile delinquents returned on warrants when Family Courts are not in session be brought before "the most accessible magistrate, if any, designated by the appellate division." The magistrates would determine whether the juveniles would be released or detained and would then set a date for the juvenile to appear in Family Court, that is, no later than the next day the Family Court is in session if the juvenile is detained and within ten court days if the juvenile is released. In order that the Family Court would be alerted to expect the case, the order of the magistrate must be immediately transmitted to the Family Court.

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

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

8. Adjournments in contemplation of dismissal in family offense proceedings in Family Court: In order to respond appropriately to civil cases of domestic violence, the Family Court requires a comprehensive menu of pre-dispositional and dispositional options. The Family Court Advisory and Rules Committee is thus submitting a proposal to fill a significant gap in the statutory framework governing those options and to remedy an disparity between the treatment of family offense cases in family and criminal courts. The Committee's measure would add a new section 829 to the Family Court Act to authorize adjournments in contemplation of dismissal ("ACD's") in Article 8 (family offense) proceedings, both before or upon a finding that a family offense has occurred, and would amend section 841 to add a new subdivision (f) authorizing an ACD as a dispositional option. The ACD would require the consent of both the respondent and petitioner, as well as the approval of the Family Court, both as to the ordering of the ACD and as to any conditions. If an attorney for the child has been appointed, the position of the attorney must be considered. A temporary order of protection may be issued under Family Court Act §828 in conjunction with the ACD and compliance with the order would be required as one of the conditions of the ACD. Similar to ACD's in criminal family offense cases under Criminal Procedure Law §170.55(2), an ACD ordered under Family Court Act §828 may last for up to one year. One extension of up to one year may be ordered, again requiring consent of the parties, approval of the Court and, if an attorney for the child has been appointed, consideration of the position of the attorney. Upon successful completion of the ACD period or the extension, the petition would automatically be dismissed in furtherance of justice. Finally, the measure delineates procedures for restoring matters to the Family Court calendar following

determinations of violations of ACD's.

9. Determinations of child support in cases of joint or shared custody in Family and Supreme Court: Cases of joint or shared custody have long posed a challenge to the courts and litigants in child support matters. Under the seminal case of Bast *v.* Rosoff, 91 N.Y.2d 723 (1998), the parent with the most custodial time with the child is deemed the custodial parent and child support is then assessed against the non-custodial parent using the standards set by the *Child Support Standards Act* [Family Court Act §413; D.R.L. §240], including, where appropriate, consideration of the deviation factors. However, the ninth deviation factor, which addresses joint or shared custody cases, is hard to prove, both because the often-routine expenses of visitation in these cases are not "extraordinary" and because the custodial parents' expenses are not generally "substantially reduced" by the non-custodial parent's extended visitation. The Committee is thus proposing the addition of a tenth deviation factor applicable to cases in which the non-custodial parent spends extended time with the child, but where the deviation would not result in insufficient funds for the custodial parent to meet the child's basic needs. Reduction in the custodial parent's expenses would be a factor to be considered for, but not a prerequisite to, deviation.

10. Jurisdiction, detention and dispositional alternatives for 16- and 17-year olds adjudicated as juvenile delinquents for violations (petty offenses) in Family Court and charged with such offenses in local criminal courts: The recently enacted legislation raising the age of criminal responsibility marks the first time that Family Courts will have jurisdiction over alleged violations (petty offenses), as defined in Penal Law §10.00(3). The Committee's measure reflects the clear legislative intent that the new jurisdiction is limited to 16- and 17-year olds and is only applicable where the violation arises out of the same transaction or occurrence as an alleged crime. It would contravene the ameliorative goals of the new statute if adolescents in cases resulting in an adjudication or a plea solely to a violation faced penalties greater than those that they would have faced had they been prosecuted for the violation in a local criminal court. The measure would amend sections 304.1, 350.1, 352.2 and 360.3 of the Family Court Act to provide that adolescents so charged in Family Court may not be securely detained, may not be placed on probation and may not be placed out of their homes as a disposition. A presumption that the matter would be referred for probation diversion (adjustment) would apply, as would automatic sealing of records upon an adjudication. If granted a conditional discharge as a disposition in such a case, a youth charged with a violation of the conditional discharge may not be subject to secure detention pending adjudication of the violation or placement upon a finding. Additional conditions, *e.g.*, restitution, community service or participation in a particular program, may be added as conditions, but neither detention nor placement would be permissible consequences. Further, Criminal Procedure Law §510.15 would be amended to preclude secure detention of a 16- or 17-year old whose sole charge is a violation.

11. Notification and engagement of parents in proceedings before the Youth Parts of superior criminal courts: The new statute raising the age of criminal responsibility requires law enforcement, upon the arrests of 16- and 17-year olds, to notify parents or other persons legally responsible for the adolescents' care both as to where the youth are being held and, if interrogating the youth, as to the youth's *Miranda* rights. *See* Criminal Procedure Law §§1.20(7), 140.20(6), 140.27(5), 140.40(5) [L. 2017, c. 59, Pt. WWW]. The Family Court Advisory and Rules Committee

is proposing a measure to build upon the recognition of the importance of parental involvement by requiring notification of probation case plan efforts and of details, to the extent available, of when and where the youth will be arraigned in court. Similar to Family Court Act §341.2(3), the proposal also amends section 722.00(1) of the Criminal Procedure Law to require presence of parents or other persons legally responsible at all proceedings in the Youth Part, with the caveat that the court would "not be prevented from proceeding by the absence of such parent or person if reasonable efforts have been made to provide such notice unless the court found good cause to dispense with such notice."

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

13. Stipulations and agreements in child support proceedings: The Committee is submitting a measure to redress the failure of Family Court Act §413(h) and Domestic Relations Law §240(1-b)(h) to address the consequences of violations of the *Child Support Standards Act* (*CSSA*) in support agreements and stipulations. The proposal would provide that if an agreement or stipulation fails to comply with any of the *CSSA* requirements, the non-compliant portion must be deemed void as of the earlier of the date one of the parties alleged the noncompliance in a pleading or motion or the date the Court made a finding of noncompliance. Further, the proposal requires that upon a finding of noncompliance, the Court must hold a hearing to determine an appropriate amount of child support as of the earlier of the date the noncompliance had been asserted in a pleading or a motion or the date of the Court's finding of noncompliance. The proposal would preclude noncompliance with the *CSSA* from being raised as a defense to non-payment of child support in violation of an agreement or stipulation for a period prior to the assertion of noncompliance in a motion or pleading. Recognizing that there are instances when child support provisions that do not comply with the *CSSA* are so intertwined with a non-child support provision that voiding the child support provisions would also result in the inappropriate invalidation of non-child support provisions, the proposal provides that if the Family Court determines that there are intertwined provisions over which it has no jurisdiction, *e.g*., equitable distribution, it must dismiss the petition in order to allow the parties to return to Supreme Court. Finally, curing the problems noted, *inter alia*, by the Supreme Court, Appellate Divisions, First and Second Departments in Georgette D.W. *v.* Gary N.R., 134 A.D.3d 406, (1st Dept., 2015) and Matter of Savini *v.* Burgaleta, 34 A.D.3d 686 (2d Dept., 2006), respectively, the measure provides that, unless precluded by the Supreme Court, the Family Court would be deemed a court of competent jurisdiction with subject matter jurisdiction to review, determine and, where necessary, vacate or modify, not simply enforce, child support in cases in which a divorce judgment did not conform to the *CSSA*.

14. Determinations of willful violations of Family Court orders of protection: Section 846-a of the Family Court Act provides that a willful violation of an order of protection must be proven

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

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

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

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

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

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

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

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

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

* * *

In addition to its legislative efforts, the Committee developed model forms for use when forensic evaluations are ordered and revised numerous official Family Court forms for pleadings, process and orders in light of new statutory requirements. 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
25 Beaver Street, Suite 1170
New York, New York 10004

II. New or Modified Measures

1. Financial disclosure in child and spousal support proceedings in Family Court [F.C.A. §424-a]

The financial disclosure required by section 424-a of the Family Court Act is one of the most critical elements enabling the Family Court to adjudicate child and spousal support, paternity and *Uniform Interstate Family Support Act* proceedings under Articles 4, 5 and 5-A, respectively, of the Family Court Act. At the same time, it is one of the aspects of Family Court procedures that poses the greatest challenges for the litigants, the vast majority of whom are representing themselves. In two respects – whether the documents submitted are admitted into evidence and whether the statute provides sufficient discretion to the Family Court in cases in which either of the parties do not comply with the disclosure requirements – a lack of clarity in the statute has engendered confusion and disparate responses by jurists throughout the State. The Family Court Advisory and Rules Committee is proposing a measure to address both of these issues.

First, the measure will make it easier, particularly for self-represented litigants, to ensure that the financial documents submitted will become part of the Family Court record and will thus be available for review, both in terms of the review by judges of objections to Support Magistrate determinations under Family Court Act §439(e) and on appeal to the Appellate Division pursuant to Article 11 of the Act. The affidavits of net worth submitted by each party would automatically be entered into evidence and would become part of the record. [2] Official documents, such as W-2 wage and tax statements, current and representative pay stubs and health insurance documents, which are filled out by employers, insurance companies and other businesses, if appearing regular on their face, would be admissible as business records under section 4518 of the Civil Practice Law and Rules, without the need for witnesses to lay the evidentiary foundation. State and federal tax returns may also be automatically deemed part of the record "if accompanied by sworn written statements or sworn statements on the record by the taxpayer that the documents are true copies of returns actually submitted, as applicable, to the United States Internal Revenue Service or state taxation authority." Consistent with due process requirements, all documents admitted into evidence would require that the party submitting the document be subject to cross-examination by the opposing party.

This measure would facilitate needed uniformity in practice throughout the State, since jurists vary as to whether they formally enter the financial disclosure documents into evidence. Section 439(d) of the Family Court Act requires Support Magistrates to follow evidentiary rules . Many of the documents may justifiably be characterized as business records under section 4518 of the CPLR, as employers, for example, are required by Labor Law §195(3) to provide pay stubs to their employees. However, some of the documents –particularly, the financial disclosure affidavit and tax returns– do not clearly conform to established hearsay exceptions, although they are explicitly required to be submitted to the Family Court by statute. Clarification of Family Court Act §424-a, therefore, to ensure that all documents submitted will become part of the record, assuming that the parties offering the documents are subject to cross-examination, will go a long way toward making proceedings more

[2] Family Court Forms 4-17 and 4-17-a (short form) provide templates for these affirmations and are available on-line at http://ww2.nycourts.gov/forms/familycourt/childsupport.shtml.

uniform, ensuring reviewability and making it easier for self-represented litigants to navigate, while, at the same time, preserving their essential due process rights.

Second, the measure will reduce the disparities in the menu of remedies available to the Family Court in cases in which one of the parties fails without good cause to provide the financial disclosure required by Family Court Act §424-a. By enhancing the discretion afforded to the Court to determine an appropriate response, both in cases in which petitioners and in which respondents are in noncompliance, the proposal addresses the confusion and erroneous assumptions engendered by the statute's use of the "petitioner" and "respondent" labels for the parties. Petitioners in original support petitions are generally custodial parents seeking support, but petitioners in proceedings to modify support are often support obligors – *i.e.,* the respondents – in the original action.

Subdivision (b) of section 424-a currently requires that, in cases in which the respondent fails to comply without good cause, the Family Court must either grant the relief requested in the petition or preclude the respondent from presenting evidence as to his or her financial condition. As noted by Prof. Merril Sobie, in his McKinney's Practice Commentaries to Family Court Act §424-a:

> The problem is that neither sanction may afford an effective remedy. The petitioner may not know the full scope of the respondent's income or assets, and therefore will lack sufficient information to frame a demand, while an order of preclusion adds nothing to the available facts (though it may preclude the respondent from countering the petitioner's alleged facts).

The Committee's proposal would make the two options discretionary and would add a third option, that is, an authorization for the Court, either *sua sponte* or on motion, to adjourn the proceeding to allow the respondent additional time in which to submit the required documents. Particularly in light of the fact that in a modification proceeding, the respondent may have been the petitioner in the original action, and, again, in recognition of the large proportion of self-represented parties, there is no reason why the Court should not have the full menu of options available.

Concomitantly, subdivision (c) of section 424-a at present provides only one remedy for cases in which the petitioner, without good cause, does not comply with the requirements of the statute, that is, the Family Court may adjourn the proceedings until such time as the petitioner provides the required documents. This rigid limitation may result in adverse consequences for both parties and may result in unwarranted delays in completing the case. Prof. Merril Sobie indicated in his 2016 update to his McKinney's Practice Commentaries:

> Adjournment is the sole statutory remedy; the court cannot dismiss; Matter of Yemi O. *v.* Amanda O., 50 Misc.3d 1058, 21 N.Y.S.3d 601 (Fam. Ct. Queens Co. 2015). Hence the case may remain on the calendar indefinitely, with multiple sequential adjournments. The child may ultimately benefit (a support order will be retroactive to the date, however distant, the petition had been filed). On the other hand, the respondent who has complied with the Section 424-a mandate may be frustrated through multiple appearances and adjournments, perhaps followed by a huge retroactive support order. In short, the statute provides the petitioner with a potent weapon with which to harass the respondent. (The only mechanism other than dismissal which might ameliorate the problem is the court's contempt powers.)

Adding needed flexibility, the Committee's proposal provides an additional, discretionary alternative for the Court, that is, the ability to dismiss the proceeding if the case involves a request for a modification of support. Especially in light of the changed party status in modification cases, there is no reason not to permit the Court wide latitude to fashion an appropriate response to noncompliance that will facilitate a timely, yet fair, adjudication of the matter.

Proposal

AN ACT to amend the family court act, in relation to financial disclosure in child and spousal support 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 424-a of the family court act, as amended by section 59 of chapter 214 of the laws of 1998, is amended to read as follows:

§ 424-a. Compulsory financial disclosure. Except as provided herein[: (a) in] In all [support] proceedings in family court where child or spousal support is in issue, including proceedings under this article and articles five and five-a of this act:

(a) there shall be compulsory disclosure by both parties of their respective financial states, provided, however, that this requirement shall not apply to a social services official who is a party in any support proceeding under this act. No showing of special circumstances shall be required before such disclosure is ordered and such disclosure may not be waived by either party or by the court. A sworn statement of net worth shall be filed with the clerk of the court on a date to be fixed by the court, no later than ten days after the return date of the petition. As used in this part, the term "net worth" shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations. It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter, provided, however, that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth. All such sworn statements of net worth shall be accompanied by a current and representative paycheck stub and the most recently filed state and federal income tax returns including a copy of the W-2(s) wage and tax statement(s) submitted with the returns. In addition, both parties shall provide information relating to any and all group health plans available to them for the provision of care or other medical benefits by insurance or otherwise for the benefit of the child or children for whom support is sought, including all such information

as may be required to be included in a qualified medical child support order as defined in section six hundred nine of the employee retirement income security act of 1974 (29 USC 1169) including, but not limited to: (i) the name and last known mailing address of each party and of each dependent to be covered by the order; (ii) the identification and a description of each group health plan available for the benefit or coverage of the disclosing party and the child or children for whom support is sought; (iii) a detailed description of the type of coverage available from each group health plan for the potential benefit of each such dependent; (iv) the identification of the plan administrator for each such group health plan and the address of such administrator; (v) the identification numbers for each such group health plan; and (vi) such other information as may be required by the court. The sworn statements of net worth of each party shall automatically be deemed part of the record of the proceeding and the financial documents submitted, including, but not limited to, representative pay stubs, W-2 forms and proof of a health plan or insurance, and shall, if appearing regular on their face, be received into evidence as a business record pursuant to subdivision (e) of section forty-five hundred eighteen of the civil practice law and rules, provided that the party, who is offering that evidence, is subject to cross-examination by the opposing party. State and federal tax returns may be automatically deemed part of the record if accompanied by sworn written statements or sworn statements on the record by the taxpayer that the documents are true copies of returns actually submitted, as applicable, to the United States Internal Revenue Service or state taxation authority, provided that the party, who is offering that evidence, is subject to cross-examination by the opposing party;

(b) when a respondent fails, without good cause, to file a sworn statement of net worth, a current and representative paycheck stub and the most recently filed state and federal income tax returns, including a copy of the W-2(s) wage and tax statement submitted with the returns, or to provide information relating to all group health plans available for the provision of care or other medical benefits by insurance or otherwise for the benefit of the disclosing party and the child or children for whom support is sought, as provided in subdivision (a) of this section, the court on its own motion or on application [shall] may grant the relief demanded in the petition or [shall] may order that, for purposes of the support proceeding, the respondent shall be precluded from offering evidence as to respondent's financial ability to pay support or may on its own motion or upon application of any party adjourn the proceeding until such time as the respondent files with the court such statements and tax returns;

(c) when a petitioner other than a social services official fails, without good cause to file

a sworn statement of net worth, a current and representative paycheck stub and the most recently filed state and federal income tax returns, as provided in subdivision (a) of this section, the court may on its own motion or upon application of any party adjourn [such] the proceeding until such time as the petitioner files with the court such statements and tax returns or may preclude the petitioner from entering any evidence regarding his or her financial ability or, in a proceeding to modify an order of support, may grant a motion to dismiss in whole or in part. The provisions of this subdivision shall not apply to proceedings establishing temporary support or proceedings for the enforcement of a support order or support provision of a separation agreement or stipulation.

§2. This act shall take effect immediately.

2. Time-limit for the filing of objections to Support Magistrate determinations in child support, paternity and parentage proceedings in Family Court [F.C.A. §439(e)]

In order to provide continued access to justice during the recent Covid-19 public health emergency, the Unified Court System, including the Family Courts, rapidly escalated its use of technology for all aspects of proceedings. Pleadings, exhibits and other documents have been transmitted to the Family Courts electronically, in many cases for the first time, and the Courts, in turn, have transmitted its orders electronically to litigants and attorneys. This new process has posed particular challenges for litigants, especially in child support cases, the largest case category in Family Court, where, except for willful violation cases involving possible incarceration, the vast majority of litigants do not have attorneys.

It is particularly critical that the statutes give these self-represented litigants clear guidance as to procedures, including the deadlines for the various remedies for which they may be eligible. As the United States Supreme Court held in Turner *v.* Rogers, 564 U.S. 431 (2011), procedures in civil child support proceedings must satisfy the precept of "fundamental fairness. " Among the most important remedies under New York law, litigants need to be given accurate notice of the deadline for filing objections to determinations by Support Magistrates so that they can be reviewed by a Family Court judge, a prerequisite to the litigants' right to appeal. *See* Family Court Act §439(e); Reynolds *v.* Reynolds,. 92 A.D.3d 1109 (3rd Dept., 2012); Kasun *v.* Kasun, 82 A.D.3d 769 (2nd Dept., 20110. Currently, the statute requires litigants to file their objections within "thirty days after receipt of the order in court or by personal service, or, if the objecting party or parties did not receive the order in court or by personal service, thirty-five days after mailing." No mention is made of the electronic transmission by the Court of its orders, which has become the prevailing practice in Family Courts statewide during the pandemic.

The Family Court Advisory and Rules Committee is proposing a measure to remedy that gap by providing that where orders are transmitted by electronic means, litigants would have up to thirty-five days from the date of transmission in which to file objections. Especially since electronic transmission of orders may remain the norm even after the pandemic emergency is over, it is vital for the statute to be clear as to the applicable time-limit for the parties to file their objections.

Proposal

AN ACT to amend the family court act, in relation to the filing of objections in child support cases in the family court

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

Section 1. Subdivision (e) of section 439 of the family court act, as amended by chapter 336 of the laws of2004, is amended to read as follows:

(e) The determination of a support magistrate shall include findings of fact and, except with respect to a determination of a willful violation of an order under subdivision three of section four hundred fifty-four of this article where commitment is recommended as provided in subdivision (a)

of this section, a final order which shall be entered and transmitted to the parties. Specific written objections to a final order of a support magistrate may be filed by either party with the court within thirty days after receipt of the order in court or by personal service, or, if the objecting party or parties did not receive the order in court or by personal service, thirty-five days after mailing or electronic transmission of the order to such party or parties. A party filing objections shall serve a copy of such objections upon the opposing party, who shall have thirteen days from such service to serve and file a written rebuttal to such objections. Proof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal. Within fifteen days after the rebuttal is filed, or the time to file such rebuttal has expired, whichever is applicable, the judge, based upon a review of the objections and the rebuttal, if any, shall (i) remand one or more issues of fact to the support magistrate, (ii) make, with or without holding a new hearing, his or her own findings of fact and order, or (iii) deny the objections. Pending review of the objections and the rebuttal, if any, the order of the support magistrate shall be in full force and effect and no stay of such order shall be granted. In the event a new order is issued, payments made by the respondent in excess of the new order shall be applied as a credit to future support obligations. The final order of a support magistrate, after objections and the rebuttal, if any, have been reviewed by a judge, may be appealed pursuant to article eleven of this act.

§2. This act shall take effect immediately.

3. Expiration dates of orders of protection and duration of temporary orders of protection issued prior to the filing of petitions in juvenile delinquency proceedings in Family Court [F.C.A. §§154-c(1); 304.2]

It has long been established that as a matter of due process and fundamental fairness, all orders of protection – civil and criminal, temporary and final – must contain expiration dates in order to be enforceable through contempt, to provide clear notice to all parties and law enforcement as to what constitutes a violation and to ensure necessary periodic review. However, the Family Court Advisory and Rules Committee has identified two significant gaps in the Family Court Act and is thus proposing a measure to ensure complete clarity on this point.

First, the measure would amend subdivision one of section 154-c of the Family Court Act to add orders of protection issued in proceedings under Articles 3, 7, 10 and 10-A – that is, orders in juvenile delinquency, Persons in Need of Supervision, child abuse and neglect and permanency planning hearings – to the requirement that all orders "plainly state" the dates that they expire. That section had been proposed in 1997 by the Family Court Advisory and Rules Committee as part of a clarification of the procedures to be followed by local criminal courts when Family and Supreme Courts are closed. *See* L. 1997, c. 186. Its focus was solely upon the orders of protection included at that time in the statewide registry of orders of protection established by the *Family Protection and Domestic Violence Intervention Act of 1994* [L. 1994, c. 222, 224]. When child abuse and neglect orders of protection were added to the domestic violence registry [L.2015, c. 492], a reference to Article 10 was not added to Family Court Act §154-c(1); nor were orders of protection not entered onto the registry, *i.e.,* in juvenile delinquency, Persons in Need of Supervision and permanency planning hearings, included in that section, even though expiration dates are just as vital in each of those categories of cases.

Second, the proposal would amend subdivision four of section 304.2 to include the requirement for an expiration date in temporary and final orders in juvenile delinquency cases, as well as to specifically address the duration of temporary orders of protection that are issued prior to the filing of an accusatory instrument (petition). A temporary order in such a case may last for an initial period of up to thirty days and may be extended by the Court for good cause, upon notice to the juvenile, for a period of up to thirty days or for a period coincident with the period during which local probation departments are attempting to adjust or divert the juvenile's case. Family Court Act §308.1(9) provides that the adjustment period may last for an initial period of up to three months, which may be extended by the Family Court for an additional period of up to two months.

Often needed in cases of alleged teen dating abuse, including in cases involving 16- and 17-year olds that are removed from Youth Parts with referrals to local probation departments for adjustment, orders issued prior to the filing of a petition implicate significant constitutional rights of juveniles not yet formally accused of any act of juvenile delinquency. This is especially true in light of the serious consequences for violations of orders of protection. As Professor Merril Sobie indicated, in the McKinney's Practice Commentaries to Family Court Act §304.2, " considerations of fairness and due process mandate that ex parte orders be subject to adversarial review." It is critically important that such orders be strictly time-limited, that any extensions be for good cause and upon notice to the juvenile and that orders are regularly reviewed. Moreover, such orders must

be properly terminated, *e.g.,* in cases in which the adjustment process has ended successfully or where it has failed, but where the presentment agency has declined to prosecute the case. With the salutary trend toward increased utilization of the adjustment process – and, at the same time, with the recent Covid-19 public health emergency inevitably causing some delays for the presentment agencies to quickly file juvenile delinquency petitions involving non-detained youth – the need to carefully delineate the permissible duration of pre-petition temporary orders of protection has become ever-more vital.

The Court of Appeals has repeatedly emphasized the necessity of including expiration dates for all categories of orders of protection. In Matter of Sheena D., 8 N.Y.3d 136 (2007), the Court of Appeals held that the Family Court lacked authority to issue an order of protection without an expiration date and without a mechanism for periodic review. Further, in People *v.* McLemore, 4 N.Y.3d 821, 822 (2005), the Court explained that "the purpose of fixing expiration dates in orders of protection is 'to provide certainty for defendants, the protected victims and witnesses, and law enforcement authorities who may be called to enforce' the orders," citing its ruling in People *v.* Nieves, 2 N.Y.3d 310, 317 (2004). Moreover, with reference to Criminal Procedure Law §530.13(5), which, like Family Court Act §154-c(1), requires orders of protection to "plainly state the date that such order expires," the Appellate Division, Third Department, in People *v.* Cordwell, 11 A.D.3d 731 (3rd Dept., 2004), stated that the provision "makes clear that the expiration date is a crucial portion of the order of protection." *Accord*, People *v.* Muchuca, 43 Misc.3d 122 (Crim. Ct., NY Co., 2014)(Unrep.).

The constitutional implications of not clearly delineating expiration dates in orders of protection and, in particular, of not explicitly delimiting the extension criteria and duration of temporary orders issued against juveniles not yet charged are unquestionably serious. Enactment of this measure would rectify these significant gaps in the Family Court Act.

Proposal

AN ACT to amend the family court act, in relation to orders of protection expiration dates and permissible duration of temporary orders of protection in juvenile delinquency cases in the family court

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

Section 1. Subdivision 1 of section 154-c of the family court act, as added by chapter 186 of the laws of 1997, is amended to read as follows:

1. Expiration dates. Any order of protection or temporary order of protection issued under articles three, four, five, six [and], seven, eight, ten and ten-A of this act shall plainly state the date that such order expires.

§2. Subdivision 4 of section 304.2 of the family court act, as amended by chapter 683 of the laws of 1984, is amended to read as follows:

4. A temporary order of protection issued or extended after the filing of a petition under this article shall contain an expiration date and may remain in effect until an order of disposition is entered. A temporary order of protection issued prior to the filing of a petition under this article may remain in effect for an initial period of up to thirty days and may be extended by the court for good cause, upon notice to the juvenile, for a period of up to thirty days or for a period coinciding with the period of adjustment of the juvenile's case under subdivision nine of section 308.1 of this article.

§3. This act shall take effect immediately.

4. Procedural requirements for parentage proceedings regarding children conceived through assisted reproduction or surrogacy agreements
[F.C.A. §§581-202, 581-203, 581-303, 581-403, 581-409]

Enactment of the *Child and Parent Security Act,* the new legislation creating a new article 5-C of the Family Court Act, which delineates procedures for the determination of parentage in assisted reproduction and newly legalized gestational surrogacy cases, marked one of the signature achievements of the 2020 legislative session. *See* L.2020, c.56, Part L. Together with the amendments to the Public Health Law and other statutes, the new law, effective February 15, 2021, will have far-reaching effects far beyond assisted reproduction and surrogacy cases. But like many comprehensive legislative changes, the new law contains a few minor drafting errors, internal inconsistencies and gaps. The Family Court Advisory and Rules Committee is submitting a proposal to correct these problems and enhance the fairness of the parentage-determination process for all parties.

In brief, the Committee's proposal would make the following changes to Article 5-C:

A. Parentage determinations in assisted reproduction parentage proceedings:

• Parentage petitions: Family Court Act § 581-202(c) requires the court to enter an order of parentage based on the petition allegations alone if it finds that the allegations are truthful. However, like the comparable provision applicable to surrogacy parentage petitions [Family Court Act § 581-203(d)], the statute should require the court to actually make a determination of the truthfulness of the allegations, whether by hearing or otherwise. It is not realistic to expect that in most cases a court would be able to determine written statements to be truthful without at least some accompanying testimony. This is particularly so when one considers that while the petition itself must be verified, the statements attached to the petition are not required to be sworn. Courts, therefore, must have discretion to insist on testimony by the participants in order to judge the truthfulness of those statements. Using language identical to that in section 581-203(d), the Committee's proposal thus requires the court to actually "find" the statements to be truthful.

• Record of gamete donation: Family Court Act § 581-202(d)(2)(a) delineates the requirements for a record acknowledging the donation of a gamete or embryo, providing that it may be but is not required to be, signed before a notary public, two witnesses who are not the intended parents or a healthcare practitioner. The Committee's proposal would require that the record be signed before a notary public or two witnesses, as the record is too significant for the witnessing of the signature to be optional. An agreement by a donor to give up any parental claim to a child born as a result of a donation of genetic material should be subject to at least some formal requirements. It should be noted that the statute already accommodates the possibility of cases lacking a formal record of the gamete donation. In such cases, Family Court Act § 581-202(d)(2)(b) provides that in the absence of a suitable record, the court may make a finding that "clear and convincing evidence" exists to support the donation.

• Notice to necessary parties: Family Court Act §581-202(e) specifies that gamete donors must be notified but is otherwise silent as to other interested individuals who should be deemed necessary parties and should be notified of parentage proceedings in assisted reproduction cases. In order to afford conclusiveness and finality to the proceedings, it is critical that a parentage proceeding not only determine who the parents of a child are, but also resolve any possible claims

of parentage that other individuals may have. The Committee's proposal requires that, in addition to the donor, notice must "also be given to the gestating intended parent, the non-gestating intended parent, if any, and the gestating intended parent's spouse, if any, each of whom shall be a necessary party." Additionally, the proposal adds a comma for clarity in subdivision two of that section.

• Parentage finding: Family Court Act § 581-202(g) contains a drafting error. The reference to subdivision (e) of section 581-202 was mistakenly carried over from a previous version of the bill. The proper reference in section 581-202(g) should be to subdivision (f). Additionally, in order for the court to report to the Department of Health in cases in which a parentage judgment had been issued prior to the child's birth the child had not yet been born, the petitioner must be required to notify the court of the birth on a form prescribed by the Chief Administrator of the Courts.

B. Parentage determinations in proceedings involving surrogacy contracts:

• Timing of filing of parentage petition: Family Court Act § 581-203(b) allows a surrogate parentage proceeding to be "commenced at any time after the surrogacy agreement has been executed." Potentially, a proceeding can then be filed prior to the "transfer" of the egg, *i.e.* prior to pregnancy – a time-frame that may be months or even years prior to a pregnancy being achieved, if it is ever achieved. The Committee proposes that the statute be amended to allow the proceeding to be commenced only after pregnancy is achieved. Concomitantly, if the parentage judgment is issued prior to the child's birth, the petitioner must be required to provide notification to the court once the child has been born.

• Necessary parties: Family Court Act § 581-203(b) states that "the person acting as surrogate and all intended parents are necessary parties." As is the case with assisted reproduction proceedings under section 581-202(e), a critical component of parentage determinations is the achievement of finality through elimination of future, potential parentage claims by other individuals. The Committee's measure thus amends the section to include as necessary parties the surrogate; her spouse, if any; donors, if any; and all intended parents and to incorporate the notification requirement of Family Court Act §581-202(e) by reference.

• Residency requirements: There is an inconsistency between the residency requirements of sections 581-203(c) (1) and 581-402(b)(1), which should be reconciled. Family Court Act §581-402(b)(1) requires that at least one intended parent in a surrogacy arrangement be a New York resident for at least six months at the time of the execution of the contract. If only one of the intended parents had been a New York resident for the requisite period, while one is a non-resident, then the surrogate must have been a resident of the State for at least six months [Family Court Act § 581-401(a)(2)]. However, FCA § 581-203(c) only requires that the petition state "that the person acting as surrogate or at least one of the intended parents" was a New York State resident for at least six months at the time the surrogacy agreement was executed. In other words, a surrogacy proceeding could be commenced in cases where neither of the intended parents had been New York State residents for the requisite six-month threshold at the time that the contract was executed. This not only contradicts the residency requirements in sections 581-402(a)(2) and 581-402(b)(1), but invites petitions from intended parents who have no connection with this State other than hiring a New York resident to act as a surrogate. The Committee's measure thus resolves the internal inconsistency in the statute by amending section 581-203(c) to conform to the requirements of §581-402.

• Sufficiency of surrogacy contract: Family Court Act § 581-203(c)(3) simply requires that the attorneys for the intended parents and the surrogate certify that the surrogacy contract meets the requirements of Part 4 of Article 5-C, which is hardly enough basis for a court to make an independent assessment of the legal sufficiency of the contract. In order for the court to have a meaningful role in reviewing the facts and making a determination that the requirements of Part 4 of Article 5-C have been met, it must have the opportunity to review the actual contract. The Committee's measure thus adds a requirement that a copy of the contract be appended to the petition.

C. Standing to bring parentage petitions in both assisted reproduction and surrogacy contract cases: Family Court Act § 581-303(b) states that a "court shall issue a judgment of parentage pursuant to this article upon application by any participant." However, in limiting parentage petitions to participants, which are defined in section 581-102(o) as gamete providers, intended parents, surrogates, and spouses of surrogates; this section is in conflict with section 581-201(c), which also grants standing to a wider range of petitioners, including children and social services agencies. We recommend that this conflict be resolved by amending section 581-303(b) to state that a "court shall issue a judgment of parentage pursuant to this article upon application by any person authorized to file a petition pursuant to FCA § 581-201(c) of this article."

D. Surrogacy contract signatures: Section 581-403(a) of the Family Court Act requires that a surrogacy contract be "a signed record verified or executed before two non-party witnesses." Two problems are evident in the language of this section. First, it is ambiguous, as it is not clear whether a verified signature must always be witnessed by two non-parties or whether the two non-party witness requirement only applies to unverified signatures. More problematic, however, is the minimal requirement for authentication of the contract, even though Part 4 of the new statute recognizes the need for surrogacy contracts to contain very specific and detailed requirements protective of all parties. These contracts are not entered into lightly, or without a great deal of time, attorney involvement, negotiation and expense. Given the importance of the contract, it is thus not unreasonable to require at least notarization of the signatures. The Committee's proposal, therefore, amends section 581-403(a) to require the same level of formality as is required in section 170(6) of the Domestic Relations Law for a separation agreement – that is, that the agreement be acknowledged or proven in the manner required to entitle a deed to be recorded.

E. Surrogacy contract and parentage disputes: Family Court Act §581-409 appropriately reserves jurisdiction over contractual disputes arising in cases involving surrogacy contracts to the Supreme Court, as financial and other issues not involving questions of parentage of children are not appropriate for resolution by either Family or Surrogates Courts. However, many cases may be anticipated that involve both issues of parentage implicating children's best interests and contractual disputes. In such cases, the Committee's proposal provides an option for Supreme Courts to transfer issues involving parentage to Family or Surrogate's Court where it determines that such bifurcation of the cases to be appropriate.

Proposal

AN ACT to amend the family court act, in relation to parentage and gestational surrogacy proceedings

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

Section 1. Subdivision (c) of section 581-202 of the family court act, as added by part L of chapter 56 of the laws of 2020, is amended to read as follows:

(c) Where [a petition includes the following truthful] the court finds the following statements in the petition to be true, the court shall adjudicate the intended parent to be the parent of the child:

(1) a statement that an intended parent has been a resident of the state for at least six months or if an intended parent is not a New York State resident, that the child will be or was born in the state within ninety days of filing; and

(2) a statement from the gestating intended parent that the gestating intended parent became pregnant as a result of assisted reproduction; and

(3) in cases where there is a non-gestating intended parent, a statement from the gestating intended parent and non-gestating intended parent that the non-gestating intended parent consented to assisted reproduction pursuant to section 581-304 of this article; and

(4) proof of any donor's donative intent.

§2. Paragraph (2) of subdivision (d) of section 581-202 of the family court act, as added by part L of chapter 56 of the laws of 2020, is amended to read as follows:

(2) In the case of a donation from a known donor, either:

a. a record from the gamete or embryo donor acknowledging the donation and confirming that the donor has no parental or proprietary interest in the gametes or embryos. The record shall be signed by the gestating intended parent and the gamete or embryo donor[. The record may be, but is not required to be, signed]:

(i) before a notary public, or

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

(iii) before a health care practitioner; or

b. clear and convincing evidence that the gamete or embryo donor agreed, prior to conception, with the gestating parent that the donor has no parental or proprietary interest in the gametes or embryos.

§3. Subdivision (e) of section 581-202 of the family court act, as added by part L of chapter 56 of the laws of 2020, is amended to read as follows:

(e)(1) In the absence of evidence pursuant to paragraph two of this subdivision, notice shall be given to the donor at least twenty day prior to the date set for the proceeding to determine the existence of donative intent by delivery of a copy of the petition and notice pursuant to section three hundred eight of the civil practice law and rules. Such notice shall also be given to the gestating intended parent, the non-gestating intended parent, if any, and the gestating intended parent's spouse, if any, each of whom shall be a necessary party. Upon a showing to the court, by affidavit or otherwise, on or before the date of the proceeding or within such further time as the court may allow, that personal service cannot be effected at the donor's last known address with reasonable effort, notice may be given, without prior court order therefore, at least twenty days prior to the proceeding by registered or certified mail directed to the donor's last known address. Notice by publication shall not be required to be given to a donor entitled to notice pursuant to the provisions of this section.

(2) Notwithstanding the above, where sperm is provided under the supervision of a health care practitioner to someone other than the sperm provider's intimate partner or spouse without a record of the sperm provider's intent to parent, notice is not required.

