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..... 1

II. New or Modified Measures..... 14

1. Implementation of "one family/one judge" in termination of parental rights, surrender and adoption proceedings (FCA §§115, 641; SSL §§383-c, 384, 384-b; DRL §113)..... 14

2. Clarification of permanency and extension of placement hearings in child protective proceedings (FCA §1055(b))..... 23

3. Standing to bring motions to dispense with the requirement to make reasonable efforts to reunify families in child abuse and neglect cases (FCA §§1039-b, 1052(b)(i)(A))..... 28

4. Abrogation of evidentiary privileges in termination of parental rights proceedings (SSL §384-b(3)(h))..... 31

5. Procedures regarding suspended judgments in permanent neglect cases (FCA §633)..... 33

6. Notice to respondent and non-respondent parents in child abuse and neglect proceedings (FCA §1035)..... 36

7. Service of process, communications between courts and taking of testimony by telephone, audio-visual or other electronic means under the *Uniform Child Custody Jurisdiction and Enforcement Act* (DRL §§75-g, 75-i, 75-j)..... 39

8. Clarification of criteria for judicial approval of conditional surrenders of children (SSL §§383-c, 384)..... 42

9. CLARIFICATION OF TIME-FRAMES FOR PERMANENCY HEARINGS REGARDING CHILDREN FREED FOR ADOPTION (FCA 1055-A(3)(C))..... 44

10. Continuity of counsel for parents in proceedings involving children placed in foster care (FCA §§262, 1055(b); S.S.L. §§358-a, 384-b, 392)..... 46

11. Judicial authority to recommend a child welfare compliance

investigation as part of a disposition in a child protective or foster care proceeding
(FCA §§1055, 1055-a; S.S.L. §392) 54

12. Clarification of procedures for wilfulness hearings in child support and paternity cases
(FCA §439)..... 58

13. Adjudication of child support and paternity proceedings by Family Court hearing examiners
(FCA §§153, 439; S.S.L. §§111-b, 111-p; CPLR. 2302, 2304, 2307)..... 61

14. Child support obligations of support obligors whose incomes are below the poverty level
(DRL §240(1-b); FCA §413(1))..... 71

15. Judicial authority to direct establishment of a trust fund or other designated account for the benefit of children in matrimonial, child support and paternity cases
(DRL §240(1-b); FCA §413 (1)(c))..... 76

16. Procedures regarding child support and paternity proceedings
(FCA §§ 413-a, 516-a, 565; DRL §240-c; S.S.L. §§111-h, 111-k, 111-n ; P.H.L. §4135-b; CPLR. 5241, 5252)..... 78

III. Previously Endorsed Measures..... 87

1. Provision of appropriate educational and early intervention services to children in foster care
(FCA §§756(a), 756-a, 1055(b), 1055-a; S.S.L. §392; Ed. L. §112)..... 87

2. Requirements for expeditious permanency planning with respect to children in foster care
(FCA §§1017, 1055; S.S.L §§383-c, 384, 384-a, 392)..... 100

3. Requirements for reports of changes in foster care placements in child protective and voluntary foster care proceedings
(FCA §§1055, 1055-a; S.S.L. §§358-a, 392)..... 107

4. Procedures and remedies for violations of orders of protection in Family Court and matrimonial proceedings
(FCA §§446, 551, 656, 846-a; DRL §§240, 252 111

5. Pretrial detention, dispositional alternatives and procedures for acceptance of admissions and violations

of orders of probation and suspended judgment in persons in need of supervision proceedings
(FCA §§739, 743, 754, 757, 776, 779, 779-a)..... 121

6. Judicial authority to order intensive probation supervision and electronic monitoring in juvenile delinquency proceedings
(FCA §§353.2, 353.3; Exec. L. §243) 130

7. Judicial authority to order electronic monitoring as a condition of probation and pre-dispositional bail and release in child support and family offense cases
(FCA §§153, 453, 454, 841, 846-a; Exec. L. §243)..... 136

8. Authority of Supreme and Family Courts to direct child protective investigations and, if indicated, the filing of child protective petitions in conjunction with custody or visitation proceedings
(DRL §240; FCA §§657, 817)..... 142

9. Dispositional options available to the Family Court in proceedings to terminate parental rights
(FCA §§631, 635; S.S.L. §384-b)..... 145

10. Dispositional and permanency hearings in juvenile delinquency and person in need of supervision proceedings
(FCA §§353.3, 355.5, 756, 756-a)..... 149

11. Extension of the permissible duration and entry of orders of protection issued in child abuse and neglect cases onto the statewide automated order of protection and warrant registry
(FCA §§ 1029, 1056; Exec. L. §221-a)..... 154

12. Criminal and child maltreatment history screening of persons with whom children are placed and persons seeking custody or visitation
(DRL §112; Exec. L. §837; FCA §§ 653, 662, 1017, 1027, 1055; S.S.L. §§376, 377, 378-a, 421; S.C.P.A. § 1707)..... 158

13. Judicial authority to direct restitution of unreimbursed medical expenses in juvenile delinquency proceedings
(FCA §§351.1, 353.6)..... 168

14. Criteria for determining under what circumstances the consent of the biological father is required when a non-marital child under the age of six months is placed for adoption
(DRL §111(1)(e))..... 171

15. Probation access to the statewide automated order of protection and warrant registry for the purpose of conducting pre-dispositional and pre-sentence investigations in family offense and other Family Court cases

(Exec. L. §221-a; FCA §835; C.P.L. §§390.20, 390.30)..... 175

16. Elimination of the bar to subsequent remedies for court-approved agreements or compromises of child support with respect to out-of-wedlock children
(FCA §516)..... 180

17. Compensation of guardians *ad litem* appointed for children and adults in civil proceedings out of public funds
(C.P.L.R §1204)..... 184

18. Penalties for unauthorized release of information from the statewide automated order of protection and warrant registry
(Exec. L. §221-a)..... 186

19. Jurisdiction of the Family Court with respect to family offenses committed by juveniles under the age of sixteen
(FCA §812(1); C.P.L. §530.11(1))..... 189

20. Procedures and powers of the Supreme and Family Courts with respect to violations of orders of custody and visitation
(FCA §657; DRL §242)..... 193

21. Procedures for violations of adjournments in contemplation of dismissal and conditional discharges in juvenile delinquency cases
(FCA §§315.3, 360.2)..... 197

IV **Future Matters**..... 201

1. Introduction

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 2002

The Committee achieved enactment of five significant statutes during the 2002 legislative session that mark milestones in the areas of child welfare, child support and domestic violence:

• Conditional surrenders [Laws of 2002, ch. 76]: This legislation fills a gap in the law regarding the procedures for addressing pre-adoption failures of material conditions in conditional surrenders of children to authorized agencies. It provides that, in case of a substantial failure of a material condition in a surrender instrument prior to finalization of the adoption, the authorized agency is required to notify the Family Court, the law guardian and, absent an express waiver in the surrender instrument, the birth parent, within 20 days of the failure and to file a petition in Family Court, pursuant to Family Court Act §1055-a, within 30 days of the failure, except for good cause shown. In the absence of such a filing, the parent and/or law guardian, if any, have standing to file such a petition so long as the adoption has not yet occurred. Notice of these procedures is required both in surrender instruments and judicial allocutions and parents are required to keep the agency notified of any change in address in order to facilitate notification of any failure. Further, appointment of a law guardian is required in all conditional surrender cases and investigation and approval of a designated prospective adoptive parent is a condition precedent to the Family Court's approval of a surrender containing a condition of adoption by a designated individual. **Effective date: Aug. 20, 2002.**

• Entry of non-family intimate partner orders of protection onto the domestic violence registry [Laws of 2002, ch. 462]: This bill fills a gap in the statewide automated registry of orders of protection and warrants that was engendered by the narrow statutory definition of "family" in the Criminal Procedure Law. [1] It requires entry of orders of protection issued in criminal proceedings pursuant to Criminal Procedure Law §530.13 against a family or household member, as defined by Social Services Law §459-a, and requires courts of criminal

[1] The bill does not affect the family offense jurisdiction of the Family Court, which remains limited by the definition in Family Court Act §812.

jurisdiction, when issuing such orders of protection, to make inquiry as to the existence of other orders of protection issued with respect to the parties. The family definition under Social Services Law §459-a adds persons who are cohabiting or have cohabited, as well as other categories defined in the regulations of the New York State Office of Children and Family Services governing domestic violence shelters and non-residential programs. **Effective date: Nov. 20, 2002 (applicable to complaints filed on or after that date).**

• Technical Amendment to FCA §115; Repeal of FCA §654 [Laws of 2002, ch. 409]: In an effort to bring the statutory framework up to date, the legislation amended Family Court Act §115 to correctly enumerate the types of proceedings over which the Family Court has jurisdiction. It amended subdivision (a) to add termination of parental rights proceedings brought on the grounds of parental mental illness, mental retardation and severe or repeated child abuse. Further, it amended subdivision (c) to add: adoption; guardianship; standby guardianship; surrender; foster care placement and review; commitment of guardianship and custody of children on the grounds of the death of, or abandonment by, parents; child custody; and interstate custody, support, paternity and placement *(Uniform Interstate Child Custody Jurisdiction and Enforcement Act, Uniform Interstate Family Support Act* and *Interstate Compact on the Placement of Children*). Finally, the statute repealed Family Court Act §654, which required the Family Court to determine an application to modify an out-of-state custody determination upon a showing of a change in circumstances. This provision was inconsistent with the standard for modification in the federal *Parental Kidnapping Prevention Act* [28 U.S.C.A. §1738A], the *Uniform Child Custody Jurisdiction Act* [Domestic Relations Law Art. 5-A] and the recently-enacted *Uniform Child Custody Jurisdiction and Enforcement Act*, which replaced the *UCCJA. See* Laws of 2001, ch. 386. **Effective date: Aug. 13, 2002.**

• Orders of medical support in child support, paternity and matrimonial proceedings [Laws of 2002, ch. 624]: Designed to reduce the number of children in Family and Supreme Court proceedings who are not covered by medical insurance, this legislation provides a clear road map for judges and hearing examiners for allocating responsibility for, and pro-rating the costs of, providing medical coverage for children. The new law specifically authorizes the courts to direct parents to apply to enroll children in the New York State "Child Health Plus" (CHIP) or Medicaid program, if other health insurance for the children is not available. The statute also clarifies that driver's license suspension and other enforcement remedies are available with respect to arrears, notwithstanding the absence of current support obligations, thus legislatively overturning *Kennedy v. Kennedy*, 251 A.D.2d 407 (2d Dept., 1998). **Effective date: Oct. 2, 2002 (medical support provisions); Nov. 1, 2002** (**enforcement provisions).**

• Permanency hearings: **children freed for adoption: Laws of 2002, ch. 663:** In order to eliminate confusion regarding permanency hearing mandates, this legislation requires a permanency hearing pursuant to Family Court Act §1055-a to be convened and completed immediately following, but not more than 60 days after, commitment of guardianship and custody of a child to an agency either as a result of a termination of parental rights proceeding or approval of a surrender. Since the cases are already on the calendar, the Family

Court has flexibility to determine whether a formal petition or simply a report will be required for the permanency hearing and what schedule and form of service should be utilized to assure prompt notification of all required permanency hearing participants, including foster parents. All subsequent permanency petitions are required to be filed no later than six months after completion of the prior §§1055-a hearing and each hearing is required to be completed within 60 days of the filing of the petition. Simplicity and certainty as to the applicable time-frames is thus provided by requiring the calendar to begin for all children freed for adoption at the same time – *i.e.*, immediately upon the freeing of the child – and by specifying uniform deadlines both for the filing of subsequent petitions at six-month intervals and for completion of hearings within 60 days thereafter. Additionally, technical amendments were also made to Family Court Act §1055(h) to ensure continued foster care funding for freed children and to Social Services Law §392 to remove obsolete references to proceedings now covered by Family Court Act §1055-a. **Effective date: December 3, 2002.**

B. New and Modified Legislative Proposals

The Committee is proposing a comprehensive agenda, including 16 new and modified proposals and 21 proposals recommended in prior years. The new and modified proposals address child neglect and abuse, foster care, termination of parental rights, child support, paternity, and interstate custody and visitation proceedings, providing needed clarification and enhancing the Unified Court System's ability to handle these cases effectively. In its agenda of new and modified proposals, the Committee is recommending the following:

1. "One Family/One Judge": Continuity of court in termination of parental rights, surrender and adoption proceedings: Children caught in the limbo of foster care must be given permanent homes – preferably through return to their families, but otherwise through adoption or other alternative – as quickly as possible, a requirement for New York State's eligibility for significant federal foster care funding under the federal *Adoption and Safe Families Act* and a critical mandate for the healthy development of the children themselves. Consistent with national recommendations implemented in New York's "Model Permanency Planning Parts," this proposal would reduce one significant source of delay in achieving permanency for children by promoting continuity of the court and the judge. It would require that if a child is or was the subject of a Family Court child protective, foster care, surrender or termination of parental rights proceeding, any subsequent agency adoption proceeding would have to be filed in the same court and to be heard, to the extent practicable, before the same judge. If filed in a different court, the court in which the case was filed would be required to ascertain whether there had been prior child welfare litigation, to communicate with the judge who presided over the earlier litigation and to defer to that judge's determination as to the exercise of jurisdiction over the case.

2. Clarification of child protective permanency hearing provisions: The proposal would amend Family Court Act §1055(b) to reorganize and simplify the issues to be determined at a permanency hearing in an abuse or neglect proceeding, sharpening the focus upon the

determinations required by the federal and New York State *Adoption and Safe Families Act* by eliminating extraneous and duplicative provisions.

3. Standing to Bring Motions to Dispense with Reasonable Efforts to Reunify Families: This proposal would amend Family Court Act §1039-b to provide that representatives of authorized agencies and law guardians, as well as social services officials, would have standing to initiate motions for orders to dispense with the requirement of reasonable efforts for the reunification of children with their families. The proposal would also incorporate the provision of the Social Services Law that defines "diligent efforts" into that statute, underscoring that if the court issues an order dispensing with the requirement of reasonable efforts, the order has the effect of dispensing as well with the element of proof of "diligent efforts" in termination of parental rights proceedings.

4. Evidence in termination of parental rights proceedings: This proposal would amend Social Services Law §384-b(3)(h) to provide that the clinical and spousal privileges that are abrogated in termination of parental rights proceedings brought on the grounds of mental illness and mental retardation would also be abrogated in proceedings brought on the grounds of permanent neglect, severe and repeated child abuse and abandonment. No reason exists for the disparity in the admissibility of such evidence in different categories of termination of parental rights proceedings.

5. Clarification of procedures regarding suspended judgments in termination of parental rights proceedings: This proposal would amend Family Court Act §633 to require that : 1) orders of suspended judgment include a warning that failure to comply may lead to commitment of guardianship and custody of the child to the agency for the purposes of consenting to adoption; 2) unless a motion for violation or extension is filed, the order of suspended judgment would be deemed satisfied, but if the child remained in care as a result of a child protective or foster care placement, an immediate permanency hearing would have to be convened; 3) if a violation or extension motion or petition is filed, the suspended judgment period would be tolled pending resolution of the application; and 4) if the respondent has been found to be in violation of the conditions of the suspended judgment, the Family Court would have the discretion to commit guardianship and custody of the child or to extend the term of the suspended judgment.

6. Clarification of procedures regarding non-respondent parents in child abuse and neglect proceedings: This proposal would amend Family Court Act §1035(b) to combine the notice on child abuse summonses that predated the enactment of the *Adoption and Safe Families Act* with the notice now required in all child protective proceedings regarding the consequences of prolonged foster care. Further, it would amend Family Court Act §§ 1035(d) and (e) to clarify that non-respondent parents in child abuse and neglect proceedings would be required to be notified of their standing to appear, to participate and to request custody of the children. The parents would also have to be notified that if the children are placed in foster care for a period of 15 months in a 22 month period, the parents may be the subjects of proceedings to terminate

their parental rights, whether or not they were respondents in the child neglect or abuse case. Finally, the notice would be required to indicate that, upon good cause, the Family Court would have the discretion to order the child protective agency to investigate whether non-respondent parents should either be added to petitions as respondents or given custody of the children.

7. Amendments to the *Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA]*: The proposal would: (1) permit service of process out of state by mail with delivery confirmation, by means specified in CPLR 313 or by means directed by court; (2) require telephone testimony or depositions to be recorded and preserved for transcription; and (3) clarify that communications between courts are mandatory in certain circumstances.

8. Amendment to conditional surrender statute: This proposal would amend Laws of 2002, ch. 76 to provide that where a conditional surrender is conditioned upon adoption by a particular individual who has been certified or approved as a foster parent, the court may approve the surrender without an additional adoption approval process.

9. Permanency hearings regarding children freed for adoption: This bill would correct the inadvertent typographical error in recently-enacted legislation [Laws of 2002, ch. 663] regarding permanency hearings for children freed for adoption, that is, the failure to delete the existing permanency hearing time-frame from FCA §1055-a(3).

10. Representation of parents at child welfare reviews: Consistent with the aim of the *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7] to ensure effective and expeditious permanency planning, the Committee is proposing legislation to facilitate continued access to counsel by parents in critical post-dispositional phases of child protective and foster care proceedings. The proposal provides that upon request, the Family Court may continue the appointment of the parent's attorney for the purposes of interim reviews and conferences or, if necessary, may appoint new counsel. The measure also would permit the discretionary appointment of counsel for parents in juvenile delinquency and PINS permanency hearings where the parent contests the permanency plan and/or placement of the child.

11. Family Court authority to recommend that the New York State Office of Children and Family Services conduct investigations regarding agency compliance: Building on the successful results achieved in reviews of children freed for adoption, the Committee proposes that in all cases involving a foster care placement, extension or periodic review, the Court, as part of its disposition, would have discretion to recommend to the New York State Office of Children and Family Services that it investigate the facts and circumstances concerning the discharge of responsibilities by local social services districts and compliance with applicable statutes and regulations, pursuant to Social Services Law §395. While generally optional, this recommendation would be required in any case in which the Court has made a determination, pursuant to the federal and state *Adoption and Safe Families Act* [Public Law 103-89; Laws of

1999, ch.7], that reasonable efforts, where appropriate, should have been, but were not, made to prevent the placement or facilitate reunification.

12. Wilfulness Hearings in Child Support Cases: In order to expedite adjudications of support violations, the proposal would expedite confirmation hearings by Family Court judges with respect to wilfulness determinations by hearing examiners. In accordance with the decision of the Supreme Court, Appellate Division, Second Department, in Roth v. Bowman, 245 A.D.2d 521 (2d Dept., 1997), hearing examiner wilfulness findings would not be subject to the 30-day objection period afforded for final orders, thus permitting confirmation hearings to occur promptly. *Cf*.. Geary v. Breen, 210 A.D. 2d 975 (4th Dept., 1994).

13. Authority of Family Court Hearing Examiners: The Committee is proposing a measure that would resolve ambiguities in the statutory framework governing hearing examiners and eliminate several limitations on their authority that impede the expeditious, comprehensive resolution of child support and paternity proceedings. The proposal amends the Civil Practice Law and Rules and Family Court Act to clarify that Family Court hearing examiners and judges would both be authorized to decide motions to quash child support subpoenas issued by local Support Collection Units, conduct judicial reviews of administrative fair hearings regarding driver's license suspensions, issue subpoenas *duces tecum*, and adjudicate the vast majority of paternity proceedings, contested as well as uncontested.

14. Child support obligations of indigent support obligors: Recognizing that current law creates an anomaly in calculating the child support obligation for non-custodial parents whose income would be reduced below the poverty level, the Committee proposes simplification of the standard. Significantly, the Committee's proposal would codify the decision of the Court of Appeals in Rose v. Moody, 83 N.Y.2d 65 (1993), *cert. denied*, 511 U.S. 1084 (1994), which held the inflexible minimum $25 per month child support obligation unconstitutional.

15. Authority of Family Court to direct establishment of trust or other account: Where a non-custodial parent, such as a professional athlete, performer or award winner, receives an economic windfall or exceptionally high income during a short period of time, an income not likely to remain at that level in the future, the Family Court has no means of assuring that a portion of the windfall income will be preserved for the children's future needs, such as college expenses. The Committee's proposal would authorize the Court to direct that the non-custodial parent be directed to establish a designated account, such as a trust fund or annuity, that would provide the children with a future stream of payments above and beyond the current child support obligation, thus ensuring adequate support even after the non-custodial parent's income has decreased.

16. Child support and paternity: The Committee is proposing a comprehensive set of amendments to the child support and paternity legislation enacted in 1997 [Laws of 1997, ch.

398]. The 1997 legislation, enacted in order to implement the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [Public Law 104-193], was ambiguous in several procedural respects and failed to address the important question of what procedural safeguards are necessary in cases involving paternity acknowledgments by parents who are themselves under the age of eighteen. The Committee's proposal requires such acknowledgments to be executed before a judge or hearing examiner and clarifies procedures applicable to "cost of living adjustment" proceedings and petitions to challenge administrative genetic testing directives.

C. Previously Endorsed Measures

The Committee is recommending resubmission of 21 of its proposals from prior years:

1. Educational and early intervention services for children in foster care: Recognizing that children in foster care are at substantial risk for significant educational impairments, the Committee is proposing legislation to ensure that critical pre-school, early intervention, special education, education and vocational services are provided to all children whose permanency planning is being monitored by the Family Court. The measure would require child protective agencies to include information in permanency plans submitted pursuant to the *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7] regarding steps taken and planned to ensure the prompt enrollment of foster children in pre-school and school programs and, in cases of children under five suspected of having a disability or developmental delay, evaluation for "early intervention program" services. The measure would require the New York State Education Department to promulgate regulations requiring school districts to cooperate with agencies' education efforts. Further, the proposal would address the critical educational deficiencies of persons in need of supervision (PINS) upon release from placement that were identified by the Vera Institute of Justice in its recent PINS study.[2] Similar to the juvenile delinquency pre-release provisions of Laws of 2000, ch. 181, it would require submission of pre-release reports in PINS cases that delineate steps for the prompt enrollment of PINS in school or vocational programs upon their release from placement.

2. Requirements for expeditious permanency planning for children in foster care: Consistent with the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7], the Committee is proposing legislation that would require local departments of social services and, as applicable, authorized child care agencies, to gather information necessary for the formulation and effectuation of permanent plans promptly when a child enters care and on an ongoing basis thereafter. The proposal would amend Family Court Act §1017 to require child protective agencies, in abuse and neglect cases involving children removed from their homes, to conduct immediate investigations to locate suitable non-custodial parents, not simply other relatives, with whom the children may reside. Information obtained in such investigations and that which is obtained in diligent searches for parents of abandoned infants pursuant to

[2] *See 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).

Family Court Act §1055 would be recorded in the child's Uniform Case Record. The proposal would also amend sections 383-c, 384 and 384-a of the Social Services Law to require agency officials to obtain information from a parent executing a voluntary placement or surrender instrument regarding the child's other parent, any person to whom the parent placing or surrendering the child had been married at the time of conception or birth of the child and any other person who would be entitled to notice of a proceeding to terminate parental rights. Information thus obtained would likewise be recorded in the child's Uniform Case Record.

3. Notices of Changes in Placement: Also in furtherance of the goals of the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7], the Committee is proposing legislation to assure that the Family Court, the parties and law guardians are promptly informed of any changes in placement that may warrant Court intervention. The proposal would amend Family Court Act §§1055 and 1055-a, as well as Social Services Law §§358-a and 392, to require an agency with whom a child has been placed, either voluntarily or as a result of an abuse or neglect finding, or to whom guardianship and custody has been transferred as a result of the child being freed for adoption, to report any change in the child's placement status within 30 days to the Court, the parties and the law guardian. Such changes would include, but not be limited to, cases in which the child has been moved from the foster or pre-adoptive home or program into which he or she has been placed, cases in which the foster or pre-adoptive parents move out of state with the child, and, with respect to children not freed for adoption, cases in which the child has been discharged from foster care on a trial or final basis.

4. Violations of orders of protection in Family Court and matrimonial proceedings: In light of ambiguities, gaps and disparities in the language of the current statutes, the Committee is proposing a measure designed to provide guidance for civil enforcement of orders of protection in Family and Supreme Courts. The proposal makes clear that the violation procedures and consequences contained in Article 8 of the Family Court Act apply to all orders of protection and temporary orders of protection issued in family offense, child support, paternity, child custody, visitation, divorce and other matrimonial proceedings. The proposal would clarify that wilful violators of temporary and final orders of protection in all categories of cases would be subject to the following sanctions: probation, restitution, visitation prohibition or requirement for supervision, firearms surrender, firearms license suspension or revocation and/or commitment to jail for up to six months.

5. Dispositional and pre-dispositional alternatives and procedures for admissions and violations of orders of probation and suspended judgment in persons in need of supervision (PINS) cases: Consistent with the recent enactment of limitations on the use of detention and placement in persons in need of supervision (PINS) cases, the Committee proposes to require the Family Court to consider alternatives to detention, including conditional release, prior to imposition of pre-dispositional detention. Further, the proposal would require the Court to order the "least restrictive available alternative" as its disposition, similar to the requirement in juvenile delinquency cases [Family Court Act §352.2(2)(a)]. Intensive probation supervision

would be included as one of the alternatives available, an effective means of avoiding resort to costly out-of-home placements. The proposal would also add a new Section 743 to the Family Court Act, establishing a judicial allocution procedure for accepting admissions in PINS cases, analogous to the allocution provision in juvenile delinquency cases [Family Court Act §321.3]. Finally, it would delineate the procedures for violations of suspended judgment and probation, drawing upon existing juvenile delinquency provisions. *See* FCA §§360.2, 360.3.

6. Juvenile delinquency: intensive probation supervision and electronic monitoring: With concern about juvenile crime remaining at a high level, the Family Court needs cost-effective options both pre- and post-disposition. In determining whether an accused juvenile delinquent should be detained prior to disposition, the Committee proposes a measure that would require the Family Court to consider whether appropriate alternatives to detention are available. Where the Court determines that grounds for detention exist under current statutory standards, the Court would have the discretion to instead release a juvenile on condition of cooperation with a program of electronic monitoring to be administered by a local probation department, if such a program would obviate the concerns that otherwise would have caused the juvenile to be detained. Further, as part of the menu of graduated sanctions available for disposition, the proposal would authorize orders both for intensive probation supervision and electronic monitoring.

7. Electronic monitoring in child support violation and family offense proceedings: Concerned about the limited pre-dispositional and dispositional options available to the Family Court in family offense and child support cases, the Committee proposes to authorize the Family Court, where a respondent in a family offense or child support violation matter is returned on a warrant, to set reasonable conditions of bail or parole, which may include electronic monitoring, where necessary to ensure respondent's appearance in court. The measure would also permit the Family Court to require a respondent, found to have committed a family offense or a violation of a family offense or child support order and who would otherwise be incarcerated, to comply with a program of electronic monitoring and/or to follow a schedule regulating his or her daily movements as a condition of probation.

8. Authority of Supreme and Family Court to direct investigations and filing of child protective petitions in custody cases: The ability of Family Court judges to call upon local social services districts to perform child protective investigations and to file child protective petitions, pursuant to Family Court Act §§817 and 1034, has often proven invaluable both to protect children and facilitate an accurate determination of their "best interests." Building upon these provisions, the Committee proposes that both the Family Court Act and Domestic Relations Law be amended to authorize Supreme and Family Court judges in the course of pending custody cases to direct investigations pursuant to Family Court Act §1034 and, if the investigation determines that any allegations are "indicated," to direct the child protective agency to file a child protective petition with respect to those allegations. Prior to a direction to file a petition, the agency, as well as the subject of the allegations, would have to be given

notice and an opportunity to be heard and the Court would have the alternative options of directing the law guardian or other individual to file the petition. *See* Family Court Act §1032(b).

9. Dispositional options in termination of parental rights proceedings: commitment to relatives or other suitable persons: Addressing a problem frequently encountered under the *Adoption and Safe Families Act*, this measure clarifies that an order of commitment of guardianship and custody may be made directly to a foster parent, relative or other suitable person for the purposes of instituting adoption proceedings as a disposition in a termination of parental rights proceeding. Social Services Law §384-b currently permits such a dispositional option for relatives and foster parents, but does not include other suitable persons. Family Court Act §631 does not include any direct commitment options at all. The proposal would thus amend both sections to delineate each of these essential permanency alternatives.

10. Permanency hearing requirements in juvenile delinquency and persons in need of supervision (PINS) proceedings: The recently-enacted reauthorization of the federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273] makes compliance with the *Adoption and Safe Families Act* 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. This proposal, therefore, extends the *ASFA* requirements to juvenile delinquency and PINS proceedings in order to provide the Family Court and litigants with the information needed to fulfill these requirements. The measure would require that dispositional and permanency hearing orders in juvenile delinquency and PINS proceedings involving foster care placements include: a description of the visitation plan between the juvenile and his or her parent or legally-responsible adult; a service plan designed to fulfill the permanency goal for the juvenile; a direction that the parent or other person legally responsible be notified of, and be invited to be present at, any planning conferences convened by the placement agency with respect to the child; and a warning that if the juvenile remains in placement for 15 out of 22 months, the agency may be required to file a petition to terminate parental rights. A copy of the court order and service plan would have to be provided to the parent or other person legally responsible for the child's care.

11. Orders of protection in child abuse and neglect proceedings: Recognizing the frequency with which domestic violence occurs in the homes of abused or neglected children, the Committee is resubmitting its proposal to eliminate a serious gap in the statewide automated order of protection and warrant registry. The proposal requires that orders of protection in child protective proceedings be entered onto the statewide automated registry, thus ensuring that law enforcement agencies and the courts have access to available information regarding such orders. The proposal also accords discretion to the Family Court, where "good cause" is demonstrated, to issue orders of protection in Article 10 cases that may continue until the 18th birthday of the youngest child for whom neglect or abuse has been found. This parallels the permissible duration of orders of protection in custody cases and would eliminate the burden imposed upon

litigants and the courts by the necessity for annual extensions of protective orders. This measure would greatly enhance the usefulness of the registry as a tool for the protection of victims of domestic violence and as a resource for law enforcement agencies and the courts.

12. Criminal history and child abuse screening of individuals with whom children are placed: Addressing a critical issue outside the scope of both Chapter 7 of the Laws of 1999 and Chapter 145 of the Laws of 2000, the legislation enacted to implement the federal *ADOPTION AND SAFE FAMILIES ACT OF 1997* [Public Law 105-89], the Committee proposes criminal records and child abuse screening of individuals accepting direct placements of children into their homes within thirty days of the placement, child abuse registry screening of all individuals over the age of sixteen residing in their homes and, where a Court deems it necessary, criminal history screening of proposed custodians and applicants for visitation.

13. Restitution in juvenile delinquency proceedings: In accordance with principles of restorative justice, the Committee is proposing legislation to provide that adjudicated juvenile delinquents may be ordered to pay restitution, not only for damage to property, but also for unreimbursed medical expenses, to the extent that information is available to the Court without delaying the dispositional proceedings.

14. Adoption consents by putative fathers: The Committee is resubmitting its proposal responding to the Court of Appeals' invitation to clarify the law regarding consents required for adoption. The Committee's proposal would clarify the circumstances under which a birth father may withhold consent to the adoption of his non-marital child. The proposal, originally submitted by the Committee in response to the Court of Appeals decision in Matter of Adoption of Raquel Marie X., 76 N.Y.2d 387 (1990), cert. denied *sub nom.* Robert C. v. Miguel T., 498 U.S. 984 (1990) was later modified to incorporate the Court of Appeals' decision in Matter of Robert O. v. Russell K., 80 N.Y. 2d. 254 (1992). This proposal would ensure that parties to an adoption, and the courts, would have the benefit of explicit statutory guidance concerning the competing interests at stake.

15. Access by probation to order of protection registry for purposes of investigations in family offense and various Family Court proceedings: In light of the importance of evidence of domestic violence to determinations in custody, visitation, guardianship and child protective proceedings, the Committee is proposing legislation that would allow local probation departments to have access to the statewide automated registry of orders of protection and related warrants for pre-dispositional investigations conducted in these categories, as well as family offense, proceedings. The measure would also explicitly authorize courts to request probation departments to conduct pre-dispositional or pre-sentence investigations in criminal and Family Court family offense cases.

16. Preclusion of remedies in court-approved agreements and compromises in paternity proceedings: The Committee is resubmitting its proposal to repeal Family Court Act §516, an outdated and discriminatory provision that bars subsequent remedies for child support where the Family Court has approved a child support agreement between a mother and putative father of an out-of-wedlock child. Enacted long before the development of advanced genetic testing techniques and the passage of the panoply of federal and state paternity and child support enforcement initiatives, Family Court Act § 516 at best no longer serves a useful purpose, and at worst results in the unfair treatment of out-of-wedlock children.

17. Compensation of guardians *ad litem*: Filling a significant gap in the statutory structure regarding appointments of guardians *ad litem*, the Committee is resubmitting its proposal to authorize public funding for guardians *ad litem* in those civil proceedings in which private compensation is not available.

18. Unauthorized disclosure of information from statewide automated registry of orders of protection: As the statewide automated registry of orders of protection and warrants has grown into a substantial database containing over 903,000 orders of protection, the need to ensure its security and integrity grows ever more critical. The Committee is thus resubmitting its proposal delineating civil and criminal penalties for unauthorized release of data from the statewide automated registry of orders of protection and warrants.

19. Family offense cases involving respondents under 16: Recognizing that Article 8 of the Family Court Act is an inappropriate vehicle for addressing family offenses committed by juveniles under the age of 16, the Committee proposes that such cases be dealt with in accordance with Article 3 (juvenile delinquency) or Article 7 (persons in need of supervision) of the Family Court Act, as applicable.

20. Violations of orders of custody and visitation: In order to fill a procedural void in both the Family Court Act and Domestic Relations Law, the Committee proposes a measure that would delineate the procedures and remedies applicable to violations of orders of custody and visitation. The proposal would expand the limited powers of Supreme and Family Courts by expressly authorizing courts to direct probation, restitution, participation in a rehabilitative program, payment of attorneys' and law guardians' fees, and supervised visitation.

21. Violations of Adjournments in Contemplation of Dismissal and Orders of Conditional Discharge in Juvenile Delinquency Cases: This proposal cures a gap in the post-dispositional procedures applicable in juvenile delinquency cases that was identified in two appellate decisions. First, the proposal clarifies that, as in probation violation cases, the period of a conditional discharge is tolled during the pendency of a violation petition. *See* Matter of Donald MM, 231 A.D.2d 810, 647 N.Y.S.2d 312 (3rd Dept., 1996). Second, the proposal delineates the procedures and time frames for restoring cases adjourned in contemplation of

dismissal to the calendar for an adjudicatory or dispositional hearing, whichever is applicable. *See* Matter of Edwin L., 88 N.Y.2d 593 (1996).

* * *

In 2002, in light of the enactment of significant new legislation, including, *inter alia*, the *Uniform Child Custody Jurisdiction and Enforcement Act*, the new conditional surrender and medical support statutes and the legislation requiring domestic violence-related non-family offense orders of protection to be entered onto the statewide registry, the Committee developed and revised over 100 official forms for pleadings, process and orders for promulgation by the Chief Administrative Judge. These forms have been placed on the Internet for easy access by attorneys, litigants and the public. *See* http://www.courts.state.ny.us.

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 all comments, suggestions and inquiries to:

Hon. Sharon S. Townsend, Chair
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. Implementation of "one family/one judge" in termination of parental rights, surrender and adoption proceedings (FCA §§115, 641; SSL §§383-c, 384, 384-b; DRL §113)

Children caught in the limbo of foster care must be given permanent homes – preferably through return to their families, but otherwise through adoption or other alternative – as quickly as possible. This is critical to the healthy development of the children and is a mandate for New York State's eligibility for significant federal foster care funding under the federal *Adoption and Safe Families Act* [Public Law 105-89]. Recognizing that the court process should not itself present an impediment to the timely achievement of permanence for children, the Family Court Advisory and Rules Committee is submitting a proposal to streamline the process through implementation of the nationally-recognized "one family/one judge" model.

Continuity of the court and the judge have been identified as essential elements for the prompt achievement of permanency for children in foster care. Federally-issued guidelines for state statutes implementing the *Adoption and Safe Families Act* , as well as guidelines adopted by the National Council of Juvenile and Family Court Judges governing "Model Courts" nationally, including those in New York and Erie Counties, emphasize the importance of having the same judge preside from the outset of a child protection proceeding to the fulfillment of a permanent home for a child, whether it be return, adoption or alternate plan.[3] Significantly, research has demonstrated that the filing of an adoption petition in the same county and before the same judge can reduce the average time between freeing a child for adoption and finalization of the adoption from over one year to under six months.[4] This finding is particularly significant when viewed in the context of earlier research demonstrating significant delays between freeing and finalization, notwithstanding the fact that an overwhelming majority of the children adoption were already

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[3] Duquette and Hardin, *Guidelines for Public Policy and State Legislation Governing Permanence for Children* (U.S. Dept. of H.H.S., Admin. for Children and Families, Children's Bureau, 1999), p. IV-4; *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse + Neglect Cases* (National Council of Juvenile and Family Court Judges, Fall, 2000), pps. 5, 64; *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, 1995), p. 19.

[4] The research examined implementation in New York City of the statutory authorization, contained in chapter 588 of the Laws of 1991, to file adoption petitions during the pendency of termination of parental rights proceedings. At the end of the research period, 91.6% of the children in the experimental group were adopted, as compared to 39.3% of the children in the randomly-assigned control group for whom the chapter 588 authorization was not utilized. *See* Festinger and Pratt, "Speeding Adoptions: An Evaluation of the Effects of Judicial Continuity," 26 *Social Work Research* #4:217-224 (Dec., 2002); Festinger, "Accelerating Adoptions: The Chapter 588 Project" (Unpub. monograph, June, 2000)

residing in their adoptive homes at the time they were freed.[5]

Consistent with national recommendations and research, the Committee's proposal would reduce a significant source of delay in achieving permanency for children by reducing the fragmentation that occurs when adoption petitions are filed in a different court than the related child protective, termination of parental rights and/or surrender proceedings. The measure would require that if a child is or was the subject of a Family Court child protective, foster care, surrender or termination of parental rights proceeding, any subsequent agency adoption proceeding would have to be filed in the same court and would be required to be heard, to the extent practicable, before the same judge. If filed in a different court, the court in which the case was filed would be required to ascertain whether there had been prior child welfare litigation, to communicate promptly with the judge who presided over the earlier litigation and to defer to that judge's determination as to the exercise of jurisdiction over the case.

Enactment of this measure would significantly advance the efforts of the Unified Court System, in conjunction with the New York State Office of Children and Family Services and the New York City Administration for Children's Services, to ensure that the large number of children freed for adoption in New York State but not yet adopted – estimated by the New York State Office of Children and Family Services to number in excess of 6000 children, of whom approximately 4000 are in New York City – can be adopted without delay.

Proposal

AN ACT to amend the family court act, the social services law and the domestic relations law, in relation to ensuring "one family, one judge" in adoption, surrender and termination of parental rights proceedings

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

Section one. Paragraph (iv) of subdivision (a) of section 115 of the family court act, as amended by chapter 409 of the laws of 2002, is amended to read as follows:

(iv) proceedings to permanently terminate parental rights to guardianship and custody of a child: (A) by reason of permanent neglect, as set forth in part one of article six of this act and

[5] Children adopted in New York City during a four-year period averaged 23 months between termination of parental rights and finalization of the adoptions, even though 84.5% of the children were already residing in their adoptive homes at the time of freeing. *See* Festinger and Pratt, "Speeding Adoptions: An Evaluation of the Effects of Judicial Continuity," 26 *Social Work Research* #4:217-224 (Dec., 2002); Festinger, *NYC Adoptions*: *1995-1998* (Unpub. annual monographs, NYU Sch. of Social Work).

paragraph (d) of subdivision four of section three hundred eighty-four-b of the social services law, [and] (B) by reason of mental illness, mental retardation and severe or repeated child abuse, as set forth in paragraphs (c) and (e) of subdivision four of section three hundred eighty-four-b of the social services law and, (C) where a child is under the jurisdiction of the family court as a result of a placement in foster care by the family court pursuant to article ten of the family court act or section three hundred fifty-eight-a or three hundred ninety-two of the social services law, by reason of the death of, or abandonment by, a parent or parents, as set forth in paragraph (a) or (b) of subdivision four of section three hundred eighty-four-b of the social services law;

§2. Section 641 of the family court act, as amended by chapter 331 of the laws of 1985, is amended to read as follows:

§641. Jurisdiction over adoption proceedings; continuity of judge.

(a) The family court has original jurisdiction concurrent with the surrogate's courts over adoption proceedings under article seven of the domestic relations law, except as provided in subdivision (b) of this section.

(b) Where parental rights regarding a child were terminated by the family court, where a surrender of a child was executed before or approved by the family court or where a child is under the jurisdiction of the family court pursuant to a placement under article ten of this act or under section three hundred fifty-eight-a or three hundred ninety-two of the social services law, adoption proceedings regarding the child shall be filed in the family court that exercised jurisdiction over the most recent prior proceeding and shall be assigned, wherever practicable, to the judge who last heard such proceeding, unless the family court declines jurisdiction over the adoption proceeding in accordance with subdivision (c) of this section.

(c) Before hearing an adoption proceeding, the court in which the adoption petition was filed shall ascertain whether the child has been the subject of a termination of parental rights or surrender proceeding or is under the jurisdiction of a family court pursuant to a placement in a child protective or foster care proceeding and, if so, which court exercised jurisdiction over the most recent proceeding. If the court determines that the child has been the subject of such a proceeding in a different court, the court in which the adoption petition has been filed shall stay its proceeding for not more than thirty days and communicate with the court that exercised jurisdiction over the most recent

proceeding. The communication shall be recorded or summarized on the record by the court in which the adoption petition was filed. Both courts shall notify the parties and law guardian, if any, in their respective proceedings and shall give them an opportunity to present facts and legal argument or to participate in the communication prior to the issuance of a decision on jurisdiction, provided, however, that the decision on jurisdiction shall be issued within thirty days of the filing of the adoption petition. If the court that exercised jurisdiction over the prior proceeding determines that it should exercise jurisdiction over the adoption petition, the petition shall be transferred to it forthwith but in no event more than thirty-five days after the filing of the petition. The petition shall be assigned, wherever practicable, to the judge who last heard the prior proceeding. If the court that exercised jurisdiction over the prior proceeding declines to exercise jurisdiction over the adoption petition, the court in which the adoption petition was filed shall proceed forthwith.

§3. Paragraph (a) of subdivision three of section 383-c of the social services law, as added by chapter 479 of the laws of 1990, is amended to read as follows:

(a) A surrender of a child to an authorized agency for the purpose of adoption may be executed and acknowledged before a judge of the family court or a surrogate in this state, provided, however, that if the child being surrendered is in foster care as a result of a proceeding before the family court pursuant to article ten of the family court act or section three hundred fifty-eight-a or three hundred ninety-two of the social services law, the surrender shall be executed and acknowledged before the family court that exercised jurisdiction over such proceeding and, shall be assigned, wherever practicable, to the judge who last heard such proceeding. A surrender executed and acknowledged before a court in another state shall satisfy the requirements of this section if it is executed by a resident of the other state before a court of record which has jurisdiction over adoption proceedings in that state, and a certified copy of the transcript of that proceeding, showing compliance with paragraph (b) of this subdivision, is filed as part of the adoption proceeding in this state.

§4. The opening paragraph of paragraph (b) of subdivision four of section 383-c of the social services law, as amended by chapter 480 of the laws of 1990, is amended to read as follows:

The authorized agency to which the child was surrendered shall file an application for approval of the extra-judicial surrender with the court in which the adoption proceeding is expected

to be filed or, if not known, the family or surrogate's court in the county in which the agency has its principal office, provided, however, that if the child being surrendered is in foster care as a result of a proceeding before the family court pursuant to article ten of the family court act or section three hundred fifty-eight-a or three hundred ninety-two of the social services law, the application shall be filed in the family court that exercised jurisdiction over such proceeding and, shall be assigned, wherever practicable, to the judge who last heard such proceeding. The application shall be filed no later than fifteen days after execution of such surrender. The application shall be accompanied by affidavits from all the witnesses before whom the surrender was executed and acknowledged as provided for in paragraph (a) of this subdivision, stating:

§5. The opening paragraph of subdivision 3 of section 384 of the social services law, as amended by chapter 479 of the laws of 1990, is amended to read as follows:

The instrument herein provided shall be [signed] executed and [shall be] acknowledged [or executed] (a) before any judge or surrogate in this state having jurisdiction over adoption proceedings, provided, however, that if the child is being surrendered as a result of, or in connection with, a proceeding before the family court pursuant to article ten of the family court act, the instrument shall be executed and acknowledged in the family court that exercised jurisdiction over such proceeding and shall be assigned, wherever practicable, to the judge who last heard such proceeding; or (b) in the presence of one or more witnesses and acknowledged by such witness or witnesses, in the latter case before a notary public or other officer authorized to take proof of deeds, and shall be recorded in the office of the county clerk in the county where such instrument is executed, or where the principal office of such authorized agency is located, in a book which such county clerk shall provide and shall keep under seal. Such record shall be subject to inspection and examination only as provided in subdivisions three and four of section three hundred seventy-two. Notwithstanding any other provision of law, if the parent surrendering the child for adoption is in foster care the instrument shall be executed before a judge of the family court.