§4. The opening paragraph of subdivision (g) of section 581-202 of the family court act, as added by part L of chapter 56 of the laws of 2020, is amended and a new paragraph (5) is added to read as follows:

(g) Where the requirements of subdivision (c) of this section are met or where the court finds the intended parent to be a parent under subdivision [(e)] (f) of this section, the court shall issue a judgment of parentage:

(5) if the judgment of parentage is issued prior to the birth of the child, ordering the petitioner, within seven days of such birth, to provide the court with notification thereof, together with such other facts as may assist in identifying the birth record of the child whose parentage was in issue. Such notification shall be in writing on a form to be prescribed by the chief administrator of the courts.

§5. Subdivisions (b) and (c) of section 581-203 of the family court act, as added by part L of chapter 56 of the laws of 2020, are amended and a new paragraph (7) is added to subdivision (d) to read as follows:

(b) The proceeding may be commenced at any time after [the surrogacy agreement has been executed] pregnancy is achieved and the person acting as surrogate, the spouse of the person acting as surrogate, if any, donors, if any, and all intended parents are necessary parties. Notice to the donors, if any, shall be pursuant to subdivision (e) of section 581-202 of this article.

(c) The petition for a judgment of parentage must be verified and include the following:

(1) a statement that [the person acting as surrogate or] at least one [of the] intended [parents has been] parent was a resident of the state for at least six months at the time the surrogacy agreement was executed and, in cases in which there are two intended parents, only one of whom was a resident of the state for at least six months prior to the execution of the agreement, then a statement that the person acting as surrogate had been a resident of the state for at least six months at the time the agreement was executed; and

(2) a certification from the attorney representing the intended parent or parents and the attorney representing the person acting as surrogate that the requirements of part four of this article have been met; and

(3) a statement from all parties to the surrogacy agreement that they knowingly and voluntarily entered into the surrogacy agreement and that the parties are jointly requesting the judgment of parentage; and

(4) a copy of the executed surrogacy agreement.

(7) if the judgment of parentage is issued prior to the birth of the child, ordering the petitioner, within seven days of such birth, to provide the court with notification thereof, together with such other facts as may assist in identifying the birth record of the child whose parentage was in issue. Such notification shall be in writing on a form to be prescribed by the chief administrator of the courts

§8. Subdivision (b) of section 581-303 of the family court act, as added by part L of chapter 56 of the laws of 2020, is amended to read as follows:

(b) The court shall issue a judgment of parentage pursuant to this article upon application by any [participant] person authorized to file a petition pursuant to section 581-201(c) of this article.

§8. Subdivision (a) of section 581-403 of the family court act, as added by part L of chapter 56

of the laws of 2020, is amended to read as follows:

(a) it shall be in a [signed] record [verified or executed before two non-party witnesses] subscribed by the parties and acknowledged in the form required to entitle a deed to be recorded.

§9. Section 581-409 of the family court act, as added by part L of chapter 56 of the laws of 2020, is amended to read as follows:

§ 581-409. Dispute as to surrogacy agreement

(a) Any dispute which is related to a surrogacy agreement other than disputes as to parentage shall be resolved by the supreme court, which shall determine the respective rights and obligations of the parties[, in]. In any proceeding initiated pursuant to this section, the court may, at its discretion, authorize the use of conferencing or mediation at any point in the proceedings.

(b) Except as expressly provided in the surrogacy agreement, the intended parent or parents and the person acting as surrogate shall be entitled to all remedies available at law or equity in any dispute related to the surrogacy agreement.

(c) There shall be no specific performance remedy available for a breach.

(d) In any proceeding initiated pursuant to this section, where the supreme court determines that the dispute involves both contractual and parentage issues, the court may order that the portion of the proceeding raising parentage issues may be transferred to the family or surrogate's court.

§10. This act shall take effect immediately.

5. Substitution of parentage for paternity and filiation in proceedings in Family Court [F.C.A. §§115, 154, 262, 418, 439, 458-a, 458-b, 458-c,511, 512, 514, 516-a-519, 521-525, 531-545, 548-a, 548-b, 548-c, 549, 551, 561-564, 571, 817, 1084[CPLR 4518; DRL. §§73, 75-a, 111, 111-a, 111-b, 240, 244-b, 244-c, 244-d; Jud. L. §90; Exec. L. §256; S.S.L. §§110-a, 111-b, 111-c, 111-d, 111-g, 111-k, 111-n, 111-p, 111-r, 111-s, 111-v, 131, 349, 349-b, 352-b, 366, 372-c; Gen. Ob. L. §3-503; V.T.L. §510; A.B.C. L. §119; Ed. L. §6509-c]

As the Legislature recognized, in enacting the *Child - Parent Security* Act in conjunction with the New York State Budget for Fiscal Year 2020-2021 [L.2020, c.56, part L], notions of parenthood have shifted dramatically in recent years. Couples are increasingly conceiving children through assisted reproduction, often utilizing donated embryos or sperm, and surrogate parent agreements with genetic intended parents, long considered against public policy in New York State, are legal as of February 15, 2021. Part L of chapter 56 added gender-neutral language to various provisions of the Family Court Act, Public Health Law and other statutes, most notably, substituting "acknowledgment of parentage" for "acknowledgment of paternity" and denominating the orders obtained under the new Article 5-C of the Family Court Act as "judgments of parentage." However, the new statute left Article 5 of the Family Court Act ("Paternity Proceedings") virtually untouched and did not alter the many now-archaic references to "paternity" throughout the New York State statutory framework.

The Committee is proposing a measure to fill this gap and to modernize New York's statutory structure. The measure amends Article 5 of the Family Court Act to expand the determination of parentage beyond traditional paternity determinations, substituting the more encompassing term "parentage" for "paternity" and "filiation." It also incorporates gender neutral terminology, where appropriate, in various provisions of the Family Court Act, Domestic Relations Law, Social Services Law, Civil Practice Law and Rules, Judiciary Law, Executive Law, Vehicle and Traffic Law, Alcoholic Beverage Control Law and Education Law. The proposal clarifies that parentage proceedings involving assisted reproduction or surrogacy agreements are governed by the new Family Court Act Article 5-C. It leaves intact, however, references in the Social Services Law, Family Court Act and Estates, Powers and Trust Law to the "putative father registry" operated by the New York State Department of Health, since virtually every state has a "putative father registry," as defined in Social Services Law §372-c, which is utilized in both child welfare and child support proceedings. *See* FCA §§ 516-a, 1017(b); S.S.L. §372-c; and EPTL § 4-1.2.

The proposal also incorporates a separate proposal by the Family Court Advisory and Rules Committee. It would amend the Family Court Act to clarify that a non-signatory to an acknowledgment of parentage (AOP) who comes forward alleging genetic parentage, where surrogacy and assisted reproduction are not involved, has standing to file a petition under Article 5 of the Family Court Act, notwithstanding the existence of an AOP signed by another individual. In such a case, the signatory to the AOP is a necessary party and would have to be named as a respondent. If appropriate, the Family Court would have discretion to order the signatory to submit to DNA testing, in addition to the petitioner, mother and child. Unless equitable estoppel has foreclosed DNA testing, the court would be required to issue an order vacating the AOP where a

non-signatory has been found to be a genetic parent, even in the absence of a vacatur petition filed by the original AOP signatory.

The need to update New York's statutory framework for determinations regarding parentage is beyond cavil and has become ever more evident as an increasing number of women have come to New York's Family Courts seeking "maternity" orders. Even before New York State enacted the Marriage Equality Act (L.2011, c. 95), New York's courts recognized that parenthood was not necessarily limited to the definitions contained within the Family Court Act and the Domestic Relations Law. For instance, courts recognized that the best interests of a child may dictate that a man who is not the biological father may still be equitably estopped from denying paternity. Shondel J. *v* Mark D., 7 N.Y.3d 320 (2006). Courts also recognized that spouses in same-sex unions performed in other states or countries may be considered to be the parents of children born during the marriage notwithstanding the lack of a biological relationship. Debra H. *v.* Janice R. 14 N.Y.3d 576 (2010); H.M. *v.* E.T., 14 N.Y.3d 521 (2010).

Since the *Marriage Equality Act* and the United States Supreme Court's decision in Obergefell *v.* Hodges, 135 S.Ct. 2584 (2015), recognition of non-traditional parentage has increased. Significantly, the Court of Appeals held in Brooke S.B. *v.* Elizabeth A.C.C., 28 NY3d 1 (2016), that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing, as a parent, to seek visitation and custody. More recently, two appellate courts found that the marriage presumption in DRL § 24 may be used to recognize a same-sex spouse of a biological parent as a parent of the child while at the same time estopping the donor from asserting parental rights. Joseph O. v. Danielle B., 158A.D.3d 767 (2nd Dept., 2018); Christopher YY *v.* Jessica ZZ, 159A.D.3d 18 (3rd Dept., 2017). And as mentioned, the new *Child - Parent Security Act* reflects the Legislature's determination of the need for gender-neutral terminology in the context of the modern, more expansive view of parenthood.

Modernizing the terminology in the Family Court Act and other statutes is not simply a matter of semantics as overly narrow interpretations of family fail to fully meet children's best interests. It is time for New York State statutes to catch up with evolving definitions of parenthood, as well as advancing science. Enactment of the Committee's measure would fulfill those goals.

Proposal

AN ACT to amend the family court act, the domestic relations law, the social services law, the civil practice law and rules, the judiciary law, the executive law, the social services law, the general obligations law, the vehicle and traffic law, the alcoholic beverage control law and the education law, in relation to substituting parentage for paternity and filiation, and to repeal certain provisions of the family court act relating thereto

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

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

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

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

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

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

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

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

(a) The court, on its own motion or motion of any party, when [paternity] parentage is contested under this article, shall order the [mother,] parties and the child [and the alleged father] to submit to one or more genetic marker or DNA marker tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether the alleged [father] parent is or is not the [father] parent of the child. No such test shall be ordered, however, where the acknowledgment was signed by the intended parent of a child born through assisted reproduction pursuant to subparagraph (ii) of paragraph (b) of subdivision one of section four thousand one hundred thirty-five-b of the public health law, or upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married [woman] couple. The record or report of the results of any such genetic marker or DNA test shall be received in evidence, pursuant to

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

§5. Subdivisions (a), (b) and (c) of section 439 of the family court act, subdivision (a) as amended by part L of chapter 56 of the laws of 2020 and subdivisions (b) and (c) as amended by chapter 576 of the laws of 2005, are amended to read as follows:

(a) The chief administrator of the courts shall provide, in accordance with subdivision (f) of this section, for the appointment of a sufficient number of support magistrates to hear and determine support proceedings. Except as hereinafter provided, support magistrates shall be empowered to hear, determine and grant any relief within the powers of the court in any proceeding under this article, articles five, five-A, five-B and five-C and sections two hundred thirty-four and two hundred thirty-five of this act, and objections raised pursuant to section five thousand two hundred forty-one of the civil practice law and rules. Support magistrates shall not be empowered to hear, determine and grant any relief with respect to issues specified in section four hundred fifty-five of this article, issues of contested parentage involving claims of equitable estoppel, custody, visitation including visitation as a defense, determinations of parentage made pursuant to section 581–407 of this act and orders of protection or exclusive possession of the home, which shall be referred to a judge as provided in subdivision (b) or (c) of this section. Where an order of [filiation] parentage is issued by a judge in a [paternity] parentage proceeding and child support is in issue, the judge, or support magistrate upon referral from the judge, shall be authorized to immediately make a temporary or final order of support, as applicable. A support magistrate shall have the authority to hear and decide motions and issue summonses and subpoenas to produce persons pursuant to section one hundred fifty-three of this act, hear and decide proceedings and issue any order authorized by subdivision (g) of section five thousand two hundred forty-one of the civil

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

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

(c) The support magistrate, in any proceeding in which issues specified in section four hundred fifty-five of this act, or issues of custody, visitation, including visitation as a defense, orders of protection or exclusive possession of the home are present or in which [paternity] parentage is contested on the grounds of equitable estoppel, shall make a temporary order of support and refer the proceeding to a judge. Upon determination of such issue by a judge, the judge may make a final determination of the issue of support, or immediately refer the proceeding to a

support magistrate for further proceedings regarding child support or other matters within the authority of the support magistrate.

§6. Subdivision (b) of section 458-a of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

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

§7. Subdivisions (b) and (c) of section 458-b of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

(b) If the respondent after receiving appropriate notice, fails to comply with a summons, subpoena or warrant relating to a [paternity] parentage proceeding under article five of this act or child support proceeding, and the court has determined that the respondent is licensed, permitted or registered by or with a board, department, authority or office of this state or one of its political subdivisions or instrumentalities to conduct a trade, business, profession or occupation, the court may order such board, department, authority or office to commence proceedings as required by law regarding the suspension of such license, permit, registration or authority to practice and to inform the court of the actions it has taken pursuant to such proceeding. The court may subsequently order such board, department, authority or office to terminate the suspension of the respondent's license, permit, registration or authority to practice; however, the court shall order the termination of such suspension when the court is satisfied that the respondent has fully complied with the requirements of all summonses, subpoenas and warrants relating to a [paternity] parentage proceeding under or child support proceeding.

(c) If the court determines that the suspension of the license, permit or registration of the respondent would create an extreme hardship to either the licensee, permittee or registrant or to

persons whom he or she serves, the court may, in lieu of suspension, suspend the order described in subdivision (a) of this section to the licensing entity for a period not to exceed one year. If on or before the expiration of this period the court has not received competent proof presented at hearing that the respondent is in full compliance with his or her support obligation and has fully complied with all summons, subpoenas and warrants relating to a [paternity] parentage proceeding under article five of this act or child support proceeding, the court shall cause the suspension of the order to be removed and shall further cause such order to be served upon the licensing entity.

§8. Subdivision (b) of section 458-c of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

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

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

[PATERNITY] PARENTAGE PROCEEDINGS

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

§10. Section 512 of the family court act, as amended by chapter 665 of the laws of 1976, is

amended to read as follows:

§512. Definitions. When used in this article,

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

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

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

(d)"Parent" means an individual who has established a parent-child relationship created or recognized under this act or other law.

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

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

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

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

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

§ 514. Liability [of father to mother] for expenses of pregnancy, confinement and recovery. The [father] court may determine which parent is liable for the reasonable expenses of the [mother's] gestating parent’s confinement and recovery and such reasonable expenses in connection with ~~her~~ the pregnancy as determined by the court; provided, however, where the [mother's] gestating parent’s confinement, recovery and expenses in connection with ~~her~~ the pregnancy were paid under the medical assistance program on the [mother's] gestating parent’s

behalf, the [father] non-gestating parent may be liable to the social services district furnishing such medical assistance and to the state department of health for medical assistance so expended. Such expenses, including such expenses paid by the medical assistance program on the [mother's] gestating parent's behalf, shall be deemed cash medical support and the court shall determine the obligation of the parties to contribute to the cost thereof pursuant to subparagraph five of paragraph (c) of subdivision one of section four hundred thirteen of this act.

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

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

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

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

§14. The title and subdivision (a) of section 519 of the family court act, as added by chapter 434 of the laws of 1987 and subdivision (c) as amended by chapter 533 of the laws of 1999, is amended to read as follows:

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

(a) the [putative father] alleged parent was the petitioner in the [paternity]parentage

proceeding; or,

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

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

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

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

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

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

§ 522. Persons who may originate proceedings.

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

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

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

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

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

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

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

§ 523. Petition to establish parentage.

(a) Proceedings are commenced by the filing of a verified petition, alleging that the person named as respondent, or the petitioner if the petitioner is a person alleging to be the child's [father] non-gestating parent, is or may be the [father] non-gestating parent of the child and petitioning the court to issue a summons or a warrant, requiring the respondent to show cause why the court should not enter a declaration of [paternity] parentage, an order of support, and such other and further relief as may be appropriate under the circumstances. Petitions involving assisted reproduction and surrogacy shall be filed in accordance with article 5-C of this act.

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

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

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

§18. Section 524 of the family court act, as amended by chapter 59 of the laws of 1993 and subdivision (b) as amended by chapter 398 of the laws of 1997, is amended to read as follows:

§524. Issuance of summons.

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

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

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

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

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

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

§21. Subdivisions (a) and (c) of section 532 of the family court act, subdivision (a) as amended by chapter 214 of the laws of 1998 and subdivision (c) as amended by chapter 773 of the laws of 1982 and as re-lettered by chapter 311 of the laws of 1983, are amended to read as follows:

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

and liability for the support of a child pursuant to this article and article four of this act.

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

§22. Section 534 of the family court act, as amended by chapter 665 of the laws of 1976, is amended to read as follows:

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

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

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

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

§ 541. Order dismissing petition. If the court finds [the male party is not the father] that the alleged parent is not a parent of the child, it shall dismiss the petition. If a neglect petition was filed in the [paternity] parentage proceeding, the court retains jurisdiction over the neglect petition whether or not it dismisses the [paternity] parentage petition.

§25. Section 542 of the family court act, as amended by chapter 354 of the laws of 1993 and subdivisions (a), (b) and (c) as amended by chapter 398 of the laws of 1997, is amended to read as follows:

§ 542. Order of [filiation] parentage.

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

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

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

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

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

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

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

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

§28. Section 545 of the family court act, as amended by chapter 849 of the laws of 1986, subdivision 1 as amended by chapter 215 of the laws of 2009 and subdivision 2 as added by chapter 892 of the laws of 1986, is amended to read as follows:

§ 545. Order of support by parents.

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

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

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

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

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

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

(b) The court may subsequently order the department of motor vehicles to terminate the suspension of the respondent's driving privileges; however, the court shall order the termination of such suspension when the court is satisfied that the respondent has fully complied with the requirements of all summonses, subpoenas and warrants relating to a [paternity] parentage or child support proceeding.

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

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

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

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

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

§ 548-c. [Paternity] Parentage or child support proceedings; suspension of recreational licenses. If the respondent, after receiving appropriate notice, fails to comply with a summons, subpoena, or warrant relating to a [paternity] parentage or child support proceeding, the court may order any agency responsible for the issuance of a recreational license to suspend or to refuse to reissue a license to the respondent or to deny application for such license by the respondent. The

court may subsequently order such agency to terminate the adverse action regarding the respondent's license; however, the court shall order the termination of such suspension or other adverse action when the court is satisfied that the respondent has fully complied with the requirements of all summons, subpoenas, and warrants relating to a [paternity] parentage or child support proceeding.

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

§ 549. Order of visitation.

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

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

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

§34. Section 561 of the family court act is amended to read as follows:

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

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

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

§ 563. [Paternity] Parentage and support proceedings combined; apportionment. When a proceeding to establish [paternity] parentage is initiated under this article, the court on its own motion or on motion of any person qualified under article four of this act to file a support petition may direct the filing of a petition under article four to compel the [mother] parent to support his or

her child. If the court enters an order of [filiation] parentage, it may apportion the costs of the support and education of the child between the parents according to their respective means and responsibilities.

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

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

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

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

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

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

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

§38. The The article heading of article 5-A, the section heading and subdivisions 1 and 8 of section 571 of the family court act, the article heading of article 5-Aand the section heading of

section 571 as added by chapter 685 of the laws of 1975 and subdivisions 1 and 8 of section 571 as amended by section 111 of part B of chapter 436 , are amended to read as follows

ARTICLE 5-A

SPECIAL PROVISIONS RELATING TO ENFORCEMENT OF SUPPORT

AND ESTABLISHMENT OF [PATERNITY] PARENTAGE

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

1. Any inconsistent provision of this law or any other law notwithstanding, in cases where a social services official has accepted, on behalf of the state and a social services district, an assignment of support rights from a person applying for or receiving family assistance in accordance with the provisions of the social services law, the social services official or an authorized representative of the state is authorized to bring a proceeding or proceedings in the family court pursuant to article four of this act to enforce such support rights and, when appropriate or necessary, to establish the [paternity] parentage of a child pursuant to article five of this act.

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

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

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

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

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

of competent jurisdiction, or without an [acknowledgement] acknowledgment of the [paternity] parentage of such person executed pursuant to applicable provisions of law.

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

(d) Any records or reports relating to the administration and analysis of a genetic marker or DNA test, including records or reports of the costs of such tests, administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law are admissible in evidence under this rule and are prima facie evidence of the facts contained therein provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee delegated for that purpose, or by a qualified physician. If such record or report relating to the administration and analysis of a genetic marker test or DNA test or tests administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law indicates at least a ninety-five percent probability of [paternity] parentage, the admission of such record or report shall create a rebuttable presumption of [paternity] parentage, and shall, if unrebutted, establish the [paternity] parentage of and liability for the support of a child pursuant to articles four and five of the family court act.

(g) Pregnancy and childbirth costs. Any hospital bills or records relating to the costs of pregnancy or birth of a child for whom proceedings to establish [paternity] parentage, pursuant to sections four hundred eighteen [and], five hundred thirty-two and article 5-C of the family court act or section one hundred eleven-k of the social services law have been or are being undertaken, are admissible in evidence under this rule and are prima facie evidence of the facts contained therein, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee designated for that purpose, or by a qualified physician.

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

4. “Child custody proceeding” means a proceeding in which legal custody, physical

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

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

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

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

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

§44. Paragraph (j) of subdivision 1 of section 240 of the domestic relations law, as amended by chapter 624 of the laws of 2002, is amended to read as follows:

(j) The order shall be effective as of the date of the application therefor, and any retroactive amount of child support due shall be support arrears/past due support and shall, except as provided for herein, be paid in one lump sum or periodic sums, as the court shall direct, taking into account any amount of temporary support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the courts shall not direct the schedule of repayment of retroactive support. Where such direction is for child support and [paternity] parentage has been

established by a voluntary acknowledgement of [paternity] parentage as defined in section forty-one hundred thirty-five-b of the public health law, the court shall inquire of the parties whether the acknowledgement has been duly filed, and unless satisfied that it has been so filed shall require the clerk of the court to file such acknowledgement with the appropriate registrar within five business days. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding. Any order or judgment made as in this section provided may combine in one lump sum any amount payable to the custodial parent under this section with any amount payable to such parent under section two hundred thirty-six of this article. Upon the application of either parent, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party, parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty, or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the provisions of section two hundred forty-four of this article, no such modification or annulment shall reduce or annul arrears accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. Such modification may increase such child support nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of child support due shall be support arrears/past due support and shall be paid in one lump sum or periodic sums, as the court shall direct, taking into account any amount of temporary child support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules.

§45. Subdivision (b) of section 244-b of the domestic relations law, as amended by

chapter 398 of the laws of 1997, is amended to read as follows:

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

§46. Subdivision (b) of section 244-c of the domestic relations law, as amended by chapter 398 of the laws of 1997, is amended to read as follows;

(b) If the respondent, after receiving appropriate notice, fails to comply with a summons, subpoena or warrant relating to a [paternity] proceeding under article five of the family court act or child support proceeding, and the court has determined that the respondent is licensed, permitted or registered by or with a board, department, authority or office of this state or one of its political subdivisions or instrumentalities to conduct a trade, business, profession or occupation, the court may order such board, department, authority or office to commence proceedings as required by law regarding the suspension of such license, permit, registration or authority to practice and to inform the court of the actions it has taken pursuant to such proceeding. The court may subsequently order such board, department, authority or office to terminate the suspension of the respondent's license, permit, registration or authority to practice; however, the court shall order the termination of such suspension when the court is satisfied that the respondent has fully complied with all summons, subpoenas and warrants relating to a [paternity] parentage proceeding under article five of the family court act or child support proceeding.

§47. Subdivision (b) of section 244-d of the domestic relations law, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

(b) If the respondent, after receiving appropriate notice, fails to comply with a summons, subpoena, or warrant relating to a [paternity] parentage proceeding under article five of the family court act or child support proceeding, the court may order any agency responsible for the issuance

of a recreational license to suspend or to refuse to reissue a license to the respondent or to deny application for such license by the respondent. The court may subsequently order such agency to terminate the adverse action regarding the respondent's license; however, the court shall order the termination of such suspension or other adverse action when the court is satisfied that the respondent has fully complied with the requirements of all summons, subpoenas, and warrants relating to a paternity or child support proceeding.

§48. Paragraph (a) of subdivision 6 of section 256 of the executive law, as amended by chapter 601 of the laws of 2007, is amended to read as follows:

(a) Each probation agency or department and state operated probation services shall provide for intake, investigation, supervision and conciliation services relating to custody, visitation and [paternity] parentage proceedings and may provide for such services in support proceedings under the provisions of articles four, five, five-A and six of the family court act. For purposes of this subdivision, intake services: (i) relating to support proceedings under article four and relating to [paternity] parentage proceedings under articles five and five-A of the family court act, shall include referral to the office of temporary and disability assistance's child support enforcement unit in cases where a person is applying for or receiving public assistance or where a person chooses to utilize the services of such unit; (ii) relating to support proceedings under article four of the family court act, shall include services rendered to the payors of support orders seeking to modify such orders.

§49. Paragraphs (a) and (g) of subdivision 2-a of section 90 of the judiciary law, as added by chapter 398 of the laws of 1997, are amended to read as follows:

(a). The provisions of this subdivision shall apply in all cases of an attorney licensed, registered or admitted to practice in this state who has failed after receiving appropriate notice, to comply with a summons, subpoena or warrant relating to a [paternity] parentage proceeding under article five of the family court act or child support proceeding involving him or her personally, or who is in arrears in payment of child support or combined child and spousal support which matter shall be referred to the appropriate appellate division by a court pursuant to the requirements of section two hundred forty-four-c of the domestic relations law or pursuant to section four hundred fifty-eight-b or five hundred forty-eight-b of the family court act.

(g). This subdivision two-a applies to [paternity] parentage and child support proceedings commenced under, and support obligations paid pursuant to any order of child support or child and spousal support issued under provisions of section two hundred thirty-six or two hundred forty of the domestic relations law, or article four, five, five-A or five-B of the family court act.

§50. The section section heading and subdivision 1 of section 110-a of the social services law, the section heading as added by chapter 773 of the laws of 1974 and subdivision 1 of section 110-a of the social services law, as amended by chapter 456 of the laws of 1978, is amended to read as follows:

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

1. Any inconsistent provision of law notwithstanding, the appropriating body of a social services district may authorize and make provision for the social services commissioner of such district to obtain: (a) necessary legal services on a fee for service basis or other appropriate basis which the department may approve, to obtain support from spouses and parents, to recover costs of public assistance and care granted, to establish [paternity] parentage, and to initiate and prosecute proceedings for the commitment of the guardianship and custody of destitute or dependent children to authorized agencies, pursuant to the provisions of this chapter and the domestic relations law, the family court act and other laws, and (b) necessary services of private investigators, licensed pursuant to section seventy of the general business law, on a fee for service or other appropriate basis which the department may approve, to provide investigative assistance in efforts of the district to locate absent parents [and fathers] of children born out of wedlock.

§51. The title heading of title 6-A of article and subdivisions 1, 2-a and subparagraph 1 of paragraph (d) of subdivision 4-a of section 111-b of the social services law, the title heading of title 6-A of article 3 and subdivision 1 as added by chapter 685 of the laws of 1975, subdivision 2-a as amended by chapter 815 of the laws of 1987, and subparagraph 1 of paragraph (d) of subdivision 4-a as added by chapter 398 of the laws of 1997of title 6-a and subdivisions 1, 2-a and subparagraph (1) of paragraph (d) of subdivision 4-a of section 111-b of the social services law, as amended by chapter 398 of the laws of 1997, are amended to read as follows:

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

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

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

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

§52. Subdivisions 1, paragraph g of subdivision 2, subdivision 3 and paragraphs a and c of subdivision 4 of section 111-c of the social services law, subdivision 1 as added by chapter 685 of the laws of 1995, paragraph g of subdivision 2 as added by chapter 809 of the laws of 1985, subdivision 3 as amended by chapter 398 of the laws of 1997 and paragraphs a and c of subdivision 4 as amended by chapter 343 of the laws of 2009 , are amended to read as follows:

1. Each social services district shall establish a single organizational unit which shall be responsible for such district's activities in assisting the state in the location of absent parents, establishment of [paternity] parentage and enforcement and collection of support in accordance with regulations of the department.

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

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

modifying and enforcing child support orders.

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

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

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

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

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

1. The office of temporary and disability assistance and the social services districts, in accordance with the regulations of the office of temporary and disability assistance, shall make services relating to the establishment of [paternity] parentage and the establishment and enforcement of support obligations available to persons not receiving family assistance upon application by such persons. Such persons must apply by (i) completing and signing a form as prescribed by the office of temporary and disability assistance, or (ii) filing a petition with the court or applying to the court in a proceeding for the establishment of [paternity] parentage and/or establishment and/or enforcement of a support obligation, which includes a statement signed by the person requesting services clearly indicating that such person is applying for child support enforcement services pursuant to this title.

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

§ 111-p. Authority to issue subpoenas. The department or the child support enforcement unit coordinator or support collection unit supervisor of a social services district, or his or her

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

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

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

the second and subsequent failure.

§57. The opening paragraph of subdivision 1 of section 111-s of the social services law, as added by chapter 398 of the laws of 1997, is amended to read as follows:

For the purpose of establishing [paternity] parentage, or establishing, modifying or enforcing an order of support, the department or a social services district or its authorized representative, and child support enforcement agencies of other states established pursuant to title IV–D of the social security act, without the necessity of obtaining an order from any other judicial or administrative tribunal and subject to safeguards on privacy and information security, shall have access to information contained in the following records:

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

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

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

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

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

1. When an investigation is required by section one hundred thirty-two and other provisions of this chapter for the purpose of determining the eligibility for public assistance and care of an applicant pregnant with or who is the mother of an out of wedlock child such investigation shall include diligent inquiry into the [paternity] parentage of such child.

3. In appropriate cases, such applicant shall be required to file a petition in the family

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

§61. Paragraph (b) of subdivision 1 and subdivision 2 of section 349-b of the social services law, paragraph (b) of subdivision 1 as amended by chapter 398 of the laws of 1987 and subdivision 2 as amended by chapter 685 of the laws of 1975, are amended to read as follows:

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

2. The amount of the payments due from the absent parent in meeting his or her support obligations under this section shall be the amount of a current court support order or, in the absence of a court order, if such parent agrees to meet his or her support obligation, an amount to be determined in accordance with a support formula established by the department and approved by the secretary of the federal department of health[, education and welfare] and human services.

§62. Paragraphs (a), (d), (e) and (f) of subdivision 1 of section 352-a of the social services law, paragraphs (a), (d) and (e) as added by chapter 187 of the laws of 1969 and paragraph (f) as amended by chapter 86 of the laws of 1975, are amended to read as follows:

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

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

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

(f) to reimburse, to the extent that state and federal requirements authorize or require, appropriate courts and law enforcement officials for activities related to the requirements of this

chapter and the family court act with respect to establishment of [paternity] parentage and for services they have undertaken on behalf of such official.

§63. Subparagraph (3) of paragraph (d) of subdivision 1 of section 366 of the social services law, as amended by chapter 56 of the laws of 2013, is amended to read as follows:

(3) cooperates with the appropriate social services official or the department in establishing [paternity] parentage or in establishing, modifying, or enforcing a support order with respect to his or her child; provided, however, that nothing herein contained shall be construed to require a payment under this title for care or services, the cost of which may be met in whole or in part by a third party; notwithstanding the foregoing, a social services official shall not require such cooperation if the social services official or the department determines that such actions would be detrimental to the best interest of the child, applicant, or recipient, or with respect to pregnant women during pregnancy and during the sixty-day period beginning on the last day of pregnancy, in accordance with procedures and criteria established by regulations of the department consistent with federal law; and

§64. Subdivisions 1, 2, 3 and 4 of section 372-c of the social services law, subdivisions 1 and 2 as amended by part L of chapter 56 of the laws of 2020 and subdivisions 3 and 4 as added by chapter 665 of the laws of 1976, are amended to read as follows:

1. The department shall establish a putative father registry which shall record the names and addresses of: (a) any person adjudicated by a court of this state to be the parent of a child born out of wedlock; (b) any person who has filed with the registry before or after the birth of a child out of wedlock, a notice of intent to claim parentage of the child; (c) any person adjudicated by a court of another state or territory of the United States to be the father of an out of wedlock child, where a certified copy of the court order has been filed with the registry by such person or any other person;

(d) any person who has filed with the registry an instrument acknowledging [paternity] parentage pursuant to section 4-1.2 of the estates, powers and trusts law or section four thousand thirty-five-b of the public health law.

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

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

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

§65. Subdivision 4 of section 3-503 of the general obligations law, as added by chapter 398 of the laws of 1997, is amended to read as follows:

4. Every application shall state in bold face that persons who are four months or more in arrears in child support or who have failed to comply with a summons, subpoena or warrant relating to a [paternity] parentage proceeding under article five of the family court act or child support proceeding may be subject to suspension of their business, professional, drivers and/or recreational licenses and permits including, but not limited to, licences issued pursuant to section 11-0713 of the environmental conservation law.

§66. The title of subdivision 4-e of section 510 of the vehicle and traffic law, as added by chapter 398 of the laws of 1997, is amended to read as follows:

4-e. [Expires and deemed repealed August 31, 2021, pursuant to L.1995, c. 81, § 246, subd. 19.] Suspension and disqualification for failure to make child support payments or failure to comply with a summons, subpoena or warrant relating to a [paternity] parentage proceeding under article five of the family court act or child support proceeding.

§67. Paragraphs (a) and (d) of subdivision 4 of section 119 of the alcoholic beverage control law, as added by chapter 398 of the laws of 1997, are amended to read as follows:

(a) The provisions of this subdivision shall apply in all cases of licensee or permittee failure after receiving appropriate notice, to comply with a summons, subpoena or warrant relating to a [paternity] parentage proceeding under article five of the family court act or child support proceeding and arrears in payment of child support or combined child and spousal support referred to the authority by a court pursuant to the requirements of section two hundred forty-four-c of the domestic relations law or pursuant to section four hundred fifty-eight-b or five hundred forty-eight-b of the family court act.

(d) Upon receipt of an order from the court based on failure to comply with a summons, subpoena, or warrant relating to a [paternity] parentage proceeding under article five of the family court act or child support proceeding, the authority, if it finds such person has been issued a license or permit, shall within thirty days of receipt of such order from the court, provide notice to the licensee or permittee that his or her license shall be suspended in sixty days unless the conditions in paragraph (e) of this subdivision are met.

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

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

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

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

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

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

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

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

The Committee's proposal is consistent with the rulings of appellate courts that have stepped in to resolve the ambiguity. In Dwayne J.B. *v.* Santos H., 89 A.D.3d 838 (2nd Dept. 2011), the Appellate Division, Second Department, determined that a prior AOP "does not serve as an insuperable bar to a claim of paternity by one who is a stranger to the acknowledgment." The Third and Fourth Departments have followed suit. *See* Matter of Ryan M.E. *v.* Shelby S., -A.D.3d- (4th Dept., Feb. 5, 2021); Stephen N. *v.* Amanda O., 140 A.D.3d 1223 (3rd Dept., 2016); Frost *v.* Wisniewski, 126 A.D.3d 1305 (4th Dept., 2015). However, even in these cases, little guidance has been given to the Family Courts about what to do should a non-signatory be declared the father. In the absence of any statutory authority, many courts are reluctant to issue any orders vacating the underlying AOPs unless a signatory has filed a petition to vacate. In cases in which one of the signatories did not initiate the proceeding, they are unlikely to file a petition to vacate the AOP. This measure would provide needed clarification by amending Family Court Act §542 to provide that where the AOP signatory is determined not to be the father, the AOP must be vacated at the same time that a new order of filiation is issued.

The recent decision of the Family Court, Bronx County, in Matter of Emily R. *v.* Emilio R. and Juan Alexis C., 53 Misc.3d 325 (Fam. Ct., Bx. Co., 2017), illustrates and, in fact, suggests

[3] This proposal uses the term "parentage," as suggested in the Committee's parentage proposal, *supra*.

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

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

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

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

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

Proposal

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

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

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

§ 522. Persons who may originate proceedings.

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

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

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

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

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

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

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

§ 523. Petition to establish parentage.

(a) Proceedings are commenced by the filing of a verified petition, alleging that the person named as respondent, or the petitioner if the petitioner is a person alleging to be the child's [father] non-gestating parent, is or may be the [father] non-gestating parent of the child and petitioning the court to issue a summons or a warrant, requiring the respondent to show cause why the court should not enter a declaration of [paternity] parentage, an order of support, and such other and further relief as may be appropriate under the circumstances. Petitions involving assisted reproduction and surrogacy shall be filed in accordance with Article 5-C of this Act.

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

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

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

§3. Section 524 of the family court act, as amended by chapter 59 of the laws of 1993, subdivision (b) as amended by chapter 398 of the laws of 1997, is amended to read as follows:

§524. Issuance of summons

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

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

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

(a) The court shall advise the parties of their right to one or more genetic marker tests or DNA tests and, on the court's own motion or the motion of any party, shall order the [mother] gestating parent, [her] the child, [and] the alleged [father] parent, and, if appropriate, the non-gestating signatory to an acknowledgment of parentage to submit to one or more genetic marker or DNA tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether the alleged [father] parent is or is not the [father] parent of the child. No such test shall be ordered, however, upon a written finding by the court 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. The record or report of the results of any such genetic marker or DNA test ordered pursuant to this section or pursuant to section one hundred eleven-k of the social services law shall be received in evidence by the court pursuant to

subdivision (e) of rule forty-five hundred eighteen of the civil practice law and rules where no timely objection in writing has been made thereto and that if such timely objections are not made, they shall be deemed waived and shall not be heard by the court. If the record or report of the results of any such genetic marker or DNA test or tests indicate at least a ninety-five percent probability of [paternity] parentage, the admission of such record or report shall create a rebuttable presumption of [paternity] parentage, and shall establish, if unrebutted, the [paternity] parentage of and liability for the support of a child pursuant to this article and article four of this act.

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

§ 542. Order of [filiation] parentage.

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

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

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

order of temporary support upon the respondent's compliance with such order and subsequent appearance before the court.

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

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

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

This measure addresses an urgent problem that surfaced as the Judiciary and Executive agencies planned for implementation of the "Raise the Age" legislation, which became effective with respect to 16-year olds on October 1, 2018 and 17-year olds on October 1, 2019. (L. 2017, c. 59, part www, hereinafter "RTA"). The measure would allow for the temporary pre-arraignment detention of juvenile and adolescent offenders in a specialized juvenile secure detention facility where there is no court available to arraign and issue a securing order for those offenders. Further, where there is no specialized juvenile secure detention facility nearby, the measure also authorizes a county to establish one or more temporary pre-appearance secure holding facilities where a youth could be detained pending arraignment.

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

Both Federal and State law prohibit the detention of youth in a jail or local lockup alongside adult prisoners. The Federal *Juvenile Justice Reform Act of 2018* [Public Law 115-385; H.R. 6964], which was signed by the President on December 21, 2018, re-authorized the *Juvenile Justice and Delinquency Prevention Act of 1974* [34 U.S.C. §11103] and, *inter alia*, extended the "sight and sound separation" mandates formerly applicable only to juvenile delinquents in Family Court to youth prosecuted in the adult criminal justice system, thus including the Youth Parts established pursuant to RTA. "Sight and sound contact" is defined as "any physical, clear visual, or verbal contact that is not brief and inadvertent." [4] The State Plan requirements in the *Act* [H.R. 6964, §205], which are prerequisites to New York State's receipt of significant Federal juvenile justice funding, provide only limited circumstances for departures from the requirements in the interests of justice. Those limited circumstances do not resolve the pre-arraignment holding area problem since judges would not be available to make the comprehensive findings detailed in the statute. The U.S. Department of Justice includes court holding facilities in the detention and lock-up facilities

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

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

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

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

Proposal

AN ACT to amend the criminal procedure law, executive law and county law, in relation to temporary holding facilities for adolescent offenders

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

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

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

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

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

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

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

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

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

§5. Subdivision 3 of section 502 of the executive law, as amended by section 19 of part k of chapter 59 of the laws of 2017, is amended to read as follows:

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

§6. The executive law is amended by adding a new section 503-b to read as follows:

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

1. The office of children and family services shall establish regulations for the operation of temporary pre-appearance secure holding facilities for juvenile and adolescent offenders pursuant to this article and subdivision six of section two hundred eighteen-a of the county law.

Notwithstanding any other provision of law, the office, in consultation with the state commission of correction, shall jointly regulate, certify, visit, inspect and supervise temporary pre-appearance secure holding facilities for adolescent offenders. The office shall maintain a list on-line of all facilities certified for the temporary pre-appearance holding of adolescent offenders and shall file a copy of that list periodically with the clerk of the youth part established in each county in accordance with article 722 of the criminal procedure law.

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

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

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

§7. Section 218-a of the county law, as amended by chapter 880 of the laws of 1976, the opening paragraph of subdivision A as amended by chapter 465 of the laws of 1992, paragraphs 1,2,3 and 4 of subdivision A as amended by chapter 555 of the laws of 1978, paragraph 6 of subdivision A as added by section 82-B of part www of chapter 59 of the laws of 2017, subdivision

B as amended by chapter 419 of the laws of 1987 and subdivision C as added by section 12 of part E of chapter 57 of the laws of 2005, is amended to read as follows:

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

A. [To] The office of children and family services shall promulgate regulations to assure that suitable and conveniently accessible accommodations and proper and adequate detention in secure, specialized secure and non-secure detention facilities, as defined in section five hundred two of the executive law and the regulations of [the division for youth] such office, will be available when required for the temporary care, maintenance and security of alleged and convicted juvenile offenders, alleged and adjudicated juvenile delinquents, alleged and convicted adolescent offenders and alleged and adjudicated persons in need of supervision. Such regulations shall not require any county to provide temporary care in a secure detention facility for residents of any other county except upon a space available basis. The county executive, if there be one, otherwise the board of supervisors shall designate the agency of county government responsible for the administration of the county juvenile detention program and shall so advise the New York state [division for youth] office of children and family services, and may make provisions therefor as follows:

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

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

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

conveniently accessible to the counties concerned. Such authorization and contract may include provisions for remodeling or enlarging the building of such facility.

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

5. The resolution providing for joint action under subdivision three or four above shall be adopted by the board of supervisors of each of the several counties affected, and a committee composed of at least one member of each of such boards shall be created to acquire the necessary real property in the name of the counties affected, and as the joint agent of such counties such committee shall have charge of the construction, equipment, maintenance and operation of such joint county detention facility and, with the advice of an advisory committee consisting of the judge of the family court and the commissioner of social services of each of said counties, shall supervise and control the maintenance and operation of such joint county detention facility. The said resolution may specify the matters as to which the action of such committee shall require the joint approval of the boards of supervisors of all the counties affected and shall prescribe the proportions to be borne by each of the several counties affected of the costs of acquisition of the site and of construction of a new joint county detention facility and the proportions to be borne by each of the several counties affected of the costs of operation of such joint county detention facility, whether established by new joint acquisition and construction or by utilization of an existing county detention facility. The moneys to pay the share to be borne by each county affected shall be provided by appropriation in such amounts and at such times as may be agreed upon.

6. Notwithstanding any other provision of law, commencing October first, two thousand eighteen, a county [must] shall provide for adequate detention of alleged or convicted adolescent offenders in a specialized secure detention facility for older youth who are alleged or convicted of committing an offense when they were sixteen years of age and commencing October first, two thousand nineteen, a county [must] shall provide for adequate detention of alleged or convicted adolescent offenders in a specialized secure detention facility for older youth who are alleged or convicted of committing an offense when they were sixteen or seventeen years of age. Such

facility shall be certified and regulated by the office of children and family services in conjunction with the state commission of correction. Such facility shall: (i) have enhanced security features and specially trained staff; and (ii) be jointly administered by the agency of county government designated in accordance with subdivision A of this section and the applicable county sheriff, which both shall have the power to perform all acts necessary to carry out their duties. The county sheriff shall be subject to the same laws that apply to the designated county agency regarding the protection and confidentiality of the information about the youth in such facility and shall prevent access thereto by, or the distribution thereof to, persons not authorized by law. Where a county is not located in proximity to a secure juvenile detention facility for juvenile offenders or a specialized secure detention facility for older youth for adolescent offenders, it may establish, on an as-needed basis, one or more temporary pre-appearance secure holding facilities for juvenile and adolescent offenders in accordance with section 503-b of the executive law. Such holding facilities shall be certified and regulated by the office of children and family services in conjunction with the state commission of correction and shall be available to hold for no more than eighteen hours juvenile and adolescent offenders, who cannot be released or held in a secure juvenile detention facility or specialized secure detention facility for older youth, as applicable, pending an appearance before a youth part or accessible magistrate, whichever is sooner.

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

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

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

8. Review of records of the sex offender and domestic violence registries and child protective records in family offense proceedings involving orders of child custody in Family Court
[F.C.A. §842]

To insure that Supreme and Family Courts are fully informed prior to issuing custody and visitation orders, chapter 595 of the Laws of 2008 amended Family Court Act §651 and Domestic Relations Law §240(1)(a) to require the courts to check the sex offender registry, the statewide registry of orders of protection and the New York State Unified Court System's own records of child protective proceedings and warrants in all custody and visitation proceedings. As the legislation's supporting memorandum indicated, the law was prompted by a tragic case in which a Family Court Judge awarded unsupervised visitation to a parent who, unbeknownst to the Court or the attorney for the child, had been convicted of raping his 14-year old niece and was a Level 2 registered sex offender. The father was subsequently arrested for raping the 12-year old daughter to whom he had been granted visitation by the Court. [5]

As the Governor recognized in the message issued upon approval of chapter 595 of the Laws of 2008:[6]

> I fully support these new statutory amendments, which will ensure that judges will have vital information to assist them in making these immensely difficult and important decisions ... I have no doubt that the changes made by this bill will protect children from being harmed by persons who should not be given custody or unsupervised access to them.

[Governor's Approval Memorandum No. 38, L. 2008, c. 595.]

Recognizing the vital nature of the information provided to the Family and Supreme Courts through a review of the domestic violence, sex offender and Family Court databases, in 2015, the Legislature expanded the records review requirements to apply to the screening of non-respondent parents, relatives and other "suitable persons" as potential custodial resources for children in child abuse and neglect proceedings pursuant to Family Court Act §1017(2)[L. 2015, c. 567]. However, the statutory framework governing the Family Court similarly lacks a records review requirement for another context in which the Court renders decisions regarding custody and visitation for which the information would be essential, that is, family offense proceedings under Article 8 of the Family Court.

The Family Court Advisory and Rules Committee is, therefore, proposing a measure requiring a review of records in accordance with Family Court Act §651 prior to the issuance of temporary and final orders of protection in which custody is awarded to either parent or a relative in the second degree. The incorporation by reference of Family Court Act §651 ensures that in the rare cases in which the review is not feasible but in which an emergency custody order is critical,

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[5] Memorandum in Support of Assembly Bill No. A 11657--A, L. 2008, c. 595.

[6] Governor's Approval Memorandum No. 38, L. 2008, c. 595.

subdivisions five and six of section 651 would apply, thus permitting a temporary order of custody with a prompt review of records afterwards. Additionally, the measure would repeal the paragraph of Family Court Act §842 regarding orders to terminate leases or rental agreements that has been rendered obsolete in light of the substitution of an administrative procedure in chapter 694 of the Laws of 2019.

Significantly, in cases in Family and Supreme Courts in which temporary and final orders of protection in conjunction with custody orders are issued pursuant to sections 655 and 656 of the Family Court Act or sections 240(3) and 252 of the Domestic Relations Law, the records review requirements of Family Court Act §651 and Domestic Relations Law §240(1)(a) already apply, thus ensuring that the Courts will obtain vital information to inform their decisions. It is equally vital to provide this information to the Family Court when its custody order is contained solely in a temporary or final order of protection under sections 828 and 842 of the Family Court Act.

Proposal

AN ACT to amend the family court act, in relation to records checks in family offense cases involving custody of, or access to, children

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

Section 1. The first and eighth undesignated paragraphs of section 842 of the family court act, as amended by chapter 335 of the laws of 2019, are 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 article, 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)(1) to refrain from remotely controlling any connected devices affecting the home, vehicle or property of the person protected by the order.

(2) For purposes of this subdivision, "connected device" shall mean any device, or other physical object that is capable of connecting to the internet, directly or indirectly, and that is assigned an internet protocol address or bluetooth address; and

(l) 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. Prior to ordering custody pursuant to this paragraph, the court shall direct a review, in accordance with section six hundred fifty-one of this act, of the reports of the sex offender registry established and maintained pursuant

to section one hundred sixty-eight-b of the correction law, reports of the statewide computerized registry of orders of protection established and maintained pursuant to section two hundred twenty-one-a of the executive law, related decisions in court proceedings under article ten of this act and all warrants issued under this act. Nothing in this section gives the court power to place or board out any child or to commit a child to an institution or agency.

Notwithstanding the provisions of section eight hundred seventeen of this article, where a temporary order of child support has not already been issued, the court may in addition to the issuance of an order of protection pursuant to this section, issue an order for temporary child support in an amount sufficient to meet the needs of the child, without a showing of immediate or emergency need. The court shall make an order for temporary child support notwithstanding that information with respect to income and assets of the respondent may be unavailable. Where such information is available, the court may make an award for temporary child support pursuant to the formula set forth in subdivision one of section four hundred thirteen of this act. Temporary orders of support issued pursuant to this article shall be deemed to have been issued pursuant to section four hundred thirteen of this act.

Upon making an order for temporary child support pursuant to this subdivision, the court shall advise the petitioner of the availability of child support enforcement services by the support collection unit of the local department of social services, to enforce the temporary order and to assist in securing continued child support, and shall set the support matter down for further proceedings in accordance with article four of this act.

Where the court determines that the respondent has employer-provided medical insurance, the court may further direct, as part of an order of temporary support under this subdivision, that a medical support execution be issued and served upon the respondent's employer as provided for in section fifty-two hundred forty-one of the civil practice law and rules.

Notwithstanding the provisions of section eight hundred seventeen of this article, where a temporary order of spousal support has not already been issued, the court may, in addition to the issuance of an order of protection pursuant to this section, issue an order directing the parties to appear within seven business days of the issuance of the order in the family court, in the same action, for consideration of an order for temporary spousal support in accordance with article four of this act. If the court directs the parties to so appear, the court shall direct the parties to appear with information with respect to income and assets, but a temporary order for spousal support may

be issued pursuant to article four of this act on the return date notwithstanding the respondent's default upon notice and notwithstanding that information with respect to income and assets of the petitioner or respondent may be unavailable.

In any proceeding in which an order of protection or temporary order of protection or a warrant has been issued under this section, the clerk of the court shall issue to the petitioner and respondent and his or her counsel and to any other person affected by the order a copy of the order of protection or temporary order of protection and ensure that a copy of the order of protection or temporary order of protection 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 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.

§2. This act shall take effect immediately.

9. Reentry of former foster care children into foster care
[F.C.A. §§355.3, 756-a, 1055, 1088, 1091; S.S.L. §409-a; Exec. L. §501]

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,[7] the statute has proven invaluable in preventing future societal costs by ensuring that the youth will have the support necessary to fulfill the commitments that they must make to participate in educational or vocational programs as a condition of reentry into care.

The Family Court Advisory and Rules Committee is submitting this measure to extend the option of foster care reentry to a discrete group of youth not covered by chapter 342 who would benefit significantly from it. In addition to the rare cases of youth who "age out" of foster care at the age of 18, the measure would also apply to the limited number of youth who were discharged from foster care on or after attaining the age of 16 but who are or are likely to be homeless unless returned to foster care. Like the youth who have "aged out," the measure would provide that such youth would not be able to petition to reenter foster care until they reach the age of 18. In order to accommodate this category, youth who have been discharged prior to their 18th birthday would have to make their reentry applications prior to their 20th birthday. The requirement to make the application within 24 months of discharge from foster care would continue to apply to youth discharged on or after their 18th birthday.

The inclusion of youth discharged prior to reaching 18 in the definition of "former foster care youth" is critically important as providers of services to runaway and homeless youth have reported a significant influx of these youth in their shelters – youth who would be better served and for a longer period of time by a return to foster care than by the temporary shelter available from these providers. Recognizing the efficacy of returning to foster care as a means of reducing the prevalence of former foster care youth in homeless youth facilities, the Article VII language bill accompanying the Fiscal Year 2017-2018 New York State budget amended the *Runaway and Homeless Youth Act* [Executive Law §532-b(1)(h)] to require that runaway and homeless youth crisis services programs "provide information to eligible youth about their ability to reenter foster care" in accordance with this statute. See L. 2017, c. 56, Part M, §3.

Additionally, the measure would clarify an aspect of the statute that has caused some confusion, that is, the categories of former foster care youth to which the statute applies. "Former foster care youth" is not defined in Family Court Article 10-B and, although referenced in the permanency hearing provisions (Family Court Act Article 10-A), no specific cross-references are contained in provisions applicable to juvenile delinquents or Persons in Need of Supervision (PINS). The Committee's measure would remedy that gap by amending the post-dispositional provisions regarding extensions of placement in the juvenile delinquency and PINS statutes

[7] 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].

[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 also include the small number of juvenile delinquents placed by Family Courts in counties outside New York City, who were discharged from non-secure or limited-secure care placements with the New York State Office of Children and Family Services (NYS OCFS).[8]

The Committee's proposal would codify the only appellate ruling on the statute to date and is consistent with the position taken by the NYS OCFS, the oversight agency for foster care in New York. The Appellate Division, Second Department, in Matter of Jefry H., 102 A.D.3d 132, 955 N.Y.S.2d 90 (2nd Dept., 2012), reversed a Family Court decision in which the judge had construed the absence of specific language to mean that the statute did not cover PINS cases. In holding that Family Court Act §1091 does apply to PINS who had been placed in foster care, the Appellate Division noted that the rationale for enacting chapter 342 applies with equal force to all foster care youth discharged from care. The Court further noted the broad interpretation accorded to the scope of the statute by the NYS OCFS. *Id.* Consistent with Federal requirements to treat all categories of youth eligible to receive foster care assistance under Title IV-E of the *Social Security Act* identically, the NYS OCFS, in its administrative memorandum to local social services districts, indicated that the statute applied to all former foster care youth, including former foster care youth placed with local departments of social services. *See* 11-OCFS ADM-02 (March 3, 2011) at pps 2, 7.

Professor Merril Sobie, in his 2012 Practice Commentary to Family Court Act §1091, indicated that "[t]he language strongly suggests that the statute applies to each and every foster child, and is not limited to children who have been placed as a result of an Article 10 [child protective] proceeding." Writing before the Appellate Division reversal in Matter of Jefry H., Prof. Sobie continued:

> It would have been preferable if Article 10-B had been drafted to explicitly apply to non-Article 10 placements. (See, by comparison, Section 1087(a), which enumerates the placements for which Article 10-A applies.) But the lack of an explicit provision is not necessarily dispositive. It's difficult to conceive that the Legislature intended to differentiate or discriminate between similarly situated "former foster care youth", or that the legislative decision to craft a separate article excludes non-Article 10 children (if Section 1091 was intended to be limited to Article 10 placements, it would have presumably been added to that Article). The issue will probably be raised and determined at the Appellate Division level (unless the Legislature quickly amends Section 1091).

[8] With the implementation of the "Close to Home" program in New York City, the New York City Family Court only places delinquent youth with the New York City Administration for Children's Services, except for a small number placed restrictively with NYS OCFS, a category not covered by the existing reentry statute or the measure.

Predictably, most youth returning to foster care are those who had been placed pursuant to child protective proceedings, but the option is equally vital for those youth in the juvenile justice system who have been placed with local social services districts. As the Supporting Memorandum for chapter 342 stated:

> Although the Family Court Act permits [foster care youth] to consent to continued foster care with its attendant supports and services until they reach the age of 21, many make precipitous decisions to show their independence and refuse to consent to remain in care even when they are desperately in need of assistance. Youth living in intact families are not faced with such decisions; they may leave home to attend college, but they do not abruptly terminate all connections with their families and often continue to receive financial and other aid. Youth leaving foster care, in contrast, often have no family to fall back on. For them, independent living' may be akin to falling off a precipice.

[Assembly Mem in Support, Bill Jacket, L. 2010, c. 342 at 8]

The well-documented problems faced by former foster care youth – increased incidence of school drop-out, homelessness, unemployment, criminality and teen pregnancy[9] – afflict such youth regardless of the ages at which they are discharged and may be even more serious with respect to the vulnerable juvenile justice population upon discharge from care. In its memos to the Governor regarding chapter 342, both the Division of the Budget and NYS OCFS noted the additional costs to counties from these adverse consequences that would be averted by permitting the option for youth to reenter foster care. *See* Memo of Division of the Budget and Letter from NYS OCFS General Counsel, Bill Jacket, L. 2010 c. 342. Codification of Matter of Jefry H. through enactment of the Committee's proposal, as well as extension of the option to youth discharged prior to their 18th birthday, therefore, will provide a cost-effective avenue to support particularly vulnerable youth as they make the difficult transition from foster care to successful, productive and law-abiding adulthood.

Proposal

AN ACT to amend the family court act, in relation to reentry of former foster care children into foster care

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

Section 1. Subdivision 6 of section 355.3 of the family court act, as amended by part www of chapter 59 of the laws of 2017, is amended and a new subdivision 7 is added 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

[9] *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).

consent for acts committed before the respondent's sixteenth birthday and in no event past [the child's] his or her twenty-first birthday except as provided in subdivision four of section 353.5 of this act.

7. A youth who was formerly a respondent pursuant to this article may be eligible to file a motion pursuant to article ten-b of this act and may be subsequently placed into foster care or receive services in accordance with such article, section four hundred nine-a of the social services law or section five hundred one of the executive law, as applicable.

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

(h) A youth who was formerly a respondent pursuant to this article shall be eligible to file a motion pursuant to article ten-b of this act and may be subsequently placed into foster care or receive services in accordance with such article, section four hundred nine-a of the social services law or section five hundred one of the executive law, as applicable.

§3. Paragraph (i) and subparagraph (A) of paragraph (ii) of subdivision (e) of section 1055 of the family court act, as amended by chapter 346 of the laws of 2020, are amended to read as follows:

(i) No placement may be made or continued under this section beyond the child's eighteenth birthday without his or her consent and in no event past his or her twenty-first birthday. However, a former foster youth [under the age of twenty-one who was previously discharged from foster care due to a failure to consent to continuation of placement], as defined in section one thousand ninety-one of this act, may make a motion pursuant to such 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. In such motion, the youth must consent to enrollment in and attendance at a vocational or educational program in accordance with paragraph two of subdivision (a) of section one thousand ninety-one of this act.

(A) A former foster care youth [under the age of twenty-one who was previously discharged from foster care due to a failure to consent to continuation of placement pursuant to] , as defined in section one thousand ninety-one of this act, may:

§4. 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-one 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 article ten-b 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 had been placed.

§5. Section 1091 of the family court act, as amended by chapter _34 of the laws of 2021, is amended to read as follows:

§1091. Motion to return to foster care placement.

(a) For purposes of this article:

(1) the term "former foster care youth" shall mean

(i) a youth who has attained the age of eighteen but is under the age of twenty-one and who had been discharged from a foster care setting on or after: (A). attaining the age of eighteen due to a failure to consent to continuation in foster care; or (B) attaining the age of sixteen but who is or is likely to be homeless unless returned to foster care; and

(ii) a youth who was: (A) placed in foster care with a local social services district or authorized agency, as applicable, 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

(B) freed for adoption in accordance with section six hundred thirty-one 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

(C) placed with the office of children and family services as a juvenile delinquent for a non-secure level of care pursuant to article three of this act,

(2) the term "foster care setting" shall not include placements in: (i) a limited secure or secure level of care with the office of children and family services; or (ii) a limited secure level of care where the placement was made in a county that has an approved "close to home" program pursuant to section four hundred and four of the social services law.

(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], to the district from which the youth was most recently discharged, or, either in the case of a youth previously placed with the office of children and family services for placement in an authorized agency or of a child freed for adoption, to the social services district or authorized agency into whose custody and guardianship the child had been placed, may be made by such former foster care youth, or by [a] the applicable official of the local social services [official] district, authorized agency or state office of children and family services 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)(1) With respect to a former foster care youth discharged on or after his or her eighteenth birthday, the court shall not entertain a motion filed after twenty-four months from the date of the first final discharge that occurred on or after the former foster care youth's eighteenth birthday; provided further, however, that during the state of emergency declared pursuant to Executive Order 202 of 2020 in response to the novel coronavirus (COVID–19) pandemic or any extension or subsequent executive order issued, a former foster care youth shall be entitled 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 without making a motion pursuant to this section and, to the extent federally allowable, any requirement to enroll in and attend an educational or vocational program shall be waived for the duration of the state of emergency. Subsequent to a former foster youth's return to placement without making a motion, as authorized under this section during the state of emergency declared pursuant to Executive Order 202 of 2020 or any extension or subsequent executive order issued in response to the

novel coronavirus (COVID–19) pandemic, nothing herein shall prohibit the local social services district from filing a motion for requisite findings needed to subsequently claim reimbursement under Title IV–E of the federal social security act to support the youth's care, and the family court shall hear and determine such motions.

(2) With respect to a former foster care youth discharged prior to his or her eighteenth birthday, the court shall not entertain a motion filed after his or her twentieth birthday; provided further, however, that during the state of emergency declared pursuant to Executive Order 202 of 2020, or any extension or subsequent order issued, such former foster youth shall be entitled 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 without making a motion in accordance with paragraph one of this subdivision.

[(a)] (d) A motion made pursuant to this [section] article by [a] the applicable official of the local social services [official] district, authorized agency or state office of children and family services shall be made by order to show cause. Such motion shall show by affidavit or other evidence that:

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

(2) preventive services under section four hundred nine-a of the social services law or section five hundred one of the executive law, as applicable, have been offered to the former foster care youth but would not avert the need for foster care;

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

[(4)](5) the former foster care youth consents to the re-entry into foster care; and

(6) in the case of a former foster care youth discharged from foster care on or after attaining the age of sixteen, the youth is or is likely to be homeless unless returned to foster care.

[(b)](e) A motion made pursuant to this [section] article by a former foster care youth shall be made by order to show cause [or] on ten days notice to the applicable official of the local social services [official] district, authorized agency or state office of children and family services. Such motion shall show by affidavit or other evidence that:

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

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

(ii) the applicable official of the local social services district, authorized agency or state office of children and family services refuses to consent to the re-entry of such former foster care youth [and that such refusal is unreasonable].

[(c)](f) (1) If at any time during the pendency of a proceeding brought pursuant to this [section] article, the court finds a compelling reason that it is in the best interests of the former foster care youth to be returned immediately to the custody of the applicable local commissioner of social services or [other officer, board or department authorized to receive children as public charges] official of the applicable authorized agency or state office of children and family services, pending a final decision on the motion, the court may issue a temporary order returning the youth to the custody of [the] such local commissioner of social services or other [officer, board or department authorized to receive children as public charges] official.

(2) Where the applicable official of the local social services district, authorized agency or state office of children and family services has refused to consent to the re-entry of a former foster care youth, [and where it is alleged pursuant to paragraph two of subdivision (b) 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 re-enter care is unreasonable if:

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

(ii) preventive services under section four hundred nine-a of the social services law or section five hundred one of the executive law, as applicable, have been offered to the former foster care youth but would not avert the need for foster care;

(iii) 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)](iv) re-entry into foster care is in the best interests of the former foster care youth.

(3) Upon making a determination on a motion filed pursuant to this [section] article, where a motion has previously been granted pursuant to this [section] article, in addition to the applicable

findings required by this [section] article, the court shall grant the motion to return a former foster care youth to the custody of the applicable local commissioner of social services or [other officer, board or department authorized to receive children as public charges] official of the applicable authorized agency or state office of children and family services, only:

(i) upon a finding that there is a compelling reason for such former foster care youth to return to care;

(ii) if preventive services under section four hundred nine-a of the social services law or section five hundred one of the executive law, as applicable, have been offered to the former foster care youth but would not avert the need for foster care;

(iii) 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)](iv) 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.

§ 6. Section 409-a of the social services law is amended by adding a new subdivision 1-a to read as follows:

1-a. In relation to former foster care youth, as such term is defined in subparagraph (i) and clause (A) or (B) of subparagraph (ii) of paragraph (1) of subdivision (a) of section one thousand ninety-one of the family court act, if a former foster care youth between the ages of eighteen and twenty-one seeks additional services or supports from a social services district that the youth was previously in the care and custody or care, custody or guardianship of, such social service districts shall:

(a) provide referrals to services that may be beneficial based on the particular circumstances of such youth that the youth may be eligible for;

(b) offer case management services to such youth until such time as such youth turns age twenty-one; and

(c) provide information to such youth on re-entry into foster care pursuant to article ten-b of the family court act.

§7. Section 501 of the executive law is amended by adding a new subdivision 15-a to read as follows:

15-a. In relation to former foster care youth, as such term is defined in clause (C) of subparagraph (ii) of paragraph (1) of subdivision (a) of section one thousand ninety-one of the family court act, if a

former foster care youth between the ages of eighteen and twenty-one seeks additional services or supports from the office, the office shall:

(a) provide referrals to services that may be beneficial based on the particular circumstances of such youth that the youth may be eligible for;

(b) offer case management services to such youth until such time as such youth turns age twenty-one; and

(c) provide information to such youth on re-entry into foster care pursuant to article ten-b of the family court act.

§8. Subdivision 5 of section 507-a of the executive law, as amended by part www of chapter 59 of the laws of 2017, is amended to read as follows:

5. Consistent with other provisions of law, in the discretion of the commissioner of the office of children and family services, youth placed within the office under the family court act who attain the age of eighteen while in custody of the office and who are not required to remain in the placement with the office as a result of a dispositional order of the family court may reside in a placement in an authorized agency or a non-secure facility until the age of twenty-one, provided that such youth attend a full-time vocational or educational program and are likely to benefit from such program.

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

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

In 1979, the United States Supreme Court, in Caban *v.* Mohammed, 441 US 388 (1979), held a statute unconstitutional that failed to afford a birth father the right to consent to his child's adoption, where he had lived with the mother, admitted paternity and had a substantial relationship with, and provided support to, the child. Following Caban, the Legislature enacted new criteria defining those alleged or unwed fathers who are entitled to consent to adoptions ("consent fathers") and those who are entitled simply to notice of termination of parental rights, surrender and adoption proceedings ("notice-only fathers"). Those entitled to notice only may be heard regarding the children's best interests but do not have veto power over their adoptions. L.1980, c. 575. Notwithstanding the Legislature's goals of providing "reasonable, unambiguous and objective" criteria for notice and consent,[10] experience with the 1980 statute has demonstrated that it fulfills none of those intentions. The Family Court Advisory and Rules Committee is, therefore, proposing this measure to expand and objectify both the criteria for non-marital parents to consent to adoptions and the criteria for those entitled to notice of, but not veto power over, adoptions.

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

In addition to clarifying the initial benchmark, the Committee's proposal incorporates well-established objective criteria into the determination of whether a non-marital parent, who did not give birth to the child, is a "consent" parent. "Consent" parents would include those who have established legal parentage in a timely manner by having been adjudicated as the parent either by a court of competent jurisdiction or by having acknowledged parentage in a form recognized by the jurisdiction in which it was executed to have the force and effect of an order of parentage. The Committee's proposal

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

sets time limits for the unwed parent's establishment of parentage that are consistent with a child's need for prompt resolution of permanency issues: to qualify as a consent parent under DRL § 111(1)(d), the unwed parent's legal parentage must be established within six months of the child's first entry into foster care or be the result of a court action filed within six months of the child's birth, so long as that matter was actively prosecuted from the time of filing until the order was entered.

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

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

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

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

In the absence of statutory guidance, courts have had to determine on a case-by-case basis whether the consent of a parent of an infant born out-of-wedlock is required before an adoption can be approved. This process undermines the confidence with which adoptions can be planned and impedes

the achievement of permanent homes for children by significantly complicating the litigation. Moreover, as noted with respect to older children under DRL §111(1)(d), in seeking to apply the judicially created criteria to determine whether a given unwed parent's consent should be required for adoption of a child under the age of six months, courts struggle with the ambiguous "placed for adoption" benchmark. The Committee's measure thus applies DRL §111(1)(e) to infants born within six months of "the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earliest."

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

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

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

The final criterion establishing "consent" parent status in the Committee's proposal is the requirement that within 30 days of receiving notice of an adoption proceeding, termination of parental rights proceeding, proceeding to grant temporary guardianship of the child to a proposed adoptive parent or notice of the commitment of guardianship and custody of the child by voluntary surrender instrument, the alleged parent must file a motion to intervene in the proceeding, including an assertion of parentage and request for custody. Significantly, the measure provides that the alleged parent's consent shall not be required unless and until parentage is in fact legally established.

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

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

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

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

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

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

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

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

Proposal

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

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

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

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

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

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

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

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

(iii) maintained substantial and continuous or repeated contact with the child as manifested by[: (i)] the payment by the [father] parent toward the support of the child of a fair and reasonable sum that has been judicially ordered or assessed, according to [the father's] his or her means, where such payment has not been prevented by the agency or person or persons caring for the child, and either [(ii) the father's]

A. visiting the child at least [monthly] twice per month when physically and financially

able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or [(iii) the father's regular communication]

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

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

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

judicially ordered or assessed, unless prevented from so doing by the person or agency having lawful custody of the child; and (iv) upon receiving notice of an adoption proceeding pursuant to the provisions of this chapter, or a notice of a proceeding to terminate parental rights pursuant to section three hundred eighty-four-b of the social services law, or a notice of the commitment of the guardianship and custody of the child by voluntary surrender instrument pursuant to section three hundred eighty-three-c or section three hundred eighty-four of the social services law, or a notice of a proceeding to grant temporary guardianship of the child to a proposed adoptive parent pursuant to section one hundred fifteen-c of this article, such parent filed a motion to intervene in the proceeding, including an assertion of parentage and a request for custody, within thirty days of the date of such notice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c)] any person who has timely filed an unrevoked notice of intent to claim [paternity]

parentage of the child, pursuant to section three hundred seventy-two-c of this chapter;

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

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

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

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

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

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

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

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

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

III. Previously Submitted Proposals

1. Discovery in juvenile delinquency proceedings in Family Court
[F.C.A. §§330.1, 331.1-331.13; Jud. L. §325]

The reforms enacted during the 2019 New York State legislative session regarding discovery in criminal cases had been long in coming and represented major progress in bringing New York into line with the prevailing trend in other states and with applicable national standards. *See* L.2019, c. 59, Part LLL. Similar to the discovery provisions in states, such as Massachusetts, New Jersey, California, Illinois and Michigan, the new statute requires broad discovery at a far earlier point in the proceedings than was the case prior to its effective date of January 1, 2020. Reversing decades of inaction, the Legislature repealed Article 240 of the Criminal Procedure Law, which had been one of the narrowest discovery laws in the nation, and replaced it with a new Article 245 designed to expedite proceedings by linking discovery time-frames to the date of arraignment, rather than the date of trial. As noted in the Briefing Book accompanying the proposed FY 2019 Executive Budget, New York had been one of only ten states that did not require disclosure of key evidence until the day of trial.

However, the new legislation failed to address a significant segment of the justice system, namely, young people prosecuted as juvenile delinquents in Family Court, including the 16- and 17-year old juveniles accused of misdemeanors and non-violent felonies whose cases are either initiated in or removed to Family Court under the recent raise-the-age law [L. 2017, c. 59, part www]. Subdivision one of section 303.1 of the Family Court Act specifically provides that "[t]he provisions of the criminal procedure law shall not apply to proceedings under this [juvenile delinquency] article unless the applicability of such provisions are specifically prescribed by this [Family Court] act." Thus, without either an incorporation of the new law by reference or specific enactment in the Family Court Act, the new Article 245 of the Criminal Procedure Law, with its attendant disclosure obligations for both the defense and prosecution, has no applicability in juvenile delinquency proceedings. Those proceedings remain governed by the Family Court Act version of the now-obsolete Article 240 of the Criminal Procedure Law as set forth in Family Court Act §§331.1 - 331.7.

Ironically, accused juvenile offenders, ages 13, 14 and 15, as well as 16- and 17-year old accused adolescent offenders whose violent felony cases are retained in Youth Parts in superior courts have the benefit of the new laws while their peers in Family Court, who are either younger or accused of less violent crimes do not.

To address this anomaly, the Family Court Advisory and Rules Committee has developed a proposal to adapt the new Article 245 of the CPL into new sections 331.1 through 331.13 of the Family Court Act. With no grand jury indictments or jury trials and with flat trial and detention time-frames far shorter than in criminal proceedings, juvenile delinquency proceedings proceed significantly more quickly than adult proceedings – requiring fact-finding hearings (trials) within three days of the initial appearance for juveniles in detention on less than Class C felony charges, within 14 days for juveniles detained on Class A, B or C felony charges and within 60 days for non-detained juveniles, with limited adjournments possible. *See* Family Court Act §340.1. Thus,

the adaptation of Article 245 into the Family Court Act requires modifications of the CPL time-frames. Similar to the original adaptation of CPL Article 240 into the current Family Court Act, the time-frames, therefore, as well as terminology,[11] are the key differences between the Committee's proposal and CPL Article 245 upon which it is based.

The key provisions of the proposed measure include the following:

• To the extent that presentment agencies have the items in their possession, Family Court Act §331.1 would require them to disclose police or law enforcement reports, electronic recordings and exculpatory evidence to the juveniles' attorneys at the juveniles' initial appearances.

• Family Court Act §331.2 would require presentment agencies to fulfill their automatic discovery obligations – a list of items set forth in Family Court Act §331.3 that is similar to CPL Article 245 – within the earlier of 15 calendar days after the initial appearance or not later than three days prior to the first scheduled trial date. If the discovery is voluminous – in actuality a rarity in juvenile delinquency cases – the presentment agency may obtain an extension of ten calendar days or three days if the accused juvenile is in detention. The juvenile respondent's counsel would need to comply with the reciprocal discovery requirements not more than 25 days after the presentment agency has provided a certificate of compliance or not later than three days prior to the fact-finding hearing, whichever is earlier. These time-frames can be modified by the Family Court for good cause based upon the needs of the case, whether or not the juvenile is in detention and the "need for a fair and expeditious resolution" of the case.

• As in CPL Article 245, both the presentment agency and the juvenile's attorney would be required to submit certificates of compliance with discovery, convene discovery conferences, maintain open communication and fulfill their continuing disclosure obligations under proposed sections 331.6, 331.8 and 331.9 of the Family Court Act.

• Also similar to CPL Article 245, proposed Family Court Act §§331.11 and 331.12 provide that attorneys may seek protective orders upon a showing of good cause and the Family Court may impose appropriate sanctions for attorneys' noncompliance with discovery responsibilities.

• Proposed Family Court Act §331.13 prohibits adverse inferences from being drawn from attorneys' statements during the discovery process of their intention to call particular witnesses or submit items of evidence.

• Conforming amendments would be made to correct citations in Family Court Act §330.1 and Judiciary Law §325.

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[11] In juvenile delinquency proceedings, for example, arraignments are referred to as "initial appearances," trials as "fact-finding hearings," defendants as "respondents," prosecutors as "presentment agencies," pleas of guilty as "admissions," and sentences as "dispositions."