§6. Subdivision 4 of section 384 of the social services law, as amended by chapter 862 of the laws of 1977, is amended to read as follows:

4. Upon petition by an authorized agency, a judge of the family court, or a surrogate, may approve such surrender, on such notice to such persons as the surrogate or judge may in his or her

discretion prescribe, provided, however, that if the child is being surrendered as a result of, or in connection with, a proceeding before the family court pursuant to article ten of the family court act, the petition shall be filed in the family court that exercised jurisdiction over such proceeding and shall be assigned, wherever practicable, to the judge who last heard such proceeding. The petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to section three hundred eighty-four- c, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice pursuant to such section. No person who has received such notice and been afforded an opportunity to be heard may challenge the validity of a surrender approved pursuant to this subdivision in any other proceeding. However, this subdivision shall not be deemed to require approval of a surrender by a surrogate or judge for such surrender to be valid.

§7. Paragraph (c) of subdivision three of section 384-b of the social services law, as amended by chapter 607 of the laws of 1996 , and paragraph (d) of such subdivision, as added by chapter 666 of the laws of 1976, are amended and a new paragraph (c-1) is added to such subdivision to read as follows:

(c) [Unless a proceeding under this section is brought in the surrogate's court, where] Where a child was placed in foster care pursuant to article ten of the family court act or section three hundred fifty-eight-a or three hundred ninety-two of the social services law, a proceeding under this section shall be originated in the family court in the county in which the proceeding pursuant to article ten of the family court act or section three hundred fifty-eight-a or section three hundred ninety-two of the social services law was last heard and shall be assigned, wherever practicable, to the judge who last heard such proceeding. Where multiple proceedings are commenced under this section concerning a child and one or more siblings or half-siblings of such child, placed in foster care with the same commissioner pursuant to section ten hundred fifty-five of the family court act, all of such proceedings may be commenced jointly in the family court in any county which last heard a proceeding under article ten of the family court act regarding any of the children who are the subjects of the proceedings under this section. In such instances, the case shall be assigned, wherever practicable, to the judge who last heard such proceeding. In any other case, a proceeding under this section, including a proceeding brought in the surrogate's court, shall be originated in the county

where either of the parents of the child reside at the time of the filing of the petition, if known, or, if such residence is not known, in the county in which the authorized agency has an office for the regular conduct of business or in which the child resides at the time of the initiation of the proceeding. To the extent possible, the court shall, when appointing a law guardian for the child, appoint a law guardian who has previously represented the child.

(c-1) Before hearing a petition under this section, the court in which the petition has been filed shall ascertain whether the child is under the jurisdiction of a family court pursuant to a placement in a child protective or foster care proceeding and, if so, which court exercised jurisdiction over the most recent proceeding. If the court determines that the child has been the subject of such a proceeding in another court, the court in which the termination of parental rights petition has been filed shall stay its proceeding for not more than thirty days and communicate with the court that exercised jurisdiction over the most recent proceeding. The communication shall be recorded or summarized on the record by the court in which the termination of parental rights petition was filed. Both courts shall notify the parties and law guardian, if any, in their respective proceedings and shall give them an opportunity to present facts and legal argument or to participate in the communication prior to the issuance of a decision on jurisdiction, provided, however, that the decision on jurisdiction shall be issued within thirty days of the filing of the adoption petition. If the court that exercised jurisdiction over the prior proceeding determines that it should exercise jurisdiction over the termination of parental rights petition, the petition shall be transferred to it forthwith but in no event more than thirty-five days after the filing of the petition. The petition shall be assigned, wherever practicable, to the judge who last heard the prior proceeding, If the court that exercised jurisdiction over the prior proceeding declines to exercise jurisdiction over the adoption petition, the court in which the termination of parental rights petition was filed shall proceed forthwith.

(d) The family court shall have exclusive, original jurisdiction over any proceeding brought upon grounds specified in paragraph (c), (d) or (e) of subdivision four of this section, and the family court and surrogate's court shall have concurrent, original jurisdiction over any proceeding brought upon grounds specified in paragraph (a) or (b) of subdivision four of this section, except as provided in paragraphs (c) and (c-1) of this subdivision.

§8. Subdivision 3 of section 113 of the domestic relations law, as amended by chapter 531 of

the laws of 1998, is amended to read as follows:

3. The agreement of adoption shall be executed by such authorized agency. If the adoption petition is filed pursuant to subdivision eight of section one hundred twelve of this article or subdivision ten of section three hundred eight-three-c or subdivision eleven of section three hundred eighty-four-b of the social services law, the petition shall be filed in the county where the termination of parental rights proceeding or judicial surrender proceeding, as applicable, is pending and shall be assigned, wherever practicable, to the same judge. In any other agency adoption proceeding, the petition shall be filed in the same court and, wherever practicable, shall be assigned to the same judge of the county in which parental rights had been terminated [or], a judicial surrender had been approved or the most recent proceeding under article ten of the family court act or section three hundred fifty-eight-a or three hundred ninety-two of the social services law had been heard, whichever occurred last, unless that court declines jurisdiction over the adoption proceeding in accordance with subdivision (c) of section six hundred forty-one of the family court act or subdivision four of this section. If that court declines jurisdiction, the petition may be filed in the county where the adoptive parents reside or, if such adoptive parents do not reside in this state, in the county where such authorized agency has its principal office. Neither such authorized agency nor any officer or agent thereof need appear before the judge or surrogate. The judge or surrogate in his or her discretion may accept the report of an authorized agency verified by one of its officers or agents as the report of investigation hereinbefore required. In making orders of adoption the judge or surrogate when practicable must give custody only to persons of the same religious faith as that of the adoptive child in accordance with article six of the social services law.

§9. Section 113 of the domestic relations law is amended by adding a new subdivision four to read as follows:

4. Before hearing an adoption proceeding, the court in which the adoption petition was filed shall ascertain whether the child has been the subject of a termination of parental rights or surrender proceeding or is under the jurisdiction of a family court pursuant to a placement in a child protective or foster care proceeding and, if so, which court exercised jurisdiction over the most recent proceeding. If the court determines that the child has been the subject of such a proceeding in a different court, the court in which the adoption petition has been filed shall stay its proceeding for not

more than thirty days and communicate with the court that exercised jurisdiction over the most recent proceeding. The communication shall be recorded or summarized on the record by the court in which the adoption petition was filed. Both courts shall notify the parties and law guardian, if any, in their respective proceedings, and shall give them an opportunity to present facts and legal argument or to participate in the communication prior to the issuance of a decision on jurisdiction, provided, however, that the decision on jurisdiction shall be issued within thirty days of the filing of the adoption petition. If the court that exercised jurisdiction over the prior proceeding determines that it should exercise jurisdiction over the adoption petition, the petition shall be transferred to it forthwith but in no event more than thirty-five days after the filing of the petition. The petition shall be assigned, wherever practicable, to the judge who last heard the prior proceeding, If the court that exercised jurisdiction over the prior proceeding declines to exercise jurisdiction over the adoption petition, the court in which the adoption petition was filed shall proceed forthwith.

§10. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to adoption, extra-judicial surrender approval and termination of parental rights petitions and applications to execute judicial surrenders filed on or after such date.

2. Clarification of permanency and extension of placement hearing provisions in child protective proceedings (FCA §1055(b))

The New York State *Adoption and Safe Families Act* [Laws of 1999, ch. 7] conformed the extension of placement statute to the federal permanency hearing requirements, but in several respects the two statutes were not a perfect fit. Engrafting the new statute on top of the old meant that the agencies would have to plead and prove, and the Family Court would have to determine and record in its written order, multiple findings, some of which were duplicative of those required by the federal law. Because of the complexity of the hybrid statute, the Family Courts have faced a daunting task in issuing uniform orders containing all of the detail required under both State and federal law. The Family Court Advisory and Rules Committee has developed a proposal to simplify the child protective permanency hearing statute, while retaining its conformity to federal law.

The Committee's proposal reorganizes and streamlines Family Court Act §1055, combining sections that appear redundant or extraneous. In all permanency hearings in child abuse and neglect cases, the Court would be required to determine, in addition to any other factors it deems appropriate: (i) what the permanency plan is and the time-frame for its fulfillment; (ii) whether the plan should be approved or modified; (iii) what, if any, steps have been taken to further the plan, whether it be reunification or some other alternative; (iv) whether the family services plan requires adjustment or modification, and if so, how; (v) what services or actions, if any, should be ordered by the court to further the permanency plan; and (vi) in the case of a child over the age of 16, what services, if any, are needed to assist the child in making the transition from foster care to independent living. The Court's order, as well as the family services plan, as approved, adjusted or modified by the Court, would be required to be given to the respondent parent.

In any case in which an extension of placement has been requested, the Family Court would also be required to determine the threshold issue of whether the extension is in the child's best interests, including consideration of whether it is necessary for achievement of the permanency plan and whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible for the child's care. If the Court concludes that an extension is necessary, the Court would be required to determine the duration of the extension, as well as whether reasonable efforts had been made to enable the child to return home safely, unless such efforts would have endangered the child, would have been inconsistent with the permanency plan or had been excused pursuant to Family Court Act §1039-b. If the child's permanency plan is adoption, guardianship or an alternative permanent arrangement, other than return home, the Court would also be required to determine whether reasonable efforts are in progress to finalize that plan. Finally, if the child is in placement outside New York State, the Court would be required to determine whether the out-of-state placement continues to be necessary, appropriate and in the child's best interests.

Enactment of this proposal would greatly facilitate compliance with the myriad requirements of the *Adoption and Safe Families Act* by providing the parties and the Family Court with a streamlined set of findings, set forth in logical order, that must be addressed in each permanency hearing and incorporated into each permanency order. The content of the hearing closely parallels that which was recommended both by the federal Children's Bureau in its state statutory guidelines and by the National Council of Juvenile and Family Courts in the standards that govern courts that it has designated as "model courts," including those in Erie and New York County. *See* Duquette and Hardin, *Adoption 2002: The President's Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children* (Children's Bureau, U.S. Dept. of Health and Human Services, June, 1999), pps. IV-28 - IV-29; N.C.F.C.J., *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (1995), pps. 85-86; N.C.J.F.C.J., *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (2002), pps. 20-22.

Proposal

AN ACT to amend the family court act, in relation to permanency hearings in child abuse and neglect proceedings

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

Section one. Paragraph (iv) of subdivision (b) of section 1055 of the family court act, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

(iv) (A) At the permanency hearing the court shall determine:

1. [whether] what the permanency plan is for [conditions and circumstances giving rise to] the child [order of placement, or extension thereof, have changed since the issuance of such order or last extension thereof] and what the time-frame is for achieving the plan, that is, whether and, if so, when the child: (i) will be returned to the parent; (ii) should be placed for adoption with the social services official 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 if the social services official has documented to the court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights and be placed for adoption, be placed with a fit and willing relative, or be placed with a legal guardian; and

2. whether the permanency plan for the child [services plan prepared in accordance with section four hundred nine-e of the social services law requires review,] should be approved or whether it requires adjustment or modification and, if so, [the court may adjust or modify such plan and may issue appropriate orders pursuant to section one thousand fifteen-a of this chapter] how it should be adjusted or modified; and

3. [the extent to which such plan has been complied with] what, if any, steps have been taken by the respondent and the supervising agency during the term of the most recent order of placement or extension [thereof] to comply with and achieve the permanency plan; and what further steps should be taken by the respondent and supervising agency to achieve the plan; and

4. whether the family services plan prepared in accordance with section four hundred nine-e of the social services law requires adjustment or modification and, if so, how it should be adjusted or modified; and

5. whether the court should issue any orders for services pursuant to section one thousand fifteen-a of this chapter in order to achieve the permanency plan and, if so, what services should be ordered; and

6. in the case of a child who has attained the age of sixteen, the services needed, if any, to assist the child to make the transition from foster care to independent living; and

7. any other factors that the court deems appropriate.

(B) [in determining whether] If an extension of placement has been requested, the court shall determine whether an extension of placement is in the child's best interests, including consideration both of whether an extension of placement is necessary for the achievement of the permanency plan established for the child, as approved, adjusted or modified by the court, and of whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible for the child's care. If the court determines that an extension of placement is [consistent with the best interests of the child] necessary, the court shall [consider and] further determine in its order the duration of such extension and:

1. whether [an extension is consistent with the permanency goal established for the child in the child services plan as approved, adjusted or modified by the court;

2. whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible for the child's care;

3. in the case of a child placed outside this state, whether the out-of-state placement continues to be appropriate and in the best interests of the child;

4. where appropriate, that] reasonable efforts were made to make it possible for the child to safely return to his or her home, [or] unless such efforts would imperil the child's health and safety or are inconsistent with the permanency plan for the child or have been excused pursuant to section one thousand thirty-nine-b of this article; and

2. if the permanency plan for the child is adoption, guardianship or some other permanent living arrangement other than reunification with the parent or parents of the child, whether reasonable efforts are being made to make and finalize such alternate permanent placement;

[5.whether or when the child: (i) will be returned to the parent; (ii) should be placed for adoption with the social services official 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 if the social services official has documented to the court a compelling reason for determining that it would not be in the best interest of the child 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;

6. in the case of a child who has attained the age of sixteen, the services needed, if any, to assist the child to make the transition from foster care to independent living; and

7] and

3. in the case of a child placed outside this state, whether the out-of-state placement continues to be necessary, appropriate and in the best interests of the child.

The court shall state its findings [thereon] in writing. A copy of the court's [decision] order and the [child] family services plan, as approved, adjusted or modified by the court, shall be given to the respondent.

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

3. Standing to bring motions to dispense with the requirement to make reasonable efforts to reunify families in child abuse and neglect cases (FCA §§1039-b, 1052(b)(i)(A))

The statutory provisions implementing the federal *Adoption and Safe Families Act* [Public Law 105-89] in New York State delineate circumstances warranting a judicial determination that an authorized agency would no longer be required to expend "reasonable efforts" to reunify a child with his or her parent – extreme circumstances in which severe or repeated child abuse by a parent, a parent's conviction for an enumerated serious felony or the involuntary termination of the parental rights of the child's sibling or half-sibling militate toward expediting the child to permanency through adoption or other permanent alternative to return to the parent's care. Laws of 1999, ch. 7. In each of these circumstances, the Family Court is required to enter an order dispensing with the "reasonable efforts" requirement, unless it determines, and states its findings in its order, that such efforts would be in the child's best interests, would not be contrary to the child's health and safety and would be likely to result in the reunification of the child and parent in the foreseeable future. Governor Pataki, in signing the legislation, expressed the legislative intent to "ensure that no child ever grows up in foster care," *inter alia*, by ending the practice of prolonged foster care in "harmful circumstances," such as these, in which reunification of the child with the parent would not be appropriate. *See* Governor's Memorandum of Approval, McKinney's 1999 Session Laws, ch. 7, p. 1467.

Judicial authority to dispense with the reasonable efforts requirement is contained in the statutory provisions governing voluntary placements of children into foster care, as well as placements in persons in need of supervision, juvenile delinquency and child abuse and neglect proceedings. *See* Social Services Law §§ 358-a(3)(b); 392(6-a); Family Court Act §§352.2(2)(c), 754(2)(b), 1039-b, 1052(b). However, only in the child abuse and neglect provisions [Family Court Act §§1039-b and 1052(b)] is a motion procedure delineated; in all other sections, the statute simply requires the Family Court to make the determination if the requisite circumstances are present. This has the clearly-unintended effect of restricting the standing to request this determination in child protective proceedings, but not in any other cases involving placements of children. The proposal of the Family Court Advisory and Rules Committee seeks to remedy this disparity.

This proposal would amend sections 1039-b and 1052(b) of the Family Court Act to provide that representatives of authorized agencies and law guardians, as well as social services officials, would have standing to initiate motions for orders to dispense with the requirement of reasonable efforts for the reunification of children with their families. Where the designated circumstances are present, no reason exists to restrict the Family Court's determination to cases in which a social services official makes a motion, although clearly social services officials should continue to have primary responsibility to move with dispatch in such cases. In the absence of a motion by a social services official, the authorized agency or law guardian should have standing to put the "reasonable efforts" issue before the Family Court. The child's exigent need for permanency – for an expeditious exit from the limbo of foster care – demands this type of statutory flexibility.

Finally, in order to eliminate any possible confusion, the proposal would also incorporate a key provision of the Social Services Law into Family Court Act §1039-b, that is, the equation of the definition of "reasonable" and "diligent" efforts. The definition of diligent efforts in Social Services Law §384-b(7(f), incorporated by reference in the Committee's proposal, in fact, defines diligent efforts as "reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child..." As set forth in the provisions regarding termination of parental rights on the grounds of permanent neglect and severe and repeated child abuse, if the court issues an order dispensing with the requirement of "reasonable" efforts, the order has the effect of dispensing as well with the element of proof of "diligent" efforts in these cases. *See* Social Services Law §§384-b(7)(a), 384-b(8)(a)(iv), 384-b(8)(b)(iii). As Governor Pataki wrote, upon approving the New York State *Adoption and Safe Families Act*, the statute "alleviates the burden of demonstrating diligent efforts in a proceeding to terminate parental rights where a court has previously determined that reasonable efforts to reunify the family are not required." *See* Governor's Memorandum of Approval, McKinney's 1999 Session Laws, ch. 7, p. 1467.

In Matter of Marino S., 293 A.D.2d 223 (1st Dept., 2002), *mot. lve. app. pending* (2002), the Appellate Division, First Department, made clear that the "reasonable efforts" provisions of the *Adoption and Safe Families Act* encompass the existing statutory and decisional law regarding "diligent efforts" that pre-dated its enactment. *See also* Matter of Kyle M., -Misc.2d-, 2002 WL 1414286 (Fam. Ct., Qns. Co., 2002); Matter of La'Asia S., 191 Misc.2d 28, 45 (Fam. Ct., N.Y.Co., 2002). Consistent with these cases, the incorporation by reference of the "diligent efforts" definition of Social Services Law §384-b(7)(f) into Family Court Act §1039-b would assure the continued viability of the substantial body of pre-*ASFA* appellate case law construing the "diligent efforts" requirement and would provide all parties with requisite notice that an order issued under the Family Court Act dispensing with the "reasonable efforts" requirement would eliminate the requirement of proving "diligent efforts" in a subsequent termination of parental rights proceeding.

Proposal

AN ACT to amend the family court act, in relation to motions to dispense with the requirement for reasonable efforts to reunify children with their families in child abuse and neglect proceedings

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

Section one. Subdivision (a) of section 1039-b of the family court act, as added by chapter 7 of the laws of 1999, is amended and a new subdivision (e) is added to such section to read as

follows:

(a) In conjunction with, or at any time subsequent to, the filing of a petition under section [ten hundred] one thousand thirty-one of this chapter, the social services official, representative of an authorized child care agency or law guardian may file a motion upon notice requesting a finding that reasonable efforts to return the child to his or her home are no longer required.

* * *

(e) For purposes of this section, "reasonable efforts" shall mean and include "diligent efforts," as defined in paragraph (f) of subdivision seven of section three hundred eighty-four-b of the social services law.

§2. The opening two paragraphs of subparagraph (A) of paragraph (i) of subdivision (b) of section 1052 of the family court act, as amended by chapter 7 of the laws of 1999, are amended to read as follows:

(A) WHETHER CONTINUATION IN THE CHILD'S HOME WOULD BE CONTRAR THE CHILD AND WHERE APPROPRIATE, THAT REASONABLE EFFORTS WERE MAD DISPOSITIONAL HEARING HELD PURSUANT TO THIS ARTICLE TO PREVENT OR E REMOVAL OF THE CHILD FROM HIS OR HER HOME AND IF THE CHILD WAS RE TO THE DATE OF SUCH HEARING, THAT SUCH REMOVAL WAS IN THE CHILD'S APPROPRIATE, REASONABLE EFFORTS WERE MADE TO MAKE IT POSSIBLE FOR THE HOME. IF THE COURT DETERMINES THAT REASONABLE EFFORTS TO PREVENT REMOVAL OF THE CHILD FROM THE HOME WERE NOT MADE BUT THAT THE LA APPROPRIATE UNDER THE CIRCUMSTANCES, THE COURT ORDER SHALL INCLUDE PERMANENCY PLAN FOR THE CHILD IS ADOPTION, GUARDIANSHIP OR SOME O ARRANGEMENT OTHER THAN REUNIFICATION WITH THE PARENT OR PARENTS O ORDER SHALL INCLUDE A FINDING THAT REASONABLE EFFORTS ARE BEING MA ALTERNATE PERMANENT PLACEMENT.

FOR THE PURPOSE OF THIS SECTION, REASONABLE EFFORTS TO PREVENT OR REMOVING THE CHILD FROM THE HOME OF THE CHILD OR TO MAKE IT POSSIBL SAFELY TO THE HOME OF THE CHILD SHALL NOT BE REQUIRED WHERE, UPON A SOCIAL SERVICES OFFICIAL, AUTHORIZED AGENCY OR LAW GUARDIAN, THE COU

§3. This act shall take effect immediately.

4. Abrogation of evidentiary privileges in termination of parental rights proceedings (SSL §384-b(3)(h))

The statutory framework governing the admissibility of evidence in termination of parental rights proceedings contains an inexplicable anomaly: the spousal, medical, psychological and social worker privileges are automatically abrogated in proceedings brought on the ground of mental illness or retardation of the respondent parent, but not on the grounds of permanent neglect (failure to plan for, or maintain contact with, the child), severe or repeated child abuse or abandonment. *See* Social Services Law §384-b(3)(h). No reason exists for the disparity in the admissibility of such evidence in different categories of termination of parental rights proceedings.