In implementing the recent raise-the-age law, a critically important operating principle has been that juveniles should not be disadvantaged by their prosecution in Family Court, rather than in criminal courts. Likewise, in recognition of the fact that Family Court Act §301.1 states that the purpose of juvenile delinquency proceedings is "to establish procedures in accordance with due process of law," it is essential that all youth under 18 prosecuted in the Family Court be provided with discovery commensurate with that provided to adults and to their peers charged with felonies in criminal courts. Further, it should be recognized that enactment of this measure would benefit presentment agencies and the courts, as well as accused juveniles. Expeditious, broad discovery allows all parties to weigh the strength of their respective cases and where appropriate, will spur more expeditious disposition of juvenile delinquency matters through admissions or other non-adversarial means of resolution, grounded, as is required by the Criminal Justice Standards of the American Bar Association,[12] by a fully informed assessment of the evidence in the case.

Proposal

AN ACT to amend the family court act and the judiciary law, in relation to discovery provisions applicable to 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. Sections 331.1, 331.2, 331.3, 331.4, 331.5, 331.6 and 331.7 of the family court act are REPEALED.

§ 2. The family court act is amended by adding thirteen new sections 331.1, 331.2, 331.3, 331.4, 331.5, 331.6, 331.7, 331.8, 331.9, 331.10, 331.11, 331.12 and 331.13 to read as follows:

§ 331.1. Initial appearance. 1. Disclosure. At the respondent's initial appearance, as defined in section 320.1 of this article, the presentment agency shall disclose to the respondent:

(a) any police or other law enforcement agency reports and written witness statements relating to the juvenile delinquency proceeding against the respondent that are within the presentment agency's possession at that time;

(b) electronic recordings relating to the juvenile delinquency proceeding against the respondent that are within the presentment agency's possession at that time, in accordance with paragraph (g) of subdivision one of section 331.3 of this part; and

(c) exculpatory information known to the presentment agency at that time.

[12] American Bar Association Criminal Justice Standards, *Prosecution Function Standards* §3-5.6 and *Defense Function Standards* §§4-6.1, 4-6.2 (4th Ed., 2017)(available at: https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition, and https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.

2. Copy of records. If in the exercise of reasonable diligence and due to the limited availability of resources for downloading or copying recordings, a copy of an electronic recording discoverable under this section is unavailable at the initial appearance, a copy shall be made and disclosed to the respondent as soon as practicable but not later than five calendar days after the initial appearance, provided, however, that if the respondent is in detention, a copy shall be made not later than three days after the initial appearance. Portions of materials under this section claimed to be non-discoverable may be withheld pending a prompt request by the presentment agency for a determination and ruling of the court under section 331.11 of this part; but the discoverable portions of such materials shall be disclosed to the extent practicable.

§ 331.2. Timing of discovery after the initial appearance.

1. Presentment agency's performance of obligations.

(a) The presentment agency shall perform its initial discovery obligations under subdivision one of section 331.3 of this part as soon as practicable but not later than fifteen calendar days after the respondent's initial appearance or not later than three days prior to the first scheduled fact-finding hearing date, whichever is earlier. Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under section 331.11 of this part; but the respondent shall be notified in writing that information has not been disclosed under a particular subdivision of this section, and the discoverable portions of such materials shall be disclosed to the extent practicable. When the discoverable materials are exceptionally voluminous, the time periods in this paragraph may be stayed by up to an additional ten calendar days or, if the respondent is in detention, up to an additional period of three days without need for a motion pursuant to subdivision two of section 331.11 of this part.

(b) The presentment agency shall perform its supplemental discovery obligations under subdivision three of section 331.3 of this part as soon as practicable but not later than fifteen calendar days prior to the first scheduled fact-finding hearing date, unless the respondent is in detention, in which case the presentment agency shall fulfill its supplemental discovery obligations not later than three days prior to the first scheduled fact-finding hearing date.

2. Respondent's performance of obligations. The respondent shall perform his or her discovery obligations under subdivision four of section 331.3 of this part not later than twenty-five calendar days after being served with the presentment agency's certificate of

compliance pursuant to subdivision two of section 331.6 of this part or not later than three days prior to the first scheduled fact-finding hearing date, whichever is earlier. Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under section 331.11 of this part; but the presentment agency shall be notified in writing that information has not been disclosed under a particular section.

3. Timing adjustment. The time periods in this section may be adjusted by the court upon a finding of good cause based upon the needs of the case, the detention status of the respondent and the need for a fair and expeditious resolution of the proceeding.

§ 331.3. Automatic discovery. 1. Initial discovery for the respondent. The presentment agency shall disclose to the respondent, and permit the respondent to discover, inspect, copy, photograph and test, all items and information that relate to the subject matter of the case and are in the possession, custody or control of the presentment agency or persons under the presentment agency's direction or control, including but not limited to:

(a) All written or recorded statements, and the substance of all oral statements, made by the respondent or a co-respondent to a public servant engaged in law enforcement activity or to a person then acting under his or her direction or in cooperation with him or her.

(b) All transcripts of the testimony of a person who has testified before a grand jury in a related criminal proceeding, including but not limited to the respondent or a co-respondent. The presentment agency shall request that the prosecutor of the matter before the grand jury provide a transcript of the testimony and, upon receipt of the request, the prosecutor shall promptly apply to the appropriate criminal court, with written notice to the presentment agency and the respondent, for a written order pursuant to section three hundred twenty-five of the judiciary law releasing a transcript to the presentment agency; provided, however, that the transcripts of the grand jury proceedings in a case removed from the youth part pursuant to article seven hundred twenty-five of the criminal procedure law shall be annexed to the petition or transferred to the family court in accordance with subdivision seven of section 311.1 of this article. If in the exercise of reasonable diligence, and due to the limited availability of transcription resources, a transcript is unavailable for disclosure within the time period specified in subdivision one of section 331.2 of this part, such time period may be stayed by up to an additional fifteen calendar days or, if the respondent is in detention, an additional period of three days, without need for a motion pursuant to subdivision

two of section 331.11 of this part; provided, however, that such disclosure shall be made as soon as practicable and not later than fifteen calendar days prior to the first scheduled fact-finding hearing date, unless the respondent is in detention, in which case such disclosure shall be made not later than three days prior to the first scheduled fact-finding hearing date, unless an order is obtained pursuant to section 331.11 of this part. When the court is required to review grand jury transcripts, the presentment agency shall disclose such transcripts to the court expeditiously upon receipt by such agency, notwithstanding the otherwise applicable time periods for disclosure in this part.

(c) The names of, and adequate alternative contact information for, all persons other than law enforcement personnel whom the presentment agency knows to have evidence or information relevant to any act of juvenile delinquency charged or to any potential defense thereto, including a designation by the presentment agency as to which of those persons may be called as witnesses. Nothing in this paragraph shall require the disclosure of physical addresses; provided, however, upon a motion and good cause shown the court may direct the disclosure of a physical residence. Information under this subdivision relating to a confidential informant may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 331.11 of this part; but the presentment agency shall notify the respondent in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.

(d) The name and work affiliation of all law enforcement personnel whom the presentment agency knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the presentment agency as to which of those persons may be called as witnesses. Information under this subdivision relating to undercover personnel may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 331.11 of this part; but the presentment agency shall notify the respondent in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.

(e) All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto, including all police reports, notes of police and other investigators, and law enforcement agency reports. This provision also includes statements, written or recorded or summarized in any writing or recording, by persons to be called as witnesses at pre-fact-finding

hearings.

(f) Expert opinion evidence, including the name, business address, current curriculum vitae, a list of publications, and all proficiency tests and results administered or taken in the current employment or within the past ten years, whichever is longer, of each expert witness whom the presentment agency intends to call as a witness at the fact-finding hearing or at a pre-trial motion hearing, and all reports prepared by the expert that pertain to the case, or if no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If in the exercise of reasonable diligence this information is unavailable for disclosure within the time period specified in subdivision one of section 331.2 of this part, that period shall be stayed without need for a motion pursuant to subdivision two of section 331.11 of this part; except that the presentment agency shall notify the respondent in writing that such information has not been disclosed, and such disclosure shall be made as soon as practicable and not later than fifteen calendar days prior to the first scheduled fact-finding hearing date, or, if the respondent is in detention, not later than three days prior to the first scheduled fact-finding hearing date, unless an order is obtained pursuant to section 331.11 of this part. When the presentment agency's expert witness is being called in response to disclosure of an expert witness by the respondent, the court shall alter a scheduled fact-finding hearing date, if necessary, to allow the presentment agency fifteen calendar days to make the disclosure and the respondent fifteen calendar days to prepare and respond to the new materials, unless the respondent is in detention, in which case the court may alter the scheduled fact-finding hearing date, if necessary, to allow the presentment agency an additional three days to make the disclosure and the respondent three days to prepare and respond to the new materials.

(g) All tapes or other electronic recordings, including all electronic recordings of 911 telephone calls made or received in connection with the alleged incident of juvenile delinquency, and a designation by the presentment agency as to which of the recordings under this paragraph the presentment agency intends to introduce at fact-finding hearing or a pre-trial motion hearing. If the discoverable materials under this paragraph exceed ten hours in total length, the presentment agency may disclose only the recordings that it intends to introduce at a fact-finding hearing or a pre-fact-finding hearing, along with a list of the source and approximate quantity of other recordings and their general subject matter if known, and the respondent shall have the right upon

request to obtain recordings not previously disclosed. The presentment agency shall disclose the requested materials as soon as practicable and not less than fifteen calendar days after the respondent's request, or, if the respondent is in detention, not less than three days after the respondent's request, unless an order is obtained pursuant to section 331.11 of this part.

(h) All photographs and drawings made or completed by a public servant engaged in law enforcement activity, or which were made by a person whom the presentment agency intends to call as a witness at fact-finding or a pre-trial motion hearing or which relate to the subject matter of the proceeding.

(i) All photographs, photocopies and reproductions made by or at the direction of law enforcement personnel of any property prior to its release.

(j) All reports, documents, records, data, calculations or writings, including but not limited to preliminary tests and screening results and bench notes and analyses performed or stored electronically, concerning physical or mental examinations, or scientific tests or experiments or comparisons, relating to the juvenile delinquency proceeding which were made by or at the request or direction of a public servant engaged in law enforcement activity, or which were made by a person whom the presentment agency intends to call as a witness at fact-finding or a pre-trial motion hearing, or which the presentment agency intends to introduce at fact-finding or a pre-trial motion hearing. Information under this paragraph also includes, but is not limited to, laboratory information management system records relating to such materials, any preliminary or final findings of non-conformance with accreditation, industry or governmental standards or laboratory protocols, and any conflicting analyses or results by laboratory personnel regardless of the laboratory's final analysis or results. If the presentment agency submitted one or more items for testing to, or received results from, a forensic science laboratory or similar entity not under the presentment agency's direction or control, the court on motion of a party shall issue subpoenas or orders to such laboratory or entity to cause materials under this paragraph to be made available for disclosure.

(k) All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: (i) negate the respondent's guilt as to a charged act of juvenile delinquency; (ii) reduce the degree of or mitigate the respondent's culpability as to a charged act of juvenile delinquency; (iii) support a potential

defense to a charged act of juvenile delinquency; (iv) impeach the credibility of a testifying presentment agency witness; (v) undermine evidence of the respondent's identity as a perpetrator of a charged act of juvenile delinquency; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate the restrictiveness of the disposition. Information under this subdivision shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the presentment agency credits the information. The presentment agency shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 331.2 of this part.

(l) A summary of all promises, rewards and inducements made to, or in favor of, persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses and copies of all documents relevant to a promise, reward or inducement.

(m) A list of all tangible objects obtained from, or allegedly possessed by, the respondent or a co-respondent. The list shall include a designation by the presentment agency as to which objects were physically or constructively possessed by the respondent and were recovered during a search or seizure by a public servant or an agent thereof, and which tangible objects were recovered by a public servant or an agent thereof after allegedly being abandoned by the respondent. If the presentment agency intends to prove the respondent's possession of any tangible objects by means of a statutory presumption of possession, it shall designate such intention as to each such object. If reasonably practicable, the presentment agency shall also designate the location from which each tangible object was recovered. There is also a right to inspect, copy, photograph and test the listed tangible objects.

(n) Whether a search warrant has been executed and all documents relating thereto, including but not limited to the warrant, the warrant application, supporting affidavits, a police inventory of all property seized under the warrant, and a transcript of all testimony or other oral communications offered in support of the warrant application.

(o) All tangible property that relates to the subject matter of the case, along with a designation of which items the presentment agency intends to introduce in its case-in-chief at a fact-finding hearing or at a pre-trial motion hearing. If in the exercise of reasonable diligence the presentment agency has not formed an intention within the time period specified in subdivision one of section 331.2 of this part that an item under this subdivision will be introduced at

fact-finding hearing or at a pre-trial motion hearing, the presentment agency shall notify the respondent in writing, and the time period in which to designate items as exhibits shall be stayed without need for a motion pursuant to subdivision two of section 331.11 of this part; but the disclosure shall be made as soon as practicable, provided, however, that if the respondent is in detention, such disclosure shall be made no later than three days prior to the first scheduled fact-finding hearing date. All property under this subdivision is subject to the continuing duty to disclose pursuant to section 331.9 of this part.

(p) The results of complete checks of juvenile delinquency fingerprint records or criminal history records, as applicable, as well as any history of juvenile delinquency adjudications known to the presentment agency and not sealed, for all respondents and all persons designated as potential presentment agency witnesses pursuant to paragraph (c) of this subdivision, other than those witnesses who are experts.

(q) When it is known to the presentment agency, the existence of any pending criminal action against all persons designated as potential presentment agency witnesses pursuant to paragraph (c) of this subdivision.

(r) The approximate date, time and place of the offense or offenses charged and of the respondent's seizure and arrest.

(s) In any juvenile delinquency proceeding alleging a violation of the vehicle and traffic law, all records of calibration, certification, inspection, repair or maintenance of machines and instruments utilized to perform any scientific tests and experiments, including but not limited to any test of a person's breath, blood, urine or saliva, for the period of six months prior and six months after such test was conducted, including the records of gas chromatography related to the certification of all reference standards and the certification certificate, if any, held by the operator of the machine or instrument.

(t) Any presentment agency alleging a violation of section 156.05 or 156.10 of the penal law, the time, place and manner such violation occurred.

(u) (i) A copy of all electronically created or stored information seized or obtained by or on behalf of law enforcement from: (A) the respondent as described in subparagraph (ii) of this paragraph; or (B) a source other than the respondent which relates to the subject matter of the proceeding.

(ii) If the electronically created or stored information originates from a device, account, or other electronically stored source that the presentment agency believes the respondent owned, maintained, or had lawful access to and is within the possession, custody or control of the presentment agency or persons under the presentment agency's direction or control, the presentment agency shall provide a complete copy of the electronically created or stored information from the device or account or other source, and a designation by the presentment agency as to which portions it intends to introduce.

(iii) If possession of such electronically created or stored information would be a crime if committed by an adult under New York state or federal law, the presentment agency shall make those portions of the electronically created or stored information that are not criminal to possess available as specified under this paragraph and shall afford counsel for the respondent access to inspect contraband portions at a supervised location that provides regular and reasonable hours for such access, such as a presentment agency's office, police station, or court.

(iv) This paragraph shall not be construed to alter or in any way affect the right to be free from unreasonable searches and seizures or such other rights a suspect or respondent may derive from the state constitution or the United States constitution. If in the exercise of reasonable diligence the information under this paragraph is not available for disclosure within the time period required by subdivision one of section 331.2 of this part, that period shall be stayed without need for a motion pursuant to subdivision two of section 331.11 of this part, except that the presentment agency shall notify the respondent in writing that such information has not been disclosed, and such disclosure shall be made as soon as practicable and not later than fifteen calendar days prior to the first scheduled fact-finding hearing date or, if the respondent is in detention, such disclosure shall be made no later than three days prior to the first scheduled fact-finding hearing date, unless an order is obtained pursuant to section 331.11 of this part.

2. Duties of the presentment agency. The presentment agency shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under subdivision one of this section and to cause such material or information to be made available for discovery where it exists but is not within the presentment agency's possession, custody or control; provided that the presentment agency shall not be required to obtain by subpoena duces tecum material or information which the respondent may thereby obtain. For purposes of subdivision one of this

section, all items and information related to the presentment agency of a charge in the possession of any New York state or local police or law enforcement agency, and any information in the possession of a laboratory having contact with evidence related to the presentment agency of a charge, shall be deemed to be in the possession of the presentment agency. This subdivision shall not require the presentment agency to ascertain the existence of witnesses not known to the police or another law enforcement agency, or the written or recorded statements thereof, under paragraph (c) or (e) of subdivision one of this section.

3. Supplemental discovery for the respondent. The presentment agency shall disclose to the respondent a list of all misconduct and acts of juvenile delinquency of the respondent not charged in the petition, which the presentment agency intends to use at fact-finding hearing for purposes of (a) impeaching the credibility of the respondent, or (b) as substantive proof of any material issue in the proceeding. In addition, the presentment agency shall designate whether it intends to use each listed act for impeachment and/or as substantive proof.

4. Reciprocal discovery for the presentment agency.

(a) The respondent shall, subject to constitutional limitations, disclose to the presentment agency, and permit the presentment agency to discover, inspect, copy or photograph, any material and relevant evidence within the respondent's or counsel for the respondent's possession or control that is discoverable under paragraphs (f), (g), (h), (j), (l) and (o) of subdivision one of this section, which the respondent intends to introduce at fact-finding or a pre-trial motion hearing, and the names, addresses, birth dates, and all statements, written or recorded or summarized in any writing or recording, of those persons other than the respondent whom the respondent intends to call as witnesses at fact-finding hearing or at a pre-trial motion hearing.

(b) Disclosure of the name, address, birth date, and all statements, written or recorded or summarized in any writing or recording, of a person whom the respondent intends to call as a witness for the sole purpose of impeaching a presentment agency witness is not required until after the presentment agency witness has testified at fact-finding hearing.

(c) If in the exercise of reasonable diligence the reciprocally discoverable information under paragraph (f) or (o) of subdivision one of this section is unavailable for disclosure within the time period specified in subdivision two of section 331.2 of this part, such time period shall be stayed without need for a motion pursuant to subdivision two of section 331.11 of this part; but

the disclosure shall be made as soon as practicable, provided, however, that if the respondent is in detention, such disclosure shall be made no later than three days prior to the first scheduled fact-finding hearing date. All reciprocally discoverable information under this subdivision is subject to the continuing duty to disclose pursuant to section 331.9 of this part.

5. Stay of automatic discovery; remedies and sanctions. Sections 331.1 and 331.2 of this part and subdivisions one, two, three and four of this section shall have the force and effect of a court order, and failure to provide discovery pursuant to such section or subdivision may result in application of any remedies or sanctions permitted for noncompliance with a court order under section 331.12 of this part. However, if in the judgment of either party, good cause exists for declining to make any of the disclosures set forth above, such party may move for a protective order pursuant to section 331.11 of this part and production of the item shall be stayed pending a ruling by the court. The opposing party shall be notified in writing that information has not been disclosed under a particular section. When some parts of material or information are discoverable but in the judgment of a party good cause exists for declining to disclose other parts, the discoverable parts shall be disclosed and the disclosing party shall give notice in writing that non-discoverable parts have been withheld.

6. Redactions permitted. Either party may redact social security numbers and tax numbers from disclosures under this part.

7. Presumption of openness. There shall be a presumption in favor of disclosure when interpreting sections 331.1, 331.2 and 331.4 of this part and subdivision one of this section.

§ 331.4. Disclosure prior to an admission by the respondent; waiver of discovery by respondent. 1. Disclosure of crime. Where the presentment agency has made an offer to accept an admission pursuant to section 321.3 of this article to an act that, if committed by an adult, would be a crime, the presentment agency shall disclose to the respondent, and permit the respondent to discover, inspect, copy, photograph and test, all items and information that would be discoverable prior to the fact-finding hearing under subdivision one of section 331.3 of this part and are in the possession, custody or control of the presentment agency. The presentment agency shall disclose the discoverable items and information not less than three calendar days prior to the expiration date of the offer by the presentment agency for the respondent to make an admission or any deadline imposed by the court for acceptance of the offer of an admission.

2. Timing of disclosure. If the presentment agency does not comply with the requirements of this subdivision, then, notwithstanding any other provision of law, such offer shall be deemed available to the respondent until three calendar days after the presentment agency has complied, absent extraordinary circumstances involving new adverse information bearing on the respondent occurring or discovered in the interim that, after appropriate notice and an opportunity for a hearing, are shown by the presentment agency and found by the court. Where the offer of an admission has lapsed or been withdrawn in light of non-compliance by the presentment agency with this subdivision, the respondent may make a motion alleging such non-compliance and the court shall consider the impact of any non-compliance on the respondent's decision to accept or reject the offer of an admission. If the court finds that the non-compliance materially affected the respondent's decision and if the presentment agency declines to reinstate the lapsed or withdrawn plea offer, the court, as a presumptive minimum sanction, shall preclude the admission at trial of any evidence not disclosed as required under this subdivision. The court may take other additional appropriate action as necessary to address the non-compliance.

3. Exception. The rights under this subdivision do not apply to items or information that are the subject of a protective order under section 331.11 of this part; but if such information tends to be exculpatory, the court shall reconsider the protective order.

4. Waiver. A respondent may provide a voluntary, knowing and intelligent waiver in the presence of his or her counsel of his or her rights under this section; but an offer of an admission may not be conditioned on such waiver.

§ 331.5. Court orders for preservation, access or discovery.

1. Order to preserve evidence. At any time, a party may move for a court order to any individual, agency or other entity in possession, custody or control of items which relate to the subject matter of the case or are otherwise relevant, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship to such individual, agency or entity, on condition that the probative value of that evidence is preserved by a specified alternative means.

2. Order to grant access to premises. At any time, the respondent may move for a court order to any individual, agency or other entity in possession, custody or control of a crime scene

or other premises that relates to the subject matter of the case or is otherwise relevant, requiring that counsel for the respondent be granted prompt and reasonable access to inspect, photograph or measure such crime scene or premises, and that the condition of the crime scene or premises remain unchanged in the interim. The court shall consider the respondent's expressed need for access to the premises including the risk that the respondent will be deprived of evidence or information relevant to the case, the position of any individual or entity with possessory or ownership rights to the premises, the nature of the privacy interest and any perceived or actual hardship of the individual or entity with possessory or ownership rights, and the position of the presentment agency with respect to any application for access to the premises. The court may deny access to the premises when the probative value of access to such location has been or will be preserved by specified alternative means. If the court grants access to the premises, the individual or entity with ownership or possessory rights to the premises may request law enforcement presence at the premises while the respondent's counsel or a representative thereof is present.

3. Discretionary discovery by order of the court. The court in its discretion may, upon a showing by the respondent that the request is reasonable and that the respondent is unable without undue hardship to obtain the substantial equivalent by other means, order the presentment agency, or any individual, agency or other entity subject to the jurisdiction of the court, to make available for disclosure to the respondent any material or information which potentially relates to the subject matter of the case and is reasonably likely to be material.

4. Procedure. A motion under this section shall be on notice to any individual, agency or entity affected by the order. A motion may be made orally on the record so long as such notice is provided. The court may, on its own or upon request of any individual, agency or entity affected by the order, modify or vacate the order if compliance would be unreasonable or will create significant hardship to such individual, agency or entity. For good cause shown, the court may permit a party seeking or opposing a discretionary order of discovery under this subdivision, or another affected individual, agency or entity, to submit papers or, for good cause shown, testify on the record ex parte or in camera. For good cause shown, any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal.

§ 331.6. Court ordered procedures to facilitate compliance; certificates of compliance.

1. Discretion of courts. To facilitate compliance with this part, and to reduce or streamline

litigation of any disputes about discovery, the court in its discretion may issue an order:

(a) requiring that the presentment agency and counsel for the respondent diligently confer to attempt to reach an accommodation as to any dispute concerning discovery prior to seeking a ruling from the court;

(b) requiring a discovery compliance conference at a specified time prior to the fact-finding hearing between the presentment agency, counsel for all respondents, and the court or its staff;

(c) requiring the presentment agency to file a certificate of compliance that states that the presentment agency and/or an appropriate named agent has made reasonable inquiries of all police officers and other persons who have participated in investigating or evaluating the case about the existence of any favorable evidence or information within paragraph (k) of subdivision one of section 331.3 of this part, including such evidence or information that was not reduced to writing or otherwise memorialized or preserved as evidence, and has disclosed any such information to the respondent; and/or

(d) requiring other measures or proceedings designed to carry into effect the goals of this part.

2. Certificates of compliance.

(a) When the presentment agency has provided the discovery required by subdivision one of section 331.3 of this part, except for any items or information that are the subject of an order pursuant to section 331.11 of this part, it shall serve upon the respondent and file with the court a certificate of compliance. The certificate of compliance shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the presentment agency has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided. If additional discovery is subsequently provided prior to the fact-finding hearing pursuant to section 331.9 of this part, a supplemental certificate shall be served upon the respondent and filed with the court identifying the additional material and information provided. No adverse consequence to the presentment agency or the prosecutor shall result from the filing of a certificate of compliance in good faith; but the court may grant a remedy or sanction for a discovery violation as provided in section 331.12 of this part.

(b) When the respondent has provided all discovery required by subdivision four of section

331.3 of this part, except for any items or information that are the subject of an order pursuant to section 331.11 of this part, counsel for the respondent shall serve upon the presentment agency and file with the court a certificate of compliance. The certificate shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, counsel for the respondent has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided. If additional discovery is subsequently provided prior to trial pursuant to section 331.9 of this part, a supplemental certificate shall be served upon the presentment agency and filed with the court identifying the additional material and information provided. No adverse consequence to the respondent or counsel for the respondent shall result from the filing of a certificate of compliance in good faith; but the court may grant a remedy or sanction for a discovery violation as provided in section 331.12 of this part.

§ 331.7. Non-testimonial evidence from the respondent; DNA comparison order.

1. Availability. After the filing of the petition, and subject to constitutional limitations, the court may, upon motion of the presentment agency showing probable cause to believe the respondent has committed the act that if committed by an adult would constitute a crime, a clear indication that relevant material evidence will be found, and that the method used to secure such evidence is safe and reliable, require a respondent to provide non-testimonial evidence, including to:

(a) appear in a lineup;

(b) speak for identification by a witness or potential witness;

(c) be fingerprinted if authorized in accordance with section 306.1 of this article;

(d) pose for photographs not involving reenactment of an event, provided respondent is subject to photographing pursuant to section 306.1 of this article;

(e) permit the taking of samples of the respondent's blood, hair, and other materials of the respondent's body that involves no unreasonable intrusion thereof or a risk of serious physical injury thereto;

(f) provide specimens of the respondent's handwriting; and

(g) submit to a reasonable physical or medical inspection of the respondent's body.

2. Limitations. This section shall not be construed to alter or in any way affect the issuance

of a similar court order, as may be authorized by law, before the filing of the petition, consistent with such rights as the respondent may derive from this article, the state constitution or the United States constitution. This section shall not be construed to alter or in any way affect the administration of a chemical test where otherwise authorized. An order pursuant to this section may be denied, limited or conditioned as provided in section 331.11 of this part.

3. DNA comparison order. Where property in the presentment agency's possession, custody, or control consists of a DNA profile obtained from probative biological material gathered in connection with the investigation of the crime, and the respondent establishes:

(a) that such profile complies with federal bureau of investigation or state requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking a keyboard search or similar comparison, and

(b) that the data meets state DNA index system or national DNA index system criteria as such criteria are applied to law enforcement agencies seeking such a keyboard search or similar comparison, the court may, upon motion of a respondent against whom a petition is pending, order an entity that has access to the combined DNA index system or its successor system to compare such DNA profile against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon notice to both parties and the entity required to perform the search, upon a showing by the respondent that such a comparison is material to the presentation of his or her defense and that the request is reasonable. For purposes of this section, a "keyboard search" shall mean a search of a DNA profile against the databank in which the profile that is searched is not uploaded to or maintained in the databank. Nothing in this section authorizes the taking of a DNA profile from the respondent or any other person unless specifically authorized by law.

§ 331.8. Flow of information. 1. Sufficient communication for compliance. The presentment agency shall endeavor to ensure that a flow of information is maintained with the police and other investigative personnel and sufficient to place within the presentment agency's possession or control all material and information pertinent to the respondent and the offense or offenses charged, including, but not limited to, any evidence or information discoverable under paragraph (k) of subdivision one of section 331.3 of this part.

2. Provision of law enforcement agency files. Absent a court order or a requirement that

the respondent's counsel obtain a security clearance mandated by law or authorized government regulation, upon request by the presentment agency, each New York state and local law enforcement agency shall make available to the presentment agency a complete copy of its complete records and files related to the investigation of the case or related to the presentment agency regarding compliance with this part.

3. 911 telephone call and police radio transmission electronic recordings, police-worn body camera recordings and other police recordings.

(a) Whenever an electronic recording of a 911 telephone call or a police radio transmission or video or audio footage from a policeworn body camera or other police recording was made or received in connection with the investigation of an apparent criminal incident, the arresting officer or lead detective shall expeditiously notify the presentment agency in writing upon the filing of the petition of the existence of all such known recordings. The presentment agency shall expeditiously take whatever reasonable steps are necessary to ensure that all known electronic recordings of 911 telephone calls, police radio transmissions and video and audio footage and other police recordings made or available in connection with the case are preserved. Upon the respondent's timely request and designation of a specific electronic recording of a 911 telephone call, the presentment agency shall also expeditiously take whatever reasonable steps are necessary to ensure that it is preserved.

(b) If the presentment agency fails to disclose such an electronic recording to the respondent pursuant to paragraph (e), (g) or (k) of subdivision one of section 331.3 of this part due to a failure to comply with this obligation by police officers or other law enforcement or prosecution personnel, the court upon motion of the respondent shall impose an appropriate remedy or sanction pursuant to section 331.12 of this part.

§ 331.9. Continuing duty to disclose. If either the presentment agency or the respondent subsequently learns of additional material or information which it would have been under a duty to disclose pursuant to any provisions of this part had it known of it at the time of a previous discovery obligation or discovery order, it shall expeditiously notify the other party and disclose the additional material and information as required for initial discovery under this part. This section also requires expeditious disclosure by the presentment agency of material or information that became relevant to the case or discoverable based on reciprocal discovery received from the

respondent pursuant to subdivision four of section 331.3 of this part.

§ 331.10. Work product. This part does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories or conclusions of the adverse party or its attorney or the attorney's agents, or of statements of a respondent, written or recorded or summarized in any writing or recording, made to the attorney for the respondent or the attorney's agents.

§ 331.11. Protective orders. 1. Any discovery subject to protective order. Upon a showing of good cause by either party, the court may at any time order that discovery or inspection of any kind of material or information under this part be denied, restricted, conditioned or deferred, or make such other order as is appropriate. The court may impose as a condition of discovery to a respondent that the material or information to be discovered be available only to counsel for the respondent; or, alternatively, that counsel for the respondent, and persons employed by the attorney or appointed by the court to assist in the preparation of a respondent's case, may not disclose physical copies of the discoverable documents to a respondent or to anyone else, provided that the presentment agency affords the respondent access to inspect redacted copies of the discoverable documents at a supervised location that provides regular and reasonable hours for such access, such as a presentment agency's office, police station, facility of detention, or court. Should the court impose as a condition that some material or information be available only to counsel for the respondent, the court shall inform the respondent on the record that his or her attorney is not permitted by law to disclose such material or information to the respondent. The court may permit a party seeking or opposing a protective order under this section, or another affected person, to submit papers or testify on the record ex parte or in camera. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal. This section does not alter the allocation of the burden of proof with regard to matters at issue, including privilege.

2. Modification of time periods for discovery. Upon motion of a party in an individual case, the court may alter the time periods for discovery imposed by this part upon a showing of good cause.

3. Prompt hearing. Upon request for a protective order, the court shall conduct an

appropriate hearing within three business days to determine whether good cause has been shown and when practicable shall render decision expeditiously. Any materials submitted and a transcript of the proceeding may be sealed and shall constitute a part of the record on appeal.

4. Showing of good cause. In determining good cause under this section the court may consider: constitutional rights or limitations; danger to the integrity of physical evidence or the safety of a witness; risk of intimidation, economic reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person, and the nature, severity and likelihood of that risk; a risk of an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, and the nature, severity and likelihood of that risk; the nature and circumstances of the factual allegations in the case; whether the respondent has a history of witness intimidation or tampering and the nature of that history; the nature of the stated reasons in support of a protective order; the nature of the witness identifying information that is sought to be addressed by a protective order, including the option of employing adequate alternative contact information; danger to any person stemming from factors such as a respondent's substantiated affiliation with a criminal enterprise as defined in subdivision three of section 460.10 of the penal law; and other similar factors found to outweigh the usefulness of the discovery.

5. Successor counsel. In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material or information disclosed subject to a condition that it be available only to counsel for the respondent, or limited in dissemination by protective order or otherwise, shall be provided only to successor counsel for the respondent under the same condition or conditions or be returned to the presentment agency, unless the court rules otherwise for good cause shown or the presentment agency gives written consent. Any work product derived from such material or information shall not be provided to the respondent, unless the court rules otherwise or the presentment agency gives written consent.

6. Compliance with protective order. Any protective order issued under this part is a mandate of the court for purposes of the offense of criminal contempt in subdivision three of section 215.50 of the penal law.

§ 331.12. Remedies or sanctions for non-compliance.

1. Need for remedy or sanction. (a) When material or information is discoverable under this part but is disclosed belatedly, the court shall impose an appropriate remedy or sanction if the

party entitled to disclosure shows that it was prejudiced. Regardless of a showing of prejudice the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material.

(b) When material or information is discoverable under this part but cannot be disclosed because it has been lost or destroyed, the court shall impose an appropriate remedy or sanction if the party entitled to disclosure shows that the lost or destroyed material may have contained some information relevant to a contested issue. The appropriate remedy or sanction is that which is proportionate to the potential ways in which the lost or destroyed material reasonably could have been helpful to the party entitled to disclosure.

2. Available remedies or sanctions. For failure to comply with any discovery order imposed or issued pursuant to this part, the court may make a further order for discovery, grant a continuance, order that a hearing be reopened, order that a witness be called or recalled, draw an adverse inference regarding the non-compliance, preclude or strike a witness's testimony or a portion of a witness's testimony, admit or exclude evidence, order a mistrial, order the dismissal of all or some of the charges, or make such other order as it deems just under the circumstances; except that any sanction against the respondent shall comport with the respondent's constitutional right to present a defense, and precluding a witness from testifying on behalf of the respondent shall be permissible only upon a finding that the respondent's failure to comply with the discovery obligation or order was willful and motivated by a desire to obtain a tactical advantage.

3. Consequences of non-disclosure of statement of witness testifying for the presentment agency. The failure of the presentment agency to disclose any written or recorded statement made by a witness testifying on the agency's behalf, which relates to the subject matter of the witness's testimony, shall not constitute grounds for any court to order a new pre-trial hearing or set aside an adjudication, or reverse, modify or vacate an adjudication, in the absence of a showing by the respondent that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding; provided, however, that nothing in this section shall affect or limit any right the respondent may have to a reopened pre-trial hearing when such statements were disclosed before the close of evidence at the fact-finding hearing.

§ 331.13. Admissibility of discovery. The fact that a party has indicated during the discovery process an intention to offer specified evidence or to call a specified witness is not

admissible in evidence or grounds for adverse comment at a pre-trial or fact-finding hearing.

§ 3. Subdivision 2 of section 325 of the judiciary law, as added by chapter 920 of the laws of 1982, is amended to read as follows:

2. Where an application follows a demand to produce any transcript of testimony at a grand jury proceeding pursuant to paragraph (b) of subdivision [two] one of section [331.2 or paragraph (a) of subdivision one of section 331.4] 331.3 of the family court act the presentment agency and respondent shall be given notice of such application and an opportunity to be heard.

§ 4. Subdivision 5 of section 330.1 of the family court act, as added by chapter 398 of the laws of 1983, is amended to read as follows:

5. Court ordered bill of particulars. Where a presentment agency has timely served a written refusal pursuant to subdivision four of this section and upon motion, made in writing, of a respondent, who has made a request for a bill of particulars and whose request has not been complied with in whole or in part, the court must, to the extent a protective order is not warranted, order the presentment agency to comply with the request if it is satisfied that the items of factual information requested are authorized to be included in a bill of particulars, and that such information is necessary to enable the respondent adequately to prepare or conduct his or her defense and, if the request was untimely, a finding of good cause for the delay. Where a presentment agency has not timely served a written refusal pursuant to subdivision four of this section the court must, unless it is satisfied that the presentment agency has shown good cause why such an order should not be issued, issue an order requiring the presentment agency to comply or providing for any other order authorized by subdivision one of section [331.6] 331.12 of this part.

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

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

A rapidly escalating national consensus is emerging to restrict the routine use of hardware restraints upon children when they appear in court. Two major national organizations– the National Council of Juvenile and Family Court Judges and the American Bar Association – adopted resolutions in 2015 calling for states to enact presumptions against the use of restraints, reserving their use only for cases in which the child poses a demonstrated safety risk to himself or herself or others.[13] Recognizing the particular vulnerability of children, at least 30 states have imposed a presumption against restraints either by statute, court rule or case law; fifteen states have statutes requiring an individualized judicial finding prior to use of restraints, eleven of which afford youth a right to be heard.[14] Most recently, presumptions against routine restraints and processes similar to the Committee's proposal have been established in Delaware, Connecticut, Indiana, Nebraska and Nevada by statute, in Washington, D.C. by Administrative Order of the Superior Court and in Illinois, Ohio, North Dakota, Utah, Iowa and Tennessee by court rule.[15] 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."[16] Following this trend, the Family Court Advisory and Rules Committee is proposing to amend the Family Court Act to create a new section 162-a, applicable to youth under the age of 21 when they appear in Family Court in all categories of Family Court proceedings.