The Committee's proposal would eliminate this disparity. It would amend section 384-b(3)(h) of the Social Services Law to provide that the clinical and spousal privileges that are abrogated automatically in termination of parental rights proceedings alleging mental illness and mental retardation would also be abrogated in proceedings alleging permanent neglect, severe and repeated child abuse and abandonment . Significantly, no changes would be made in the "clear and convincing" standard of proof required in each of these categories of termination of parental rights proceedings, pursuant to Social Services Law §384-b(g) and Family Court Act §622. *See also* Santosky v. Kramer, 455 U.S. 745 (1982).[6]

Treating the clinical and spousal privileges equally in each of the categories of termination of parental rights proceedings would reflect a recognition of the relevance and importance of the evidence, regardless of the termination ground alleged. In Matter of Timothy B., Jr., 106 A.D.2d 898 (4th Dept., 1984), the Appellate Division, Fourth Department, reversed the dismissal of a permanent neglect petition in part because the Family Court invoked the social worker-client privilege to limit testimony. This testimony may have shed light on the important element of proof regarding the agency's "diligent efforts" to assist the respondent parent. The parent's responses to those efforts, as expressed to clinical professionals, may well have been highly relevant to the issue of whether the agency had met its burden. In Matter of Star Leslie W., 63 N.Y.2d 136(1984), for example, the Court of Appeals held that an agency whose efforts have been met with indifference or uncooperativeness on the parent's part would be deemed to have satisfied its burden.

The anomalous nature of the current statute is in sharpest focus in the many cases in which termination of parental rights proceedings are brought alleging both permanent neglect and mental illness or retardation, in which evidence admissible on one ground would not be admissible on the other. *See, e.g.,* Matter of Star A., 55 N.Y.2d 560 (1982). Further, cases alleging severe or repeated child abuse may be based upon an underlying adjudication under Article 10 of the Family Court Act, based upon "clear and convincing" proof, in which clinical privileges had been abrogated pursuant to Family Court Act §1046(a)(vii). Highlighting the irrationality of the current law, evidence upon which the underlying finding was based that would be covered by the spousal or

[6] Nor would any changes be made in the requirement for a court order upon good cause or written consent of the patient for disclosure of substance abuse treatment records protected by federal law [42 U.S.C. §290–ee(3)].

clinical privileges would not be admissible in the termination of parental rights action. Enactment of this measure would cure this anomaly and would promote conformity in the evidentiary rules applicable to all termination of parental rights proceedings.

Proposal

AN ACT to amend the social services law, in relation to evidence in termination of parental rights proceedings

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

Section one. Paragraph (h) of subdivision three of section 384-b of the social services law, as added by chapter 666 of the laws of 1976, is amended to read as follows:

In any proceeding brought upon a ground set forth in [paragraph (c) of] subdivision four, neither the privilege attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the physician-patient and related privileges, as set forth in section forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.

§2. This act shall take effect immediately.

5. Procedures regarding suspended judgments in permanent neglect cases (FCA §633)

The federal *Adoption and Safe Families Act* [Public Law 105-89], as implemented in New York State by chapter 7 of the Laws of 1999, greatly accelerates the initiation of termination of parental rights proceedings – requiring petitions to be filed when a child has remained in foster care for 15 months out of the most recent 22-month period, except in delineated circumstances. This acceleration means that respondent parents may not be given as many chances prior to the filing of permanent neglect petitions to cure the problems that led to their children's entry into foster care and to demonstrate that they have planned for, or have maintained regular contact with, their children. While the quicker achievement of permanency is a benefit for children in clear cases, in some instances the Family Court has deemed it appropriate to give the parents a final opportunity, a grace period, during which they may demonstrate that a transfer of guardianship and custody of their children for the purposes of adoption would not be appropriate. Thus, the dispositional alternative of a suspended judgment has assumed a greater importance in permanent neglect proceedings, highlighting the need for greater clarity in the statutory framework.

The Family Court Advisory and Rules Committee is proposing a comprehensive set of amendments to section 633 of the Family Court Act. In the interest of preserving the children's interests in expeditious resolution, the proposal would amend subdivision (b) of section 633 to make clear that only one extension of a suspended judgment of up to a period of one year would be permitted. A new subdivision (c) would be added to require that orders of suspended judgment include a warning in conspicuous print that failure to comply may lead to commitment of guardianship and custody of the child to the agency for the purposes of consenting to adoption. Incorporating section 205.50(b) of the *Uniform Rules of the Family Court*, the order of suspended judgment would have to be in writing, would have to set forth the duration, terms and conditions and would have to be given to the respondent parent, along with a copy of the current family service plan. Further, the order would be required to contain a scheduled court date not later than 30 days prior to expiration of the order.

The Committee's proposal would add a new subdivision (d) to Family Court Act §633 that would require petitioner to file a report with the parties and the Family Court regarding the respondent's compliance with the order, a report that would be reviewed on the scheduled court date. Unless a motion for violation or extension of the order had been filed, the order of suspended judgment would be deemed satisfied and an order committing guardianship and custody would not be issued. Pursuant to proposed subdivision (g), if the child nonetheless remained in foster care as a result of a child protective or foster care placement, an immediate permanency hearing would have to be convened and completed within 60 days.

Finally, the Committee's proposal would clarify procedures applicable when an application is made to extend a suspended judgment order or to adjudicate a respondent parent in violation of such an order. A new subdivision (e) would be added to Family Court Act §633 providing that if a violation or extension motion or petition has been filed, the suspended judgment period would be tolled pending resolution of the application. A new subdivision (f) would be added that would authorize the Family Court, upon finding a respondent parent to have violated a suspended judgment order, to revoke the order and commit guardianship and custody of the children for the purposes of adoption or to extend the order for a period of up to one year. Subdivision (g) would require that if a child on an extended order remained in foster care, as a result of a child protective or foster care placement, a permanency hearing would have to be convened immediately and completed within 60 days. If guardianship and custody of the child has been transferred as a result of a violation finding, a permanency hearing would have to be convened immediately in accordance with Family Court Act §1055-a and, again, would have to be completed within 60 days.

Subsequent permanency hearings in such cases would be required at six-month intervals pursuant to chapter 663 of the Laws of 2002.

Proposal

AN ACT to amend section 633 of the family court act, in relation to suspended judgments in permanent neglect cases

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

Section one. Section 633 of the family court act, as added by chapter 686 of the laws of 1962, is amended by adding new subdivisions (c), (d), (e), (f) and (g) to read as follows:

(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 responsible for the care of the child.

(b) The maximum duration of a suspended judgment under this section is one year, unless the court finds at the conclusion of that period that exceptional circumstances require an extension of that period for an additional period of up to one year. Successive extensions may not be granted.

(c) The order of suspended judgment must set forth the duration, terms and conditions of the suspended judgment, and must contain a scheduled court date not later than thirty days prior to the expiration of the period of suspended judgment. The order of suspended judgment must also state in conspicuous print that a failure to obey the order may lead to its revocation and to the issuance of an order terminating parental rights and committing guardianship and custody of the child to an authorized agency for the purposes of adoption. A copy of the order of suspended judgment, along with the current family services plan, must be furnished to the respondent.

(d) Not later than sixty days before the expiration of the period of suspended judgment, the petitioner shall file a report with the family court and all parties, including the respondent, law guardian and intervenors, if any, regarding 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 petition, 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 and an order committing the guardianship and custody of the child shall not be entered.

(e) If, prior to the expiration of the period of the suspended judgment, a petition, motion or

order to show cause is filed that alleges a violation of the terms and conditions of the suspended judgment, or that seeks to extend the period of the suspended judgment for an additional year, then the period of the suspended judgment is tolled until entry of the order that disposes of the petition, motion or order to show cause.

(f) Upon finding that the respondent has violated the terms and conditions of the order of suspended judgment, the court may enter an order revoking the order of suspended judgment and committing custody and guardianship of the child or may extend the order of suspended judgment for an additional period of up to one year.

(g) If an order of suspended judgment has been satisfied or has been extended, but the child nonetheless remains in foster care pursuant to a placement under article ten of this act or section three hundred ninety-two of the social services law, a permanency hearing shall be completed pursuant to section one thousand fifty-five of this act or section three hundred ninety-two of the social services law, as applicable, immediately following, but in no event later than sixty days after, the earlier of the court's statement of its order on the record or issuance of its written order. If guardianship and custody of the child have been transferred to the authorized agency upon an order revoking the order of suspended judgment, a permanency hearing shall be completed pursuant to section one thousand fifty-five-a of this act immediately following, but in no event later than sixty days after, the earlier of the court's statement of its order on the record or issuance of its written order. In all cases under this subdivision, a notice of the permanency hearing and a petition and/or report, as directed by the court, shall be filed and provided to the parties, law guardian and individuals required to be notified in the manner and according to the schedule specified by the court.

§2. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to orders of suspended judgment issued on or after such date.

6. Notice to respondent and non-respondent parents in child abuse and neglect proceedings (FCA §1035)

Article 10 of the Family Court Act "is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child..." [Family Court Act §1011]. The Family Court's role in protecting children must be carried out within a due process framework in which parents and children are given full notice of the consequences of the proceeding and an opportunity to be heard. The *Adoption and Safe Families Act*, as implemented in New York State pursuant to chapter 7 of the Laws of 1999, therefore, requires the Family Court, prior to accepting an admission in a child abuse or neglect case, to notify the respondent that "if the child remains in foster care for 15 of the most recent 22 months, the agency may be required by law to file a petition to terminate parental rights" and such a notice must also be included in conspicuous print on any orders of placement issued in such cases. *See* Family Court Act §§1051(f)(ii), 1055(b)(vi)(B). Reflecting the need to provide notice to parents in all proceedings in which their children may be placed in foster care, *ASFA* requires petitions and orders regarding voluntary foster care placements and reviews to contain a similar notice as well. *See* Social Services Law §§358-a((2)(a), 358-a(3), 392(6). However, the provisions regarding initial summonses and petitions in child abuse and neglect proceedings were not amended to require this notice; nor is the notice that is given to parents, who are not named as respondents in these cases, as complete as it should be with respect to the possible consequences of prolonged foster care. The Family Court Advisory and Rules Committee proposes to remedy these gaps by amending section 1035 of the Family Court Act.

Almost two decades prior to enactment of the *Adoption and Safe Families Act,* Family Court Act §1035 was amended to require summonses in child abuse cases to alert respondent parents to the possibility that the proceedings may lead to the filing of petitions to terminate parental rights. *See* Laws of 1981, ch. 739. However , no similar requirements were enacted regarding child neglect summonses, although the same possibility has existed in those cases, assuming statutory grounds for termination were present. The enactment of *ASFA*, with its escalation of the time-frame for the filing of termination of parental rights petitions for all categories of children in foster care, places this omission in sharp focus. In order to eliminate any possible confusion, the Committee's proposal would amend subdivision (b) of Family Court Act §1035 to incorporate the broader *ASFA* notice regarding prolonged foster care.

Additionally, the measure would ensure that adequate notice would be given as well to parents who have not been named as respondents in child abuse and neglect proceedings but who may have critical roles to play as party-intervenors, clarifying legislation enacted in 1986. *See* Laws of 1986, ch. 699. The proposal would amend Family Court Act §§ 1035(d) and (e) to clarify that non-respondent parents in child protective proceedings would be required to be notified of their standing to appear, to participate and to request custody of the children. Non-respondent parents would also have to be notified that if the children are placed in foster care for a period of 15 months in the most recent 22 month period, the parents may be the subjects of proceedings to terminate their parental rights, whether or not they were named as respondents in the child neglect or abuse cases involving their children. Finally, the notice would articulate the authority of the Family Court, upon good cause, to order the child protective agency to investigate whether the non-respondent parents should either be named as respondents in child protective proceedings or, absent any showing of unfitness, be given custody of the children.

Proposal

AN ACT to amend the family court act, in relation to the notice to respondent and non-respondent parents in child abuse and neglect proceedings

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

Section one. Subdivision (b) of section 1035 of the family court act, as added by chapter 739 of the laws of 1981, is amended to read as follows:

(b) In a proceeding to determine abuse or neglect, the summons shall contain a statement [clearly marked on the face thereof,] in conspicuous print informing the respondent that:

(i) the proceeding [could] may lead to the filing of a [proceeding] petition under the social services law for the termination of respondent's parental rights and commitment of guardianship and custody of the child [and that the rights of the respondent with respect to said child may be terminated in such proceeding under such law] for the purpose of adoption; and

(ii) if the child is placed and remains in foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition for termination of respondent's parental rights and commitment of guardianship and custody of the child for the purposes of adoption.

§2. Subdivision (d) of section 1035 of the family court act, as amended by chapter 443 of the laws of 1987, is amended to read as follows:

(d) Where the respondent is not the child's parent, service of the summons and petition shall also be ordered on both of the child's parents; where only one of the child's parents is the respondent, service of the summons and petition shall also be ordered on the child's other parent. The summons and petition shall be accompanied by a notice of pendency of the child protective proceeding advising the parents or parent of the right to appear and participate in the proceeding as an interested party intervenor for the purpose of seeking temporary and permanent custody of the child, and to participate thereby in all arguments and hearings insofar as they affect the temporary custody of the child during fact-finding proceedings, and in all phases of dispositional proceedings. The notice shall also indicate that:

(i) upon good cause, the court may order an investigation pursuant to section one thousand thirty-four of this article to determine whether a petition should be filed naming such parent or parents as respondents;

(ii) if the court determines that the child must be removed from his or her home, the court may order an investigation to determine whether the non-respondent parent or parents would be suitable custodians for the child; and

(iii) if the child is placed and remains in foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition for termination of the parental rights of the parent or parents and commitment of guardianship and custody of the child for the purposes of adoption, even if the parent or parents were not named as a respondent or as respondents in the child abuse or neglect proceeding.

§3. Subdivision (e) of section 1035 of the family court act, as amended by chapter 457 of the laws of 1988, is amended to read as follows:

(e) The summons [and], petition [ordered to be] and notice of pendency of a child protective proceeding served on the child's noncustodial parent in accordance with subdivision (d) of this section shall [as], if applicable, be served together with a notice that the child was removed from his or her home by a social services official. Such notice shall also include the name and address of the official to whom the temporary custody has been transferred, the name and address of the agency or official with whom the child has been temporarily placed, if different, and shall advise such parent of the right to request temporary and permanent custody and to seek enforcement of visitation rights with the child as provided for in part eight of this article.

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

7. Service of process, communications between courts and taking of testimony by telephone, audiovisual or other electronic means under the *Uniform Child Custody Jurisdiction and Enforcement Act* (DRL §§75-g, 75-i, 75-j)

Enactment of the *Uniform Child Custody Jurisdiction and Enforcement Act* in New York State [Laws of 2001, Ch. 386] has been extremely helpful in facilitating uniformity, consistency with federal law and greater enforceability of custody orders across jurisdictions. Experience under the new statute has proven salutary, but, at the same time, has revealed a few areas in which fine-tuning would be desirable. The Family Court Advisory and Rules Committee has developed a proposal that strengthens three provisions of the statute without sacrificing the uniformity that is essential to the efficacy of uniform acts.

First, the proposal restores subdivision one of section 75-f of the former *Uniform Child Custody Jurisdiction Act*, which was repealed when the *UCCJA* was replaced by the *UCCJEA*. That provision permitted the Supreme or Family Court to direct service of an Order to Show Cause or a petition involving an out-of-state party by personal service, by mail with proof by a return receipt or delivery confirmation or by other means directed by the Court. The absence of a specific provision in the *UCCJEA* for service by mail out of state has posed a significant impediment to litigants, especially in Family Court, particularly the many litigants without counsel who lack resources and wherewithal to effectuate service.

Restoration of the flexibility of the former *UCCJA* regarding service of process is essential to ensure fairness to all sides in interstate custody litigation and to facilitate prompt adjudication. Litigants lacking resources to retain out-of-state firms to serve pleadings may either let litigation languish for long periods or may improperly attempt personal service themselves. Victims of family violence, in particular, may require the option of service by mail or other means directed by the Court. Ensuring that litigants have access to means of fast, fair, safe and effective service is central to the legislative purposes underlying the *UCCJEA*, that is, "to provide an effective mechanism to obtain and enforce orders of custody and visitation across state lines and to do so in a manner that ensures that the safety of the children is paramount and that victims of domestic violence and child abuse are protected." [D.R.L. §75(2)].

Second, the proposal provides needed clarity regarding the circumstances under which communication between courts is discretionary and under which it is mandated. Section 75-i(1) of the Domestic Relations Law would be amended to cross-reference to sections 76-c(4), 76-e(2) and 77-f, thus identifying the three situations – temporary emergency jurisdiction, simultaneous child custody proceedings pending in two jurisdictions and simultaneous enforcement and modification proceedings in two jurisdictions – where inter-court communications are mandated. In all other situations, courts retain discretion as to communications with courts in other jurisdictions.

Finally, the proposal clarifies that depositions or testimony taken by telephone, audiovisual

or other electronic means must be recorded and preserved for transcription, an essential prerequisite for preserving a record for appeal. Courts are further directed to cooperate in determining the procedures to be followed in taking testimony by these means, including, for example, the swearing-in of witnesses and the handling of objections in depositions.

Proposal

AN ACT to amend the domestic relations law, in relation to service of process, communications between courts and taking of testimony in proceedings under the uniform child custody jurisdiction and enforcement act

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

Section 1. Subdivision 1 of section 75-g of the domestic relations law, as added by chapter 386 of the laws of 2001, is amended to read as follows:

1. Notice required for the exercise of jurisdiction when a person is outside this state [may] shall be given in a manner prescribed by the law of this state for service of process or by the law of the state in which service is made. Service of process may be made by personal delivery outside the state in the manner prescribed in section three hundred thirteen of the civil practice law and rules, or by any form of mail addressed to the person and requiring a receipt or delivery confirmation or by any manner directed by the court. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

§2. Subdivision 1 of section 75-i of the domestic relations law, as added by chapter 386 of the laws of 2001, is amended to read as follows:

1. A court of this state may communicate and, pursuant to subdivision four of section seventy-six-c, subdivision two of section seventy-six-e and section seventy-seven-f of this article, must communicate, with a court in another state concerning a proceeding arising under this article.

§3. Subdivision 2 of section 75-j of the domestic relations law, as added by chapter 386 of the laws of 2001, is amended to read as follows:

2. A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or

at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony and the procedures to be followed by the persons taking such deposition or testimony. Any such testimony or deposition shall be recorded and preserved for transcription.

§4. This act shall take effect immediately.

8. Clarification of Criteria for
Judicial Approval of Conditional Surrenders
(SSL §§383-c, 384)

This Family Court Advisory and Rules Committee proposal would make an essential correction in the recently-enacted legislation regarding conditional surrenders of children [Laws of 2002, chapter 76]. That statute, *inter alia*, provided that prior to accepting a surrender conditioned upon adoption by a particular individual, the authorized child care agency would be required to have fully investigated and approved the designated individual as a qualified adoptive parent.

Since the designated prospective adoptive parent in many cases is the foster parent of the child, the designee has already undergone the comprehensive investigation, including criminal records screening, now required for foster parents in accordance with Social Services Law §378-a. Where the foster parent is the designated prospective adoptive parent, therefore, it is unnecessary to require a full, separate investigation and approval process prior to accepting a surrender, a process that may be likely to impede expeditious resolution of such cases.

The Committee's proposal would permit an authorized agency to accept a surrender conditioned upon adoption by an individual who has been fully investigated and certified or approved as a foster parent or as a qualified adoptive parent. In facilitating the prompt resolution of foster care proceedings through conditional surrenders, the bill would further New York State's efforts to comply with the federal funding mandates for expeditious achievement of permanency for children in foster care. *See Adoption and Safe Families Act* [Public Law 105-89].

Proposal

AN ACT to amend the social services law, in relation to criteria for judicial approval of conditional surrenders of children

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

Section 1. Subdivision 2 of section 383-c of the social services law, as amended by chapter 76 of the laws of 2002, is amended to read as follows:

2. Terms. Such guardianship shall be in accordance with the provisions of this article and the instrument shall be upon such terms and subject to such conditions as may be agreed upon by the parties thereto and shall comply with subdivision five of this section; provided, however, that an authorized agency shall not accept a surrender instrument conditioned upon adoption by a particular

person, unless the agency has fully investigated and certified or approved such person as a foster parent or qualified adoptive parent. No such agency shall draw or receive money from public funds for the support of any such child except upon the written order or permit of the social services official of the county or city sought to be charged with the support of such child.

§2. Subdivision 2 of section 384 of the social services law, as amended by chapter 76 of the laws of 2002, is amended to read as follows:

2. Terms. Such guardianship shall be in accordance with the provisions of this article and the instrument shall be upon such terms and subject to such conditions as may be agreed upon by the parties thereto. The instrument shall recite that the authorized agency is thereby authorized and empowered to consent to the adoption of such child in the place and stead of the person signing the instrument, and may recite that the person signing the instrument waives any notice of such adoption; provided, however, that an authorized agency shall not accept a surrender instrument conditioned upon adoption by a particular person, unless the agency has fully investigated and certified or approved such person as a foster parent or qualified adoptive parent. No such agency shall draw or receive money from public funds for the support of any such child except upon the written order or permit of the social services official of the county or city sought to be charged with the support of such child.

§3. This act shall take effect immediately.

9. Clarification of time-frames for permanency hearings regarding children freed for adoption (FCA §1055-a(3)(c))

This Family Court Advisory and Rules Committee proposal would correct a typographical error in a recent enactment regarding permanency hearing procedures with respect to children who have been freed for adoption. Specifically, it would delete language regarding the time-frames for the hearings that has been rendered obsolete by the enactment of chapter 663 of the Laws of 2002. That statute amended Family Court Act §§625, 1055-a and Social Services Law §§383-c, 384-b to require that a permanency hearing be completed immediately, but no later than 60 days following, the earlier of the announcement on the record or issuance of an order by the Family Court terminating parental rights or accepting or approving a surrender of a child. Subsequent permanency petitions must be filed at six month intervals, with each hearing to be completed within 60 days of the filing.

In one of the amended sections, Family Court Act §1055-a(3)(c), the former time-frame for filing and completion of a permanency hearing following a surrender or termination of parental rights was inadvertently not deleted. That provision required a permanency hearing six months after a child has been freed for adoption where the child has either not yet been placed in a prospective adoptive home or placed in a prospective adoptive home but for whom an adoption petition has not yet been filed and at six-month intervals thereafter; for other children freed for adoption, permanency hearings would be required 12 months after the initial placement in foster care (measured from the earlier of the child protective fact-finding or 60 days after initial removal from the home) and then at 12-month intervals thereafter.