The Committee's proposal provides that restraints are prohibited and thus must presumptively be removed upon entry of the juvenile into the courtroom[17] unless Family Court

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[13] *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).

[14] Federal Advisory Committee on Juvenile Justice, *Spotlight on Juvenile Justice Initiatives: A State by State Survey* 28, 29 (May, 2017); Campaign to End Indiscriminate Juvenile Shackling, *Shackling Reform Statewide Court Rules, Policies, Administrative Orders & Statutes* [Aug., 2016; http://njdc.info/campaign-against-indiscriminate-juvenile-shackling; *Juvenile Justice in a Developmental Framework: A 2015 Status Report* (MacArthur Fdtn., 2015) at p. 30.

[15] *See* Delaware House Bill HB 211 (2016); Conn. H.B. 7050§3, Gen. Ass., Jan. Sess. (2015); Indiana Code Ann. §31-30.5(2015); Nebraska L.B. 482 (2015); Nevada A.B. 8 (2015); Superior Court of the District of Columbia Administrative Order 16-09 (2016); Illinois Supreme Court Rule 943 (2016); Ohio R. Juv. Proc. 5.01 (2016); Tenn. R. Juv. Proc. 204 (2016); N.D. Rules of Juv. Proc. §20 (2017); Utah Council Code of Judicial Administration §4-905 (2015); Iowa Rules of Juv. Proc. §8.41 (2017).

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

[17] 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,

determines and explains on the record why restraints are "necessary to prevent: (1) physical injury by the child to himself or herself or another person; (2) physically disruptive courtroom behavior, as evidenced by a recent history of behavior that presented a substantial risk of physical harm to the child or another person where the behavior indicates a substantial likelihood of current physically disruptive courtroom behavior by the child; or (3) the child' flight from the courtroom, as evidenced by a recent history of absconding from the Court." the particular restraints permitted must be the "least restrictive alternative" and, in order to ensure due process, the child must be given an opportunity to he heard regarding a request to impose restraints. The measure further provides that in cases where the exception is invoked, only handcuffs or footcuffs may be used and handcuffs may not be joined to footcuffs.

The measure closely mirrors the presumption, exception factors and right to be heard in the Florida and Illinois court rules, as well as the Model Statute/Court Rule developed by the Campaign Against Indiscriminate Juvenile Shackling, the statute and court rule in Pennsylvania, and the statutes in Delaware, New Hampshire, North Carolina and South Carolina.[18] It is similar to the court rules in Massachusetts, Washington, New Mexico, Maryland, Illinois, North Dakota, Utah and, most recently, Iowa.[19] It is consistent with the orders that resulted from challenges to restraints in California, North Dakota, Oregon and Illinois.[20] It reflects the criticisms articulated in, and recommendations by, myriad commentators[21] and, most recently, in the resolutions by the

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2010 (S.Ct., N.Y.Co., 2010).

[18] *See Fla. Rules of Juvenile Procedure* §8.100(b) (2009); Campaign Against Indiscriminate Juvenile Shackling, *2014 Model Statute/Court Rule* (www.njdc.info, checked Dec. 29, 2014)*; Adoption of the New Rule 139 of the Rules of Juvenile Court Procedure,* Pa. S.Ct., No. 527, 237 Pa. Code §139 (Apr. 26, 2011); 42 Pa. C.S.A. §6336.2 (2012); Del. House Bill HB 211 (2016); N.H. R.S.A. §126-U:13 (2010); N.C. Gen. Stat. §7B-2402 (2013); S.C. Code Ann. §63-19-1435 (2014).

[19] *See* Illinois Supreme Court Rule 943; Amendment to *Trial Court of the Commonwealth [of Mass.] Court Officer Policy and Procedures Manual, ch. 4 Courtroom Procedures, Section VI, Juvenile Court Sessions* (2010); N.M. Children's Ct. R. §10-223A (2013); Wash. Ct. Rule (effective Sept. 1, 2014); *Resolution Regarding Shackling of Children in Juvenile Court* (Adopted by Md. Judiciary and Chief Judge of Court of Appeals, Sept. 21, 2015); N.D. Rules of Juv. Proc. §20 (2017); Utah Council Code of Judicial Administration §4-905 (2015); Iowa Rules of Juv. Proc. §8.41 (2017).

[20] *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).

[21] *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

National Council of Juvenile and Family Court Judges and the American Bar Association noted above. Estimating that over 100,000 children have been routinely shackled in court nationally, the National Campaign to End Indiscriminate Shackling of Youth has reported that, since its campaign began in August, 2014, Delaware, Illinois, Connecticut, Maryland, Indiana, Nebraska, Alaska, Utah, Nevada, Ohio, Tennessee and the District of Columbia have prohibited indiscriminate use of restraints.[22] 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.[23] Nor has implementation presented any significant burdens upon the courts as requests for restraints are rare and the hearings, when held, are brief.[24]

Restrictions upon the use of mechanical restraints on adult offenders in criminal trials has long been recognized as necessary to a fair trial. The United States Supreme Court, in Deck *v.* Missouri, in rejecting routine shackling as a violation of due process, noted its origins in common law:

> Blackstone's 1769 Commentaries on the Laws of England noted that "it is laid down in our ancient books" that a defendant "must be brought to the bar without irons, or in any manner of shackled or bonds, unless there be evident dangers of an escape."

544 U.S. 622, 626 (2005). Following Deck, the New York Court of Appeals, in People *v.* Best, 39 N.Y.3d 739 (2012) criticized the shackling of a defendant in a judge trial in the absence of a showing of necessity on the record, noting that "judges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder," in addition to harming the defendant and the public's perception of both the defendant "and of criminal proceedings

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permanent damage to our kids," *Washington Post* (OpEd., Nov. 13, 2014); National Juvenile Justice Network, *Policy Update: Unchain the Children: Policy Opportunities to End the Shackling of Youth in Court* (Sept., 2014; www.njjn.org, checked Dec. 29, 2014); National Juvenile Defender Center, *Issue Brief: Ending the Indiscriminate Shackling of Youth* (2014; www.njdc.info); K. McLaurin, "Children in Chains: Indiscriminate Shackling of Juveniles," 38 *Wash. U. J.L.&Policy* 213(2012); H. Ted Rubin, "Shackling Juveniles for Court Hearings: Only if 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).

[22] Campaign to End Indiscriminate Juvenile Shackling, *supra,* note 43; B. Schatz, *supra,* note 50 *;* G.Gately, *supra,* note 50.

[23] 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 34, and ABA, *supra,* note 42. And no incidents were reported by Judge Daniel Murphy regarding ten years of experience in Linn County, Oregon. *See* Rubin, *supra*, note 34 at 11.

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

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 use of restraints upon adult offenders are even more compelling with respect to children. Not only is the use of shackles an infringement upon the presumption of innocence at the fact-finding (trial) stage, but it also impedes the ability and willingness of youth to participate in court proceedings, including dispositional and permanency hearings, and to engage in planning for their futures. Juveniles are critical participants in such hearings, pursuant to Family Court Act §§341.2(1), 355.5(8), 756-a(d-1). The Federal *Preventing Sex Trafficking and Strengthening Families Act* (Public Law 113-183) requires placement agencies to involve youth 14 years of age and older in development of their plans, expanding upon the earlier Federal mandate for courts to consult with juveniles in an age-appropriate manner. Significantly, hardware restraints inhibit counsel's ability to develop an attorney-client relationship with their child clients deemed so integral to the Family Court Act (*see, e.g.*, Family Court Act §241) and to the United States Supreme Court decision in *Matter of Gault*, 387 U.S. 1 (1967).

The need for a presumption against use of restraints upon juveniles appearing in Family Court is further underscored by the wealth of recent research on adolescent brain development, particularly by the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. *See* www.adjj.org. Children's characters are not fully formed until well into adulthood and their sense of self-esteem is especially vulnerable to the harm caused by indiscriminate use of shackles. As Patricia Puritz, former Executive Director of the National Juvenile Defender Center, noted, it is well-documented that "young people are less likely to re-offend when they perceive that the juvenile justice system has treated them fairly":

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

Puritz, *supra*, note 20.

The Committee's measure recognizes the rare circumstances in which use of restraints may be

necessary and provides a simple means of addressing those circumstances. In states in which restrictions upon restraints are in effect, the culture has shifted; invocation of the exceptions is rare and the provision of a right for the juvenile to be heard upon an oral application, often by a court officer or placement agency official, for restraints to be used has been neither lengthy nor burdensome and has caused no adverse effects. Recognition by the United States Supreme Court and New York Court of Appeals of the need to protect adult criminal defendants from the adverse effects of restraints renders even more compelling the need to enact a measure protecting children before the Family Court.

Proposal

AN ACT to amend the family court act, in relation to use of restraints on children appearing before the family court

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

Section 1. The family court act is amended by adding a new section 162-a to read as follows:

§162-a. Use of restraints on children in courtrooms**.** (a) Use of restraints. Except as otherwise provided in subdivision (b) of this section, restraints on children under the age of twenty-one, including, but not limited to, handcuffs, chains, shackles, irons or straitjackets, are prohibited in the courtroom.

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

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

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

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

§2. This act shall take effect immediately.

3. Sealing and expungement of records in Persons in Need of Supervision proceedings [F.C.A. §§783, 784]

When Article 3 of the Family Court Act, the juvenile delinquency procedure statute, was enacted over three decades ago [L. 1982, c. 920], applicable provisions of the Criminal Procedure Law deemed essential for due process and fairness were incorporated into Article 3. However, a similar process was not undertaken in the remaining provisions of Article 7 of the Family Court Act, which from that point onward applied only to Persons in Need of Supervision (PINS). One of the most glaring omissions is the provision regarding confidentiality of records. Article 3, modeled after Criminal Procedure Law §160.50, has afforded youth who are accused of juvenile delinquency, like adults accused of crimes, far more protections than those who are the subjects of PINS proceedings. Likewise, the PINS statute has not yet been modified to incorporate the amendment, enacted in 2019, that provides automatic sealing of records of petty offense-level marijuana offenses, notwithstanding the fact that violations of Penal Law §221.05 are specifically included in Family Court Act §712 as grounds for PINS.

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 anomaly. 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. In light of the amendment to Criminal Procedure Law §160.50(3) in chapter 131 of the Laws of 2019, providing that convictions for petty offense-level marijuana possession under Penal Law §221.05 are deemed to be terminations of actions in favor of the accused requiring mandatory sealing, PINS findings for violations of Penal Law §221.05 would be subject to automatic sealing following the conclusion of any disposition or period of extension. Likewise, since the Federal *Trafficking Victims Protection Act* defines "severe forms of trafficking in persons," *inter alia*, as "sex trafficking in which ...the person induced to perform such act has not attained 18 years of age,"[25] the measure would require sealing at the conclusion of any disposition or extension based upon a finding for a prostitution offense under

[25] 22 U.S.C. §7102(11)(A).

Penal Law §230.00. Notices would be required to be sent to probation departments, designated lead agencies for PINS diversion and, if either presentment or law enforcement agencies have been involved, to such agencies, directing them to seal their records as well. Youth whose cases had been favorably terminated prior to the effective date of the statute would be permitted to move for sealing upon twenty days' notice. The proposal authorizes designated lead diversion agencies to check their records if a juvenile returns on a subsequent PINS, and, where the diversion agency is the local Department of Social Services, the local Department may have access to its own records where necessary for service determinations and where the Commissioner determines the information is necessary to comply with Social Services Law §422-a regarding disclosure of fatality-related information.

Second, in cases in which a juvenile has been adjudicated as a PINS, the juvenile would be permitted to make a motion for sealing of the record in the interests of justice. If granted, notices would likewise be sent to the agencies involved in the case to seal their records. As in Family Court Act §375.3, the Family Court would retain its inherent authority to expunge, rather than simply seal, its records. *See* Matter of Dorothy D. *v.* New York City Probation Department, 49 N.Y.2d 212 (1980)(juvenile delinquency); Matter of Richard S. *v.* City of New York, 32 N.Y.2d 592 (1973)(PINS); Matter of Daniel PP., 224 A.D.2d 906 (3d Dept., 1996)(PINS). As the Court of Appeals held in Matter of Dorothy D. *supra*:

> That the very existence of such records, despite provisions for confidentiality, may constitute a substantial impediment to entry into institutions of higher learning, government or private employment, the armed services, or the professions, cannot be seriously questioned. For this reason it would be antithetical to the purpose of the Family Court Act to maintain records which would not benefit society and would result in bringing unwarranted discrimination to a child's future. (Matter of Richard S. *v.* City of New York, 32 N.Y.2d 592, 595-596, 347 N.Y.S.2d 54, 56, 300 N.E.2d 426, 427).

Many states, in fact, include expungement, not simply sealing, as their mechanism for ensuring the confidentiality of juvenile records. *See, e.g.,*West's Colorado Revised Statutes §19-1-306*;* Illinois Compiled Statutes §405/5-915 (juvenile delinquency) and §405/1-9 (juvenile court records other than juvenile delinquency); Ohio Revised Code §§2151.355, 2151.356, 2151.358 (juvenile delinquency and "unruly children" records); Revised Code of Washington §13.50.050; Delaware Code §§1014-1018; North Carolina General Statutes §§7B-3200, 3201 (juvenile delinquency and "undisciplined" children); Arizona Revised Statutes §13-921; Arkansas Code §§9-27-309[b][1][A], [b][2]; West's California Code, Div. 2, C. 2, Art. 22, §826[a]; Connecticut General Statutes §§46b-133a,46b-146; West's Florida Statutes §943.0582; Minnesota Statutes §260B.235[9]; Pennsylvania Consolidated Statutes §9123; West's Code of Virginia §16-1-306.

Finally, recognizing that PINS behavior consists of conduct that would not be criminal if committed by adults, sections 783 and 784 of the Family Court Act would be amended to preclude use of PINS records in other courts. The language in section 783, permitting such records to be

utilized in criminal sentencing proceedings, as well as the reference in section 784 to criminal courts taking action regarding police records, are vestiges of the days when juvenile delinquency and PINS proceedings were both covered by Article 7 of the Family Court Act and are more appropriately applied solely to juvenile delinquency records. Indeed, these provisions have been incorporated into Article 3. *See* Family Court Act §§381.2, 381.3(2). The Committee's proposed measure appropriately deletes these provisions from Family Court Act Article 7.

The need to keep records of juvenile misbehavior, both criminal and noncriminal in nature, confidential has long been a central feature of the juvenile justice system. As former Chief Justice Rehnquist noted, in his concurring opinion in Smith *v.* Daily Mail, 443 U.S. 97, 107 (1979):

> It is a hallmark of our juvenile justice system in the United States that, virtually from its inception at the end of the last century, its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity. See H. Lou, Juvenile Courts in the United States 131-133 (1927); Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mt.L.Rev. 101, 102, 116 (1958). This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and "bury them in the graveyard of the forgotten past.'" In re Gault, 387 U. S. 1, 387 U. S. 24-25 (1967).

The Committee's proposal recognizes that non-criminal conduct, the gravamen of PINS cases, no less than the criminal conduct that forms the basis of juvenile delinquency proceedings, compels the protections that have long been deemed essential to fulfilling the goals of the juvenile justice system.

Proposal

AN ACT to amend the family court act, in relation to sealing and expungement of records in persons in need of supervision cases in the family court

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

Section 1. Section 783 of the family court act is amended to read as follows:

§ 783. Use of [record] records in other court; sealing and expungement of records.

(a) Neither the fact that a person was before the family court under this article for a hearing nor any confession, admission or statement made by him or her to the court or to any officer thereof in any stage of the proceeding is admissible as evidence against him or her or his or her interests in any other court. [Another court, in imposing sentence upon an adult after conviction, may receive and consider the records and information on file with the family court concerning such person when he was a

child.]

(b) For purposes of this section, "sealing" shall mean that all official records and papers, including judgments and orders of the court, but not including public court decisions or opinions or records and briefs on appeal, relating to the arrest, prosecution and court proceedings and records of the probation service and designated lead agency, including all duplicates or copies thereof, on file with the court, police department and law enforcement agency, probation service, designated lead agency and presentment agency, if any, shall be protected from public inspection and, except as provided in paragraphs (v) and (vi) of subdivision (c) of this section, shall not be made available to any person or public or private agency.

(c) Automatic sealing of a proceeding under this article that is terminated in favor of the respondent.

(i) Upon termination of a proceeding under this article in favor of the respondent, the clerk of the court shall immediately notify and direct the directors of the appropriate probation department, designated lead agency pursuant to section seven hundred thirty-five of this article and, if a presentment agency represented the petitioner in the proceeding, such agency, that the proceeding has terminated in favor of the respondent and that the records, if any, of such action or proceeding on file with such offices shall be sealed. If the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement had been the referring agency or petitioner pursuant to section seven hundred thirty-three of this article, the notice shall also be sent to the appropriate police department or law enforcement agency. Upon receipt of such notification, the records shall be sealed in accordance with subdivision (b) of this section. The attorney for the respondent shall be notified by the clerk of the court in writing of the date and agencies and departments to which such notifications were sent.

(ii) For the purposes of this section, a proceeding under this article shall be considered terminated in favor of a respondent where the proceeding has been:

(A) diverted prior to the filing of a petition pursuant to subdivision (g) of section seven hundred thirty-five of this article or subsequent to the filing of a petition pursuant to subdivision (b) of section seven hundred forty-two of this article; or

(B) withdrawn or dismissed for failure to prosecute, or for any other reason at any stage; or

(C) dismissed following an adjournment in contemplation of dismissal pursuant to subdivision (a) of section seven hundred forty-nine of this article.

(D) adjudicated where the only finding was for a violation of section 221.05 or 230.00 of the penal law; provided, however, that with respect to findings under this paragraph, the sealing required by this section shall not take place until the conclusion of the period of any disposition or extension under this article.

(iii) If, with respect to a respondent who had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency, the designated lead agency diverts a case either prior to or subsequent to the filing of a petition under this article, the designated lead agency shall notify the appropriate probation service and police department or law enforcement agency in writing of such diversion. Such notification may be on a form prescribed by the chief administrator of the courts. Upon receipt of such notification, the probation service and police department or law enforcement agency shall seal any records in accordance with subdivision (b) of this section in the same manner as is required thereunder with respect to an order of a court.

(iv) If, following the referral of a proceeding under this article for the filing of a petition, the petitioner or, if represented by a presentment agency, such agency, elects not to file a petition under this article, the petitioner or, if applicable, the presentment agency, shall notify the appropriate probation service and designated lead agency of such determination. Such notification may be on a form prescribed by the chief administrator of the courts and may be transmitted by electronic means. If the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency, the notification shall also be sent to the appropriate police department or law enforcement agency. Upon receipt of such notification, the records shall be sealed in accordance with subdivision (b) of this section in the same manner as is required thereunder with respect to an order of a court, provided, however, that the designated lead agency may have access to its own records in accordance with paragraph (v) of this subdivision.

(v) Where a proceeding has been diverted pursuant to subparagraph (A) of paragraph (ii) of this subdivision or where a proceeding has been referred for the filing of a petition but the potential

petitioner or, if represented by a presentment agency, such agency, elects not to file a petition in accordance with paragraph (iv) of this subdivision, the designated lead agency shall seal its records under this section, but shall have access to its own records:

(A) where there is continuing or subsequent contact with the child under this article; or

(B) in a proceeding in which the designated lead agency is the local department of social services, where the information is necessary for such department to determine what services had been arranged or provided to the family or where the commissioner determines that the information is necessary in order for the commissioner of such department to comply with section four hundred twenty-two-a of the social services law.

(vi) Records sealed under this section shall be made available to the juvenile or his or her agent and, where the petitioner or potential petitioner is a parent or other person legally responsible for the juvenile's care, such parent or other person. No statement made to a designated lead agency by the juvenile or his or her parent or other person legally responsible that is contained in a record sealed under this section shall be admissible in any court proceeding, except upon the consent or at the request, respectively, of the juvenile or his or her parent or other person legally responsible for the juvenile's care.

(vii) A respondent in whose favor a proceeding was terminated prior to the effective date of this paragraph may, upon motion, apply to the court, upon not less than twenty days notice to the petitioner or (where the petitioner is represented by a presentment agency) such agency, for an order granting the relief set forth in paragraph (i) of this subdivision. Where a proceeding under this article was terminated in favor of the respondent in accordance with paragraph (iii) or (iv) of this subdivision prior to the effective date of this paragraph, the respondent may apply to the designated lead agency, petitioner or presentment agency, as applicable, for a notification as described in such paragraphs granting the relief set forth therein and such notification shall be granted.

(d) Motion to seal after an adjudication and disposition.

(i) If an action has resulted in an adjudication and disposition under this article, the court may, in the interest of justice and upon motion of the respondent, order the sealing of the records and proceedings.

(ii) Such motion must be in writing and may be filed at any time subsequent to the conclusion of the disposition, including, but not limited to, the expiration of the period of placement, suspended judgment, order of protection or probation or any extension thereof. Notice of such motion shall be served not less than eight days prior to the return date of the motion upon the petitioner or, if the petitioner was represented by a presentment agency, such agency. Answering affidavits shall be served at least two days before the return date.

(iii) The court shall set forth in a written order its reasons for granting or denying the motion. If the court grants the motion, all court records, as well as all records in the possession of the designated lead agency, the probation service, the presentment agency, if any, and, if the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or if the police or law enforcement agency was the referring agency or petitioner pursuant to section seven hundred thirty-three of this article, the appropriate police or law enforcement agency, shall be sealed in accordance with subdivision (b) of this section.

(e) Expungement of court records. Nothing contained in this article shall preclude the court's use of its inherent power to order the expungement of court records.

§ 2. Section 784 of the family court act is amended to read as follows:

§ 784. Use of police records. All police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection, but such records shall be open to inspection upon good cause shown by the parent, guardian, next friend or attorney of that person upon the written order of a judge of the family court in the county in which the order was made [or, if the person is subsequently convicted of a crime, of a judge of the court in which he was convicted].

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

4. Execution of warrants in juvenile delinquency cases when Family Courts are not in session [F.C.A. §312.2]

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

Recognizing the benefits of these provisions, the Family Court Advisory and Rules Committee is proposing a measure to amend Family Court Act §312.2 to include similar provisions for juvenile delinquents returned on warrants when Family Courts are not in session. The measure would require juveniles in such cases to be brought before "the most accessible magistrate, if any, designated by the appellate division." The magistrates would determine, in accordance with the requirements of section 320.5 of the Family Court Act, whether the juveniles would be released or detained and would then set a date for the juvenile to appear in Family Court, that is, no later than the next day the Family Court is in session if the juvenile is detained and within ten court days if the juvenile is released. In determining whether the juvenile should be released, with or without conditions, or detained, the magistrates would be required to apply the criteria in and issue the findings mandated by section 320.5 of the Family Court Act. In order that the Family Court would be alerted to expect the case, the order of the magistrate must be immediately transmitted to the Family Court.

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

The failure to include a provision in the current statute directing juvenile delinquents returned on warrants to be brought before accessible magistrates when Family Courts are not in session

violates the fundamental value of fairness permeating the "raise the age" implementation efforts, that is, that outcomes for the 16- and 17-year olds who are prosecuted in Family Court should not be worse off after the effective date of the "raise the age" statute than prior to its enactment. The Committee's measure is essential to remedy that failure.

Proposal

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

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

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

3. A juvenile who is arrested pursuant to a warrant issued under this section must forthwith and with all reasonable speed be taken directly to the family court located in the county in which the warrant had been issued, or, when the family court is not in session, to the most accessible magistrate, if any, designated by the appellate division of the supreme court in the applicable department. If a juvenile is brought before an accessible magistrate, the magistrate shall set a date for the juvenile to appear in the family court in the county in which the warrant had been issued, which shall be no later than the next day the court is in session if the magistrate orders the juvenile to be detained and within ten court days if the magistrate orders the juvenile to be released. In determining whether the juvenile should be released, with or without conditions, or detained, the magistrate shall apply the criteria in and issue the findings required by section 320.5 of this article. The magistrate shall transmit its order to the family court forthwith.

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

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

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

However, the statute did not address a significant obstacle to the retention of youth in their communities, that is, the limitations in sections 140.20 and 150.20 of the Criminal Procedure Law on the authority of arresting officers to issue desk appearance tickets; nor has it been modified to be consistent with chapter 59 of the Laws of 2019, the recently enacted bail reform law. Under current law, appearance tickets may only be issued in cases in which the charges do not exceed Class E felonies in seriousness, with six Class E felony charges exempted from eligibility.[26] The Family Court Advisory and Rules Committee is proposing a measure to remedy that gap with respect to 16- and 17-year olds. It would amend both sections of the Criminal Procedure Law to permit law enforcement to exercise their discretion to issue appearance tickets to adolescent offenders upon arrest, with the exception of those charged with Class A felonies or violent felony offenses as defined in subdivision one of section 70.02 of the Penal Law. Issuance of appearance tickets would not be a mandate but would provide a significant addition to the menu of options available to law enforcement in their efforts to address cases involving older adolescents appropriately.

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

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

sexual abuse.[27] Further, as reported by the Justice Policy Institute in a report in 2017, pretrial detention of youth actually heightens the likelihood of re-offending, increases the probability of conviction and out-of-home commitment, exacerbates mental and physical health problems and creates challenges for youth in reconnecting to school and to jobs.[28]

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

Proposal

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

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

Section 1. The opening paragraph of subdivision 2, the opening paragraph of subdivision 6 and subdivision 8 of section 140.20 of the criminal procedure law, the opening paragraph of subdivision 2 as amended by chapter 550 of the laws of 1987, the opening paragraph of subdivision 6 as amended by section 20 and subdivision 8 as added by section 19 of part www of chapter 59 of the laws of 2017, are amended to read as follows:

If the arrest is for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or if, in the case of an adolescent offender, the arrest is for an offense other than a class A felony or a violent felony offense as defined

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

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

in subdivision one of section 70.02 of the penal law, the arrested person need not be brought before a local criminal court as provided in subdivision one, and the procedure may instead be as follows: Upon arresting a juvenile offender or a person sixteen [or commencing October first, two thousand nineteen,] seventeen years of age without a warrant, the police officer shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that such offender or person has been arrested, and the location of the facility where he or she is being detained or the place and date an appearance ticket is returnable if the adolescent offender has been given an appearance ticket. If the officer determines that it is necessary to question a juvenile offender or such person, the officer must take him or her to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the juvenile or such person, to his or her residence and there question him or her for a reasonable period of time. A juvenile or such person shall not be questioned pursuant to this section unless he or she and a person required to be notified pursuant to this subdivision, if present, have been advised:

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

§2. Paragraph (a) of subdivision 1 and subdivisions 2 and 3 of section 150.20 of the criminal procedure law, paragraph (a) of subdivision 1 as amended by section I-a of part JJJ of chapter 59 of the laws of 2019 and subdivisions 2 and 3 as amended by chapter 550 of the laws of 1987, are amended to read as follows:

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

(a). Whenever a police officer is authorized pursuant to section 140.10 of this title to arrest a person without a warrant for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or if, in the case of an adolescent offender, the arrest is for an offense other than a class A felony or a violent felony offense

as defined in subdivision one of section 70.02 of the penal law, he or she shall, except as set out in paragraph (b) of this subdivision, subject to the provisions of subdivisions three and four of section 150.40, instead issue to and serve upon such person an appearance ticket.

2. (a) Whenever a police officer has arrested a person without a warrant for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law pursuant to section 140.10, or if, in the case of an adolescent offender, the arrest is for an offense other than a class A felony or a violent felony offense as defined in subdivision one of section 70.02 of the penal law, or (b) whenever a peace officer, who is not authorized by law to issue an appearance ticket, has arrested a person for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law pursuant to section 140.25 or if, in the case of an adolescent offender, the arrest is for an offense other than a class A felony or a violent felony offense as defined in subdivision one of section 70.02 of the penal law, and has requested a police officer to issue and serve upon such arrested person an appearance ticket pursuant to subdivision four of section 140.27, or (c) whenever a person has been arrested for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or if, in the case of an adolescent offender, the arrest is for an offense other than a class A felony or a violent felony offense as defined in subdivision one of section 70.02 of the penal law and has been delivered to the custody of an appropriate police officer pursuant to section 140.40, such police officer may, instead of bringing such person before a local criminal court and promptly filing or causing the arresting peace officer or arresting person to file a local criminal court accusatory instrument therewith or, in the case of an adolescent offender, instead of bringing such offender before a youth part or if the youth part is not in session, an accessible magistrate, may issue to and serve upon such person an appearance ticket. The issuance and service of an appearance ticket under such circumstances may be conditioned upon a deposit of pre-arraignment bail, as provided in section 150.30.

3. A public servant other than a police officer, who is specially authorized by state law or local law enacted pursuant to the provisions of the municipal home rule law to issue and serve appearance tickets with respect to designated offenses other than class A, B, C or D felonies or

violations of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or, in the case of an adolescent offender, with respect to an offense other than a class A felony or a violent felony offense as defined in subdivision one of section 70.02 of the penal law, may in such cases issue and serve upon a person an appearance ticket when he or she has reasonable cause to believe that such person has committed a crime, or has committed a petty offense in his or her presence.

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

6. Adjournments in contemplation of dismissal and suspended judgments in child protective proceedings
[F.C.A. §§1039, 1053, 1071]

Long-standing uncertainty regarding the consequences of adjournments in contemplation of dismissal and suspended judgments in child protective proceedings has hindered the ability of the Family Courts to utilize these important mechanisms for resolving child protective cases without the need for more drastic alternatives, such as out-of-home foster care placements. The Family Court Advisory and Rules Committee is, therefore, submitting a proposal to clarify and fill gaps in the statutory framework with respect to both of these options.

The proposal would make clear that an adjournment in contemplation of dismissal may be ordered either before the entry of a fact-finding order or before the entry of a final disposition. It would maintain the current law permitting an adjournment in contemplation of dismissal to be ordered upon the consent of the parties and child's attorney prior to the entry of a fact-finding order. Preserving the 1990 amendment to Family Court Act §1039(e) that followed from the Court of Appeals decision in Matter of Marie B., 62 N.Y.2d 352 (1984), if the Family Court finds a violation of the conditions of a pre-fact-finding adjournment and restores the matter to the Family Court calendar, the parent would be entitled to a fact-finding hearing on the original child abuse or neglect petition prior to the case advancing to the dispositional stage. Eliminating the confusing and overly limiting phrase "upon a fact-finding hearing," the proposal makes clear that an adjournment in contemplation of dismissal may alternatively be ordered '[a]fter the entry of a fact-finding order but prior to the entry of a dispositional order," by the Family Court or also upon motion by any party or the child's attorney. In such a case, the consent of the petitioner child protective agency and child's attorney would not be required but both would have a right to be heard regarding their positions. In the event the matter is restored to the Family Court calendar as a result of a violation of the conditions of the adjournment, the matter would proceed to disposition no later than thirty days after the application to restore the matter to the calendar, unless an extension for "good cause" is granted by the Court. In all cases, the Family Court would have to state reasons on the record for adjourning a case in contemplation of dismissal.

The proposal also clarifies that an adjournment in contemplation of dismissal may be extended for up to one year, either upon consent of the parties and child's attorney (if prior to fact-finding) or for good cause upon the respondent's consent (if after fact-finding and prior to disposition). If a violation of the conditions of the adjournment is alleged, the adjournment period is tolled pending a determination regarding the alleged violation. Additionally, sixty days prior to the expiration of the adjournment, the child protective agency must submit a report to the Family Court, parties and child's attorney regarding compliance with the conditions. If there has been no violation of the adjournment in contemplation of dismissal and the adjournment in contemplation of dismissal has not been extended, the petition would be deemed dismissed and, in the case of a post-fact-finding ACD, the fact-finding itself would be deemed vacated. If the court finds a violation, the FamilyCourt may extend the ACD, possibly with new or different

conditions, or may restore the matter to the calendar for fact-finding (for pre-fact-finding ACD's) or for disposition (for post-fact-finding ACD's).

During the period of an ACD, Family Court would not be authorized to place the child pursuant to Family Court Act §§1017(2)(a)(iii), 1052(a)(iii), 1055 or order custody to a parent or non-respondent parent pursuant to Family Court Act §§1017(2)(a)(i), 1052(a)(vi), (vii), 1055-b and Article Six of the Family Court Act. A release of the child to a non-respondent parent would, however, be permisible, if, for example, the condition of the ACD included a mandate for a respondent parent to complete a particular program. The ACD may not be conditioned upon the child's voluntary placement pursuant to Social Services Law §358-a. Except as necessary under sections 1024 or 1027 of the Family Court Act, the child could not be removed from home during the adjournment period. These amendments are necessary in light of the fact that children remanded or placed in foster care, notwithstanding the adjournment in contemplation of dismissal of the underlying proceeding, are not eligible for Federal foster care reimbursement under Title IV-E of the *Social Security Act*. It goes without saying that if the case warrants dismissal following a period of adjournment, the Court would not be able to find that retention in the home would be contrary to the child's best interests, as is required by the New York State and Federal *Adoption and Safe Families Act*s for Federal foster care eligibility. *See* Family Court Act §1027(b); Social Services Law §358-a(3); Public Law 105-89.

Like the provisions regarding adjournments in contemplation of dismissal, the dispositional alternative of suspended judgment in child protective cases has long generated confusion, because the Family Court Act is largely silent regarding procedures for its issuance, as well as its ultimate consequences. Similar to the amendments made in 2005 and 2006 to Family Court Act §633,[29] 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.

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

Consistent with the observation of the Supreme Court, Appellate Division, Third Department, in Matter of Baby Girl W., 245 A.D.2d 830 (3d Dept., 1997), the Committee's proposal provides that at the end of a successful period of a suspended judgment, the underlying order of fact-finding would not automatically be vacated; nor would the report on the Statewide Central Register of Child Abuse and Maltreatment automatically be sealed or expunged. Rather, as in Matter of Makynli N., 17 Misc.3d 1127(A), 2007 N.Y.Slip Op. 52162 (Fam. Ct., Monroe Co., 2007) (Unreported), the parent could apply to the Family Court, pursuant to Family Court Act §1061, for an order vacating the order of fact-finding and dismissing the proceeding in accordance with subdivision (c) of section 1051 of the Family Court Act on the ground that the aid of the Court is no longer required and that the dismissal would be in the children's best interests. *See also* Matter of Crystal S., 74 A.D.3d 823 (2nd Dept., 2010); Matter of Araynah B., 34 Misc.3d 566, 939 N.Y.S.2d 239 (Fam. Ct., Kings Co., 2011). Such a dismissal would then provide the parent with grounds to seek administrative relief in terms of sealing or expungement of the State Central Register report. As the Family Court, Monroe County, noted in its earlier opinion in the case,

> [A] suspended judgment neither condones Respondent's neglectful action, nor does it necessarily eradicate the finding. [Citation omitted].

Matter of MN, 16 Misc.3d 499, 506 (Fam. Ct., Monroe Co., 2007).

Significantly, it is the requirement of this procedural step, *i.e.*, the motion under Family Court Act §1061, that distinguishes the outcome of a successful suspended judgment from that of an adjournment in contemplation of dismissal. A suspended judgment may thus be an appropriate disposition in cases in which the Court determines that a full dismissal of the proceedings, including vacatur of the fact-finding, should not be automatic.

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

The Committee's proposal provides needed clarity to both the provisions regarding adjournments in contemplation of dismissal and the disposition of suspended judgment, thus enhancing the usefulness of these options for the resolution of child abuse and neglect proceedings in Family Court. Both of these options are critically important to promote and preserve the well-being of children and their families by providing opportunities for families to

access services in order to repair the problems that precipitated court action without the disruption and, all too often, the trauma of out-of-home placement.

Proposal

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

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

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

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

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

(iii) The court may make [such] an order under this section only after it has apprised the respondent of the provisions of this section and it is satisfied that the respondent understands the effect of such provisions. Under no circumstances shall the court order any party to consent to an order under this section. The court shall state its reasons on the record for ordering an adjournment in contemplation of dismissal under this section.

(b) An adjournment in contemplation of dismissal is an adjournment of the proceeding for a period not to exceed one year with a view to ultimate dismissal of the petition in furtherance of

justice. In the case of an adjournment in contemplation of dismissal after the entry of a fact-finding order, such dismissal includes vacatur of the fact-finding order.

(i) Upon the consent of the petitioner, the respondent and the child's attorney, the court may issue an order extending [such] the period of an adjournment in contemplation of dismissal issued pursuant to paragraph (i) of subdivision (a) of this section prior to the entry of a fact-finding order for such time and upon such conditions as may be agreeable to the parties.

(ii) For good cause shown and with the consent of the respondent, the court may, on its own motion or on motion of any party or the attorney for the child and after providing notice and an opportunity to be heard to all parties and the attorney for the child, issue an order extending an adjournment in contemplation of dismissal issued pursuant to paragraph (ii) of subdivision (a) of this section after entry of a fact-finding order for such time and upon such conditions as may be in the best interests of the child or children who are the subjects of the proceeding.

(iii) The court shall state its reasons on the record for extending an adjournment in contemplation of dismissal under this subdivision, including its reasons for changes in the terms and conditions, if any.