In order to prevent the confusion engendered by the two apparently-conflicting time-frames, the proposal would delete the now-obsolete, longer time-frame contained in Family Court Act §1055-a(3)(c). Sections 625 and 1055-a of the Family Court Act and sections 383-c and 384-b of the Social Services Law would thus be consistent in requiring permanency hearings for all freed children immediately, but no later than 60 days after, the announcement of the decision or issuance of the order freeing them for adoption, whichever occurs earlier, and then at six-month intervals thereafter. Deletion of the conflicting provision in Family Court Act §1055-a(3)(c) is essential to furtherance of the legislative goals of adding clarity to the permanency hearing statutes, facilitating advance calendaring of permanency hearings and providing more rigorous monitoring that will expedite achievement of permanence for children freed for adoption.

Proposal

AN ACT to amend the family court act, in relation to permanency hearings regarding children freed for adoption

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

Section 1. Paragraph (c) of subdivision 3 of section 1055-a of the family court act, as amended by chapter 663 of the laws of 2002, is amended to read as follows:

(c) shall be filed in the appropriate family court as directed by the court immediately following the commitment of guardianship and custody to an authorized agency pursuant to section three hundred eighty-four-b of the social services law or surrender of the child to an authorized agency pursuant to section three hundred eighty-three-c or section three hundred eighty-four of the social services law. The permanency hearing pursuant to this section shall be completed immediately following, but in no event later than sixty days after, the earlier of the court's statement of its order on the record or issuance of its written order. Subsequent permanency petitions shall be filed no later than six months after completion of the last permanency hearing, unless the court directs an earlier filing, and each subsequent permanency hearing shall be completed within sixty days of the filing of the petition. [However, for a child who has been freed for adoption but not placed in a prospective adoptive home or who has been placed in a prospective adoptive home but for whom an adoption petition has not yet been filed, such petition shall be filed six months after such child has been freed. For the purposes of calculating the initial period of placement, such placement shall be deemed to have commenced the earlier of the date of the fact finding of abuse or neglect of the child pursuant to section one thousand fifty-one of this part or sixty days after the date the child was removed from his or her home in accordance with the provisions of this article. The initial permanency hearing shall be held no later than twelve months following placement. Each subsequent permanency hearing shall be held as directed by the court but no later than twelve months following the preceding permanency hearing.]

§2. This act shall take effect immediately.

10. Continuity of counsel for parents in proceedings involving children placed in foster care (FCA §§262, 1055(b); SSL §§358-a, 384-b, 392)

Legislative enactments in recent years have reflected the importance of providing continuing law guardian representation at all stages of child protective and foster care proceedings, including post-dispositional proceedings. *See, e.g.,* Family Court Act §§ 249, 1016, 1055(b)(iii), 1055-a(12); Laws of 1999, ch. 506; Laws of 1997, ch. 353. Scant attention, however, has been accorded to the equally critical role of counsel for parents in these proceedings. The Family Court Advisory and Rules Committee, therefore, is recommending legislation to rectify this gap.

The federal *Adoption and Safe Families Act* [Public Law 105-89], as implemented in New York State, places a significant responsibility upon the Family Court to ensure the development and realization of permanency plans for children on a sharply expedited basis. *See* Laws of 1999, ch. 7; Laws of 2000, ch. 145. Permanency hearings and case conferences are required at earlier intervals in order to reduce the number of children lingering in the limbo of foster care. Judicial involvement in the permanency planning process compels the concomitant active involvement of advocates for parents and children at every stage.

Implementation of *ASFA* in New York has significantly raised the stakes for parents and children in child welfare proceedings in Family Court. Parents whose children are in foster care face the possibility of termination of parental rights – and children face the consequent loss of their ties to their parents – if reunification is not accomplished within a fifteen-month period. If certain aggravating circumstances are found to exist, these consequences may occur almost immediately upon such a finding. Moreover, termination of the parental rights of one child may constitute grounds for an authorized agency to seek judicial authorization to cease reunification efforts with respect to siblings. With termination of parental rights as an increased possibility, the right to counsel, as the Family Court Act recognizes, is "indispensable" for both parents and children to protect the fundamental family interests at stake. It is also critically important to assist the court in making well-informed, reasoned decisions. *See* Family Court Act §§241, 261.

Recognizing that "[e]ach party must be competently and diligently represented in order for juvenile and family courts to function effectively," the National Council of Juvenile and Family Court Judges recommends that attorneys for all parties "[a]ctively participate in every critical stage of the proceedings." N.C.F.C.J., *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (1995), pps. 22-23.[7] In a similar vein, the United States Department of Health and Human Services advocates that "the same legal representatives for the child, parent, and State

[7] THESE GUIDELINES WERE ENDORSED BY THE CONFERENCE OF CHIEF JUSTICES AND ASSOCIATION IN 1995 AND HAVE BEEN UTILIZED AS THE STANDARDS FOR THE PERMANE THE FAMILY COURTS IN NEW YORK AND ERIE COUNTIES, BOTH OF WHICH HAVE BEEN D BY THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES.

remain involved throughout the case," that parents be represented at all hearings and that counsel be provided at government expense if the parents are indigent. Duquette and Hardin, *Adoption 2002: The President's Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children* (Children's Bureau, U.S. Dept. of Health and Human Services, June, 1999), pps. IV-4 - IV-5, VII-5 - VII-6. Significantly, the statute in California requires assigned counsel for the parent to represent the parent at all stages "unless relieved by the court upon the substitution of other counsel or for cause." Cal. Welf. & Instit. Code §317(d) (West, 1997).[8]

In order to ensure representation of parents at all critical stages, the Family Court Advisory and Rules Committee is proposing that the permanency hearing provisions relating to child protective and voluntary foster care proceedings be amended to provide that upon the request of indigent respondents, the Family Court may assign counsel to provide representation at post-hearing case conferences. This would ensure that the parent would have access to assistance for the critical agency case conferences that are often pivotal in determining the ultimate permanency planning goal for the child and concomitant rights of the parent. Progress reports and notices sent to the Court and law guardian would also have to be sent to the attorney for the parent. The proposal also provides that, to the extent practicable, when appointing counsel in a child abuse, child neglect, foster care, termination of parental rights or adoption proceeding, the Family Court should appoint an attorney who previously represented the individual in order to provide needed continuity. Recognizing that permanency hearings in juvenile delinquency and Persons in Need of Supervision (PINS) proceedings implicate the same parental rights and trigger the same consequences under the *Adoption and Safe Families Act* as child protective and foster care proceedings, the proposal authorizes appointment of counsel for a parent who is "contesting placement, the permanency plan or visitation plan" in a proceeding under Article 3 or 7 of the Family Court Act. *See* V. Hemrich, "Applying *ASFA* to Delinquency and Status Offender Cases," 18 *ABA Child Law Practice* 9:129, 132 (Nov., 1999).

The implementing legislation for the *Adoption and Safe Families Act* requires the Family Court to notify respondents of their right to have counsel or other representatives accompany them to case conferences, but provides no mechanism for effectuating that right. *See* FCA§1055; SSL §§358-a, 392; Laws of 1999, ch. 7. While respondent parents have a right to counsel in child welfare hearings in Family Court pursuant to section 262 of the Family Court Act, no authorization exists either for continuing appointments to cover interim conferences or for appointments of counsel for parents in juvenile delinquency or PINS proceedings. In contrast to sections 1016, 1055(b)(iii), 1055-a(12) and 1120(b) of the Family Court Act and subdivision (4-a) of section 392 of the Social Services Law, which specifically provide that the appointment of a law guardian

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[8] A POLICY MEMORANDUM IN ONE CALIFORNIA JUVENILE COURT LIMITING THE AUT
THE FIRST PERMANENCY HEARING WAS STRUCK DOWN BY AN APPELLATE COURT AS INC
TANYA H. V. TOBY B., 17 CAL.APP.4TH 825, 21 CAL. RPTR.2D 503 (CT. APP., 1993) [CITED IN K.
PARTIES IN CHILD PROTECTIVE PROCEEDINGS: PARENTS IN POVERTY AND THE ROLE OF
THEM," 66 *FORD. L.REV.* 2285, 2304, N. 139 (MAY, 1998)].

continues without further court order or appointment, sections 1022-a and 1033-b of the Family Court Act simply require appointment of counsel for an indigent respondent at the first appearance. These sections contain no language providing for the post-disposition continuation of the appointment or entitlement to remuneration for such services. Section 1052-b of the Family Court Act requires counsel for the respondent parent to notify the parent of the right to an appeal and the procedures for instituting an appeal and, if necessary, file a notice of appeal and section 1120(a) of the Family Court Act requires assignment of counsel to an indigent respondent on appeal. However, neither provision provides for the continuation of the original appointment. No comparable provision exists to section 1016 of the Family Court Act, which provides that the law guardian is "entitled to compensation for services rendered subsequent to the disposition of the petition."

Continuing the involvement of counsel after the conclusion of hearings in court will significantly increase the likelihood of expeditious resolution of child welfare matters through engagement of respondent parents in the conference process, an important feature of the New York City and Erie County Family Court "Model Courts" initiatives. Promoting the principle of continuity of counsel will enhance the likelihood that respondent parents will be represented by attorneys who are well-informed about their cases and their needs and who will advocate for the services necessary for a prompt resolution of the case. *See* K. Bailie, "The Other 'Neglected' Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them," 66 *Ford. L.Rev.* 2285, 2323 (May, 1998). Enactment of this measure, therefore, will inure to the benefit, not only of the parents, but also of their children and, concomitantly, to the Family Court in fulfilling its responsibilities.

Proposal

AN ACT to amend the family court act and the social services law, in relation to representation of parents in proceedings involving children in placement

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

Section 1. Paragraph (viii) of subdivision (a) of section 262 of the family court act, as amended by chapter 457 of the laws of 1988, is amended and a new paragraph (ix) is added to read as follows:

(viii) the respondent in any proceeding under article five of this act in relation to the establishment of paternity;

(ix) the parent contesting placement, the permanency plan or visitation plan for his or her

child as part of a dispositional hearing, violation of court order proceeding, extension of placement or permanency hearing under articles three and seven of this act.

§2. Section 262 of the family court act is amended by adding a new subdivision (d) to read as follows:

(d) In making an assignment of counsel pursuant to paragraphs (i), (iv), (vii) and (viii) of subdivision (a) of this section, the court shall, to the extent practicable, assign the same attorney who represented the respondent during prior proceedings involving the child.

§3. Paragraphs (ii) and (vi) of subdivision (b) of section 1055 of the family court act, as amended by chapter 7 of the laws of 1999, are amended to read as follows:

(ii) No placement shall be extended or continued pursuant to this subdivision except upon a permanency hearing held concerning the need for extending or continuing the placement. Such hearing shall be held upon the petition filed by the person, agency or institution with whom the child was placed, or the motion of the child or the child's law guardian or of the foster parent or parents in whose home the child resides at the time of the application for extension of placement. The initial permanency hearing shall be held no later than twelve months following placement. Placement shall be deemed to have commenced as set forth in paragraph (i) of this subdivision. Each subsequent permanency hearing shall be held no later than twelve months following the preceding permanency hearing. In any proceeding under this section, when appointing an attorney or attorneys for the respondent parent or parents pursuant to section two hundred sixty-two of this act, the court shall, to the extent practicable, appoint an attorney or attorneys who previously represented the respondent parent or parents in proceedings involving the child.

* * *

(vi) In any order of placement or extension of placement made under this section the court shall state on the record its findings supporting the length of placement ordered.

Such order of placement or extension of placement shall include at the least:

(A) a description of the visitation plan;

(B) a direction that the respondent or respondents shall be notified of the planning conference or 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 conference or conferences, and of their right to have counsel or [other] another representative or companion with them. If the respondent or respondents are indigent and so apply to the court at the time of issuance of the order or extension or at any time thereafter during the period of placement, or if the court on its own motion deems it appropriate, the court may assign counsel pursuant to section two hundred sixty-two of this act to provide representation at such conference or conferences, in which case all notices and reports shall also be provided to such counsel. To the extent practicable, the court shall assign the same attorney or attorneys who represented the respondent or respondents during the child protective proceeding or other proceeding involving the child.

A copy of the court's order and the service plan shall be given to the respondent or respondents. The order shall also contain a notice that if the child remains in foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate parental rights.

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, counsel for the parties and the child's law guardian on the implementation of such order. [Where the order of disposition is issued upon the consent of the parties and the child's law guardian, such] The agency shall report to the court, the parties, counsel for the parties and the child's law guardian no later than ninety days after the issuance of the order, unless earlier directed by the court or unless the court determines that the facts and circumstances of the case do not require such report to be made.

4. PARAGRAPH (E) OF SUBDIVISION (3) OF SECTION 358-A OF THE SOCIAL SE CHAPTER 7 OF THE LAWS OF 1999, IS AMENDED TO READ AS FOLLOWS:

(E) THE ORDER GRANTING THE PETITION OF A SOCIAL SERVICES OFFICIAL INSTRUMENT EXECUTED PURSUANT TO SECTION THREE HUNDRED EIGHTY-FO INCLUDE CONDITIONS, WHERE APPROPRIATE AND SPECIFIED BY THE JUDGE, I OF A SPECIFIC PLAN OF ACTION BY THE SOCIAL SERVICES OFFICIAL TO EXERCI THE DISCHARGE OF THE CHILD FROM CARE, EITHER TO HIS OR HER OWN FAMIL PROVIDED, HOWEVER, THAT SUCH PLAN SHALL NOT INCLUDE THE PROVISION

THE CHILD AND HIS OR HER FAMILY WHICH IS NOT AUTHORIZED OR REQUIRE
PURSUANT TO THE COMPREHENSIVE ANNUAL SERVICES PROGRAM PLAN THEN IN
PLACEMENT SHALL INCLUDE, AT THE LEAST:

(I) A DESCRIPTION OF THE VISITATION PLAN;

(ii) a direction that the respondent or respondents shall be notified of the planning conference or conferences to be held pursuant to subdivision three of section four hundred nine-e of this chapter, of their right to attend the conference or conferences, and of their right to have counsel or other representative or companion with them[; a]. If the respondent or respondents are indigent and so apply to the court at the time of issuance of the order or at any time thereafter during the placement, or if the court on its own motion deems it appropriate, the court may assign counsel pursuant to section two hundred sixty-two of the family court act to provide representation at such conference or conferences, in which case all notices and reports shall also be provided to such counsel. To the extent practicable, the court shall assign the same attorney or attorneys who represented the respondent or respondents during the foster care placement proceeding or other proceeding involving the child.

A copy of the court's order and the service plan shall be given to the respondent or respondents. The order shall also contain a notice that if the child remains in foster care for more than fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate parental rights.

Nothing in such order shall preclude either party to the instrument from exercising its rights under this section or under any other provision of law relating to the return of the care and custody of the child by the social services official to the parent, parents or guardian. Violation of such [on] an order shall be subject to punishment pursuant to section seven hundred fifty-three of the judiciary law.

§5. Paragraph (c) of subdivision (3) of section 384-b of the social services law, as amended by chapter 607 of the laws of 1996, is amended to read as follows:

(c) Unless a proceeding under this section is brought in the surrogate's court, where a child was placed in foster care pursuant to article ten of the family court act, a proceeding under this section

shall be originated in the family court in the county in which the proceeding pursuant to article ten of the family court act was last heard and shall be assigned, wherever practicable, to the judge who last heard such proceeding. Where multiple proceedings are commenced under this section concerning a child and one or more siblings or half-siblings of such child, placed in foster care with the same commissioner pursuant to section [ten hundred] one thousand fifty-five of the family court act, all of such proceedings may be commenced jointly in the family court in any county which last heard a proceeding under article ten of the family court act regarding any of the children who are the subjects of proceedings under this section. In such instances, the case shall be assigned, wherever practicable, to the judge who last heard such proceeding. In any other case, a proceeding under this section, including a proceeding brought in the surrogate's court, shall be originated in the county where either of the parents of the child reside at the time of the filing of the petition, if known, or, if such residence is not known, in the county in which the authorized agency has an office for the regular conduct of business or in which the child resides at the time of the initiation of the proceeding. To the extent [possible] practicable, the court shall, when appointing a law guardian for the child pursuant to section two hundred forty-nine of the family court act and counsel for the respondent parent or parents pursuant to section two hundred sixty-two of such act, appoint a law guardian who [has] previously represented the child and an attorney or attorneys who previously represented the respondent parent or parents in a proceeding involving the child or children.

§6. Paragraph (e) of subdivision 6 of section 392 of the social services law, as amended by chapter 663 of the laws of 2002, is amended to read as follows:

(e) in regard to an order issued in accordance with paragraph (a), (b), or (c) of this subdivision, such order shall also include, at the least:

(i) a description of the visitation plan;

(ii) a direction that the respondent or respondents shall be notified of the planning conference or conferences to be held pursuant to subdivision three of section four hundred nine-e of this chapter; of their right to attend the conference or conferences, and of their right to have counsel or [other] another representative with them. If the respondent or respondents are indigent and so apply to the court at the time of issuance of the order or at any time thereafter during the placement or if the court on its own motion deems it appropriate, the court may assign counsel pursuant to section two

hundred sixty-two of the family court act to provide representation at such conference or conferences, in which case all notices and reports shall also be provided to such counsel. To the extent practicable, the court shall assign the same attorney or attorneys who represented the respondent or respondents during the foster care placement review proceeding or other proceeding involving the child.

A copy of the court's order and the service plan shall be given to the respondent or respondents. The order shall also contain a notice that if the child remains in foster care for more than fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate parental rights.

An order of disposition entered pursuant to this subdivision shall, except as provided for in subdivision six-a of this section, include a determination where appropriate, that reasonable efforts were made to make it possible for the child to return to his or her home, and, in the case of a child who has attained the age of sixteen, a determination of the services needed, if any, to assist the child to make the transition from foster care to independent living, and, in the case of a child placed outside New York state, whether the out-of-state placement continues to be appropriate and in the best interests of the child, and the court's findings supporting its determination that such order is in accordance with the best interest of the child. If the court promulgates separate findings of fact or conclusions of law, or an opinion in lieu thereof, the order of disposition may incorporate such findings and conclusions, or opinions, by reference.

§7. Subdivision 9 of section 392 of the social services law, as amended by chapter 534 of the laws of 1999, is amended to read as follows:

9. The court shall possess continuing jurisdiction in proceedings under this section and, in the case of children who are continued in foster care, shall rehear the matter whenever it deems necessary or desirable, or upon petition by any party entitled to notice in proceedings under this section, but at least every twelve months following the preceding permanency hearing. In any proceeding under this section, when appointing counsel for the respondent parent or parents pursuant to section two hundred sixty-two of such act, the court shall, to the extent possible, appoint an attorney or attorneys who previously represented the respondent parent or parents.

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

11. Judicial authority of the Family Court to recommend a child welfare compliance investigation as part of a disposition in a child protective or foster care proceeding (FCA §§1055, 1055-a; SSL §392)

In 1986, as part of the legislation requiring periodic reviews of voluntarily-placed foster children freed for adoption, the Family Court was specifically authorized to recommend in its dispositional orders that the New York State Department of Social Services (now the Office of Children and Family Services) investigate the facts and circumstances of local social service districts' discharge of their responsibilities for the care and welfare of children in their custody pursuant to section 395 of the Social Services Law. *See* Laws of 1986, ch. 902.[9] These provisions, expanded in 1988 to apply to freed children originally placed as a result of child protective proceedings, were then consolidated into section 1055-a(7) of the Family Court Act in 1999 when that provision was revised to encompass all permanency hearings held regarding children freed for adoption . *See* Laws of 1988, ch. 638; Laws of 1999, ch. 534. However, no analogous provisions were enacted with respect to children in foster care who were not freed for adoption, although the utility of such provisions for those children would be equally as great. The Family Court Advisory and Rules Committee proposes to remedy this gap.

The Committee's proposal would amend section 1055 of the Family Court Act and section 392 of the Social Services Law to provide that in all cases involving a foster care placement, extension or periodic review – *i.e.,* dispositional and permanency hearings in child protective and voluntary foster care proceedings – the Family Court may recommend to the New York State Office of Children and Family Services that it investigate the facts and circumstances concerning the discharge of responsibilities by a local social services district with respect to a particular case, pursuant to section 395 of the Social Services Law. This recommendation would be optional in cases where the Family Court has reason to believe that a district is not in compliance with laws or regulations. However, the recommendation for an OCFS investigation would be required to be contained in the Family Court dispositional or permanency hearing order in any case in which the Court has made a determination, pursuant to the federal and state *Adoption and Safe Families Act* [Public Law 103-89; Laws of 1999, ch.7], that reasonable efforts, where appropriate, should have been, but were not, made to prevent the placement or facilitate reunification. *See* Family Court Act §§1022(a), 1027(b), 1028, 1052; Social Services Law §§392(5-a), 392(6).

Additionally, court records in all cases referred would be made available to the New York State Office of Children and Family Services to assist in its review or investigation. Further, while the referral to OCFS may provide the Court with a useful alternative to the imposition of contempt sanctions, the availability of this option would not impair the authority of the Court to utilize

[9] The statute originally permitted the Family Court to recommend that the State conduct a "utilization review" pursuant to Social Services Law §398-b, but that provision was repealed in 2002. *See* Laws of 2002, ch. 83, Part C.

section 156 of the Family Court Act and Article 19 of the Judiciary Law in appropriate cases. Finally, conforming changes would be made as well with respect to reviews of children freed for adoption, pursuant to section 1055-a of the Family Court Act. In a case involving a freed child, the referral to OCFS would only be mandatory if the Family Court had reason to believe that the local social services district had violated a court order, pursuant to section 1055-a(7)(c) of the Family Court Act, directing provision of services or assistance to the child and the prospective adoptive parent as authorized or required by the applicable comprehensive annual services program plan.

While not frequently invoked, the Family Court's successful experiences in utilizing subdivision seven of section 1055-a of the Family Court Act support its extension to child protective and foster care proceedings as a means of ensuring appropriate provision of reunification, preventive or other services in accordance with applicable laws and regulations. The New York State Office of Children and Family Services has been responsive to these referrals, has issued comprehensive reports and has directed changes that have inured to the benefit of children and families before the Court. Indeed, in one case, OCFS even recommended that the order freeing the child for adoption be set aside and the child reunited with a rehabilitated parent.

Inclusion of the option of a referral to OCFS would actually save money by providing the Court with an alternative to the severe federal fiscal sanctions that would result from a finding that required reasonable efforts had not been made. In cases in which the referral is in fact triggered by a judicial "no reasonable efforts" finding, it would provide the State with a means of reviewing and assisting local social services districts – in essence, providing the State agency with an "early warning" system – that may facilitate compliance by local districts and concomitant preservation of funding. Further, while not replacing the existing contempt provisions in Article 19 of the Judiciary Law, applicable to the Family Court through section 156 of the Family Court Act, it provides a useful alternative to imposition of such drastic sanctions or, at the very least, a means of assisting a social services district in preventing violations that may rise to the level of contempt. In some cases, this "early warning system" may also stimulate local districts, through their authorized agencies, to comply with their responsibilities to provide not only reasonable, but also diligent, efforts to families in order to avoid dismissals of permanent neglect petitions. *Cf.*, Matter of Jamie M., 63 N.Y.2d 388 (1984); Matter of Star A., 55 N.Y.2d 560 (1982). Finally, of utmost importance, children and families would benefit by the enhanced coordination between the Family Court, OCFS and local social services districts, coordination that would facilitate timely compliance with the myriad mandates for the achievement of permanency.

Proposal

AN ACT to amend the family court act, in relation to permanency hearings in child abuse, neglect and foster care proceedings and reviews of children freed for adoption

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND A

FOLLOWS:

SECTION 1. SECTION 1055 OF THE FAMILY COURT ACT IS AMENDED BY ADD
TO READ AS FOLLOWS:

(J) IN ADDITION TO OR IN LIEU OF AN ORDER OF PLACEMENT OR AN EXTE
CONTINUATION OF A PLACEMENT MADE PURSUANT TO SUBDIVISION (B), WHER
BELIEVE THAT THE LOCAL SOCIAL SERVICES DISTRICT HAS FAILED TO COMPLY O
APPLICABLE STATE AND FEDERAL LAWS AND REGULATIONS, THE COURT MAY MA
RECOMMENDING THAT THE STATE OFFICE OF CHILDREN AND FAMILY SERVICES
AND CIRCUMSTANCES CONCERNING THE DISCHARGE OF RESPONSIBILITIES FO
SUCH CHILD BY A SOCIAL SERVICES DISTRICT PURSUANT TO SECTION THREE HU
SOCIAL SERVICES LAW AND/OR OTHER APPLICABLE STATE AND FEDERAL LAWS AN
COURT SHALL MAKE SUCH AN ORDER IN ANY CASE IN WHICH THE COURT HAS M
TO SUBDIVISION (A) OF SECTION ONE THOUSAND TWENTY-TWO OR SUBDIVISIO
THOUSAND TWENTY-SEVEN, SECTION ONE THOUSAND TWENTY-EIGHT OR SECT
TWO OF THIS ACT, THAT REQUIRED REASONABLE EFFORTS, WHERE APPROPRIATE
WERE NOT MADE. THE COURT SHALL MAKE AVAILABLE TO THE STATE OFFICE OF
SERVICES ALL RELEVANT COURT RECORDS RELATING TO THE PROCEEDING OR A
NOTHING IN THIS SECTION SHALL LIMIT THE AUTHORITY OF THE COURT PURS
HUNDRED FIFTY-SIX OF THIS ACT AND ARTICLE NINETEEN OF THE JUDICIARY LA

2. PARAGRAPHS (C) AND (D) OF SUBDIVISION 7 OF SECTION 1055-A OF THE
AMENDED BY CHAPTER 83 OF THE LAWS OF 2002, ARE AMENDED TO READ AS FOL

(C) DIRECTING THE PROVISION OF SERVICES OR ASSISTANCE TO THE CHIL
ADOPTIVE PARENT AUTHORIZED OR REQUIRED TO BE MADE AVAILABLE PURSUAN
ANNUAL SERVICES PROGRAM PLAN THEN IN EFFECT. SUCH ORDER SHALL INCLU
EVALUATION OF ELIGIBILITY FOR ADOPTION SUBSIDY PURSUANT TO TITLE NINE
SOCIAL SERVICES LAW, BUT SHALL NOT REQUIRE THE PROVISION OF SUCH SUBSI
ORDER SHALL BE SUBJECT TO PUNISHMENT PURSUANT TO SECTION SEVEN HUN
JUDICIARY LAW AND SHALL RESULT IN AN ORDER PURSUANT TO PARAGRAPH (D)

SUBDIVISION;

(D) RECOMMENDING THAT THE STATE OFFICE OF CHILDREN AND FAMILY
THE FACTS AND CIRCUMSTANCES CONCERNING THE DISCHARGE OF RESPONSIB
WELFARE OF SUCH CHILD BY A SOCIAL SERVICES DISTRICT PURSUANT TO SECTIO
NINETY-FIVE OF THE SOCIAL SERVICES LAW AND/OR OTHER APPLICABLE STATE A
REGULATIONS. THE COURT MAY MAKE SUCH AN ORDER WHERE THE COURT HAS
THE LOCAL SOCIAL SERVICES DISTRICT HAS FAILED TO COMPLY ON A TIMELY BAS
AND FEDERAL LAWS AND REGULATIONS AND SHALL MAKE SUCH AN ORDER WHE
DISTRICT HAS NOT COMPLIED ON A TIMELY BASIS WITH AN ORDER ISSUED PUR
THIS SUBDIVISION. THE COURT SHALL MAKE AVAILABLE TO THE STATE OFFICE O
SERVICES ALL RELEVANT COURT RECORDS RELATING TO THE PROCEEDING OR A
NOTHING IN THIS SECTION SHALL LIMIT THE AUTHORITY OF THE COURT PURSU
HUNDRED FIFTY-SIX OF THIS ACT AND ARTICLE NINETEEN OF THE JUDICIARY LA

3. SECTION 392 OF THE SOCIAL SERVICES LAW IS AMENDED BY ADDING A N
READ AS FOLLOWS:

10. AS PART OF ITS DISPOSITIONAL ORDER, WHERE THE COURT HAS REASO
LOCAL SOCIAL SERVICES DISTRICT HAS FAILED TO COMPLY ON A TIMELY BASIS W
FEDERAL LAWS AND REGULATIONS, THE COURT MAY MAKE AN ORDER RECOMM
OFFICE OF CHILDREN AND FAMILY SERVICES INVESTIGATE THE FACTS AND CIRC
THE DISCHARGE OF RESPONSIBILITIES FOR THE CARE AND WELFARE OF SUCH CH
DISTRICT PURSUANT TO SECTION THREE HUNDRED NINETY-FIVE OF THE SOCIA
OTHER APPLICABLE STATE AND FEDERAL LAWS AND REGULATIONS. THE COURT S
IN ANY CASE IN WHICH THE COURT HAS MADE A FINDING, PURSUANT TO SUBD
THIS SECTION THAT REQUIRED REASONABLE EFFORTS, WHERE APPROPRIATE, SH
NOT MADE. THE COURT SHALL MAKE AVAILABLE TO THE STATE OFFICE OF CHILD
ALL RELEVANT COURT RECORDS RELATING TO THE PROCEEDING OR ANY RELATI
IN THIS SECTION SHALL LIMIT THE AUTHORITY OF THE COURT PURSUANT TO SE

FIFTY-SIX OF THE FAMILY COURT ACT AND ARTICLE NINETEEN OF THE JUDICIAR

4. THIS ACT SHALL TAKE EFFECT IMMEDIATELY.

12. CLARIFICATION OF PROCEDURES FOR WILFULNESS HEARINGS IN CHILD SUPPORT AND PATERNITY CASES (FCA 439)

IN 2001, THE NEW YORK STATE UNIFIED COURT SYSTEM PROMULGATED CO DESIGNED TO EXPEDITE THE PROCESS OF ADJUDICATING CASES IN WHICH SUPI IN WILFUL VIOLATION OF ORDERS OF SUPPORT ISSUED IN CHILD SUPPORT AND *UNIFORM RULES OF THE FAMILY COURT* 205.43 [22 N.Y.C.R.R. 205.43]. STRICT TIM WERE ESTABLISHED FOR EVERY PHASE OF THE PROCEEDINGS FROM THEIR INCEI DECISIONS BY HEARING EXAMINERS. HOWEVER, THE UNIFIED COURT SYSTEM W SOURCE OF DELAY BY COURT RULE: THE TIME-FRAME FOR TRANSFER OF THE CAS PROCEEDINGS TO CONFIRM THE FINDINGS OF THE HEARING EXAMINERS AND, PENALTIES FOR THE VIOLATIONS. STATUTORY RESOLUTION IS NEEDED OF A CON APPELLATE DIVISION DECISIONS INTERPRETING AN AMBIGUITY IN THE CURREN ADVISORY AND RULES COMMITTEE IS, THEREFORE, PROPOSING LEGISLATION TO

The Committee's proposal would expedite confirmation hearings by Family Court judges with respect to wilfulness determinations by hearing examiners, by eliminating an arguable redundancy in the current statute. Several court decisions have interpreted Family Court Act §439 to mean that a hearing examiner wilfulness determination may not be referred to a judge for confirmation until after the 30-day period for objections has expired – implying that alleged support violators would be able to challenge a wilfulness determination first by objecting to the Family Court judge and then by having the same Family Court judge "confirm" the determination prior to imposing a penalty. In counties governed by those decisions, the "return date" before a Family Court judge for a confirmation hearing is thus automatically delayed at least 35 days in order for the objection period to run. This procedure, however, was criticized by the Supreme Court, Appellate Division, Second Department, in Roth v. Bowman, 245 A.D.2d 521 (2d Dept., 1997), on the ground that a wilfulness determination is an interim order and is thus not subject to the objection process. The Court stated:

> Since a determination of a Hearing Examiner recommending incarceration can have no force and effect until confirmed, and could never constitute a "final order", the procedure under Family Court Act § 439 (e) concerning the filing of objections does not apply.
>
> The determination of the Hearing Examiner recommending incarceration, once confirmed, is subject to appellate review on an appeal from the order of the Family Court confirming the determination (see, Family Ct Act § 1112). Therefore, precluding the appellant from filing objections pursuant to Family Court Act § 439 (e) does not affect the appellant's right to appellate review of the Hearing Examiner's determination.

245 A.D.2d, at 522. *Cf*.. DEBOTTIS V. GATES, 247 A.D.2D 844 (4TH DEPT., 1998); GEARY V. (4TH DEPT., 1994).

THE COMMITTEE'S PROPOSAL FOLLOWS THE HOLDING IN ROTH V. BOWMA
BITES AT THE APPLE," TWO REVIEWS OF THE SAME DETERMINATIONS BY FAMILY C
CLARIFIES THAT HEARING EXAMINER WILFULNESS DETERMINATIONS WOULD N
OBJECTION PERIOD AFFORDED FOR FINAL ORDERS, THUS PERMITTING CONFIR
PROMPTLY.[10]

PROPOSAL

AN ACT TO AMEND THE FAMILY COURT ACT, IN RELATION TO CHILD SUPPORT V
FAMILY COURT

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND A

SECTION 1. SUBDIVISION (A) OF SECTION 439 OF THE FAMILY COURT ACT,
THE LAWS OF 1997, IS AMENDED TO READ AS FOLLOWS:

(A) THE CHIEF ADMINISTRATOR OF THE COURTS SHALL PROVIDE, IN ACCO
OF THIS SECTION, FOR THE APPOINTMENT OF A SUFFICIENT NUMBER OF HEARI
DETERMINE SUPPORT PROCEEDINGS. EXCEPT AS HEREINAFTER PROVIDED, HEA
EMPOWERED TO HEAR, DETERMINE AND GRANT ANY RELIEF WITHIN THE POWE
PROCEEDING UNDER THIS ARTICLE, ARTICLES FIVE AND FIVE-A, AND SECTIONS T
TWO HUNDRED THIRTY-FIVE OF THIS ACT, ARTICLE FIVE-B OF THIS ACT, AND OF
SECTION FIFTY-TWO HUNDRED FORTY-ONE OF THE CIVIL PRACTICE LAW AND R
NOT BE EMPOWERED TO HEAR, DETERMINE AND GRANT ANY RELIEF WITH RESPE
SUBDIVISION FIVE OF SECTION FOUR HUNDRED FIFTY-FOUR OR SECTION FOUR
ISSUES OF CONTESTED PATERNITY, CUSTODY, VISITATION INCLUDING VISITATIO
PROTECTION OR EXCLUSIVE POSSESSION OF THE HOME, WHICH SHALL BE REFER
SUBDIVISION (B) OR (C) OF THIS SECTION. A HEARING EXAMINER SHALL HAVE TH
DETERMINATION THAT ANY PERSON BEFORE THE SAID EXAMINER IS IN VIOLATI

[10] The current version of Family Court Act §439(a), which precludes hearing examiners from reviewing challenges to administrative hearings regarding drivers' license suspensions, expires on June 30, 2003. *See* Laws of 1995, ch. 8; Laws of 1997, ch. 398. The Committee is recommending that its proposal be enacted whether or not the current version of Family Court Act §439(a) is extended.

AUTHORIZED BY SECTION ONE HUNDRED FIFTY-SIX OF THIS ACT SUBJECT TO C
COURT WHO SHALL IMPOSE ANY PUNISHMENT FOR SUCH VIOLATION AS PROVI
HEARING EXAMINER THAT A PERSON IS IN WILFUL VIOLATION OF AN ORDER SH
PARTIES, ACCOMPANIED BY FINDINGS OF FACT, BUT THE DETERMINATION SHAL
UNTIL CONFIRMED BY A JUDGE OF THE COURT.

2. SUBDIVISION (E) OF SECTION 439 OF THE FAMILY COURT ACT, AS AMEN
LAWS OF 1996, IS AMENDED TO READ AS FOLLOWS:

(E) THE DETERMINATION OF A HEARING EXAMINER SHALL INCLUDE FIND
RESPECT TO WILFUL VIOLATIONS AS PROVIDED IN SUBDIVISION (A) OF THIS SEC
BE ENTERED AND TRANSMITTED TO THE PARTIES. SPECIFIC WRITTEN OBJECTIO
HEARING EXAMINER MAY BE FILED BY EITHER PARTY WITH THE COURT WITHIN
ORDER IN COURT OR BY PERSONAL SERVICE, OR, IF THE OBJECTING PARTY OR PA
IN COURT OR BY PERSONAL SERVICE, THIRTY-FIVE DAYS AFTER MAILING OF THE
A PARTY FILING OBJECTIONS SHALL SERVE A COPY OF SUCH OBJECTIONS UPON T
HAVE THIRTEEN DAYS FROM SUCH SERVICE TO SERVE AND FILE A WRITTEN REBU
OF SERVICE UPON THE OPPOSING PARTY SHALL BE FILED WITH THE COURT AT T
AND ANY REBUTTAL. WITHIN FIFTEEN DAYS AFTER THE REBUTTAL IS FILED, OR T
HAS EXPIRED, WHICHEVER IS APPLICABLE, THE JUDGE, BASED UPON A REVIEW OF
REBUTTAL, IF ANY, SHALL (I) REMAND ONE OR MORE ISSUES OF FACT TO THE HEA
WITHOUT HOLDING A NEW HEARING, HIS OR HER OWN FINDINGS OF FACT AN
OBJECTIONS. PENDING REVIEW OF THE OBJECTIONS AND THE REBUTTAL, IF AN
EXAMINER SHALL BE IN FULL FORCE AND EFFECT AND NO STAY OF SUCH ORDER
NEW ORDER IS ISSUED, PAYMENTS MADE BY THE RESPONDENT IN EXCESS OF TH
CREDIT TO FUTURE SUPPORT OBLIGATIONS. THE FINAL ORDER OF A HEARING E
THE REBUTTAL, IF ANY, HAVE BEEN REVIEWED BY A JUDGE, MAY BE APPEALED PUR
ACT.

3. THIS ACT SHALL TAKE EFFECT IMMEDIATELY.

13. Adjudication of child support and paternity proceedings by Family Court hearing examiners (FCA §§153, 439; SSL §§111-b, 111-p; CPLR. 2302, 2304, 2307)

Child support and paternity matters account for a significant portion of the work of the Family Court: 45% of new case filings (309,070 out of a total of 689,298 cases filed) in calendar year 2000, a figure that has risen dramatically during the past decade.[11] This enormous caseload could not be handled without the invaluable assistance of expert hearing examiners, who are well-versed in the federal and state law and regulations in this esoteric area. However, several ambiguities in the statutory framework and, in some instances, outright limitations on the authority of the hearing examiners cause fragmentation of the cases, thus impeding the expeditious, comprehensive resolution of these important matters.

The Family Court Advisory and Rules Committee, therefore, is proposing a measure that would greatly facilitate the adjudication of issues and enforcement of orders by hearing examiners. Specifically, the proposal amends the Civil Practice Law and Rules and Family Court Act to clarify that Family Court hearing examiners, and not only judges, would be authorized to determine motions to quash child support subpoenas issued by local Support Collection Units, issue subpoenas *duces tecum,* adjudicate contested paternity proceedings (with the exception of cases involving issues of "equitable estoppel") and conduct judicial reviews of administrative fair hearings regarding driver's license suspensions.[12] Included in the authority to issue subpoenas *duces tecum* is a clarification of the hearing examiners' power to direct the New York State Department of Correctional Services and local correctional authorities to produce incarcerated parties or witnesses necessary to the litigation of support and paternity matters.[13] Section 439 of the Family Court Act specifically accords subpoena

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[11] In 1990, 224,983 child support and paternity petitions were filed, 42% of the total of 540,209 petitions filed statewide. Between 1990 and 2000, the 37% increase in child support and paternity filings outpaced the 28% increase in overall filings statewide.

[12] IN ORDER TO ENSURE THAT A CHALLENGE TO A DRIVER'S LICENSE SUSPENSION WO WITH KNOWLEDGE OF THE CIRCUMSTANCES SURROUNDING THE CASE, THE PROPOSAL CONDUCTED BY THE COURT THAT ISSUED THE UNDERLYING CHILD SUPPORT ORDER, T JURISDICTION TO INCLUDE SUPREME, AS WELL AS FAMILY, COURTS. ADDITIONALLY, TO OBJECTIONS TO FAMILY COURT HEARING EXAMINER DETERMINATIONS, THE PROPOSAL "EXCEPTION" TO REFER TO CHALLENGES TO ADMINISTRATIVE DRIVER'S LICENSE SUSPEN THAT The current version of Family Court Act §439(a), which precludes hearing examiners from reviewing challenges to administrative hearings regarding driver's license suspensions, expires on June 30, 2003, along with the driver's license suspension provisions. *See* Laws of 1995, ch. 8; Laws of 1997, ch. 398. The Committee is recommending that this portion of its proposal be enacted if the driver's license suspension provisions of Family Court Act §§439(a) and 454(5) are extended.

[13] It should be noted that some appearances by prisoners have been obviated by the enactment of chapter 475 of the Laws of 2000, which permits testimony to be taken by telephone, audio-visual or other electronic means.

powers to hearing examiners, a provision that supersedes the Civil Practice Law and Rules by virtue of section 101 of the Civil Practice Law and Rules and section 165(a) of the Family Court Act. Nonetheless, the reference in subdivision (b) of section 2302 of the Civil Practice Law and Rules solely to Family Court judges has caused some confusion. ADDITIONALLY, IN ORDER TO EXPEDI ENFORCEMENT OF CHILD SUPPORT ORDERS BY PERMITTING PROMPT CONFIRM HEARING EXAMINER WILFULNESS DETERMINATIONS WOULD EXPLICITLY NOT BE PROCESS, SINCE THEY HAVE NO FORCE OR EFFECT UNTIL CONFIRMED BY FAMILY ROTH V. BOWMAN, 245 A.D.2D 521 (2D DEPT., 1997); *CF.*. DEBOTTIS V. GATES, 247 A LIVINGSTON CO. DEPT. OF SOCIAL SERVICES O/B/O LINSNER V. GRIMMELT, 254 A. V. BREEN, 210 A.D. 2D 975 (4TH DEPT., 1994).

EACH OF THESE PROVISIONS WILL ENHANCE THE ABILITY OF HEARING EXA SUPPORT PROCEEDINGS IN AN INTEGRATED, RATHER THAN A FRAGMENTED, MA CHALLENGES REGARDING SUPPORT COLLECTION UNIT-GENERATED SUBPOENAS HEARINGS REGARDING AUTOMATIC DRIVER'S LICENSE SUSPENSIONS SHOULD BE EXAMINERS, WHO ALREADY HAVE OR WILL HEAR THE CASES AS A WHOLE, AND WO ABLE TO PROVIDE PROMPT RELIEF. FINALLY, AFFORDING HEARING EXAMINERS C THE VAST MAJORITY OF CONTESTED PATERNITY MATTERS WILL FURTHER THE GO FEDERAL MANDATES TO EXPEDITE THE ESTABLISHMENT OF PATERNITY AND THE SUPPORT.

PROPOSAL

AN ACT TO AMEND THE FAMILY COURT ACT, THE SOCIAL SERVICES LAW AND THE IN RELATION TO PROCEEDINGS BEFORE FAMILY COURT HEARING EXAMIN PATERNITY PROCEEDINGS

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND A FOLLOWS:

SECTION 1. SECTION 153 OF THE FAMILY COURT ACT, AS AMENDED BY CHA 1997, IS AMENDED TO READ AS FOLLOWS:

153. SUBPOENA, WARRANT AND OTHER PROCESS TO COMPEL ATTENDANC ISSUE A SUBPOENA OR IN A PROPER CASE A WARRANT OR OTHER PROCESS TO SEC ATTENDANCE OF AN ADULT RESPONDENT OR CHILD OR ANY OTHER PERSON WH AT A HEARING OR PROCEEDING IS DEEMED BY THE COURT TO BE NECESSARY, AN

BAIL, OR PAROLE HIM OR HER PENDING THE COMPLETION OF THE HEARING OR
ALSO AUTHORIZED TO ISSUE A SUBPOENA DUCES TECUM IN ACCORDANCE WITH
THE [CIVIL PRACTICE ACT AND, UPON ITS EFFECTIVE DATE, IN ACCORDANCE WIT
OF THE] CPLR. [A JUDGE OF THE FAMILY] THE COURT IS ALSO AUTHORIZED TO H
RELATING TO CHILD SUPPORT SUBPOENAS ISSUED PURSUANT TO SECTION ONE
SOCIAL SERVICES LAW.