(c) [Such] The order [may] shall include terms and conditions [agreeable to the parties and to the court, provided that such terms and conditions] in furtherance of the best interests of the child or children who are the subjects of the proceeding and shall include, but not be limited to, a requirement that the child and the respondent be under the supervision of a child protective agency during the adjournment period. Except as provided in subdivision (g) of this section, an order pursuant to subparagraphs (i) and (iii) of paragraph (a) of subdivision two of section one thousand seventeen, paragraphs (iii), (vi), and (vii) of subdivision (a) of section one thousand fifty-two, section one thousand fifty-five or section one thousand fifty-five-b of this article shall not be made in any case adjourned under this section; nor shall an order under this section contain a condition requiring the child or children to be placed voluntarily pursuant to sections three hundred fifty-eight or three hundred eighty-four-a of the social services law. In any order issued pursuant to this section, [such agency] the petitioner shall be directed to make a progress report to the court, the parties and the child's attorney on the implementation of such order, no later than

ninety days after the issuance of such order[, unless the court determines that the facts and circumstances of the case do not require such reports to be made] and shall submit a report pursuant to section one thousand fifty-eight of this article no later than sixty days prior to the expiration of the order. The [child protective agency] petitioner shall make further reports to the court, the parties and the child's attorney in such manner and at such times as the court may direct.

(d) Upon application of the respondent, the petitioner[,] or the child's attorney or upon the court's own motion, made at any time during the duration of the order, if the child protective agency has failed substantially to provide the respondent with adequate supervision or to observe the terms and conditions of the order, the court may direct the child protective agency to observe such terms and conditions and provide adequate supervision or may make any order authorized pursuant to section two hundred fifty-five or one thousand fifteen-a of this act.

(e) [Upon application of] If, prior to the expiration of the period of an adjournment in contemplation of dismissal, a motion or order to show cause is filed by the petitioner or the child's attorney or upon the court's own motion, made at any time during the duration of the order, [the] that alleges a violation of the terms and conditions of the adjournment, the period of the adjournment in contemplation of dismissal is tolled as of the date of such filing until the entry of an order disposing of the motion or order to show cause. The court may revoke the adjournment in contemplation of dismissal and restore the matter to the calendar or the court may extend the period of the adjournment in contemplation of dismissal pursuant to subdivision (b) of this section, if the court finds after a hearing on the alleged violation that the respondent has failed substantially to observe the terms and conditions of the order or to cooperate with the supervising child protective agency. [In such event] Where the court has revoked the adjournment in contemplation of dismissal and restored the matter to the calendar:

(i) in the case of an adjournment in contemplation of dismissal issued prior to the entry of a fact-finding order, unless the parties consent to an order pursuant to section one thousand fifty-one of this [act] article or unless the petition is dismissed upon the consent of the petitioner, the court shall thereupon proceed to a fact-finding hearing under this article no later than sixty days

after [such] the application to restore the matter to the calendar has been granted, unless such period is extended by the court for good cause shown; or

(ii) in the case of an adjournment in contemplation of dismissal issued after the entry of a fact-finding order, the court shall thereupon proceed to a dispositional hearing under this article no later than thirty days after the application to restore the matter to the calendar has been granted, unless such period is extended by the court for good cause shown.

(iii) The court shall state its reasons on the record for revoking an adjournment in contemplation of dismissal and restoring the matter to the calendar under this subdivision.

(f) If the proceeding is not [so] restored to the calendar as a result of a finding of an alleged violation pursuant to subdivision (e) of this section and if the adjournment in contemplation of dismissal is not extended pursuant to subdivision (b) of this section, the petition is, at the expiration of the adjournment in contemplation of dismissal period, deemed to have been dismissed by the court in furtherance of justice [unless an application is pending pursuant to subdivision (e) of this section]. If [such application is granted] the court finds a violation pursuant to subdivision (e) of this section, the petition shall not be dismissed and shall proceed in accordance with the provisions of such subdivision (e).

(g) Notwithstanding the provisions of this section, if a motion or order to show cause is filed alleging a violation pursuant to subdivision (e) of this section and the court finds that removal of the child from the home is necessary pursuant to section one thousand twenty-seven of this article during the pendency of the violation motion or order to show cause, the court[,] may, at any time prior to dismissal of the petition pursuant to subdivision (f), issue an order authorized pursuant to section one thousand twenty-seven of this article. Nothing in this section shall preclude the child protective agency from taking emergency action pursuant to section one thousand twenty-four of this article where compelled by the terms of that section. If the violation is found and the matter is restored to the calendar, the court may make further orders in accordance with subdivision (e) of this section.

§2. Section 1053 of the family court act, as added by chapter 962 of the laws of 1970 and subdivision (c) as amended by chapter 41 of the laws of 2010, is amended to read as follows:

§1053. Suspended judgment. (a) Rules of court shall define permissible terms and conditions of a suspended judgment. These terms and conditions shall relate to the acts or omissions of the parent or other person legally responsible for the care of the child.

(b) The maximum duration of any term or condition of a suspended judgment is one year, unless the court finds at the conclusion of that period, upon a hearing, that exceptional circumstances require an extension thereof for a period of up to an additional year. The court shall state its reasons on the record for extending a period of suspended judgment under this subdivision, including its reasons for changes in the terms and conditions, if any.

(c) Except as provided for herein, in any order issued pursuant to this section, the court may require the child protective agency to make progress reports to the court, the parties, and the child's attorney on the implementation of such order. Where the order of disposition is issued upon the consent of the parties and the child's attorney, such agency shall report to the court, the parties and the child's attorney no later than ninety days after the issuance of the order, unless the court determines that the facts and circumstances of the case do not require such report to be made.

(d) The order of suspended judgment must set forth the duration, terms and conditions of the suspended judgment, and must contain a date certain for a court review not later than thirty days prior to the expiration of the period of suspended judgment. The order of suspended judgment also must state in conspicuous print that a failure to obey the order may lead to its revocation and to the issuance of any order that might have been made at the time judgment was suspended. A copy of the order of suspended judgment must be furnished to the respondent.

(e) Not later than sixty days before the expiration of the period of suspended judgment, the petitioner shall file a report, pursuant to section one thousand fifty-eight of this article, with the family court and all parties, including the respondent and his or her attorney, the attorney for the child and intervenors, if any, regarding the respondent's compliance with the terms of the suspended judgment. The report shall be reviewed by the court on the scheduled court date. Unless a motion or order to show cause has been filed prior to the expiration of the period of suspended judgment alleging a violation or seeking an extension of the period of the suspended

judgment, the terms of the disposition of suspended judgment shall be deemed satisfied. In such event, the court's jurisdiction over the proceeding shall be terminated. However, the order of fact-finding and the presumptive effect of such finding upon retention of the report of suspected abuse and neglect on the state central register in accordance with paragraph (b) of subdivision eight of section four hundred twenty-two of the social services law shall remain in effect unless the court grants a motion by the respondent to vacate the fact-finding pursuant to section one thousand sixty-one of this article.

§3. Section 1071 of the family court act, as amended by chapter 437 of the laws of 2006, is amended to read as follows:

§1071. Failure to comply with terms and conditions of suspended judgment. If, prior to the expiration of the period of the suspended judgment, a motion or order to show cause is filed that alleges that a parent or other person legally responsible for a child's care violated the terms and conditions of a suspended judgment issued under section one thousand fifty-three of this article, the period of the suspended judgment shall be tolled as of the date of such filing pending disposition of the motion or order to show cause. If a motion or order to show cause alleging a violation has been filed and the court finds that removal of the child from the home pending disposition of the motion or order to show cause is necessary pursuant to section one thousand twenty-seven of this article, the court may issue an order pursuant to such section one thousand twenty-seven. Nothing in this section shall preclude the child protective agency from taking emergency action pursuant to section one thousand twenty-four of this article where compelled by the terms of that section. If, after a hearing on the alleged violation, the court is satisfied by competent proof that the parent or other person violated the order of suspended judgment, the court may revoke the suspension of judgment and enter any order that might have been made at the time judgment was suspended or may extend the period of suspended judgment pursuant to subdivision (b) of section one thousand fifty-three of this article. The court shall state its reasons for revoking or extending a period of suspended judgment under this section.

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

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

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

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

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

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

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

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

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

Under current law, a parent, relative or other household member living in the home of the child who is the subject of a child abuse case, who has subjected the child to sexual abuse or other severe forms of child abuse, may only be ordered out of the home for the period of the disposition, typically six months (until the next permanency planning hearing) or one year, which may be extended for an additional year (if supervision had been ordered). Incorporation into Family Court Act §1056 of the family offense periods of two years and, where special circumstances have been found, five years, is essential to prevent further injury to children and critically important to effectuate the purpose clause of the child protective article of the Family Court Act, that is, as stated in Family Court Act §1011, "to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well-being."

Proposal

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

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

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

The court may [make] issue an order of protection in assistance or as a condition of any other order made under this part. Such order of protection [shall] issued under this section may remain in effect [concurrently with, shall expire no later than the expiration date of, and] for a period of up to two years or, if the court finds special circumstances, a period of up to five years. For purposes of this section, "special circumstances" shall mean physical injury or serious physical injury caused by the respondent to the protected person or persons or any minor child, the use of a dangerous instrument by the respondent against the protected person or persons or any minor child, a history of violations of orders of protection by the respondent, prior convictions for crimes against the protected person or persons or a minor child by the respondent or the exposure by the respondent of the protected person or persons or a minor child or any family or household member to physical injury or acts constituting a felony sex offense as defined in subdivision (e) of section one thousand twelve of this article and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the protected person or persons or a minor child or any family or household member. The order of protection

may be extended independently or concurrently with, [such other] another order [made] issued under this [part] article or article ten-A of this act, except as provided in subdivision four of this section. The order of protection may set forth reasonable conditions of behavior for the purposes of protection to be observed for a specified time by a person who is before the court and is a parent or a person legally responsible for the child's care or the spouse of the parent or other person legally responsible for the child's care, or both. Such an order may require any such person:

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

8. Adjournments in contemplation of dismissal in family offense proceedings in Family Court [F.C.A. §§829, 841]

Enactment of the Family Court Act in 1962 was accompanied by a finding that, in order to fulfill the Court's responsibilities "for dealing with the complexities of family life so that its action may fit the particular needs of those before it," the judges "are thus given a wide discretion and grave responsibilities." Family Court Act §141. The seriousness of the responsibility to provide individualized justice that provides fairness in process and outcome to both victim and offender, including meaningful accountability for the offender and safety for the victim, cannot be overemphasized in family offense cases. In order to respond appropriately to civil cases of domestic violence, the Family Court requires a comprehensive menu of pre-dispositional and dispositional options. The Family Court Advisory and Rules Committee is submitting a proposal to fill a significant gap in the statutory framework governing those options and to remedy any disparity between the treatment of family offense cases in family and criminal courts.

The Committee's measure would add a new section 829 to the Family Court Act to authorize adjournments in contemplation of dismissal ("ACDs") in Article 8 (family offense) proceedings, both before or upon a finding that a family offense has occurred, and would amend section 841 to add a new subdivision (f) authorizing an ACD as a dispositional option. Importantly, the ACD would require the consent of both the respondent and petitioner, as well as the approval of the Family Court, both as to the ordering of the ACD and as to any conditions. If an attorney for the child has been appointed, the position of the attorney must be considered, a particularly significant provision if any of the ACD conditions involve contact with a child. A temporary order of protection may be issued under Family Court Act §828 in conjunction with the ACD and compliance with the order would be required as one of the conditions of the ACD. Similar to ACD's in criminal family offense cases under Criminal Procedure Law §170.55(2), an ACD ordered under Family Court Act §828 may last for up to one year. One extension of up to one year may be ordered, again requiring consent of the parties, approval of the Court and, if an attorney for the child has been appointed, consideration of the position of the attorney. Upon successful completion of the ACD period or the extension, the petition would automatically be dismissed in furtherance of justice.

The measure would also delineate procedures for violations of ACD's in Family Court family offense cases. The Family Court would be able to restore the matter to the calendar, either on its own motion or upon application of the petitioner, if it finds a violation "after a hearing based upon competent, material and relevant evidence." If a violation is found, the original family offense petition would be reinstated and the Court would proceed to either a fact-finding hearing or a dispositional hearing, depending upon whether the ACD had been ordered before or after a finding had been made.

It is truly anomalous that ACD's are explicitly authorized in criminal family offense proceedings under section 170.55 of the Criminal Procedure Law but not when identical cases are brought under Article 8 of the Family Court Act. Nor is there any justification for the fact that ACD's are explicitly permitted under other Articles of the Family Court Act, namely, in juvenile delinquency,

Persons in Need of Supervision and child abuse and neglect proceedings under sections 315.3, 749 and 1039, respectively, of the Family Court Act. Indeed, ACD's have been ordered without challenge, notwithstanding the lack of specific statutory authorization, in several family offense cases in the Family Court. The Appellate Division, Second Department, in Matter of Cote *v.* Berger, 112 A.D.3d 821 (2d Dept., 2013), reversed an ACD violation petition for insufficiency of the violation allegations, but did not challenge issuance of the ACD itself. In the custody case of Matter of M.M.H. *v.* William D.H., 26 Misc. 3d 1240 (Unrep., Fam. Ct., Dutchess Co., 2010), the Family Court noted that an ACD had been ordered in an earlier family offense proceeding between the parties. Significantly, the now-retired Family Court judge in Matter of Sirley M.M. *v.* Jorge L.C., 58 Misc.3d 796 (Fam. Ct., Qns. Co., 2018), after ordering that the proceeding be adjourned in contemplation of dismissal, wrote an article encouraging the use of the ACD procedure. *See* J. Hunt, "Why ACD's Should Be a Dispositional Alternative in Family Offense Cases," *N.Y. Law J.,* Jan. 18, 2019, p.4, col. 4.

Allowing ACDs in Article 8 cases provides benefits for both petitioners and respondents and, at the same time, expands the tools available to the Family Court to resolve family offense cases to the satisfaction of all parties. ACDs will allow petitioners to continue temporary orders of protection for up to a year without the need for continued litigation and thus will not compromise victim safety. From a victim's perspective, an ACD granted prior to a fact-finding will limit the need for court appearances and will not require the victim to undergo the trauma involved in recounting the violence on the witness stand and under cross examination. Further, as judges who have ordered ACD's have indicated, the option of an ACD may provide a valuable alternative to the frequent withdrawals of, or failures to follow through with, family offense petitions in Family Court. Given an option of an ACD, with the continued safety provided by a temporary order of protection, a domestic violence victim may choose it over the option of outright dismissal or withdrawal of a petition. An ACD may inure to the benefit of the parties' children as well, since the ACD conditions may regulate and, if appropriate, require supervision over visits with the children. Finally, an ACD as a means of resolving a family offense petition has obvious benefits for respondents as well, as it provides an automatic dismissal upon successful completion and it is not an admission of guilt and thus does not trigger the potential collateral consequences of an adjudication.

Proposal

AN ACT to amend the family court act, in relation to providing authorization for adjournments in contemplation of dismissal in family offense cases in family court

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

Section 1. Article 8 of the family court act is amended by adding a new section 829 to read as follows:

§829. Adjournment in contemplation of dismissal.

1. Prior to or upon a fact-finding hearing, with the consent of the petitioner and the respondent and with the approval of the court, the proceeding may be "adjourned in contemplation of dismissal". The court shall consider the position of the attorney for the child, if one has been appointed. Under no circumstances shall the court order any party to consent to an order under this section.

2. 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.

3. Such order of adjournment in contemplation of dismissal may include terms and conditions agreeable to the parties and to the court. The court may, as a condition of such order, issue a temporary order of protection in accordance with section 828 of this part. The duration of the temporary order of protection may not exceed the length of the adjournment in contemplation of dismissal. Compliance with the temporary order of protection shall be a condition of the order of adjournment in contemplation of dismissal.

4. Upon consent of the petitioner and respondent, upon consideration of the position of the attorney for the child, if one has been appointed, and with the approval of the court, the court may issue an order extending the adjournment in contemplation of dismissal for an additional period of up to one year upon terms and conditions agreeable to the parties and to the court.

5. Upon application of the petitioner alleging a violation of such order, or upon the court's own motion, made at any time during the duration of the adjournment in contemplation of dismissal, the court may restore the matter to the calendar if the court finds after a hearing based upon competent, relevant and material evidence that the respondent has failed to comply with the terms and conditions of the order. Pending a determination after a hearing, the court may toll the expiration of any of the provisions of the order of adjournment in contemplation of dismissal, modify and/or extend the temporary order of protection or issue a new temporary order of protection.

6. If the proceeding is not restored to the calendar at the expiration of the adjournment period, the petition is deemed to have been dismissed by the court in furtherance of justice, unless an application is pending pursuant to subdivision four of this section. If the application to restore the petition is granted, the petition shall not be dismissed and unless the parties agree to extend the order or to dismissal of the petition, the court shall proceed either to a fact-finding hearing or to a

dispositional hearing, if such order was issued after fact-finding.

§2. Subdivision (e) of section 841 of the family court act, as amended by chapter 222 of the laws of 1994, is amended and a new subdivision (f) is added to read as follows:

(e) directing payment of restitution in an amount not to exceed ten thousand dollars. An order of restitution may be made in conjunction with any order of disposition authorized under [subdivisions] subdivision (b), (c) [or], (d) or (f) of this section. In no case shall an order of restitution be issued where the court determines that the respondent has already paid such restitution as part of the disposition or settlement of another proceeding arising from the same act or acts alleged in the petition before the court; or

(f) adjourning the petition in contemplation of dismissal in accordance with section eight hundred twenty-nine of this article.

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

9. Determinations of child support in cases of joint or shared custody in Family and Supreme Court
[F.C.A. §413(1)(f); D.R.L. §240(1-b)(f)

Cases of joint or shared custody, particularly where parents spend equal or near-equal time or where non-custodial parents spend extended time with their children, have long posed a challenge to the courts and litigants in child support matters. Section 413(1)(f) of the Family Court Act and Section 240-1(b)(f) of the Domestic Relations Law provide the bases for courts to deviate from the basic child support obligation, which is arrived at through application of the child support percentages to the parents' incomes. The ninth deviation factor permits a court to vary from the percentage amount in the *Child Support Standards Act* by considering the following:

> Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof...

[FCA § 413-1(f)(9); DRL § 240-1(b)(f)(9)].

While the factor appears at first glance to allow a court to deviate in cases of shared custody, the requirement in subdivision (ii) that a non-custodial parent's expenses offset the custodial parent's expenses in order to qualify for the deviation has meant that it is often impossible for a parent, who is designated as the non-custodial parent, to obtain an order deviating from the basic child support obligation even when that parent has equal or near-equal parenting time with the custodial parent. Moreover, it is often difficult to prove that expenses of visitation are "extraordinary."

The Family Court Advisory and Rules Committee is proposing a measure to amend the Family Court Act and Domestic Relations Law to add a deviation factor that would not require that the non-custodial parent's expenses offset the custodial parent's. Instead, under the proposed additional factor, the Court would be required to take into account whether such an offset exists, while not requiring such an offset to be a prerequisite to a deviation. It should be noted that this proposal does not create a rigid numeric formula to be applied in cases of shared custody; nor does it change the existing statute's requirement that the court find that the non-custodial parent's parenting time is "extended" for the deviation factor to apply.

There have been relatively few substantive changes to the *Child Support Standards Act* (CSSA) since it was enacted in 1989. [Family Court Act §413 *et seq*.] However, during the more than 30 years that have passed, the arrangements in which separated parents rear their children have dramatically changed. Parents now regularly choose various forms of shared and joint custodial arrangements, with the parent designated as non-custodial or non-residential often receiving substantial parenting time. Now, access time often is equal or near-equal. Unfortunately, the CSSA does not adequately address situations where the designated non-custodial parent has extended or equal parenting time.

In Bast *v.* Rossoff, 239 A.D.2d 106 (1998), the Court of Appeals rejected any approaches other than a strict application of the CSSA. The Court held that the child support percentages must be utilized to determine the non-custodial parent's basic child support obligation in all shared custody cases. Only if one of the parties establishes a basis to deviate from the basic child support obligation can a different amount of support be ordered. The Third Department addressed the equal-custody situation in Baraby *v.* Baraby, 250 A.D.2d 201, 204 (3rd Dept. 1998) and ruled that the percentages must be applied even in cases where custody is shared equally. In these cases, the higher-earning parent is deemed to be the non-custodial parent for the purpose of computing the basic child support obligation.

Where the custodial time is equal, or even where a non-custodial parent has extended parenting time, a deviation from the formula may often be appropriate to ensure that resources exist in both households to adequately care for the child. Unfortunately, while deviations are theoretically permitted in such cases, the current deviation factor is too narrowly drawn to properly address this issue. Careful analysis of this factor demonstrates how difficult it is to use in shared custody situations and how impractical its application can be. First, in the typical equal or near-equal custody situation, the non-custodial or non-residential parent obligated to pay support and seeking deviation does not incur "extraordinary" expenses in visiting, but rather incurs normal expenses in raising the children during his or her access time. Further, the proviso that the custodial parent's expenses must be shown to be "substantially reduced" by what is termed extended visitation is difficult, if not impossible, to prove to a court.

In Matter of Riemersma *v.* Riemersma, 84 A.D.3d 1474, 1477 (3rd Dept. 2011), the Appellate Division, Third Department held that "the costs of maintaining suitable housing and providing food and clothing for the children during custodial period do not constitute extraordinary expenses that would justify a deviation from the statutory formula." In Matter of Mitchell *v.* Mitchell, 134 A.D.3d 1213 (3rd Dept. 2015), the Court found that a non-custodial parent's claims of higher grocery bills, clothes purchases, social activities and summer camp expenses incurred as a result of shared custody did not qualify as extraordinary expenses. In Ball *v.* Ball, 150 A.D.3d 1566, 1570 (3rd Dept., 2017), the Third Department summarized its position as follows: "In short, shared parenting does not automatically justify a deviation from a party's presumptive child support obligation."

In Matter of Jerrett *v.* Jerrett, 162 A.D.3d 1715 (4th Dept. 2018), the Fourth Department echoed the Third Department in holding that "the father's testimony that he incurred household expenses for the benefit of the child in the form of housing, food, clothing, and certain activities does not establish that he incurred any extraordinary expenses that would warrant a deviation from the presumptive support obligation" pursuant to Family Court Act § 413(1)(f)(9). The Appellate Division also rejected a deviation on the basis of "the non-monetary contributions that the parents will make toward the care and well-being of the child pursuant to Family Court Act §413(1)(f)(5) because "the father's testimony that he incurred ordinary household expenses and paid for some of the child's activities does not constitute evidence of non-monetary contributions to the care and well-being of the child."

Thus, after removing food, clothing, housing, and other activities, typical parents, who are enjoying equal or near-equal access time with their children, might reasonably wonder what expenses actually qualify as "extraordinary" justifying a deviation from the presumptive child support amount. The case law highlights the predicament these parents find themselves in as they are forced to pay non-deviation child support obligations despite significant access time. These parents are often left with insufficient resources to adequately care for the children while in their households. In such cases, the benefits to the children that might flow from substantial and meaningful contact with their "non-custodial parent" are often lost.

Many states address the shared-custody issue in their child support statutes.[30] The states that address shared custody in their statutes use either a formula approach or a deviation factor method. While New York uses the latter approach, as described above, the current deviation language is too restrictive.

The Committee is not recommending the adoption of a formula to account for shared custody situations. A strict formula would not take into account the quality of the parenting time. In many cases, while the non-custodial parent has substantial parenting time, the burden of paying for many of the child's needs, such as clothing, education, extracurricular and entertainment expenses, still continues to fall squarely on the custodial parent. A formula approach would then unfairly shift the burden to the custodial parent to show that these expenses justify a deviation from the shared-custody formula, rather than leaving the burden with the non-custodial parent.

Additionally, shared custody formulas necessarily contain thresholds before the formulas are triggered. In Wisconsin, for instance, the shared-custody formula is used when the child is with the non-custodial parent at least 92 days.[31] A triggering event would create additional incentives for litigation in custody and visitation cases by monetizing parenting time. When the difference of one day can mean a substantial difference in the amount of support paid, litigation –and, importantly, settlement negotiations – about the amount of parenting time causes financial considerations based upon the formula to trump the paramount consideration of the child's best interests.

The Committee's proposal splits the current ninth deviation factor into two separate factors. The ninth factor would retain the language regarding extraordinary expenses in the exercise of visitation, as these may be clear in some cases. This would allow courts to continue to consider whether, for example, the cost of long-distance travel incurred in the exercise of visitation justifies a deviation. The new tenth factor would specifically address equal and near-equal shared custody arrangements. The proposal would still require courts to examine the extent to which the

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[30] *See* G. Richard & J. Walters, *State Provisions in Child Support Guidelines Concerning Joint Custody Cases* (Alabama Law Institute, April 5, 2016); available at: www.alacourt.gov/docs/Memo-v1.0.pdf .

[31] *See,* Wis. Adm. Code § 150.04.

expenditures of the non-custodial parent reduce those of the custodial parent, but it would remove the requirement that such a reduction be present prior to the granting of a deviation. The facts of each extended parenting time case differ, and the addition of the Committee's proposed tenth deviation factor would allow the court to engage in the intensive analysis of each particular case that is necessary before a determination is made to vary, and, if that determination is made, what the amount of the variance should be. Enactment of this measure would, therefore, greatly enhance the courts' ability to appropriately tailor child support orders to the specific needs of the children and families appearing before them.

Proposal

AN ACT to amend the family court act and domestic relations law, in relation to deviations from the child support standards in child support proceedings involving joint or shared custody of children

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

Section 1. Subparagraphs 9 and 10 of paragraph (f) of subdivision 1 of section 413 of the family court act, as amended by chapter 567 of the laws of 1989, are amended to read as follows:

(9) Provided that the child is not [on public assistance (i)] receiving temporary assistance for needy families, extraordinary expenses incurred by the non-custodial parent in exercising visitation[, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and]

(10) Provided that the child is not receiving temporary assistance for needy families, a determination that the child has extended visitation with the non-custodial parent. The court shall not, however, deviate on this basis if the deviation will result in insufficient funds in the household of the custodial parent to meet the basic needs of the child. When determining the amount of deviation, the court shall consider, among other factors, evidence concerning the increased expenses to the non-custodial parent resulting from the extended time spent with that parent and the decreased expenses, if any, to the custodial parent resulting from the extended time spent with the non-custodial parent; and

(11) Any other factors the court determines are relevant in each case, the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation, and may order the non-custodial parent to pay an amount pursuant to paragraph (e) of this subdivision.

§2. Subparagraphs 9, 10 and 11 of paragraph (f) of subdivision (1-b) of section 240 of the domestic relations law, as amended by chapter 567 of the laws of 1989, are amended to read as follows:

(9) Provided that the child is not [on public assistance] receiving temporary assistance for needy families, [(i)] extraordinary expenses incurred by the non-custodial parent in exercising visitation, [or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and]

(10) Provided that the child is not receiving temporary assistance for needy families, a determination that the child spend extended time with the non-custodial parent. The court shall not, however, deviate on this basis if the deviation will result in insufficient funds in the household of the custodial parent to meet the basic needs of the child. When determining the amount of deviation, the court shall consider, among other things, evidence concerning the increased expenses to the non-custodial parent resulting from the extended time spent with that parent and the decreased expenses, if any, to the custodial parent resulting from the extended time spent with the non-custodial parent; and

[(10)](11) Any other factors the court determines are relevant in each case, the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation, and may order the non-custodial parent to pay an amount pursuant to paragraph (e) of this subdivision.

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

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

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

Some cases of older adolescents in Family Court that involve crimes and violations charged together may result in an adjudication or in a plea only to the violation. It would contravene the ameliorative goals of the statute raising the age of criminal responsibility if adolescents in such cases faced penalties greater than those that they would have faced had they been prosecuted in a local criminal court.

The Family Court Advisory and Rules Committee is thus proposing a measure that would amend sections 304.1, 350.1, 352.2 and 360.3 of the Family Court Act to provide that these adolescents may not be securely detained, may not be placed on probation and may not be placed out of their homes as a disposition. If granted a conditional discharge as a disposition in such a case, a youth charged with a violation of the conditional discharge may not be subject to secure detention pending adjudication of the violation or placement upon a finding. Additional conditions, *e.g.*, restitution, community service or participation in a particular program may be added as conditions, but neither detention nor placement would be permissible consequences. Significantly, the measure imposes a rebuttable presumption that, absent good cause, the proceeding should be referred to probation for possible adjustment (diversion) in accordance with Family Court Act §320.6, adjourned in contemplation of dismissal pursuant to Family Court Act §315.3 or dismissed where the youth does not need supervision, treatment or confinement under Family Court Act §352.1(2). Further, it amends subdivision one of section 301.2 and subdivision three of section 302.1 of the Family Court Act to eliminate any possible ambiguity regarding the

fact that the jurisdiction over petty offenses in juvenile delinquency cases applies only to 16- and 17- year olds who were charged as juvenile delinquents in Family Court or were originally charged as adolescent offenders and had their cases removed from the Youth Part to Family Court. Finally, Criminal Procedure Law §510.15 would be amended to preclude secure detention of a 16- or 17-year old whose sole charge is a violation.

The Committee's measure would ensure that adolescents adjudicated for violations (petty offenses) or charged with, or adjudicated for, violations of conditional discharges would not be adversely affected by chapter 59 of the Laws of 2017. Prior to the effective date of the raise-the-age statute, 16- and 17-year old offenders convicted of violations were subject only to sentences of conditional or unconditional discharge, jail up to 15 days and/or a fine of up to $250. Likewise, under current law, 16- and 17-year old offenders charged solely with violations continue to have their cases heard in local criminal courts and continue to be subject to the same limitations on penalties. Subdivision three of section 10.00 of the Penal Law defines a "violation" as "an offense, other than a 'traffic infraction,' for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed." Penal Law §65.00(1)(a) requires conviction of a "crime," not merely a "violation," for imposition of a probation sentence and Penal Law §65.05(1)(a) authorizes sentences of conditional discharge for up to one year for violations.

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

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

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

Proposal

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

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

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

1. "Juvenile delinquent" means a person over seven and less than [sixteen years of age, or commencing on October first, two thousand eighteen a person over seven and less than seventeen years of age, and commencing October first, two thousand nineteen, a person over seven and less than] eighteen years of age, who, having committed an act that would constitute a crime if committed by an adult, or (with respect to a person over sixteen and less than eighteen years of age) a violation as defined by subdivision three of section 10.00 of the penal law if committed by an adult, where such violation is alleged to have occurred in the same transaction or occurrence of the alleged criminal act[, if committed by an adult], and where such person: (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law.

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

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

§ 3. Subdivision 3 of section 304.1 of the family court act, as amended by section 59 of part WWW of chapter 59 of the laws of 2017, is amended to read as follows:

3. The detention of a child under ten years of age in a secure detention facility shall not be

directed, nor shall the detention of a child adjudicated solely for an act that would constitute a violation, as defined in subdivision three of section 10.00 of the penal law, be directed under any of the provisions of this article.

§ 4. Subdivision 13 of section 308.1 of the family court act, as added by chapter 920 of the laws of 1982, is amended and a new subdivision 14 is added to read as follows:

13. The provisions of this section shall not apply where the petition is an order of removal to the family court pursuant to article seven hundred twenty-five of the criminal procedure law against a juvenile offender as defined in subdivision eighteen of section 10.00 of the penal law.

14. Notwithstanding subdivisions three, four and thirteen of this section, the probation service may adjust a proceeding where the court has referred a case to the probation service in accordance with section 320.6 of this article in conjunction with or subsequent to the issuance of an order pursuant to subdivision one of section 345.1 of this article where such order does not include a fact-finding for a crime that would constitute a juvenile offense as delineated in subdivision eighteen of section 10.00 of the penal law, a designated felony act as defined in subdivision eight of section 301.2 of this article or a delinquent act listed in subdivision four of this section. Where a proceeding has been referred to the probation service in which an order issued pursuant to section 345.1 of this article consists solely of a violation as defined in subdivision three of section 10.00 of the penal law committed by a juvenile sixteen or seventeen years of age, the probation service shall adjust the matter unless good cause is shown and is documented in its records.

§ 5. Section 315.3 of the family court act is amended by adding a new subdivision 4 to read as follows:

4. Where an order of fact-finding that includes solely a violation, as defined in subdivision three of section 10.00 of the penal law committed by a juvenile sixteen or seventeen years of age, has been entered pursuant to section 345.1 of this article, there shall be a rebuttable presumption that the court shall adjourn the case in contemplation of dismissal pursuant to this section, refer the case to the probation service for adjustment services pursuant to section 320.6 of this article or dismiss the case pursuant to subdivision two of section 352.1 of this article.

§ 6. Subdivision 2 of section 320.6 of the family court act, as amended by chapter 310 of

the laws of 2019, is amended to read as follows:

2. At the initial appearance or at any subsequent appearance, the court may refer a case to the probation service for adjustment services. The probation service shall consider the views of the complainant and the impact of the alleged act or acts of juvenile delinquency upon the complainant and upon the community in determining whether adjustment under this section would be suitable. In the case of a designated felony petition, the consent of the presentment agency shall be required to refer a case to the probation service for adjustment services. Where an order of fact-finding that includes solely a violation, as defined in subdivision three of section 10.00 of the penal law committed by a juvenile sixteen or seventeen years of age, has been entered pursuant to section 345.1 of this article, there shall be a rebuttable presumption that the court shall refer the case to the probation service for adjustment services in accordance with this subdivision, dismiss the case pursuant to subdivision two of section 352.1 of this article or adjourn the case in contemplation of dismissal pursuant to section 315.3 of this article.

§ 7. Section 345.1 of the family court act is amended by adding a new subdivision 3 to read as follows:

3. Where an order of fact-finding that includes solely a violation as defined in subdivision three of section 10.00 of the penal law committed by a juvenile sixteen or seventeen years of age has been entered pursuant to subdivision one of this section, there shall be a rebuttable presumption that the court shall refer the case to the probation service for adjustment services in accordance with section 320.6 of this article, dismiss the case pursuant to subdivision two of section 352.1 of this article or adjourn the case in contemplation of dismissal pursuant to section 315.3 of this article.

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

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

solely a violation as defined in subdivision three of section 10.00 of the penal law, the respondent shall not be detained pending disposition.

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

4. Where a youth receives a juvenile delinquency adjudication for conduct committed when the youth was [age] sixteen [or older, commencing on October first, two thousand nineteen, seventeen years of age,] or seventeen years of age that would solely constitute a violation as defined in subdivision three of section 10.00 of the penal law and if the presumption pursuant to subdivision three of section 345.1 of this article has been rebutted, the court shall have the power to enter an order of disposition in accordance with [paragraphs] paragraph (a) [and (b)] of subdivision one of this section. The court shall not order detention, probation or placement of a youth solely adjudicated under this subdivision.

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

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

§ 11. Section 375.2 of the family court act is amended by adding a new subdivision 7 to read as follows:

7. Where an order of fact-finding has been issued pursuant to subdivision one of section 345.1 of this article that includes solely a violation as defined in subdivision three of section 10.00 of the penal law committed by a juvenile sixteen or seventeen years of age, the records shall be sealed automatically at the expiration, as applicable, of a successful period of an adjustment,

adjournment in contemplation of dismissal or conditional discharge.

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

1. When a principal who is under the age of sixteen is committed to the custody of the sheriff the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services as a juvenile detention facility for the reception of children. When a principal who [(a) commencing October first, two thousand eighteen,] is sixteen or seventeen years of age[; or (b) commencing October first, two thousand nineteen, is sixteen or seventeen years of age,] is committed to the custody of the sheriff, the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services in conjunction with the state commission of correction as a specialized secure juvenile detention facility for older youth. Where such a direction is made the sheriff shall deliver the principal in accordance therewith and such person shall although lodged and cared for in a juvenile detention facility continue to be deemed to be in the custody of the sheriff. No principal under the age specified to whom the provisions of this section may apply shall be detained in any prison, jail, lockup, or other place used for adults convicted of a crime or under arrest and charged with the commission of a crime without the approval of the office of children and family services which shall consult with the commission of correction if the principal is sixteen years of age or older in the case of each principal and the statement of its reasons therefor; nor shall a principal under the age specified who is charged solely with a violation as defined in subdivision three of section 10.00 of the penal law be subject to detention. The sheriff shall not be liable for any acts done to or by such principal resulting from negligence in the detention of and care for such principal, when the principal is not in the actual custody of the sheriff.

§ 13. This act shall take effect immediately.

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

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

The Family Court Advisory and Rules Committee is proposing a measure to build upon this recognition by requiring probation to engage parents or other persons legally responsible in their case planning efforts in the Youth Part and to require law enforcement and probation to notify them of details to the extent available of when and where the youth will be arraigned in court. The proposal also amends section 722.10 to require notice to the parents or other persons legally responsible of their right to be present at all proceedings in the Youth Part, "unless good cause exists to dispense with such notice." The court would "not be prevented from proceeding by the absence of such parent or person if reasonable efforts have been made to provide such notice unless the court found good cause to dispense with such notice."

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

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

Id, at 56.

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

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

Id., at p. 3.

The *Guidelines* explained that "[d]ispositions will only be effective if the juvenile delinquency court ensures that the youth and parents, probation, and service providers follow through with court

orders." *Id*. The *Guidelines* include notification and inclusion of parents and guardians at every stage of the process from arrest, through probation diversion, detention, disposition and post-disposition proceedings. *Id.*[32] Likewise, the *Juvenile Justice Standards* promulgated by the American Bar Association and Institute for Judicial Administration almost 40 years ago emphasize the need to notify parents and guardians and include them at every stage. *See* IJA-ABA *Standards Relating to*: *Adjudication* §§1.4, 3.7, 4.5; *Disposition Procedures* §3.1; *Interim Status* §§5.3, 6.5; *Juvenile Probation Function* §2.4(E).[33]

In construing Family Court Act §340.2(3), appellate courts in New York State have repeatedly underscored the importance of involving parents and legally responsible adults in their children's court proceedings, reversing Family Court delinquency plea allocutions and dispositions where insufficient efforts had been made to notify them or, where notified, to give them a reasonable opportunity to appear in court. *See, e.g.,* Matter of Nikim M., 144 A.D.3d 424 (1st Dept., 2016); Matter of Alexander B., 126 A.D.3d 533 (1st Dept., 2015); Matter of John L., 125 A.D.2d 472 (2nd Dept., 1986); Matter of John D., 104 A.D.2d 885 (2nd Dept., 1984); Matter of Tracy B., 80 A.D.2d 792 (1st Dept., 1981); Matter of Smith, 21 A.D.2d 737 (4th Dept., 1964). At the same time, the proposal recognizes that, particularly with the alleged adolescent offenders who are the subjects of proceedings in the Youth Part, there may be cases in which good cause exists to proceed without the involvement of parents or other persons legally responsible.