2. SUBDIVISIONS (A), (B) AND (C) OF SECTION 439 OF THE FAMILY COURT A
398 OF THE LAWS OF 1997, ARE AMENDED TO READ AS FOLLOWS:

(A) THE CHIEF ADMINISTRATOR OF THE COURTS SHALL PROVIDE, IN ACCO
(F) OF THIS SECTION, FOR THE APPOINTMENT OF A SUFFICIENT NUMBER OF HEA
DETERMINE SUPPORT PROCEEDINGS. EXCEPT AS HEREINAFTER PROVIDED, HEA
EMPOWERED TO HEAR, DETERMINE AND GRANT ANY RELIEF WITHIN THE POWE
PROCEEDING UNDER THIS ARTICLE, ARTICLES FIVE [AND], FIVE-A AND FIVE-B, AN
THIRTY-FOUR AND TWO HUNDRED THIRTY-FIVE OF THIS ACT, [ARTICLE FIVE-B O
RAISED PURSUANT TO SECTION FIFTY-TWO HUNDRED FORTY-ONE OF THE CIVIL
HEARING EXAMINERS SHALL NOT BE EMPOWERED TO HEAR, DETERMINE AND GR
TO ISSUES SPECIFIED IN [SUBDIVISION FIVE OF SECTION FOUR HUNDRED FIFTY-
HUNDRED FIFTY-FIVE OF THIS ACT, ISSUES OF CONTESTED PATERNITY INVOLVIN
ESTOPPEL, CUSTODY, VISITATION INCLUDING VISITATION AS A DEFENSE, AND O
EXCLUSIVE POSSESSION OF THE HOME, WHICH SHALL BE REFERRED TO A JUDGE
OR (C) OF THIS SECTION. A HEARING EXAMINER SHALL HAVE THE AUTHORITY TO
AND ISSUE SUMMONSES AND SUBPOENAS PURSUANT TO SECTION ONE HUNDRE
HEAR AND DECIDE PROCEEDINGS AND ISSUE ANY ORDER AUTHORIZED BY SUBD
THOUSAND TWO HUNDRED FORTY-ONE OF THE CIVIL PRACTICE LAW AND RULE
PURSUANT TO SECTION TWO THOUSAND THREE HUNDRED FOUR OF THE CIVIL
SUBPOENAS AND SUBPOENAS DUCES TECUM PURSUANT TO SECTIONS TWO THO
AND TWO THOUSAND THREE HUNDRED SEVEN OF THE CIVIL PRACTICE LAW AN
DETERMINATION THAT ANY PERSON BEFORE THE SAID EXAMINER IS IN VIOLATI

AS AUTHORIZED BY SECTION ONE HUNDRED FIFTY-SIX OF THIS ACT SUBJECT TO
THE COURT WHO SHALL IMPOSE ANY PUNISHMENT FOR SUCH VIOLATION AS PR
DETERMINATION BY A HEARING EXAMINER THAT A PERSON IS IN WILFUL VIOLA
TRANSMITTED TO THE PARTIES, ACCOMPANIED BY FINDINGS OF FACT, BUT SUC
NO FORCE AND EFFECT UNTIL CONFIRMED BY A JUDGE OF THE COURT.

(B) IN ANY PROCEEDING TO ESTABLISH PATERNITY WHICH IS HEARD BY A
HEARING EXAMINER SHALL ADVISE THE MOTHER AND PUTATIVE FATHER OF THI
COUNSEL AND SHALL ADVISE THE MOTHER AND PUTATIVE FATHER OF THEIR RI
OTHER GENETIC MARKER OR DNA TESTS IN ACCORDANCE WITH SECTION FIVE H
ACT. THE HEARING EXAMINER SHALL ORDER THAT [BLOOD GROUPING] SUCH T
INCLUDING BLOOD GENETIC-MARKER TESTS,] IN ACCORDANCE WITH SECTION
THIS ACT. THE HEARING EXAMINER SHALL BE EMPOWERED TO HEAR AND DETE
THE PROCEEDING INCLUDING THE MAKING OF AN ORDER OF FILIATION PURSU
FORTY-TWO OF THIS ACT [BASED UPON THE ADMISSION OF THE RESPONDENT T
A WRITTEN ACKNOWLEDGMENT OF PATERNITY BY THE RESPONDENT IN ACCOR
SECTION FIVE HUNDRED SIXTEEN-A OF THIS ACT], PROVIDED, HOWEVER, THAT W
PATERNITY[, THE RESPONDENT DEFAULTS IN APPEARING BEFORE A HEARING EXA
OBTAINED JURISDICTION OVER THE RESPONDENT OR THE ACKNOWLEDGMENT
[DISPUTED] CONTESTED ON THE GROUNDS OF EQUITABLE ESTOPPEL, THE HEAR
EMPOWERED TO DETERMINE THE ISSUE OF PATERNITY, BUT SHALL TRANSFER TH
THE COURT FOR A DETERMINATION UPON THE ISSUE OF PATERNITY. WHENEVE
MADE BY A HEARING EXAMINER, THE HEARING EXAMINER ALSO SHALL MAKE A FI
SUPPORT. [WHEN AN ORDER OF FILIATION IS MADE BY THE JUDGE, THE JUDGE S
TEMPORARY ORDER OF SUPPORT. IF A TEMPORARY ORDER IS MADE THE PROCE
HEARING EXAMINER FOR A FINAL DETERMINATION PURSUANT TO THIS SECTION
THIRTY- NINE-A OF THIS ARTICLE UPON THE ISSUE OF SUPPORT PAYMENTS OR C
AUTHORITY OF THE HEARING EXAMINER.]

(C) [EXCEPT IN A PROCEEDING TO ESTABLISH PATERNITY IN WHICH THE R

ACKNOWLEDGED PATERNITY, THE] THE HEARING EXAMINER, IN ANY PROCEEDIN
IN SECTION FOUR HUNDRED FIFTY-FIVE OF THIS ACT, OR ISSUES OF CUSTODY, V
VISITATION AS A DEFENSE, ORDERS OF PROTECTION OR EXCLUSIVE POSSESSION
IN WHICH PATERNITY IS CONTESTED ON THE GROUND OF EQUITABLE ESTOPPE
ORDER OF SUPPORT AND REFER THE PROCEEDING TO A JUDGE. UPON DETERMI
JUDGE, THE JUDGE MAY MAKE A FINAL DETERMINATION OF THE ISSUE OF SUPPO
BE RETURNED TO A HEARING EXAMINER FOR A FINAL DETERMINATION UPON TE
OR OTHER MATTERS WITHIN THE AUTHORITY OF THE HEARING EXAMINER.

3. SUBDIVISION (E) OF SECTION 439 OF THE FAMILY COURT ACT, AS AMEND
LAWS OF 1996, IS AMENDED TO READ AS FOLLOWS:

(E) THE DETERMINATION OF A HEARING EXAMINER SHALL INCLUDE FIND
WITH RESPECT TO WILFUL VIOLATIONS AS PROVIDED IN SUBDIVISION (A) OF TH
WHICH SHALL BE ENTERED AND TRANSMITTED TO THE PARTIES. SPECIFIC WRIT
FINAL ORDER OF A HEARING EXAMINER MAY BE FILED BY EITHER PARTY WITH T
AFTER RECEIPT OF THE ORDER IN COURT OR BY PERSONAL SERVICE, OR, IF THE C
NOT RECEIVE THE ORDER IN COURT OR BY PERSONAL SERVICE, THIRTY-FIVE DAY
TO SUCH PARTY OR PARTIES. A PARTY FILING OBJECTIONS SHALL SERVE A COPY O
OPPOSING PARTY, WHO SHALL HAVE THIRTEEN DAYS FROM SUCH SERVICE TO SE
REBUTTAL TO SUCH OBJECTIONS. PROOF OF SERVICE UPON THE OPPOSING PAR
COURT AT THE TIME OF FILING OF OBJECTIONS AND ANY REBUTTAL. WITHIN FI
IS FILED, OR THE TIME TO FILE SUCH REBUTTAL HAS EXPIRED, WHICHEVER IS AP
UPON A REVIEW OF THE OBJECTIONS AND THE REBUTTAL, IF ANY, SHALL (I) REMA
FACT TO THE HEARING EXAMINER, (II) MAKE, WITH OR WITHOUT HOLDING A NE
FINDINGS OF FACT AND ORDER, OR (III) DENY THE OBJECTIONS. PENDING REV
THE REBUTTAL, IF ANY, THE ORDER OF THE HEARING EXAMINER SHALL BE IN FU
STAY OF SUCH ORDER SHALL BE GRANTED. IN THE EVENT A NEW ORDER IS ISSU
RESPONDENT IN EXCESS OF THE NEW ORDER SHALL BE APPLIED AS A CREDIT TO
THE FINAL ORDER OF A HEARING EXAMINER, AFTER OBJECTIONS AND THE REBU

REVIEWED BY A JUDGE, MAY BE APPEALED PURSUANT TO ARTICLE ELEVEN OF THI

4. SUBDIVISION 5 OF SECTION 454 OF THE FAMILY COURT ACT, AS AMEND
LAWS OF 1999, IS AMENDED TO READ AS FOLLOWS:

5. [THE COURT] IN ANY CASE IN WHICH A SUPPORT OBLIGOR HAS ACCUM
EQUIVALENT TO OR GREATER THAN THE AMOUNT OF CURRENT SUPPORT DUE F
AND HAS RECEIVED A NOTICE THAT THE OFFICE OF TEMPORARY AND DISABILIT
NOTIFY THE DEPARTMENT OF MOTOR VEHICLES THAT THE RESPONDENT'S DRIV
SUSPENDED, THE COURT THAT ISSUED THE SUPPORT ORDER FOR WHICH THE R
REVIEW A SUPPORT COLLECTION UNIT'S DENIAL OF A CHALLENGE MADE BY A
TO PARAGRAPH (D) OF SUBDIVISION TWELVE OF SECTION ONE HUNDRED EL
LAW IF [OBJECTIONS] SPECIFIC WRITTEN EXCEPTIONS THERETO ARE FILED BY A S
RECEIVED NOTICE THAT THE [DEPARTMENT] OFFICE OF [SOCIAL SERVICES] TE
ASSISTANCE INTENDS TO NOTIFY THE DEPARTMENT OF MOTOR VEHICLES THA
DRIVING PRIVILEGES ARE TO BE SUSPENDED. SPECIFIC WRITTEN [OBJECTIONS
COLLECTION UNIT'S DENIAL MAY BE FILED BY THE SUPPORT OBLIGOR WITHIN
MAILING OF THE NOTICE OF THE SUPPORT COLLECTION UNIT'S DENIAL. A SUP
[OBJECTIONS] EXCEPTIONS SHALL SERVE A COPY OF THE [OBJECTIONS] EXCE
COLLECTION UNIT, WHICH SHALL HAVE TEN DAYS FROM SUCH SERVICE TO FI
[OBJECTIONS] EXCEPTIONS AND A COPY OF THE RECORD UPON WHICH THE SU
DENIAL WAS MADE, INCLUDING ALL DOCUMENTATION SUBMITTED BY THE S
SERVICE SHALL BE FILED WITH THE COURT AT THE TIME OF FILING OF [OBJECTI
REBUTTAL. THE COURT'S REVIEW SHALL BE BASED UPON THE RECORD AND SUB
OBLIGOR AND THE SUPPORT COLLECTION UNIT UPON WHICH THE SUPPOR
WAS MADE. WITHIN FORTY-FIVE DAYS AFTER THE REBUTTAL, IF ANY, IS FILED, TH
(I) DENY THE [OBJECTIONS] EXCEPTIONS AND REMAND TO THE SUPPORT COL
THE [OBJECTIONS] EXCEPTIONS IF THE COURT FINDS THE DETERMINATION OF
IS BASED UPON A CLEARLY ERRONEOUS DETERMINATION OF FACT OR ERROR O
SHALL DIRECT THE SUPPORT COLLECTION UNIT NOT TO NOTIFY THE DEPARTM

SUSPEND THE SUPPORT OBLIGOR'S DRIVING PRIVILEGES. IF THE JUDICIAL REV
COURT BY A HEARING EXAMINER PURSUANT TO SECTION FOUR HUNDRED THIR
ACT AND EITHER PARTY FILES OBJECTIONS TO THE DETERMINATION OF THE HE
COLLECTION UNIT SHALL NOT NOTIFY THE DEPARTMENT OF MOTOR VEHICLES
OBLIGOR'S DRIVING PRIVILEGES UNTIL FIFTEEN DAYS AFTER MAILING OF A COPY
COURT WITH RESPECT TO THE OBJECTIONS TO THE DETERMINATION OF THE H
SET FORTH HEREIN RELATING TO PROCEDURES FOR [APPEAL TO] REVIEW BY TH
BY INDIVIDUALS SUBJECT TO SUSPENSION OF DRIVING PRIVILEGES FOR FAI
SHALL APPLY SOLELY TO SUCH CASES AND NOT AFFECT OR MODIFY ANY OTHER
APPEAL OF ADMINISTRATIVE ENFORCEMENT OF CHILD SUPPORT REQUIREMENT

5. PARAGRAPH (D) OF SUBDIVISION 12 OF SECTION 111-B OF THE SOCIAL SE
CHAPTER 309 OF THE LAWS OF 1996, IS AMENDED TO READ AS FOLLOWS:

(D)(1) A SUPPORT OBLIGOR MAY CHALLENGE IN WRITING THE CORRECTNE
OF THE SUPPORT COLLECTION UNIT THAT THE OBLIGOR'S DRIVING PRIVILEGES
SUPPORT OF THE CHALLENGE MAY SUBMIT DOCUMENTATION DEMONSTRATING
CALCULATION OF ARREARS, FINANCIAL EXEMPTION FROM LICENSE SUSPENSION
ENUMERATED IN PARAGRAPH (E) OF THIS SUBDIVISION, THE ABSENCE OF AN UN
SUPPORT SUCH DETERMINATION, OR OTHER REASON THAT THE PERSON IS NOT
DETERMINATION. SUCH DOCUMENTS MAY INCLUDE BUT ARE NOT LIMITED TO
SUPPORT PURSUANT TO WHICH THE OBLIGOR CLAIMS TO HAVE MADE PAYMENT
ORDERS, COPIES OF CANCELED CHECKS, RECEIPTS FOR SUPPORT PAYMENTS, PAY
IDENTIFYING WAGE WITHHOLDING, AND PROOF OF IDENTITY. THE SUPPORT C
THE DOCUMENTATION SUBMITTED BY THE SUPPORT OBLIGOR, SHALL ADJUST T
ACCOUNT IF APPROPRIATE, AND SHALL NOTIFY THE SUPPORT OBLIGOR OF THE
INITIATED IN RESPONSE TO THE CHALLENGE WITHIN SEVENTY-FIVE DAYS FROM
REQUIRED BY PARAGRAPH (B) OF THIS SUBDIVISION. IF THE SUPPORT COLLECTI
THAT THE DETERMINATION TO SUSPEND DRIVING PRIVILEGES WAS CORRECT, T
SHALL NOTIFY THE SUPPORT OBLIGOR OF THE RESULTS OF THE REVIEW AND TH

THIRTY-FIVE DAYS FROM THE DATE OF MAILING OF SUCH NOTICE TO SATISFY TH
ARREARS OR COMMENCE PAYMENT OF THE ARREARS/PAST DUE SUPPORT AS SPEC
SUBDIVISION AND IF THE SUPPORT OBLIGOR FAILS TO DO SO, THE SUPPORT CO
THE DEPARTMENT OF MOTOR VEHICLES TO SUSPEND THE SUPPORT OBLIGOR'S I
TO SECTION FIVE HUNDRED TEN OF THE VEHICLE AND TRAFFIC LAW. THE SUPP
NOTIFIED THAT IF THE SUPPORT OBLIGOR FILES [OBJECTIONS] WRITTEN EXCEPT
THAT ISSUED THE UNDERLYING COURT ORDER OF SUPPORT AND SERVES THESE
THE SUPPORT COLLECTION UNIT WITHIN THIRTY-FIVE DAYS FROM THE DATE O
DENYING THE CHALLENGE PURSUANT TO SUBDIVISION FIVE OF SECTION FOUR
FAMILY COURT ACT, THE SUPPORT COLLECTION UNIT SHALL NOT NOTIFY THE D
VEHICLES TO SUSPEND THE SUPPORT OBLIGOR'S DRIVING PRIVILEGES UNTIL FIF
MAILING OF A COPY OF THE JUDGMENT BY THE [FAMILY] COURT DENYING THE
SUPPORT OBLIGOR SHALL BE FURTHER NOTIFIED THAT IF THE JUDICIAL REVIEW
COURT BY A HEARING EXAMINER PURSUANT TO SECTION FOUR HUNDRED THIR
ACT AND EITHER PARTY FILES OBJECTIONS TO THE DETERMINATION OF THE HE
COLLECTION UNIT SHALL NOT NOTIFY THE DEPARTMENT OF MOTOR VEHICLES
OBLIGOR'S DRIVING PRIVILEGES UNTIL FIFTEEN DAYS AFTER MAILING OF A COPY
COURT WITH RESPECT TO THE OBJECTIONS TO THE DETERMINATION OF THE H

(2) A SUPPORT OBLIGOR MAY WITHIN THIRTY-FIVE DAYS OF THE MAILING O
OR HER CHALLENGE BY THE SUPPORT COLLECTION UNIT REQUEST THAT THE [FA
UNDERLYING COURT ORDER OF SUPPORT REVIEW THE SUPPORT COLLECTION U
PURSUANT TO SUBDIVISION FIVE OF SECTION FOUR HUNDRED FIFTY-FOUR OF T
SUPPORT OBLIGOR REQUESTS THE [FAMILY] COURT TO REVIEW THE DETERMINA
COLLECTION UNIT, THE SUPPORT COLLECTION UNIT SHALL NOT NOTIFY THE D
TO SUSPEND THE SUPPORT OBLIGOR'S DRIVING PRIVILEGES UNTIL FIFTEEN DAY
THE JUDGMENT BY THE [FAMILY] COURT TO THE SUPPORT OBLIGOR DENYING T
THE JUDICIAL REVIEW IS CONDUCTED IN FAMILY COURT BY A HEARING EXAMIN
HUNDRED THIRTY-NINE OF THE FAMILY COURT ACT AND EITHER PARTY FILES O

DETERMINATION OF THE HEARING EXAMINER, THE SUPPORT COLLECTION UNIT DEPARTMENT OF MOTOR VEHICLES TO SUSPEND THE SUPPORT OBLIGOR'S DRIV DAYS AFTER MAILING OF A COPY OF A JUDGMENT BY THE FAMILY COURT WITH F THE DETERMINATION OF THE HEARING EXAMINER.

6. SECTION 111-P OF THE SOCIAL SERVICES LAW, AS ADDED BY CHAPTER 398 AMENDED TO READ AS FOLLOWS:

111-P. AUTHORITY TO ISSUE SUBPOENAS. THE DEPARTMENT OR THE CHIL UNIT COORDINATOR OR SUPPORT COLLECTION UNIT SUPERVISOR OF A SOCIAL HER DESIGNEE, OR ANOTHER STATE'S CHILD SUPPORT ENFORCEMENT AGENCY O SOCIAL SECURITY ACT, SHALL BE AUTHORIZED, WHETHER OR NOT A PROCEEDIN SUBPOENA FROM ANY PERSON, PUBLIC OR PRIVATE ENTITY OR GOVERNMENTAL ENTITY OR AGENCY SHALL PROVIDE ANY FINANCIAL OR OTHER INFORMATION N AND TO ESTABLISH, MODIFY OR ENFORCE ANY SUPPORT ORDER. IF A SUBPOENA HAS NOT [CURRENTLY PENDING] BEEN FILED, THE SUPREME COURT OR [A JUDG HEAR AND DECIDE ALL MOTIONS RELATING TO THE SUBPOENA. IF THE SUBPOE HAS BEEN [SERVED] FILED, THE COURT IN WHICH THE PETITION IS RETURNABLE MOTIONS RELATING TO THE SUBPOENA. ANY SUCH PERSON, ENTITY, OR AGENC SUBPOENAED INFORMATION BY THE DATE AS SPECIFIED IN THE SUBPOENA. SUC TO THE PROVISIONS OF ARTICLE TWENTY-THREE OF THE CIVIL PRACTICE LAW A DISTRICT MAY IMPOSE A PENALTY FOR FAILURE TO RESPOND TO SUCH INFORMA SECTION TWENTY-THREE HUNDRED EIGHT OF THE CIVIL PRACTICE LAW AND RU

7. SUBDIVISION (B) OF SECTION 2302 OF THE CIVIL PRACTICE LAW AND RUL 183 OF THE LAWS OF 1989, IS AMENDED TO READ AS FOLLOWS:

(B) ISSUANCE BY COURT. A SUBPOENA TO COMPEL PRODUCTION OF AN OR DOCUMENT WHERE A CERTIFIED TRANSCRIPT OR COPY IS ADMISSIBLE IN EVIDE ATTENDANCE OF ANY PERSON CONFINED IN A PENITENTIARY OR JAIL, SHALL BE THE COURT ORDERS OTHERWISE, A MOTION FOR SUCH SUBPOENA SHALL BE MA

NOTICE TO THE PERSON HAVING CUSTODY OF THE RECORD, DOCUMENT OR PE
TO PRODUCE A PRISONER SO CONFINED SHALL BE ISSUED BY A JUDGE TO WHOM
CORPUS COULD BE MADE UNDER SUBDIVISION (B) OF SECTION 7002 OF THE CIV
JUDGE OF THE COURT OF CLAIMS, IF THE MATTER IS PENDING BEFORE THE COU
THE SURROGATE'S COURT, IF THE MATTER IS PENDING BEFORE THE [SURROGAT
JUDGE OR HEARING EXAMINER OF THE FAMILY COURT, IF THE MATTER IS PENDI

8. SECTION 2304 OF THE CIVIL PRACTICE LAW AND RULES, AS AMENDED BY
1997, IS AMENDED TO READ AS FOLLOWS:

2304. MOTION TO QUASH, FIX CONDITIONS OR MODIFY. A MOTION TO Q
MODIFY A SUBPOENA SHALL BE MADE PROMPTLY IN THE COURT IN WHICH THE
SUBPOENA IS NOT RETURNABLE IN A COURT, A REQUEST TO WITHDRAW OR MOI
BE MADE TO THE PERSON WHO ISSUED IT AND A MOTION TO QUASH, FIX COND
THEREAFTER BE MADE IN THE SUPREME COURT; EXCEPT THAT SUCH MOTION WI
SUPPORT SUBPOENA ISSUED PURSUANT TO SECTION ONE HUNDRED ELEVEN-P O
SHALL BE MADE TO [A JUDGE OF] THE FAMILY COURT OR THE SUPREME COURT.
BE IMPOSED UPON THE GRANTING OR DENIAL OF A MOTION TO QUASH OR MO