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

Proposal

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

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

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

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

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

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

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

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

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

5. Upon arresting a juvenile offender or a person sixteen or [commencing October first, two thousand nineteen,] seventeen years of age without a warrant, the peace officer shall immediately

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

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

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

§5. Subdivision 1 of section 722.00 of the criminal procedure law, as added by section 1-a of

part www of chapter 59 of the laws of 2017, is amended to read as follows:

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

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

3. In all proceedings under this article, the parent or other person responsible for the care of the juvenile offender or adolescent offender shall be notified of the right to be present, unless good cause exists to dispense with such notice. The court shall not be prevented from proceeding by the absence of such parent or person if reasonable efforts have been made to provide notice, unless the court found good cause to dispense with such notice.

§7. This act shall take effect immediately.

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

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

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

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

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

sections 722.21(2)(b) and 722.23(1)(a) of the Criminal Procedure Law. *Cf.,* Criminal Procedure Law §§725.05(7), 725.10(1).

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

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

Proposal

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

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

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

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

subdivision five of section 220.10 the criminal procedure law; or

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

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

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

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

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

1. [When] Unless the defendant is an adolescent offender who has been directed to appear at the family court intake office of the county department of probation for adjustment consideration in accordance with subdivision seven of section 725.05 of this chapter, when an order of removal is

filed with the family court, a proceeding pursuant to article three of the family court act must be originated. The family court thereupon must assume jurisdiction and proceed to render such judgment as the circumstances require, in the manner and to the extent provided by law.

§5. This act shall take effect immediately.

13. Stipulations and agreements for child support in Family Court and matrimonial proceedings [S 4829-a version] [F.C.A. §413(1)(h); DRL §240(1-b)(h)]

Section 413(1)(h) of the Family Court Act and section 240(1-b)(h) of the Domestic Relations Law provide three important protections for children when their parents enter into agreements and stipulations for the payment of child support. Validly executed agreements and stipulations entered into by the parties and presented to the Supreme or Family Court for incorporation into orders or judgments must include a statement that the parties were advised of the provisions of the Child Support Standards Act (*CSSA*), as well as a statement that the "basic child support obligation" (application of the *CSSA* percentages to the parties' combined parental income) would "presumptively result in the correct amount of child support to be awarded." Where the agreement or stipulation is at variance with the basic child support obligation, a statement must also be included of what the presumptive amount would have been and why the deviation from that amount is appropriate. These protections are not waivable by the parties or their attorneys. All four Judicial Departments have held that agreements not in compliance with these requirements are invalid and unenforceable. *See* David *v.* Cruz, 103 A.D.3d 494 (1st Dept., 2013); Jefferson *v.* Jefferson, 21 A.D.3d 879 (2nd Dept., 2005); Spooner *v.* Spooner, 154 A.D.3d 1158 (3rd Dept., 2017); Panzarella *v.* Panzarella, 106 A.D.3d 1527 (4th Dept., 2013). However, they have not agreed on the procedures to be followed and the remedies for noncompliance with these mandates. The Family Court Advisory and Rules Committee is proposing legislation to supply necessary clarity to this area.

The Committee's proposal would amend both Family Court Act §413(1)(h) and Domestic Relations Law §240(1-b)(h) to provide that if an agreement or stipulation fails to comply with any of the three provisions of the *CSSA*, the non-*CSSA*-compliant provisions must be deemed void as of the earlier of the date that one of the parties alleged the noncompliance in a pleading or motion or the date the Court made a finding of noncompliance. This approach is consistent with that of the Appellate Division, Third Department, which, in Clark *v.* Liska, 263 A.D.2d 640, 692 N.Y.S.2d 825 (3d Dept., 1999), treated a motion to vacate a stipulation on the ground of noncompliance with these requirements as a prospective modification of the parties' obligations. Noting that retroactive vacatur of the agreement would negatively affect the accumulated child support arrears owed by defendant, the cancellation of which is generally prohibited, the Court affirmed the modification date as the date of the application. *See also* Luisi *v.* Luisi, 6 A.D.3d 398 (2d Dept., 2004); Matter of B.J.G. *v.* M.D.G., 29 Misc.3d 670 Sup.Ct., Nassau Co., 2010). *Cf*., Jefferson *v.* Jefferson, 21 A.D.3d 879, 800 N.Y.S.2d 612 (2d Dept., 2005) (noncompliance with *CSSA* rendered agreement invalid and unenforceable; matter remitted for new determination of child support retroactive to the original date of the agreement).

Further, the Committee's proposal requires that upon a finding of noncompliance, the Court must schedule a hearing to determine an appropriate amount of child support as of the earlier of the date the noncompliance had been asserted in a pleading or a motion or the date of the Court's finding of noncompliance. Concomitantly, the proposal provides that the noncompliance with the

CSSA may not be asserted as a defense to non-payment of child support in violation of an agreement or stipulation for a period prior to the assertion of noncompliance in a motion or pleading or judicial determination of noncompliance, whichever was earlier.

At the same time, the measure recognizes that there are instances when child support provisions that do not comply with the *CSSA* are so intertwined with a non-child support provision that voiding the child support provisions would also result in the inappropriate invalidation of non-child support provisions. *See*, Cimons *v.* Cimons, 53 A.D.3d 125 (2nd Dept., 2008). Therefore the proposed legislation provides that if the Family Court determines that there are intertwined provisions over which it has no jurisdiction, e.g., equitable distribution, it must dismiss the petition in order to allow the parties to return to Supreme Court.

Finally, the proposal provides that unless the Supreme Court has retained exclusive jurisdiction to enforce or modify the agreement, the Family Court would have subject matter jurisdiction to review, and, where necessary, set a new child support obligation in cases in which a divorce judgment did not conform to the *CSSA*. *See* J.Gallet and M.Fine, *Spouse and Child Support in New York* §13:2 (Feb., 2018 Update). While the Third Department has held that the Family Court has the authority to make such an order, [Hardman *v.* Coleman, 154 A.D.3d 1146 (3rd Dept., 2017), Du Bois *v.* Swisher, 306 A.D.2d 610 (3rd Dept., 2003)], the First and Second Departments have decided that in the absence of statutory authority, the Family Court has no jurisdiction to make a new order of support where it finds that the underlying order did not comply with the *CSSA*. *See* Byrne *v.* Javino, 145 A.D.3d 718 (2nd Dept., 2016); Georgette D.W. *v.* Gary N.R., 134 A.D.3d 406 (1st Dept., 2015); Castaneda *v.* Castaneda, 132 A.D.3d 667 (2nd Dept., 2015); Savini *v.* Burgaleta, 34 A.D.3d 686 (2d Dept., 2006). If a Family Court in one of these jurisdictions finds that the support order is unenforceable, it has no choice but to dismiss the petition and direct the parties to return to Supreme Court, an often time-consuming and expensive option. And since the order is invalid, the Family Court cannot even direct a support obligor to pay arrears that may have accrued under the order to the custodial parent.

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

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to agreements and stipulations of child support

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

Section 1. Paragraph (h) of subdivision 1 of section 413 of the family court act, as amended

by chapter 41 of the laws of 1992, is amended to read as follows:

(h)(1) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include the following:

(i) a provision stating that the parties have been advised of the provisions of this subdivision; and

(ii) a provision stating that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded.

(2) In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount.

(3) Such provision may not be waived by either party or counsel.

(4) Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section.

(5) Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(6) If a court of competent jurisdiction finds that sections relating to child support in any agreement, stipulation or court order fail to comply with any of the provisions of this paragraph, such sections shall be deemed void as of the date that any of the parties raises this failure to comply in a pleading or motion or as of the date that a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier. Any sections of an agreement, stipulation or court order that are so directly connected or intertwined with a section deemed void that they necessarily must be recalculated therewith shall also be deemed void as of the same earlier date. Provided, however, that the provisions of this subparagraph shall be subject to the terms of subparagraph (8) of this

paragraph.

(7) If a court of competent jurisdiction finds that an agreement, stipulation or court order fails to comply with any of the provisions of this paragraph, the court shall issue a temporary order of child support and schedule a hearing to determine the final child support order. The final determination of child support shall be made pursuant to this section de novo and shall be effective as of the date that any of the parties raises the failure to comply with any of the provisions of this paragraph in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(8) If the family court finds that sections of an agreement, stipulation or court order other than those relating to child support are directly connected or intertwined with a section that relates to child support that the court has found fails to comply with this paragraph, it shall dismiss the proceeding without prejudice.

(9) The provisions of this paragraph shall not constitute a defense to non-payment of a child support obligation prior to the date that any of the parties raises the failure to comply in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(10) For purposes of this section, a court of competent jurisdiction shall be either the family court or the supreme court, notwithstanding the court in which the agreement, stipulation or order was initiated, unless the supreme court has retained exclusive jurisdiction to enforce or modify the agreement, stipulation or order.

§2. Paragraph (h) of subdivision 1-b of section 240 of the domestic relations law, as amended by chapter 41 of the laws of 1992, is amended to read as follows:

(h)(1) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include the following:

(i) a provision stating that the parties have been advised of the provisions of this subdivision[,]; and

(ii) a provision stating that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded.

(2) In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount.

(3) Such provision may not be waived by either party or counsel.

(4) Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section.

(5) Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(6) If a court of competent jurisdiction finds that sections relating to child support in any agreement, stipulation or court order fail to comply with any of the provisions of this paragraph, such sections shall be deemed void as of the date that any of the parties raises this failure to comply in a pleading or motion or as of the date that a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier. Any sections of an agreement, stipulation or court order that are so directly connected or intertwined with a section deemed void that they necessarily must be recalculated therewith shall also be deemed void as of the same earlier date. Provided, however, that the provisions of this subparagraph shall be subject to the terms of subparagraph (8) of this paragraph.

(7) If a court of competent jurisdiction finds that an agreement, stipulation or court order fails to comply with any of the provisions of this paragraph, the court shall issue a temporary order of child support and schedule a hearing to determine the final child support order. The final determination of child support shall be made pursuant to this section de novo and shall be effective as of from the date that any of the parties raises the failure to comply with any of the provisions of this paragraph in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(8) If the family court finds that sections of an agreement, stipulation or court order other than those relating to child support are directly connected or intertwined with a section that relates to child support that the court has found fails to comply with this paragraph, it shall dismiss the proceeding without prejudice.

(9) The provisions of this paragraph shall not constitute a defense to non-payment of a child support obligation prior to the date that any of the parties raises the failure to comply in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(10) For purposes of this section, a court of competent jurisdiction shall be either the family court or the supreme court, notwithstanding the court in which the agreement, stipulation or order was initiated, unless the supreme court has retained exclusive jurisdiction to enforce or modify the agreement, stipulation or order.

§3. This act shall take effect on the ninetieth day after it shall become a law and shall apply to agreements and stipulations entered into on or after such date.

14. Determinations of willful violations of Family Court orders of protection [F.C.A. §846-a]

Section 846-a of the Family Court Act provides that a willful violation of an order of protection must be proven by "competent evidence," but the statute is silent regarding the quantum of proof required. This gap in the law has resulted in disparate standards being applied in different parts of the State, that is, in "justice by geography." As the Supreme Court, Appellate Division, Third Department, recognized, in Matter of Stuart LL *v.* Amy KK, 123 A.D.3d 218 (3rd Dept., 2014), "[c]ase law has not been consistent regarding the level of proof when considering an alleged willful violation of a protective order (*see, e.g.,* Matter of Rubackin *v*. Rubackin, 62 A.D.3d 11, 20–21, 875 N.Y.S.2d 90 [2nd Dept., 2009]." *See also* Matter of Cori XX, 155 A.D.3d 113(3rd Dept., 2017); Matter of Nicola V., 134 A.D.3d 1131 (2nd Dept., 2015). The Family Court Advisory and Rules Committee is proposing a measure to clear up the ambiguity by codifying recent decisions issued by the Supreme Court, Appellate Divisions, Second and Third Departments.

Following Matter of Cori XX, Matter of Stuart LL *v.* Amy KK, Matter of Nicola V. and Matter of Rubackin *v.* Rubackin, *supra*, the Committee's proposal requires that if a Respondent is brought before the Family Court for a willful violation that is in the nature of a criminal contempt and that results in a definite sentence including incarceration, the willful violation must be proven beyond a reasonable doubt. This requirement would apply to sentences actually imposed, as well as to sentences that are suspended or that may be served on particular days, rather than continuously. The proposal would also clarify the provision authorizing the Family Court to suspend sentences or direct the days on which sentences must be served.

Some willful violations of orders of protection under Family Court Act §846-a may be characterized as civil in nature, that is, those that may be remediated through use of a non-incarcerative sanction or through an indefinite jail sentence lasting until the contemnor has purged the contempt. However, many willful violations of orders of protection prosecuted in Family Court are more accurately characterized as criminal contempts, aimed at punishing the contemnor for a past act. In holding that such contempts may thus preclude a criminal prosecution for the same act as a violation of the constitutional protection against double jeopardy, the Court of Appeals, in People *v.* Wood, 95 N.Y.2d 509, 719 N.Y.S.2d 639 (2000), stated:

> We have recognized that despite the "civil" legislative label (see, Family Court Act 812[2][b]), section 846-a, which provides for a penalty of incarceration for violation of Family Court orders, is punitive in nature [cites omitted]. An adjudication for contempt under Article 8 is properly characterized as punitive because it does not seek to coerce compliance with any pending court mandate, but imposes a definite term of imprisonment and punishes the contemnor for disobeying a prior court order [cites omitted]

[95 N.Y.2d 513].

Applying this characterization, the Appellate Division, in Matter of Rubackin *v.* Rubackin, *supra*, looked to long-established decisions of the United States Supreme Court for its holding that proof beyond a reasonable doubt is required in criminal contempt cases. Both Gompers *v.* Bucks

Stove & Range Co., 221 U.S. 418 (1911) and Michaelson *v.* United States *ex rel* Chicago St.P., M & O. R. Co., 266 U.S. 42 (1924) required proof beyond a reasonable doubt where the purpose of the incarceration was to punish a past violation. Similarly, the New York State Court of Appeals required this quantum of proof in labor cases [County of Rockland *v.* Civil Service Employees Association, 62 N.Y.2d 11 (1984)], and the Appellate Division, Second Department, applied the standard in cases involving violations of judgments, grand jury subpoenas to produce documents and temporary injunctions. *See* Muraca *v.* Meyerowitz, 49 A.D.3d 697, 853 N.Y.S.2d 636 (2nd Dept., 2008); Matter of Kuriansky *v.* Azam, 176 A.D.2d 943, 575 N.Y.S.2d 679 (2nd Dept., 1991); Matter of Jones [McKanic], 160 A.D.2d 870, 554 N.Y.S.2d 303 (2nd Dept., 1990); Matter of Gold *v.* Valentine, 35 A.D.2d 958, 318 N.Y.S.2d 360 (2nd Dept., 1970).

No reason exists to distinguish willful violations of orders of protection in Family Court cases from the contexts in which these settled principles of law evolved. As the Appellate Division held, in Matter of Stuart LL *v.* Amy KK,

> Where, as here, a person who has violated an order of protection is incarcerated as a punitive remedy for a definite period—with no avenue to shorten the term by acts that extinguish the contempt—then that aspect of the Family Ct. Act article 8 proceeding "is one involving criminal contempt [and] [t]he standard of proof that must be met to establish that the individual willfully violated the court's order is beyond a reasonable doubt."

(*Matter of Rubackin v. Rubackin*, 62 A.D.3d at 21, 875 N.Y.S.2d 90; see Merril Sobie, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act §846–a, at 346).

In codifying Cori XX, Stuart L.L., Nicola V. and Rubackin, the Committee's measure will bring uniformity to the prosecution of violations of orders of protection in Family Court in adherence with well-established constitutional precepts.

Proposal

AN ACT to amend the family court act, in relation to determinations of willful violations of orders of protection

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

Section 1. Section 846-a of the family court act, as amended by chapter 1 of the laws of 2013, is amended to read as follows:

§846-a. Powers on failure to obey order. (a) If a respondent is brought before the court for failure to obey any lawful order issued under this article or an order of protection or temporary order of protection issued pursuant to this act or issued by a court of competent jurisdiction of another state, territorial or tribal jurisdiction and if, after hearing, the court is satisfied by competent proof that the

respondent has willfully failed to obey any such order, the court may:

(i) modify an existing order or temporary order of protection to add reasonable conditions of behavior to the existing order,

(ii) make a new order of protection in accordance with section eight hundred forty-two of this part, [may]

(iii) 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.

15. Family Court reviews of administrative suspensions of driver's licenses for failure to pay child support and eligibility for restricted use licenses
[F.C.A. §454; S.S.L. §111-b(12); V.T.L.§§510, 530]

Of the many mechanisms for child support enforcement required by Federal law and embodied in New York State law, suspension of driver's licenses as a penalty for accumulation of more than four months of unpaid arrears has been widely recognized as an effective deterrent. The threat of a suspension propels many support obligors to pay their outstanding obligations. However, in cases where the suspension is actually imposed, it often has the effect of undermining its statutory goal of promoting payment. The Congressional Research Service, in a report issued in 2011, noted that, according to census data, approximately 76 percent of employees nationally commute to work in private vehicles and 11 percent commute by car-pool; many entry-level jobs require driver's licenses and many jobs are inaccessible by public transportation, especially in suburban and rural areas.[34] The report indicated that suspensions may be particularly punitive for low-income support obligors, "may lessen a person's ability to keep a job or find work, and thus impede a non-custodial parent's ability to fulfill his or her child support obligation."[35]

The Family Court Advisory and Rules Committee is submitting a measure designed to mitigate this counterproductive effect by delineating a clear method for the Family Court to review administrative suspensions following the support obligor's exhaustion of administrative remedies and clarifying the uses to which a restricted use license may be put during the period of suspension. The measure would alter the means of challenging unsuccessful administrative challenges to administrative driver's license suspensions and would add flexibility to the statute regarding restrictive licenses.

1. Challenges to denials of administrative hearings regarding administrative license suspensions: Pursuant to Title IV-D of the Federal *Social Security Act*, all State plans, as a condition for eligibility for 66 percent Federal reimbursement for State child support programs, must include procedures to "withhold or suspend, or to restrict the use of driver's licenses, professional and occupational licenses, and recreational and sporting licenses of individuals owing overdue support or failing, after receiving appropriate notice, to comply with subpoenas or warrants relating to paternity or child support proceedings." *See* 42 USC §666(a)(16). Congress afforded states "a great deal of flexibility in implementing license suspension programs"[36] and did not mandate specific procedures for the suspension and reinstatement of such licenses. New York laws, recently extended to August 31, 2021, thus prescribe two methods for suspending drivers' licenses of child support obligors who have accumulated more than four months of unpaid arrears:

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

[35] *Id.* at page 11.

[36] Congressional Research Service, *supra* note 16, at p.6.

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

• The Support Collection Unit (SCU) of a local Department of Social Services may administratively direct DMV to suspend an obligor's license under Social Services Law §111-b(12). An obligor in default is provided notice that the SCU intends to direct the suspension and the obligor has 45 days to challenge the determination, a challenge that may only be based upon a failure to receive actual notice of the suspension. Among the bases for a successful challenge are: the arrears have been paid in full; the obligor is in receipt of public assistance or Supplemental Security Income (SSI), the obligor's income is below the self-support reserve, or that the obligor is able to make a satisfactory payment arrangement with the SCU. A satisfactory payment arrangement requires, among other things, a confession of judgment and payments of support and arrears pursuant to an income execution. The SCU has up to 75 days to review the obligor's challenge. If, after the review, the obligor disagrees with the SCU determination, he or she may file objections with the Family Court pursuant to Family Court Act §454(5). The review is based on written submissions and unless the Family Court finds that the SCU's decision to suspend the driver's license was "based upon a clearly erroneous determination of fact or error of law," the Court must deny the objections.

While both methods can be effective in promoting collection of support arrears, they often have the perverse effect noted above of preventing obligors from finding and maintaining employment, thus hampering their ability to make support payments. With respect to administrative suspensions under Social Services Law §111-b(12), an unemployed or underemployed obligor may not be able to reach a satisfactory repayment agreement with the SCU in order to avoid or terminate the suspension. An obligor whose license has been suspended will generally not have the license reinstated until he or she has a job with support being deducted via an income execution. Moreover, the limitation of the grounds for challenges significantly impedes full review. The Committee's measure thus amends subdivision twelve of Social Services Law §111-b to permit administrative reviews – and thus ultimately judicial reviews – of license suspensions on grounds in addition to lack of actual notice of the suspension.

While the Family Court may review a support obligor's objections to an administrative denial by the SCU of a challenge to an administrative driver's license suspension, experience statewide demonstrates that almost no support obligors avail themselves of that remedy. The Family Court has received only a handful of objections to administrative denials of license suspension challenges.

In order to make the process to challenge denials resulting from administrative reviews more accessible to litigants, especially those without legal representation, the proposed measure would amend subdivision five of Family Court Act §454 to substitute the more familiar petition process. Since the Family Court does not charge fees for initiating actions, such a change would not add any expense for the litigant; nor would it encumber the litigant with an undue burden of service since the process would be similar to the current notification requirements regarding objections. The measure

would require the obligor to submit financial disclosure documents, since, as in all child support proceedings, the information is critically important to the resolution of the matters. Conforming amendments referencing the petition process for judicial review would be added to section 111-b of the Social Services Law and subdivision 4-e of section 510 of the Vehicle and Traffic Law.

Support obligors whose licenses have been suspended routinely file modification petitions with the court seeking reviews of suspensions, only to be informed by the courts that they must follow the procedures in FCA §454. Because of the strict time limits in that section and subdivision twelve of section 111-b of the Social Services Law, support obligors are often by this time precluded from taking appropriate action to have their licenses returned. And because the written objection process proves to be too onerous for many support obligors, they are often unable to obtain the relief to which they would otherwise be entitled. By shifting the process from a written objection to a petition and appearance, the Family Court can ensure that support obligors challenging their license suspensions are given the necessary opportunities to collect and present the evidence necessary to obtain effective judicial review of their cases.

2. Restricted use licenses: The Committee's measure clarifies an apparent contradiction in the activities permitted under a restricted use license pursuant to section 530 of the Vehicle and Traffic Law. In both judicial and administrative license suspension cases, a support obligor may apply for a restricted use license which is limited to travel to and from his or her place of employment or school, commuting as part of a job-search and in other limited circumstances. Family Courts are routinely faced with obligors who report that they are unable to find and maintain employment as a result of license suspensions. Without the ability to address what may be a root cause of a non-custodial parent's unemployment, the Court has only two options when addressing violations of child support orders – either lower the support obligation or continue the order, which will ultimately result in greater arrears and possible incarceration – neither of which achieves the goal of increasing support payments to custodial parents for the benefit of their children.

Vehicle and Traffic Law §530(3)(a) permits a restricted use license to be used "during the time the holder is actually engaged in pursuing or commuting to or from his business, trade, occupation or profession," clearly permitting use both for commuting and for job-seeking. The enumerated activities permitted in subdivision three exclude any driving that is a part of the license holder's job, and, consequently, exclude driving any commercial vehicle or vehicle for hire, such as a car service or taxi. Vehicle and Traffic Law §530(5), however, states that obligors, whose licenses have been suspended for non-payment of support, may nonetheless drive most vehicles for hire with the exception of commercial vehicles defined in Vehicle and Traffic Law §501-a(4). These sections appear to be in contradiction, since a vehicle for hire would be used as part of a driver's job, not simply for commuting. The measure, therefore, amends subdivision three of section 510 of the Vehicle and Traffic Law to harmonize the subdivisions by making it clear that where a restricted use license is issued to a driver whose license had been suspended for failure to pay child support, the restricted use license may be used for driving that is a part of the job. While preserving the exclusion of commercial vehicles, the measure permits a restricted license to be used for driving other types of motor vehicles "incident to the [license] holder's business, trade, occupation or profession." A clarifying amendment is also proposed for Vehicle and Traffic Law §530(5).

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

> States are continuing to make changes during each legislative session, with a number of states easing up on driver's license restrictions in particular in order to allow the obligor[s] to continue working so that they can meet their support obligation in the future.[37]

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". [38] 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.[39] 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.[40]

Consistent with this growing national trend, enactment of the Committee's proposal would increase the effectiveness of driver's license suspensions as a tool to promote, rather than impede, child support payments.

Proposal:

AN ACT to amend the family court act, the social services law and the vehicle and traffic law, in relation to family court reviews of administrative driver's license suspensions for failure to pay child support and eligibility for restricted use licenses

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

Section 1. Subdivision 5 of section 454 of the family court act, as amended by chapter 468 of the laws of 2012, is amended to read as follows:

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

[38] 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.

[39] *See* W. Va. Code §48-15-209.

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

(5) The court may review a support collection unit's denial of [a] an administrative challenge made by a support obligor pursuant to paragraph (d) of subdivision twelve of section one hundred eleven-b of the social services law if [objections thereto are] a petition is filed by a support obligor who has received notice that the office of temporary and disability assistance intends to notify the department of motor vehicles that the support obligor's driving privileges are to be suspended. [Specific written objections to]

a. The petition challenging a support collection unit's denial may be filed by the support obligor within thirty-five days of the mailing of the notice of the support collection unit's denial. A support obligor who files such [objections] a petition shall serve a copy of the [objections] petition upon the support collection unit and the support obligee, [which] each of whom shall have ten days from such service to file a written [rebuttal to such objections and] answer. On or before the return date of the petition, the support collection unit shall provide to the court a copy of the record upon which the support collection unit's denial was made, including all documentation submitted by the support obligor. Proof of service shall be filed with the court at the time of filing of [objections] the petition and any [rebuttal. The court's review shall be based upon the record and submissions of the support obligor and the support collection unit upon which the support collection unit's denial was made. Within forty-five days after the rebuttal if any, is filed, the] answer.

b. The support obligor shall submit to the court the financial disclosure required by subdivision (a) of section four hundred twenty-four-a of this act. The court shall not determine the petition in the absence of such submission.

c. The court shall (i) deny the [objections] petition and remand to the support collection unit or (ii) [affirm] grant the [objections] petition if the court finds the determination of the support collection unit is based upon a clearly erroneous determination of fact or error of law[, whereupon]. If the court grants the petition, it shall direct the support collection unit not to notify the department of motor vehicles to suspend the support obligor's driving privileges.

d. Provisions set forth herein relating to procedures for [appeal to] review by the family court by individuals subject to suspension of driving privileges for failure to pay child support shall apply solely to such cases and not affect or modify any other procedure for review or appeal of administrative enforcement of child support requirements.

§2. Paragraphs (d) and (f) of subdivision 12 of section 111-b of the social services law, as

amended by chapter 81 of the laws of 1995 and chapter 29 of the laws of 2015, are amended to read as follows:

(d)(1) A support obligor may challenge in writing the correctness of the determination of the support collection unit that the obligor's driving privileges should be suspended, and in support of the challenge may submit documentation demonstrating mistaken identity, error in calculation of arrears, financial exemption from license suspension pursuant to the conditions enumerated in paragraph (e) of this subdivision, the absence of an underlying court order to support such determination, or other reason that the person is not subject to such determination. Such documents may include but are not limited to a copy of the order of support pursuant to which the obligor claims to have made payment, other relevant court orders, copies of cancelled checks, receipts for support payments, pay stubs or other documents identifying wage withholding, and proof of identity. The support collection unit shall review the documentation submitted by the support obligor, shall adjust the support obligor's account if appropriate, and shall notify the support obligor of the results of the review initiated in response to the challenge within seventy-five days from the date of the notice required by paragraph (b) of this subdivision. If the support collection unit's review indicates that the determination to suspend driving privileges was correct, the support collection unit shall notify the support obligor of the results of the review and that the support obligor has thirty-five days from the date of mailing of such notice to satisfy the full amount of the arrears or commence payment of the arrears/past due support as specified in paragraph (e) of this subdivision and if the support obligor fails to do so, the support collection unit shall notify the department of motor vehicles to suspend the support obligor's driving privileges pursuant to section five hundred ten of the vehicle and traffic law. The support obligor shall be further notified that if the support obligor files [objections with] a petition for review by the family court and serves [these objections] the petition on the support collection unit within thirty-five days from the date of mailing of the notice denying the challenge pursuant to subdivision five of section four hundred fifty-four of the family court act, the support collection unit shall not notify the department of motor vehicles to suspend the support obligor's driving privileges until fifteen days after entry of [judgement] judgment by the family court denying the [objections] relief requested in the petition.

(2) A support obligor may within thirty-five days of mailing of the notice denying his or her challenge by the support collection unit [request that the] file a petition seeking family court review

of the support collection unit's determination pursuant to subdivision five of section four hundred fifty-four of the family court act. If the support obligor [requests the] files a petition seeking family court [to] review of the determination of the support collection unit, the support collection unit shall not notify the department of motor vehicles to suspend the support obligor's driving privileges until fifteen days after mailing of a copy of the judgment by the family court to the support obligor denying the [objections] relief requested in the petition.

(f) A support obligor [who alleges that he or she has not received actual notice pursuant to paragraph one of subdivision (b) of this section and] whose driving privileges were suspended may at any time request a review pursuant to subdivision (d) of this section or comply with the requirements of subdivision (e) of this section, and upon a determination that he or she has not accumulated support arrears equivalent to or greater than the amount of support due for a period of four months or that he or she meets the requirements of subdivision (e) of this section, the department shall notify the department of motor vehicles that the suspension of driving privileges shall be terminated. If the support collection unit upholds the suspension, the support obligor may seek a review by the family court of the determination pursuant to subdivision (d) of this section and section four hundred fifty-four of the family court act.

§3. Paragraph (3) of subdivision 4-e of section 510 of the vehicle and traffic law, as amended by chapter 81 of the laws of 1995, is amended to read as follows:

(3) Upon receipt of notification from the office of temporary and disability assistance of a person's failure to satisfy support arrears or to make satisfactory payment arrangements thereon pursuant to paragraph (e) of subdivision twelve of section one hundred eleven-b of the social services law or notification from a court issuing an order pursuant to section four hundred fifty-four or four hundred fifty-eight-a of the family court act or section two hundred forty-four-b of the domestic relations law, the commissioner or his or her agent shall suspend the license of such person to operate a motor vehicle. In the event such person is unlicensed, such person's privilege of obtaining a license shall be suspended. Such suspension shall take effect no later than fifteen days from the date of the notice thereof to the person whose license or privilege of obtaining a license is to be suspended, and shall remain in effect until such time as the commissioner is advised that the person has satisfied the support arrears or has made satisfactory payment arrangements thereon pursuant to paragraph (e) of subdivision twelve of section one hundred eleven-b of the social

services law or until such time as the court issues an order to terminate such suspension;

§4. Subdivisions (3) and (5) of section 530 of the vehicle and traffic law, subdivision (3) as amended by chapter 539 of the laws of 1990 and subdivision (5) as amended by section 31 of part LL of chapter 56 of the laws of 2010, are amended to read as follows:

(3) Such license or privilege and renewal thereof shall be issued for a period not exceeding the period during which such person's regular driver's license or privilege has been suspended or revoked, shall be marked and identified as a restricted use license or privilege and shall be valid only: (a) during the time the holder is actually engaged in pursuing or commuting to or from his or her business, trade, occupation or profession,

(b) en route to and from a driver rehabilitation program or related activity specified by the commissioner at which his or her attendance is required,

(c) to and from a class or course at an accredited school, college or university or at a state approved institution of vocational or technical training,

(d) en route to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of his or her household, as evidenced by a written statement to that effect from a licensed medical practitioner, or

(e) enroute to and from a place, including a school, at which the child or children of the holder are cared for on a regular basis and which is necessary for the holder to maintain such holder's employment or enrollment at an accredited school, college or university or at a state approved institution of vocational or technical training and shall contain the terms and conditions under which it is issued and is valid.

In the event the holder of a restricted use license or privilege is convicted of: any violation (other than parking, stopping or standing) or of operating a motor vehicle for other than his or her employment, business, trade, occupational or professional or other purposes for which the license or privilege was issued, or does not comply with other requirements established by the commissioner, such license or privilege may be revoked and the holder shall not be eligible to receive a license or privilege pursuant to this section for a period of five years from the date of such revocation. Subject to the limitations of subdivision five of of this section, a restricted use license issued to a person whose license has been suspended for failure to make payments of child support or combined child and spousal support shall be valid for operation of a motor vehicle incident to the

holder's business, trade, occupation or profession.

(5) A restricted use license or privilege shall be valid for the operation of any motor vehicle, except a vehicle for hire as a taxicab, livery, coach, limousine, van or wheelchair accessible van or tow truck as defined in this chapter subject to the conditions set forth herein, which the holder would otherwise be entitled to operate had his drivers license or privilege not been suspended or revoked. Notwithstanding anything to the contrary in a certificate of relief from disabilities or a certificate of good conduct issued pursuant to article twenty-three of the correction law, a restricted use license shall not be valid for the operation of a commercial motor vehicle. A restricted use license shall not be valid for the operation of a vehicle for hire as a taxicab, livery, coach, limousine, van or wheelchair accessible van or tow truck where the holder thereof had his or her drivers license suspended or revoked and

(i) such suspension or revocation is mandatory pursuant to the provisions of subdivision two or two-a of section five hundred ten of this title; or

(ii) any such suspension is permissive for habitual or persistent violations of this chapter or any local law relating to traffic as set forth in paragraph d or i of subdivision three of section five hundred ten of this title; or

(iii) any such suspension is permissive and has been imposed by a magistrate, justice or judge of any city, town or village, any supreme court justice, any county judge, or judge of a district court.

Except for a commercial motor vehicle as defined in subdivision four of section five hundred one-a of this title, the restrictions on types of vehicles which may be operated with a restricted license contained in this subdivision shall not be applicable to a restricted license issued to a person whose license has been suspended for failure to make payments of child support or combined child and spousal support pursuant to paragraph three of subdivision four-e of section five hundred ten of this title.

§5. This act shall take effect immediately.

16. Permanency planning in juvenile delinquency and persons in need of supervision proceedings in Family Court [F.C.A. §§312.1, 320(2), 353.3, 355.5, 736, 741, 756, 756-a]

When the Legislature enacted chapter 3 of the Laws of 2005, the landmark child welfare permanency legislation, it deferred consideration of the significant constellation of issues relating to permanency planning and permanency hearings regarding juvenile delinquents and Persons in Need of Supervision (PINS). Over a decade later, however, these issues remain critically important and should be addressed comprehensively. The permanency hearing provisions, including those regarding planning for return of the youth from out-of-home care, are vital for the successful resolution of these cases for the youth, their families and their communities. Not only are they essential for the Judiciary's ability to fulfill its mandates under the Federal *Adoption and Safe Families Act* [Public Law 105-89], but the recent enactment of the Federal *Preventing Sex Trafficking and Strengthening Families Act* [Public Law 113-183] has rendered the need to incorporate these features into the statutes pertaining to juvenile delinquents and PINS even more compelling. Most recently, in re-authorizing and expanding the *Juvenile Justice and Delinquency Prevention Act of 1974* [34 U.S.C. §11103], the Federal *Juvenile Justice Reform Act of 2018* (H.R. 6964), which was signed into law on December 21, 2018, requires States to include prompt educational records and academic credit transfers as part of the planning process for release of youth from out-of-home care. As the Family Court, Queens County, has observed, permanency hearings in juvenile delinquency and PINS proceedings "serve the same purpose" as those in child abuse and neglect cases. *See* In the Matter of Mario S., 38 Misc. 3d 444 (Fam. Ct., Qns. Co., 2012). Recent enactments, as part of the New York State budgets for Fiscal Years 2015 and 2016, which make identical modifications to the juvenile delinquency, Persons in Need of Supervision, child protective and permanency statutes, underscore this equivalence. *See* L.2016, c. 54; L. 2015, c. 56.

If the Family Court is to be able to exercise its critical monitoring functions and convene meaningful permanency hearings in juvenile delinquency and PINS proceedings, it must have the benefit of at least the same information that is required to be presented in child welfare proceedings. The Court must make determinations of specificity at least comparable to those in child welfare proceedings and the parties must have the benefit of continuity of legal representation. None of the applicable Federal statutes make any distinction between juvenile justice and child welfare proceedings for those states, including New York, that receive significant Federal foster care funding under Title IV-E of the *Social Security Act* for placements of juvenile delinquents and status offenders.

To that end, the Family Court Advisory and Rules Committee has developed a proposal that incorporates essential elements of the child welfare permanency hearing article of the Family Court Act (Article 10-A) into the permanency hearing provisions of Articles 3 and 7 of the Act. It would provide greater specificity regarding the services that must be provided for youth and would expand the alternatives available to the Court both in dispositional and permanency hearings in juvenile delinquency and PINS cases. Briefly, the proposal contains the following provisions:

1. Notices to non-custodial parents: To ensure that all possible resources are engaged in the resolution of juvenile delinquency and PINS proceedings, the proposal would require that non-custodial parents, if any, be given notices of their children's cases in Family Court to enable them to appear. This supplements the existing requirement that a summons be issued for an accused juvenile's parent or other person legally responsible. The local probation department that generally interviews parties at the outset for adjustment purposes, as well as the presentment agency (prosecution), would be charged with the responsibility of asking the custodial parent for the necessary contact information for parents other than those already notified. In juvenile delinquency cases, the presentment agency must send the notice, along with a copy of the petition, to the non-custodial parent or parents at least five days before the appearance date. In PINS cases, where there is most often no presentment agency, the Family Court would be charged with sending the notice. Consistent with Family Court Act §§341.2(3) and 741(c), however, the absence of the parent who was sent the notice to appear in court would not be grounds to delay the proceedings.

As in child abuse, child neglect and PINS proceedings, so, too, in juvenile delinquency proceedings the child's non-custodial parent may be a critical participant in the dispositional process. Sometimes a non-custodial parent or his or her extended family may provide vitally-needed placement resources for a child, both temporarily during the pendency of the action and on a more extended basis at disposition. These family members may at the very least provide helpful participation that may positively influence the child's behavior. However, unlike the statutory provisions applicable to child protective and PINS proceedings, the Family Court Act contains no mandate to even notify non-custodial parents of, let alone engage them in resolving, their children's juvenile delinquency proceedings. This proposal would fill that gap.

2. Continuity of counsel: The proposal provides necessary continuity in representation by attorneys for juveniles in both delinquency and PINS cases. Similar to the requirement in Family Court Act §1016 for the appointment of the attorney for the child in a child protective proceeding to continue during the life of a dispositional or post-dispositional order, Family Court Act §§320.2(2) and 741(a) would be amended to continue the appointment of the child's attorney in juvenile delinquency and PINS proceedings for the entire period of a dispositional order, an adjournment in contemplation of dismissal and any extensions of permanency hearings, violation hearings or other post-dispositional proceedings. As in child protective cases, the appointment would automatically continue unless the Family Court relieves the attorney or grants the attorney's application to be relieved, in which case the Court must appoint another attorney immediately. While the current practice of the attorney submitting a voucher for payment at the close of a proceeding would continue, the attorney would be able, as in child protective proceedings, to submit a separate application for compensation for post-dispositional services rendered.

One of the central precepts underlying the Family Court Act is the necessity of representation of juveniles at every stage of the proceedings, a precept "based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition." Family Court Act §241. The Act recognizes that juveniles "often require the assistance of counsel to help protect their interests and to help them express their wishes to the court." *Id*. Both the juvenile delinquency and

PINS statutes explicitly require appointment of an attorney for the youth at the outset of proceedings, require the attorney's personal appearance at every hearing and provide for the continuation of the appointment on appeal. *See* Family Court Act §§307.4(2), 320.2(2), 320.3, 341.2(1), 728(a), 741(a), 1120(b). What is less clear, however, is whether the appointment of the attorney, absent an appeal, continues after the disposition of a juvenile delinquency or PINS proceeding. This proposal eliminates that ambiguity. Representation of juveniles in such cases after disposition in case conferences and subsequent reviews is critically important to efforts to ensure that effective permanency planning takes place. In the juvenile delinquency and PINS context, this representation may significantly further the goal of ensuring that services are in place to facilitate the juvenile's successful reintegration into his or her community.

3. Permanency planning: Where the dispositional order places the juvenile in a juvenile delinquency case with a county Department of Social Services or, in the case of juvenile delinquents outside New York City, with the New York State Office of Children and Family Services for non-secure or limited secure care, the dispositional order must contain or have annexed the same elements as child protective placement orders, including a description of the family visitation plan, the service plan if available (or if not yet available, then within 60 days of the disposition) and a directive that notice be given to the parents of any planning conferences. Similar requirements apply to PINS cases, but in light of the shorter placements authorized under part K of chapter 56 of the laws of 2019, the deadlines for the plans must be shorter. These elements of a permanency order in juvenile delinquency and PINS cases are as critical as those already recognized by the Legislature in its recent enactments implementing the Federal Law, Public Law 113-183, that is, the need to document the services necessary to assist juveniles 14 and older to make the transition from foster care to successful adulthood, the need in Alternative Planned Permanent Living Arrangement cases to specify "a significant connection to an adult willing to be a permanency resource for the child," the need for placement agencies to document – and the courts to monitor – the provision of age and developmentally appropriate services to youth using a "reasonable and prudent parent" standard, the need for youth 14 and older to be integrally involved in planning for their futures and the limitation of the permanency goal of Another Planned Permanent Living Arrangement" to youth 16 years of age and older. *See* L. 2016, c. 54; L. 2015, c. 56.

Unquestionably, these features of the permanency legislation, most specifically addressing the needs of adolescents in out-of-home care, are equally essential for the adolescents who comprise the juvenile delinquency and PINS caseloads of the Family Courts statewide. Planning for the juveniles' release to their families, the predominant permanency goal in juvenile delinquency and PINS cases, must begin early and, where their families will not be a resource, the identification of suitable permanency resources is critically important. As recent reports regarding New York's placement system point out, youth exiting out-of-home care are especially vulnerable and have significant needs that must be met if they are to make a successful adjustment to the community.

4. Educational and vocational release planning in juvenile delinquency and PINS proceedings: Any finding that reasonable efforts, as required by both Federal and State law, have been made to further the permanency goals of juvenile delinquents and PINS must include advance

efforts to ensure their prompt enrollment in a school or vocational program upon release from out-of-home care. The proposal thus amends both the juvenile delinquency and PINS statutes for agencies in which youth are placed to notify the school districts in which the youth will be attending school upon release not less than 14 days in advance of their release, to promptly transfer records to the school districts and to try to coordinate release dates with school terms so as to minimize disruption to the youths' educational programs. The proposal further requires that local school districts enroll youth exiting placement in school within five business days of their release. Consistent with the school stability provisions of the Federal *Fostering Connections to Success and Adoption Improvement Act of 2008* [Public Law 110-351] and the *Every Student Succeeds Act* [Public Law 114-95], school authorities would also be required to ensure that, where appropriate, students may remain in the schools they attended prior to their placement or remand into foster care. Most recently, as noted above, section 205 of the Federal *Juvenile Justice Reform Act of 2018* (H.R. 6964), signed into law on December 21, 2018, requires States to include in their State Plans prompt educational records and academic credit transfers as part of the planning process for release of youth from out-of-home care.

All of these provisions further the goals embodied in and are consistent with the *Guiding Principles for Providing High-Quality Education in Juvenile Justice Secure Care Settings* jointly issued by the United States Department of Education and Department of Justice in December, 2014. The cover letter, from the Attorney General and Secretary of Education that accompanied the *Guiding Principles,* dated December 8, 2014, stated that:

> For youth who are confined in juvenile justice facilities, providing high-quality correctional education that is comparable to offerings in traditional public schools is one of the most powerful – and cost-effective – levers we have to ensure that youth are successful once released and are able to avoid future contact with the justice system. High-quality correctional education, training, and treatment are essential components of meaningful rehabilitation because these equip youth with the skills needed to successfully reenter their communities and either continue their education or join the workforce.

While referring to secure settings, the document notes that "the principles and core activities should also inform the services provided to any youths so displaced, regardless of where they are located or for how long." *Id.* at 2. The *Guidelines* stress the need for timely and comprehensive reentry planning, transfers of school records to ensure expeditious re-enrollment and full compliance with the *Individuals with Disabilities Education Act (IDEA). See also*, Letter from the Attorney General and Secretary of Education, dated December 5, 2014, regarding *IDEA* requirements.

It is most ironic that PINS, many, if not most, of whom had been adjudicated for truancy or other school difficulties, are the only category of juveniles before the Family Court who do not have specific statutory rights to school and vocational release planning. Therefore, the Committee's proposal conforms the PINS statute to the juvenile delinquency school and vocational release mandates of chapter 181 of the Laws of 2000 and to chapter 3 of the Laws of 2005, which added identical provisions for children in foster care. While, starting in 2020, placements will no longer

be authorized for PINS cases in which the sole allegation is truancy [L. 2019, c. 56, part K], many, if not most, PINS cases include truancy among the child's other problems. 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 in juvenile delinquency cases and 14 days in PINS cases. 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 in juvenile delinquency cases, with shorter time-frames applicable to PINS cases.

The release plan mandated in the report must delineate the steps that the agency has taken or will be taking to ensure that the PINS would be enrolled in school promptly after release, that records would be promptly transferred and that special education services, if any, would continue until such time as the new local education agency develops and implements a new Individual Education Plan, as necessary. As in juvenile delinquency and foster care cases, for a PINS not subject to the State compulsory education law who affirmatively elects not to continue in school, the agency must describe steps taken or planned to promptly ensure the juvenile's gainful employment or enrollment in a vocational program. In a consolidated extension of placement and permanency hearing, this release plan would be reviewed by the Family Court in conjunction with its review of the permanency plan and the Court's order would include a determination of the adequacy of the release plan and would specify any necessary modifications. Recognizing that, of all children in out-of-home care, PINS children are among the most likely to have serious educational deficits and needs, these provisions would help to ameliorate the serious, pervasive deficiencies in agency referrals of youth to school and vocational programs upon release from foster care.[41]

The importance of increasing efforts to ensure that both juvenile delinquents and PINS are able to stay in, re-enroll in and succeed in school cannot be overstated. High school drop-outs are 3.5 times as likely to be arrested as high school graduates and more than eight times more likely to be incarcerated in jails or prisons. Even a 10% increase in graduation rates has been estimated to prevent approximately 180 murders and 9,000 aggravated assaults in New York annually.[42]

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[41] *Educational Neglect: The Delivery of Educational Services to Children in New York City's Foster Care System* (Advocates for Children of New York, July, 2000); *Changing the PINS System in New York: A Study of the Implications of Raising the Age Limit for Persons in Need of Supervision (PINS)*, p. 34 (Vera Inst., Sept., 2001); *Changing the Status Quo for Status Offenders: New York State's Efforts to Support Troubled Teens* (Vera Inst., Dec., 2004).

[42] *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.

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 are likely, during the course of placement, to be transferred into Title 5IV-E- eligible non-secure facilities. Convening permanency hearings for this small population of placed youth greatly facilitates the planning process for their release 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 or the New York City Administration for Children's Services, but should be made uniform through a statutory requirement. *See, e.g.*, Matter of Donovan Z., 6 Misc.3d 1023(A), 800 N.Y.S.2d 345 (Fam. Ct., Monroe Co., 2005)(Unreported opinion).

Further, as in the child welfare permanency legislation, the proposal requires that permanency hearing orders in juvenile delinquency and PINS proceedings include: a description of the visiting plan between the juvenile and his or her parent or legally-responsible adult and siblings; a service plan designed to fulfill the permanency goal for the juvenile;[43] a direction that the parent or other person legally responsible be notified of, and be invited to be present at, any planning conferences convened by the placement agency with respect to the child; and a warning that if the juvenile remains in placement for 15 out of 22 months, the agency may be required to file a petition to terminate parental rights. A copy of the court order and service plan must be provided to the juvenile, his or her attorney and the juvenile's parent or other legally responsible individual. *Cf.*, Family Court Act §§1089(d)(2)(vii)(A), 1089(e).

State and Federal law and regulations are unequivocal in their requirements that juvenile delinquency and PINS cases conform to the Federal *Adoption and Safe Families Act* ["*ASFA,"* Public Law 105-89]. The reauthorization of the Federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273] in 2002 made compliance with *ASFA* a requirement, not only for New York State to receive Federal foster care assistance pursuant to Title IV-E of the *Social Security Act* [42 U.S.C.], but also for eligibility for Federal juvenile justice funding from the Department of Justice. In addition to the 2015 and 2016 New York State budget enactments cited above, the enactment of amendments in 2000 to New York State legislation implementing the Federal *ASFA* underscored the Legislature's recognition that the reasonable efforts, permanency

[43] If a service plan has not been prepared by the date of disposition in a juvenile delinquency proceeding, 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.

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.[44] 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 and siblings are clearly articulated, the likelihood of successful permanency planning is significantly increased. This would benefit not only New York State in its efforts to demonstrate compliance with *ASFA*, but also the juveniles, their families and the communities to which the juveniles return.

In Matter of Robin G., 20 Misc.3d 328 (Fam. Ct., Queens Co., 2008), for instance, at a combined permanency/extension of placement hearing, the Family Court made a finding of no reasonable efforts against NYS OCFS since neither it, nor the authorized agency having custody of the juvenile, made reasonable efforts to facilitate the juvenile's return to her mother's home; no services or counseling were provided to the mother, who was not involved in the child's transition planning, and no plan was in place to ensure that the child's mental health needs would be met upon her release. Concomitantly, Matter of Donovan Z., 6 Misc.3d 1023(A), 800 N.Y.S.2d 345 (Fam. Ct., Monroe Co., 2005)(Unreported opinion) provides a more positive example of a case where, at a combined permanency/extension of placement hearing, the Family Court was able to ascertain that both the juvenile's and his mother's needs to facilitate his ultimate release home were being met by OCFS.

The importance of these provisions is underscored as well in the recently revised, nationally

[44] 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.

recognized guidelines approved by the National Council of Juvenile and Family Court Judges.[45] As one child welfare expert has written:[46]

> If *ASFA* and Title IV-E are applied properly, consistently and with a view toward reunification, rehabilitation and safe permanent homes for the children involved, the results can be extraordinary. One outcome – collaboration among courts, agencies, and lawyers – can result in fewer delinquency, status offender, and dependency [child abuse and neglect] cases; more youths and families involved with one another and their communities; and fewer future adult crimes. Collaboration also is efficient under a cost-benefit analysis since it provides extra funding for juvenile justice initiatives and preventive services.
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> *ASFA* and Title IV-E can be important tools to reform the juvenile justice field. They can provide juvenile justice agencies with added means to control and oversee youths, work preventively with families at risk, and get community involvement and "buy-in."

Proposal

AN ACT to amend the family court act, in relation to permanency planning in juvenile delinquency and persons in need of supervision proceedings in family court

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

Section 1. Section 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

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[45] *Enhanced Juvenile Justice Guidelines: Improving Court Practice in Juvenile Justice Cases* (National Council of Juvenile and Family Court Judges, Jan., 2019).

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

appearance, as defined by section 320.1 of this article.

§2. Subdivision 2 of section 320.2 of the family court act, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

2. At the initial appearance the court must appoint an attorney to represent the respondent pursuant to the provisions of section two hundred forty-nine of this act if independent legal representation is not available to such respondent. Whenever an attorney has been appointed by the family court to represent a child in a proceeding under this article, such appointment shall continue without further court order or appointment during the period covered by any order of disposition issued by the court, an adjournment in contemplation of dismissal, or any extension or violation thereof, or during any permanency hearing, other post-dispositional proceeding or appeal. All notices and reports required by law shall be provided to such attorney. Such appointment shall continue unless another appointment of an attorney has been made by the court or unless such attorney makes application to the court to be relieved of his or her appointment. Upon approval of such application to be relieved, the court shall immediately appoint another attorney to whom all notices and reports required by law shall be provided. The attorney for the respondent shall be entitled to compensation pursuant to applicable provisions of law for services rendered up to and including disposition of the petition. The attorney shall, by separate application, be entitled to compensation for services rendered after the disposition of the petition. Nothing in this section shall be construed to limit the authority of the court to remove an attorney from his or her assignment.

§3. Section 353.3 of the family court act is amended by adding a new subdivision 4-a to read as follows:

4-a. Where the respondent is placed with the office of children and family services or the commissioner of social services pursuant to subdivision two, three or four of this section, the dispositional order or an attachment to the order incorporated by reference into the order shall include:

(a) a description of the plan to facilitate visitation, including any plans for visits and/or contact with the respondent's siblings. If the visitation plan has not yet been developed, then the visitation plan must be filed with the court and delivered to the presentment agency, attorney for

the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than sixty days from the date the disposition was made; and

(b) a service plan, if available. If the service plan has not yet been developed, then the service plan must be filed with the court and delivered to the presentment agency, attorney for the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than sixty days from the date the disposition was made; and

(c) a direction that the parent or parents or other person or persons legally responsible for the respondent shall be notified of any planning conferences to be held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and of their right to have counsel or another representative or companion with them; and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as required by federal law.

A copy of the court's order and attachments shall be given to the parent or parents or other person or persons legally responsible for the care of the respondent. The order shall also contain a notice that if the respondent remains in placement for fifteen of the most recent twenty-two months, the agency with which the child is placed may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

§4. Paragraphs (a), (b) and (c) of subdivision 7 of section 353.3 of the family court act, paragraphs (a) and (b) as amended by chapter 6 of part 6 of chapter 58 of the laws of 2010, and paragraph (c) as amended by section 16 of part L of chapter 56 of the laws of 2015, are amended to read as follows:

(a) Where the respondent is placed pursuant to subdivision two [or], two-a, three or four of this section and where the agency is not seeking an extension of the placement pursuant to section 355.3 of this part, such report shall be submitted not later than thirty days prior to the conclusion of the placement.

(b) Where the respondent is placed pursuant to subdivision two [or], two-a, three or four of this section and where the agency is seeking an extension of the placement pursuant to section 355.3 of this part and a permanency hearing pursuant to section 355.5 of this part, such report shall be submitted not later than sixty days prior to the date on which the permanency hearing must be

held and shall be annexed to the petition for a permanency hearing and extension of placement.

(c) Where the respondent is placed pursuant to subdivision two [or], two-a, three or four of this section, such report shall contain a plan for the release, or conditional release (pursuant to section five hundred ten-a of the executive law), of the respondent to the custody of his or her parent or other person legally responsible, or to another permanency alternative as provided in paragraph (d) of subdivision seven of section 355.5 of this part. For purposes of this paragraph, "placement agency" shall refer to the office of children and family services, the commissioner of social services or the authorized agency under contract with the office of children and family services or commissioner of social services with whom the respondent has been placed. The release or conditional release plan shall provide as follows:

(i) If the respondent is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the respondent is placed has taken and will be taking in conjunction with the local education agency to [facilitate] ensure the immediate enrollment of the respondent in [a] an appropriate school or educational program leading to a high school diploma [following] within five days of release, or, if such release occurs during the summer recess, immediately upon the commencement of the next school term. The placement agency shall ascertain the school calendar from the school district and shall, to the extent possible, work with the school district so that the timing of respondent's release from the program and enrollment in school are minimally disruptive for the respondent and further his or her best interests. Not less than fourteen days prior to the respondent's release, the placement agency shall notify the school district where the respondent will be attending school and transfer all necessary records, including, but not limited to, the respondent's course of study, credits earned and academic record.

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

evaluations or services, as appropriate, and provides necessary records immediately in accordance with state and federal law.

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

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

Where a respondent is placed with a commissioner of social services or the office of children and family services pursuant to subdivision two, two-a, three or four of section 353.3 of this [article] part for a period of twelve or fewer months and resides in a foster home or in a non-secure or limited secure facility:

Where a respondent is placed with a commissioner of social services or the office of children and family services pursuant to subdivision two, two-a, three or four of section 353.3 of this [article] part for a period in excess of twelve months and resides in a foster home or in a non-secure or limited secure facility:

5. A petition for an initial or subsequent permanency hearing shall be filed by the office of children and family services or by the commissioner of social services with whom the respondent was placed. Such petition shall be filed no later than sixty days prior to the end of the month in which an initial or subsequent permanency hearing must be held, as directed in subdivision two of this section. The petition shall be accompanied by a permanency hearing report that contains the information required by subdivision seven of section 353.3 and subdivision (c) of section one thousand eighty-nine of this act regarding the determinations that the court must make in

accordance with subdivision seven of this section.

6. The respondent and his or her attorney shall be shall be notified of the hearing and of the respondent's right to be heard and a copy of the permanency petition and accompanying report filed in accordance with subdivision five of this section shall be served on the respondent's attorney. The foster parent caring for the respondent or any pre-adoptive parent or relative providing care for the respondent, as well as the respondent's parents and other persons legally responsible for the respondent's care, shall be provided with notice of any permanency hearing held pursuant to this section by the office of children and family services or the commissioner of social services with whom the respondent was placed. Such foster parent, pre-adoptive parent and relative shall have the right to be heard at any such hearing; provided, however, no such foster parent, pre-adoptive parent or relative shall be construed to be a party to the hearing solely on the basis of such notice and right to be heard. The failure of the foster parent, pre-adoptive parent, or relative caring for the [child] respondent to appear at a permanency hearing shall constitute a waiver of the right to be heard and such failure to appear shall not cause a delay of the permanency hearing nor shall such failure to appear be a ground for the invalidation of any order issued by the court pursuant to this section.

(d) with regard to the completion of placement ordered by the court pursuant to section 353.3 or 355.3 of this part: whether and when the respondent: (i) will be returned to the parent or parents or other persons legally responsible for the respondent's care; (ii) should be placed for adoption with the local commissioner of social services filing a petition for termination of parental rights; (iii) should be referred for legal guardianship; (iv) should be placed permanently with a fit and willing relative; or (v) should be placed in another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the respondent if the respondent is age sixteen or older and (A) the office of children and family services or the local commissioner of social services has documented to the court: (1) the intensive, ongoing, and, as of the date of the hearing, unsuccessful efforts made to return the respondent home or secure a placement for the respondent with a fit and willing relative including adult siblings, a legal guardian, or an adoptive parent, including through efforts that utilize search technology including social media to find biological family members for children, (2) the steps being taken to ensure that (I) the respondent's foster family home or child care facility is following the reasonable and prudent

parent standard in accordance with guidance provided by the United States department of health and human services, and (II) the respondent has regular, ongoing opportunities to engage in age or developmentally appropriate activities including by consulting with the respondent in an age-appropriate manner about the opportunities of the respondent to participate in activities; and (B) the office of children and family services or the local commissioner of social services has documented to the court and the court has determined that there are compelling reasons for determining that it continues to not be in the best interest of the respondent to return home, be referred for termination of parental rights and placed for adoption, placed with a fit and willing relative, or placed with a legal guardian; and (C) the court has made a determination explaining why, as of the date of this hearing, another planned living arrangement with a significant connection to an adult willing to be a permanency resource for the respondent is the best permanency plan for the respondent; and

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

(i) a description of the plan to facilitate visitation, including any plans for visits and/or contact with the respondent's siblings;

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

(iii) a direction that the parent or parents or other person or persons legally responsible for the respondent's care shall be notified of any planning conferences, including those held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and their right to have counsel or another representative or companion with them and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as required by paragraph (b) of subdivision seven of this section.

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

return home or to make the transition from foster care to successful adulthood, the court may include in its order a direction for a local social services, mental health or probation official or an official of the office of children and family services or office of mental health, as applicable, to provide or arrange for the provision of services or assistance to the respondent and his or her family. Such order regarding a local social services official shall not include the provision of any service or assistance to the respondent and his or her family that is not authorized or required to be made available pursuant to the county child and family services plan then in effect. In any order issued pursuant to this section, the court may require the official to make periodic progress reports to the court on the implementation of such order.

(c) A copy of the court's order and the attachments shall be given to the respondent and his or her attorney and to the respondent's parent or parents or other person or persons legally responsible for the respondent's care. The order shall also contain a notice that if the respondent remains in foster care for fifteen of the most recent twenty-two months, the agency with which the respondent is placed may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

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

(4) In any proceeding under this article, the court shall cause a copy of the petition and notice of the time and place to be heard to be served upon any non-custodial parent of the child, provided that the address of such parent is known to or is ascertainable by the court. Service shall be made by ordinary first class mail at such parent's last known residence. The failure of such parent to appear shall not be cause for delay of the proceedings.

§7. Subdivision (a) of section 741 of the family court act, as amended by chapter 41 of the laws of 2010, is amended and a new subdivision (d) is added to such section to read as follows:
(a) At the initial appearance of a respondent in a proceeding and at the commencement of any hearing under this article, the respondent and his or her parent or other person legally responsible for his or her care shall be advised of the respondent's right to remain silent and of the respondent's right to be represented by counsel chosen by him or her or his or her parent or other person legally responsible for his or her care, or by an attorney assigned by the court under part four of article two.

[Provided, however, that in] In the event of the failure of the respondent's parent or other person legally responsible for his or her care to appear, after reasonable and substantial effort has been made to notify such parent or responsible person of the commencement of the proceeding and such initial appearance, the court shall appoint an attorney for the respondent and shall, unless inappropriate, also appoint a guardian ad litem for such respondent, and in such event, shall inform the respondent of such rights in the presence of such attorney and any guardian ad litem.

(d) Whenever an attorney has been appointed by the family court to represent a respondent in a proceeding under this article pursuant to subdivision (a) of this section, such appointment shall continue without further court order or appointment during an order of disposition issued by the court, an adjournment in contemplation of dismissal, or any extension or violation thereof, or any permanency hearing, other post-dispositional proceeding or appeal. All notices and reports required by law shall be provided to such attorney. Such appointment shall continue unless another appointment of an attorney has been made by the court or unless such attorney makes application to the court to be relieved of his or her appointment. Upon approval of such application to be relieved, the court shall immediately appoint another attorney to whom all notices and reports required by law shall be provided. The attorney shall be entitled to compensation pursuant to applicable provisions of law for services rendered up to and including disposition of the petition. The attorney shall, by separate application, be entitled to compensation for services rendered after the disposition of the petition. Nothing in this section shall be construed to limit the authority of the court to remove an attorney from his or her assignment.

§8. Section 756 of the family court act is amended by adding two new subdivisions (f) and (g) to read as follows:

(f) Where the respondent is placed pursuant to this section, the dispositional order or an attachment to the order incorporated by reference into the order shall include:

(i) a description of the visitation plan, including any plans for visits and/or contact with the respondent’s siblings. If the visitation plan has not yet been developed, then the visitation plan must be filed with the court and delivered to the presentment agency, attorney for the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than seven days from the date the disposition was made;

(ii) a service plan, if available. If the service plan has not yet been developed, then the service plan must be filed with the court and delivered to the presentment agency, attorney for the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than seven days from the date the disposition was made; and

(iii) a direction that the parent or parents or other person or persons legally responsible for care of the respondent shall be notified of any planning conferences to be held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and of their right to have counsel or another representative or companion with them and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as required by paragraph (ii) of subdivision (d-1) of section seven hundred fifty-six-a of this part.

A copy of the court's order and attachments shall be given to the respondent and his or her attorney and to the respondent's parent or parents or other person or persons legally responsible for the care of the respondent. The order shall also contain a notice that if the respondent remains in placement for fifteen of the most recent twenty-two months, the agency with which the respondent is placed may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

(g) Where the respondent has been placed pursuant to this section, the local commissioner of social services or the relative or suitable person with whom the respondent has been placed shall submit a report to the court, the attorney for the respondent and the presentment agency, if any, not later than fifteen days prior to the conclusion of the placement period, which, among other information, contains a plan for the release of the respondent to the custody of his or her parent or parents or other person or persons legally responsible for the respondent's care. The plan for respondent's release shall provide as follows:

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

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

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

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

§9. Subdivisions (a), (b), (d) and the paragraph (v) of subdivision (d-1) of section 756-a of the family court act, as amended by section 14-a of part K of chapter 56 of the laws of 2019, are amended, subdivision (d-1) is amended by adding a new paragraph (vi) and three new subdivisions (h), (i) and (j) are added to such section to read as follows:

(a) In any case in which the [child] respondent has been placed pursuant to [paragraph (iii) of paragraph (a) of] section seven hundred fifty-six of this part, 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 as provided for in this section. Such petition, accompanied by a permanency report, shall be filed at least fifteen days prior to the expiration of

the initial placement and at least thirty days prior to the expiration of any additional placement authorized pursuant to this section, except for good cause shown, but in no event shall such petition and permanency report be filed after the original expiration date. The permanency hearing report shall contain the information required by subdivision (c) of section one thousand eighty-nine of this act and shall contain recommendations and such supporting data as is appropriate regarding the determinations that the court must make in accordance with subdivision (d-1) of this section. The permanency hearing report shall include, but is not limited to, a plan for the release of the respondent to the custody of his or her parent or parents or other person or persons legally responsible for the respondent's care, or to another permanency alternative as provided in paragraph (iv) of subdivision (d-1) of this section. For purposes of this paragraph, "placement agency" shall refer to the commissioner of social services or an authorized agency under contract with the commissioner of social services with whom the respondent has been placed. The release plan shall provide as follows:

(i) If the respondent is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma following release, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking in conjunction with the local education agency to ensure the immediate enrollment of the respondent in an appropriate school or educational program leading to a high school diploma within five business days of release or, if such release occurs during the summer recess, immediately upon the commencement of the next school term. The placement agency shall ascertain the school calendar from the school district and shall, to the extent possible, work with the school district so that the timing of respondent's release from the program and enrollment in school are minimally disruptive for the respondent and further his or her best interests. Not less than fourteen days prior to the respondent's release, the placement agency shall notify the school district where the respondent will be attending school and transfer all necessary records, including, but not limited to the respondent's course of study, credits earned and academic record.

(ii) If the placement agency has reason to believe that the respondent may have a disability or if the respondent had been found eligible to receive special education services prior to or during the placement, in accordance with article eighty-nine of the education law, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking to ensure that

the local education agency makes any necessary referrals or arranges for special educational evaluations or services, as appropriate, and provides necessary records immediately in accordance with state and federal law.

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

(b) The court shall conduct a permanency hearing concerning the need for continuing the placement. The [child] respondent, the person with whom the [child] respondent has been placed and the commissioner of social services shall be notified of such hearing and shall have the right to be heard thereat. A copy of the petition and accompanying permanency hearing report shall be served on the respondent's attorney and upon the respondent's parent or parents.

(d)(i) At the conclusion of the first permanency hearing, the court may, in its discretion, order one extension of the placement for not more than six months;

(ii) At the conclusion of the second permanency hearing, the court may, in its discretion, order one extension of placement for not more than four months unless:

(A) The attorney for the child, at the request of the child, seeks an additional length of stay for the child in such program. If a request is made pursuant to this subparagraph, the court shall determine whether to grant such request based on the best interest of the child; or

(B) The court finds that extenuating circumstances [exists] exist that necessitate that the child be placed out of the home.

(iii) An extension of placement under this section may include a period of post-release supervision and aftercare.

(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 subdivision (d) of this section, the steps that must be taken by the agency with which the respondent is placed to implement the plan for release submitted pursuant to paragraph (i) of

subdivision (a) of such section, the adequacy of such plan and any modifications that should be made to such plan.

(h) If the order from the permanency hearing extends the respondent's placement or if the respondent continues in placement under a prior order, the order or an attachment to the order incorporated into the order by reference shall include:

(i) a description of the plan to facilitate visitation, including any plans for visits and/or contact with the respondent's siblings;

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

(iii) a direction that the parent or parents or other person or persons legally responsible for the respondent's care shall be notified of any planning conferences, including those held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and their right to have counsel or another representative or companion with them and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as required by paragraph (ii) of subdivision (d-1) of this section.

(i) Where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would further the respondent's needs and best interests and would make it possible for the respondent to safely return home or to make the transition from foster care to successful adulthood, the court may include in its order a direction for a local social services, mental health or probation official or an official of the office of 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.

(j) A copy of the court's order and the attachments shall be given to the respondent and his or her attorney and to the respondent's parent or parents or other person or persons legally responsible for the respondent's care. The order shall also contain a notice that if the respondent remains in foster care for fifteen of the most recent twenty-two months, the agency with which the

respondent is placed may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

§10. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law.

IV. Future Matters:

Under the leadership of the Committee's co-chairs, Hon. Michele Pirro Bailey, Acting Supreme Court Justice of the Integrated Domestic Violence Part and 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 notably productive year in 2020, notwithstanding the substantial challenges posed by the coronavirus pandemic. In addition to its significant legislative achievements, the Committee recommended numerous new and revised forms, that have been posted on the Unified Court System's Internet web-site for ready public access (http://www.nycourts.gov).

In addition to reviewing legislative proposals, the Committee will continue its comprehensive review of the Family Court rules with a view towards recommending possible revisions. Perhaps foremost among the Committee's concerns will be to address problems arising as the Family Court copes with the inevitable backlog of cases accumulated during the pandemic when filing of new petitions and in-person hearings were curtailed. Concomitantly, the Committee will consider any lessons learned during the pandemic, including any innovative practices that should be continued after the public health emergency passes. In light of the comprehensive report issued in October, 2020, by Jeh Johnson, Special Advisor on Equal Justice in the Courts, the Committee will also consider the racial justice implications of the issues that it examines and the recommendations that it offers. Further, the Committee's five subcommittees are expected to be actively engaged in the following projects, among others, during the coming year:

• Child Welfare: The Federal Family First Act, which will take effect in New York State in September, 2021, is likely to form a major focus of the Subcommittee's attention, both in terms of commenting upon proposed implementing legislation and in terms of any forms, court rules and training that may be required. The Subcommittee will also consider possible changes to statutes and policies regarding, among others, supervision of parents and procedures for violations of conditional surrenders. Finally, it will continue its efforts to monitor implementation of additional legislation and regulations in the child welfare area with a view toward enhancing and expediting permanency efforts, including, inter alia, the *Every Student Succeeds Act*, the *Preventing Sex Trafficking and Strengthening Families Act* and the *Indian Child Welfare Act*, as well as State statutes in the child welfare area.

• Juvenile Justice: With the second phase of the "raise the age" statute successfully implemented in 2019, the Subcommittee will continue to focus on the myriad questions and issues raised by the legislation, in particular, questions regarding detention and release. Extension of the criminal justice reforms to the discovery statutes to juvenile delinquency proceedings will continue to be a priority for the Subcommittee, as will the issue of inter-county juvenile delinquency proceedings, including the absence of adjustment consideration for foster care youth who commit offenses in counties in which they have been placed out of their homes. The Subcommittee will also explore the implications of the *Family First Act* for juvenile justice cases and will monitor implementation of the major changes in PINS legislation which became effective in 2020, including restrictions on, and cessation of State funding for, out-of-home care. The Subcommittee

will consider legislation likely to be introduced to raise the minimum age for juvenile delinquency proceedings, as well as pending bills regarding simplified *Miranda* warnings and requirements for counsel during interrogations of youth. In conjunction with its proposals regarding restraints of juveniles in courtrooms and video recording of interrogations, as well as with the increase in the use of risk-assessment instruments, the Subcommittee will keep track of innovations, laws and practices in other states. Particularly in light of implications for addressing the needs of cross-system youth (youth with both juvenile justice and child welfare cases), the Subcommittee will review proposals regarding information- and record-sharing among education, mental health and child welfare agencies and the courts. Building upon the recent enactment of Criminal Procedure Law §160.59, the Subcommittee will explore means of reducing unwarranted collateral consequences of juvenile delinquency and Persons in Need of Supervision adjudications, e.g., by developing mechanisms by which juvenile records may be sealed after an adjudicated youth has not had a juvenile or criminal case for a designated period of time. Finally, with a particular concern for effective evidence-based approaches to reentry of youth from facilities back to their neighborhoods, the Subcommittee will also continue its advocacy for Family Court probation and community-based alternatives to detention and placement.

• Child Support and Parentage: The Subcommittee will continue its in-depth examination of issues engendered by the pandemic, particularly those involving self-represented litigants, including, *inter alia*, means of enhancing available pro bono assistance and sites to utilize to enable technological access to virtual proceedings. Additionally, the implementation of the gestational surrogacy and parentage provisions enacted in conjunction with the New York State budget [L.2020, c.56, Part L] will require development of forms, training and possible court rules revisions. A major focus for the Subcommittee in 2021 will also be the implementation, in coordination with the New York State Office of Temporary and Disability Assistance, of recent Federal regulations regarding child support, which may require statutory, rules and forms changes, including with respect to treatment of incarcerated parents. Child support ramifications of cases of joint or shared custody will remain a priority, as will issues regarding expansion of paternity proceedings to encompass parentage. The Subcommittee will continue to explore possible improvements to procedures regarding drivers' license suspensions, inter-county transfers of cases and approaches to child support proceedings involving non-wage income and self-employed individuals.

• Custody, Visitation and Domestic Violence: In addition to addressing the myriad issues engendered by the pandemic, the Subcommittee will monitor implementation of recent statutes, including, *inter alia*, restrictions on visitation by convicted sex offenders, the judicial procedure regarding marriages of 17-year olds and the expanded standby guardianship statute. With a focus upon custody and visitation cases involving parents with mental health issues, the Subcommittee will continue to address issues regarding forensic evaluations, commenting upon proposed legislation regarding access by parties and counsel to the reports. In conjunction with its model forensic appointment order and protective order forms, the Subcommittee will continue to consider appropriate ordering and uses of forensic evaluations. In the area of domestic violence, the Subcommittee will continue to monitor service, concurrent criminal jurisdiction, implementation of firearms statutes and other issues regarding orders of protection, as well as means of protecting

abuse victims from contact with abusers in court-related programs.

• Forms and Technology: The Subcommittee will continue to propose revisions of uniform forms as necessitated by new legislation, including forms related to the implementation of the gestational surrogacy and parentage legislation noted above, the increase in digitalization of court records and the vastly enhanced e-filing initiatives undertaken in light of the pandemic. The Subcommittee will continue its efforts to simplify the current orders of protection and other forms to enhance access to justice for self-represented litigants as has been recommended by the Commission to Expand Access to Civil Legal Services in New York.

* * *

The Committee, which includes experienced judges, support magistrates, 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 2020 and with the substantial agenda described above, the Committee hopes to compile a similar record of achievement in 2021 as it grapples with the many difficult issues within its jurisdiction during these most difficult of times.

In conclusion, in furtherance of Chief Judge Janet DiFiore's "Excellence Initiative," the Committee pledges its continuing deep dedication in 2021 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,
Hon. Michele Pirro Bailey, Co-chair
Hon. Peter Passidomo, Co-chair
Support Magistrate John Aman
Hon. Stacey Bennett
Hon. Lisa Bloch Rodwin
Hon. Catherine DiDomenico
Hon. Alicea Elloras
Hon. Marjory D. Fields
Hon. Carol Goldstein
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Support Magistrate Thomas Gordon
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Hon. Jane Pearl
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Hon. Carol R. Sherman
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