9. SECTION 2307 OF THE CIVIL PRACTICE LAW AND RULES, AS AMENDED BY
1991, IS AMENDED TO READ AS FOLLOWS:

2307. BOOKS, PAPERS AND OTHER THINGS OF A LIBRARY, DEPARTMENT OR
CORPORATION OR OF THE STATE. ISSUANCE BY COURT. A SUBPOENA DUCES TEC
LIBRARY, OR A DEPARTMENT OR BUREAU OF A MUNICIPAL CORPORATION OR OF
THEREOF, REQUIRING THE PRODUCTION OF ANY BOOKS, PAPERS OR OTHER THI
JUSTICE OF THE SUPREME COURT IN THE DISTRICT IN WHICH THE BOOK, PAPER
OR BY A JUDGE OF THE COURT IN WHICH AN ACTION FOR WHICH IT IS REQUIR
A PROCEEDING CONDUCTED BY A HEARING EXAMINER IN ACCORDANCE WITH S
THIRTY-NINE OF THE FAMILY COURT ACT, A HEARING EXAMINER OF THE FAMILY
IS PENDING. UNLESS THE COURT ORDERS OTHERWISE, A MOTION FOR SUCH SU

LEAST ONE DAY'S NOTICE TO THE LIBRARY, DEPARTMENT, BUREAU OR OFFICER H
DOCUMENT OR OTHER THING AND THE ADVERSE PARTY. SUCH SUBPOENA MUS
LIBRARY, OR SUCH DEPARTMENT OR BUREAU OF SUCH MUNICIPAL CORPORATIC
OFFICER HAVING CUSTODY OF THE BOOK, DOCUMENT OR OTHER THING AND T
TWENTY-FOUR HOURS BEFORE THE TIME FIXED FOR THE PRODUCTION OF SUCH
OF AN EMERGENCY THE COURT SHALL BY ORDER DISPENSE WITH SUCH NOTICE
COMPLIANCE WITH A SUBPOENA DUCES TECUM MAY BE MADE BY PRODUCING A
REPRODUCTION OF THE ITEM OR ITEMS REQUIRED TO BE PRODUCED CERTIFIED
THE PERSON IN CHARGE OF SUCH LIBRARY, DEPARTMENT OR BUREAU, OR A DES
PERSONAL APPEARANCE TO CERTIFY SUCH ITEM OR ITEMS SHALL BE REQUIRED O
UNLESS THE COURT SHALL ORDER OTHERWISE PURSUANT TO SUBDIVISION (D) O
WHERE A STIPULATION WOULD SERVE THE SAME PURPOSE AS PRODUCTION OF T
THING AND THE SUBPOENA IS REQUIRED BECAUSE THE PARTIES WILL NOT STIPU
IMPOSE TERMS ON ANY PARTY, INCLUDING THE COST OF PRODUCTION OF THE
REQUIRE SUCH COST TO BE PAID AS AN ADDITIONAL FEE TO THE LIBRARY, DEPA

10. THIS ACT SHALL TAKE EFFECT ON THE NINETIETH DAY AFTER IT SHALL

14. Child support obligation of support obligors whose incomes are below the poverty level (DRL §240(1-b); FCA §413(1))

In 1993, the New York State Court of Appeals, in Rose v. Moody, 83 N.Y.2d 65, 607 N.Y.S.2d 906 (1993), *cert. denied*, 511 U.S. 1084 (1994), held subdivision (1-b) of section 240 of the Domestic Relations Law and subdivision one of the section 413 of the Family Court Act unconstitutional insofar as these provisions impose an inflexible minimum child support obligation against support obligors whose income would, by virtue of the obligation, fall below the poverty level. The Court ruled that the irrebuttable presumption mandating that an indigent, non-custodial parent would be ordered to pay a minimum of $25 per month in child support contravened the federal *CHILD SUPPORT ENFORCEMENT ACT* [Social Security Act §467(b)(2), *as amended*, 42 U.S.C.A. §667(b)(2)], thus violating the constitutional principle of federal preemption. While the effect of the Court's ruling has been to require that support obligors be permitted to rebut the presumption in favor of a minimum obligation of $25 per month, the statutory language has not been conformed accordingly.

Compounding the infirmity identified in Rose v. Moody, the statutes contain ambiguous provisions leading to anomalous, unintended results. Both subdivision (1)(d) of section 413 of the Family Court Act and subdivision (1-b)(d) of section 240 of the of the Domestic Relations Law provide that "where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater." A literal reading of this provision as applied to an indigent non-custodial parent would compel the conclusion that the child support obligation would constitute the difference between the non-custodial parent's income and the self- support reserve in virtually all instances, as that figure would generally be greater than $25 per month. For example, a non-custodial parent with no income would be ordered to pay $11, 961 in child support, since the difference between $0 and the self-support reserve (currently $11, 961 annually) is $11, 961, a greater amount than $25 per month ($300 annually).

Additionally, in cases where the basic child support obligation would reduce the non-custodial parent's income to a level below the self-support reserve but not below the poverty level, both subdivisions provide alternative standards for determining child support, that is, the greater of $50 per month or the difference between the non-custodial parents' income and the self-support reserve. However, both statutes are silent regarding whether separate amounts may also be ordered in such cases for child care, future medical and educational expenses, in accordance with subparagraphs four, five, six and seven of paragraph (c) of both subdivision one of section 413 of the Family Court Act and subdivision (1-b) of section 240 of the Domestic Relations Law. Several cases have, therefore, disallowed the inclusion of any of these expenses as part of the child support order in such circumstances. *See* In Re Rhianna R., 256 A.D.2d 1184 (4th Dept., 1998)[citing Mahady v. Megrell, 219 A.D.2d 334 (3rd Dept., 1996)]; Dunber v. Dunber, 233 A.D.2d 922 (4th Dept., 1996).

The Family Court Advisory and Rules Committee is recommending legislation to correct these anomalies and to codify the decision in Rose v. Moody. The proposal would make the presumption in favor of a minimum order of $25 per month rebuttable by a showing that such an order would be unjust or inappropriate, based upon the factors applicable to departures from the child support standards. *See* Domestic Relations Law §240(1-b)(f); Family Court Act §413(1)(f). The Family or Supreme Court would thus be authorized to order payment of an amount it deems to be just and appropriate. It would eliminate the proviso that "[i]n no instance shall the court order child support below $25 per month." Further, the proposal would delete the alternative standard for determining the child support obligation for non-custodial parents for whom imposition of the obligation would cause their incomes to fall below the poverty level, that is, the "difference between the non-custodial parent's income and the self-support reserve." Finally, in cases where imposition of the basic child support obligation would reduce the non-custodial parent's income to an amount below the self-support reserve, but not the poverty, level, the measure would clarify that the Court would be authorized, although not required, to direct payments for child care, educational and health care expenses, as part of its child support order.[14]

Proposal

AN ACT to amend the domestic relations law and the family court act, in relation to the child support obligation of indigent non-custodial parents

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

Section 1. Paragraphs (d), (g) and (i) of subdivision 1-b of section 240 of the domestic relations law, paragraphs (d) and (i) as added by chapter 567 of the laws of 1989 and paragraph (g) as a mended by chapter 41 of the laws of 1992, are amended to read as follows:

(d) Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month [or the difference between the non-custodial parent's income and the self- support reserve, whichever is

[14] The measure does not alter the current alternate standards for determining the amount of child support that the Court may order in such cases – that is, the greater of $50 per month or the difference between the non-custodial parent's income and the self-support reserve. Deletion of the current standards in the measure passed by the Legislature in 2002 had prompted a gubernatorial veto. *See* Governor's Veto Message #2 [S 3434-a].

greater], provided, however, that if the court finds that such basic child support obligation is unjust or inappropriate, which finding shall be based upon considerations of the factors set forth in paragraph (f) of this subdivision, the court shall order the non-custodial parent to pay such amount of the child support as the court finds just and appropriate. Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be fifty dollars per month or the difference between the non-custodial parent's income and the self- support reserve, whichever is greater, in addition to amounts, if any, that the court may, in its discretion, order in accordance with subparagraphs four, five six and/or seven of paragraph (c) of this subdivision .

* * *

(g) Where the court finds that the non-custodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth, in a written order, the factors it considered; the amount of each party's pro rata share of the basic child support obligation; and the reasons that the court did not order the basic child support obligation. Such written order may not be waived by either party or counsel; provided, however, and notwithstanding any other provision of law, the court shall not find that the non-custodial parent's pro rata share of such obligation is unjust or inappropriate on the basis that such share exceeds the portion of a public assistance grant which is attributable to a child or children. [In no instance shall the court order child support below twenty-five dollars per month.] Where the non-custodial parent's income is less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue.

* * *

(i) Where either or both parties are unrepresented, the court shall not enter an order or judgment other than a temporary order pursuant to section two hundred thirty-seven of this article, that includes a provision for child support unless the unrepresented party or parties have received a copy of the child

support standards chart promulgated by the commissioner of [social services] the office of temporary and disability assistance pursuant to subdivision two of section one hundred eleven-i of the social services law. Where either party is in receipt of child support enforcement services through the local social services district, the local social services district child support enforcement unit shall advise such party of the amount derived from application of the child support percentage and that such amount serves as a starting point for the determination of the child support award, and shall provide such party with a copy of the child support standards chart. [In no instance shall the court approve any voluntary support agreement or compromise that includes an amount for child support less than twenty-five dollars per month].

§2. Paragraphs (d) , (g) and (i) of subdivision 1 of section 413 of the family court act, paragraphs (d) and (i) as added by chapter 567 of the laws of 1989 and paragraph (g) as amended by chapter 41 of the laws of 1992, are amended to read as follows:

(d) Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month [or the difference between the non-custodial parent's income and the self- support reserve, whichever is greater] , provided, however, that if the court finds that such basic child support obligation is unjust or inappropriate, which finding shall be based upon considerations of the factors set forth in paragraph (f) of this subdivision, the court shall order the non-custodial parent to pay such amount of the child support as the court finds just and appropriate. Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be fifty dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater, in addition to amounts, if any, that the court may, in its discretion, order in accordance with subparagraphs four, five six and/or seven of paragraph (c) of this subdivision.

* * *

(g) Where the court finds that the non-custodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth, in a written order, the factors it considered; the amount of each party's pro rata share of the basic child support obligation; and the reasons that the court did not order the basic child support obligation. Such written order may not be waived by either party or counsel; provided, however, and notwithstanding any other provision of law, including but not limited to section four hundred fifteen of this act, the court shall not find that the non-custodial parent's pro rata share of such obligation is unjust or inappropriate on the basis that such share exceeds the portion of a public assistance grant which is attributable to a child or children. [In no instance shall the court order child support below twenty-five dollars per month]. Where the non-custodial parent's income is less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue.

* * *

(i) Where either or both parties are unrepresented, the court shall not enter an order or judgment other than a temporary order pursuant to section two hundred thirty-seven of [this article] the domestic relations law, that includes a provision for child support unless the unrepresented party or parties have received a copy of the child support standards chart promulgated by the commissioner of [social services] the office of temporary and disability assistance pursuant to subdivision two of section one hundred eleven-i of the social services law. Where either party is in receipt of child support enforcement services through the local social services district, the local social services district child support enforcement unit shall advise such party of the amount derived from application of the child support percentage and that such amount serves as a starting point for the determination of the child support award, and shall provide such party with a copy of the child support standards chart. [In no instance shall the court approve any voluntary support agreement or compromise that includes an amount for child support less than twenty-five dollars per month.]

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

15. Judicial authority to direct establishment of a trust fund or other designated account for the benefit of children in matrimonial, child support and paternity cases (DRL §240(1-b); FCA §413 (1)(c))

The *Child Support Standards Act* provides helpful parameters for Family and Supreme Courts to utilize to ensure that parents are assessed an appropriate proportion of their incomes for the support of their children, premised on the assumption that the incomes are relatively constant. However, it provides no mechanism for the courts to address the not-infrequent situation where one of the parents receives an economic windfall or exceptionally high income during a short period of time, an income not likely to remain at that level in the future. Examples include professional athletes or performers, individuals who sell a successful business or those who win significant awards. Without a means of preserving a portion of the windfall income for children's future needs, the courts are hampered in their ability to provide just and appropriate child support orders that incorporate future costs, such as college expenses. The Family Court Advisory and Rules Committee, therefore, is recommending that the courts be authorized to direct that children be permitted to benefit from such windfalls through the establishment of designated accounts, such as trust funds or annuities, that would provide the children with a future stream of payments, thus ensuring adequate support even after the non-custodial parent's income has decreased.

While explicitly not diminishing the non-custodial parent's basic support obligation, including periodic payments under an order issued pursuant to the *Child Support Standards Act*, the proposal would authorize the Supreme or Family Court, under such terms and conditions as it deems appropriate, to direct the non-custodial parent to pay an amount to establish a security account designated for the benefit of the child, including, but not limited to, a trust account or annuity, to meet the child's future needs. The proposal requires that the Court be specific in setting forth the parameters of the account, including, as applicable, the specific purposes of the account; the person or entity that will act as trustee, custodian or administrator of the funds in the account; the person or entity that will act as the trustee, custodian or administrator of the funds in the account in the event of the death of the designated trustee, custodian or administrator; the disposition of the funds after the emancipation or death of the child or children named as beneficiaries; the particular structure that will fulfill the purposes of the account; and any further provisions necessary to accomplish the purpose of the account.

Proposal:

AN ACT to amend the domestic relations law and the family court act, in relation to the authority of the court to direct establishment of a trust or other designated account for the benefit of children in matrimonial, child support and paternity cases

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSE
ENACT AS FOLLOWS:

SECTION 1. Paragraph (c) of subdivision 1-b of section 240 of the domestic relations law is amended

by adding a new subparagraph 8 to read as follows:

(8). In addition to the basic child support obligation ordered under this subdivision, the court may, in its discretion, order the respondent to pay an amount to establish a security account designated for the benefit of the child, including, but not limited to, a trust account or annuity to meet the child's future needs. The court may direct the establishment of such an account under such terms and conditions as it deems appropriate. The court shall set forth, as applicable: the specific purposes of the account; the person or entity that will act as trustee, custodian or administrator of the funds in the account; the person or entity that will act as the trustee, custodian or administrator of the funds in the account in the event of the death of the designated trustee, custodian or administrator; the disposition of the funds after the emancipation or death of the child or children named as beneficiaries; the particular structure that will fulfill the purposes of the account; and any further provisions necessary to accomplish the purpose of the account. The establishment of such an account shall not diminish any current child support obligations**.**

§2. Paragraph (c) of subdivision 1 of section 413 of the family court act is amended by adding a new subparagraph 8 to read as follows:

(8). In addition to the basic child support obligation ordered under this subdivision, the court may, in its discretion, order the non-custodial parent to pay an amount to establish a security account designated for the benefit of the child, including, but not limited to, a trust account or annuity to meet the child's future needs. The court may direct the establishment of an account under such terms and conditions as it deems appropriate. The court shall set forth, as applicable: the specific purposes of the account; the person or entity that will act as trustee, custodian or administrator of the funds in the account; the person or entity that will act as the trustee, custodian or administrator of the funds in the account in the event of the death of the designated trustee, custodian or administrator; the disposition of the funds after the emancipation or death of the child or children named as beneficiaries ; the particular structure that will fulfill the purposes of the account; and any further provisions necessary to accomplish the purpose of the account. The establishment of such an account shall not diminish any current child support obligations**.**

§3. This act shall take effect immediately.

16. Procedures regarding child support and paternity proceedings (FCA §§ 413-a, 516-a, 565; DRL §240-c; SSL §§111-h, 111-k, 111-n; P.H.L. §4135-b; CPLR. 5241, 5252)

In 1997, the New York State Legislature enacted comprehensive legislation implementing the requirements of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [Public Law 104-193]. *See* Laws of 1997, ch. 398. The statute was designed to promote more effective and expeditious establishment of paternity and determination of child support obligations, as well as to facilitate rigorous enforcement of payment obligations. The Family Court Advisory and Rules Committee has prepared a set of amendments to further the fulfillment of these important goals.

First, similar to provisions enacted in 1997 regarding reviews and adjustments of orders issued prior to September, 1989, the Committee's proposal would provide needed clarification with respect to challenges to the "cost of living adjustments" (COLA's) that will be applied to orders issued subsequent to that date. The Committee's proposal assures that the Family Court will have sufficient information before it in order to resolve challenges to disputed COLA's, by requiring, *inter alia*, that COLA orders contain the names and dates of birth of all children covered. Significantly, the proposal requires the hearing with respect to a disputed COLA to commence no later than 45 days from the date the Court receives the objection and requires the Court to render its determination no later than 30 days from the date the hearing is concluded, except upon a showing of good cause. Further, with respect to the reviews and adjustments of pre-1989 orders, the proposal clarifies the duty of local Support Collection Units to submit sworn affidavits along with proposed adjusted orders, articulating the bases, or underlying findings, for the adjustment, enumerating the children covered by the orders and their dates of birth, and specifying the dates of mailing and addresses to which notices of the review and adjustment process had been mailed.

Second, filling a significant gap in both New York State and federal law, the proposal addresses the difficult issue of paternity acknowledgments executed by minor parents under the age of eighteen by requiring such acknowledgments to be executed in the presence of a Family Court judge or hearing examiner. Significantly, under New York State law, minors are generally incapable of executing legally-binding contracts, and surrenders of parental rights by minor parents, who themselves are in foster care, must be executed in the presence of a judge; the extra-judicial surrender provisions are inapplicable in such cases. *See* General Obligations Law §3-101; Social Services Law §383-c(7).

Third, the proposal adds clarity to the procedure for challenging an administrative directive to submit to a genetic test in cases in which a paternity petition has not yet been filed. The measure would require such a challenge to be initiated by the filing of a petition that must be personally served upon, or mailed to, the local department of social services. The local agency would have an opportunity to respond within 10 days of the date of such personal service or within 15 days of the date of such mailing, as applicable. Significantly, the proposal clarifies that individuals who are married or were married to each other at the time of the conception or birth of the child, as well as a putative father in a case in which the child's mother had been married to someone else at the time of the conception or birth of the child, would be exempt

from administrative genetic testing directives. Since these cases may involve application of complex doctrines of equitable estoppel, res judicata and the presumption of legitimacy, they are more appropriately addressed in the context of judicial proceedings.

Finally, as a matter of fundamental fairness, the proposal would amend the Civil Practice Law and Rules to provide employers and income payors with notice and an opportunity to be heard prior to the imposition of sanctions for non-compliance with income deduction orders. Sanctions against employers and income payors for discriminating against individuals who are the subjects of income deduction orders would be addressed as part of civil damage action actions brought by the alleged victims of such discrimination, rather than as part of the Family Court child support or paternity proceeding.

Proposal

AN ACT to amend the family court act, the domestic relations law, the social services law, the public health law and the civil practice law and rules, in relation to child support and paternity proceedings

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

Section 1. Paragraph (d) of subdivision 3 of section 413-a of the family court act, as amended by chapter 624 of the laws of 2002, is amended to read as follows:

(d) The court shall [conduct] commence the [hearing and make its determination] proceeding no later than forty-five days from the date it receives an objection and shall make its determination no later than thirty days from the date the proceeding is concluded, except for good cause shown. If the order under review does not provide for health insurance benefits for the child, the court shall make a determination regarding such benefits pursuant to section four hundred sixteen of this part. The clerk of the court shall immediately transmit copies of the order of support or order of no adjustment issued by the court pursuant to this subdivision to the parties and the support collection unit. Where a hearing results in the issuance of a new order of support, the effective date of the court order shall be the earlier of the date of the court determination or the date the cost of living adjustment would have been effective had it not been challenged.

§2. Subdivision (a) of section 516-a of the family court act, as amended by chapter 398

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

(a) An acknowledgment of paternity executed pursuant to section one hundred eleven-k of the social services law or section four thousand one hundred thirty-five-b of the public health law shall establish the paternity of and liability for the support of a child pursuant to this act. Such acknowledgment must be reduced to writing and filed pursuant to section four thousand one hundred thirty-five-b of the public health law with the registrar of the district in which the birth occurred and in which the birth certificate has been filed. No further judicial or administrative proceedings are required to ratify an unchallenged acknowledgment of paternity; provided, however, that an acknowledgment of paternity by a child under the age of eighteen shall be executed only before a judge or hearing examiner of the family court.

§3. Section 565 of the family court act, as added by chapter 398 of the laws of 1997, is amended to read as follows:

§565. [A proceeding] Proceeding to challenge testing directive. The court is authorized to hear and decide motions to challenge a directive by the department of social services requiring a party to submit to genetic testing, pursuant to section one hundred eleven-k of the social services law. Where such testing directive has been made in a case in which no paternity petition has been filed, the party challenging the testing directive shall file a petition to challenge the testing directive. The petition shall be personally served upon or sent by mail to the local department of social services, which shall have an opportunity to respond thereto within ten days of the date of such personal service or within fifteen days of the date of such mailing, as applicable. Nothing contained in this section shall be deemed to preclude the authority of a local social services district from filing a petition pursuant to this article.

§4. Paragraph (d) of subdivision 3 of section 240-c of the domestic relations law, as amended by chapter 624 of the laws of 2002, is amended to read as follows:

(d) The court shall [conduct] commence the [hearing and make its determination] proceeding no later than forty-five days from the date it receives an objection and shall make its determination no later than thirty days from the date the proceeding is concluded, except for good cause shown. If the order under review does not provide for health insurance benefits for the child, the court shall make a determination regarding such benefits pursuant to section two hundred forty of this article. The clerk of the court shall immediately transmit copies of the order

of support or order of no adjustment issued by the court pursuant to this subdivision to the parties and the support collection unit. Where a hearing results in the issuance of a new order of support, the effective date of the court order shall be the earlier of the date of the court determination or the date the cost of living adjustment would have been effective had it not been challenged.

§5. Subdivision 14 of section 111-h of the social services law, as amended by chapter 81 of the laws of 1995, is amended to read as follows:

14. Where the support collection unit determines that there is a basis for an upward adjustment, it shall also file a proposed order together with a copy of the current order of support and an affidavit in support thereof with the clerk of the appropriate court, and send a copy of such proposed order and affidavit by first class mail to the parties. Such affidavit shall include, but not be limited to: specific findings of fact describing the sources of income used; the calculations upon which the proposed adjustment is based; if joint tax return information has been utilized in the calculations, the allocation of income to the support obligor, to his or her spouse and, if applicable, to the custodial parent; in cases in which the current order of support was based upon a finding pursuant to paragraph (f) of subdivision one of section four hundred thirteen of the family court act or paragraph (f) of subdivision one-b of section two hundred forty of the domestic relations law, the bases for determining whether the factors giving rise to such finding remain present; the names, dates of birth and social security numbers of any children covered by the order; and the date of mailing and address to which the initial notice of the rights and obligations of the parties was sent pursuant to subdivisions sixteen and seventeen of this section.

§6. Paragraph (a) of subdivision 1 and paragraph (a) of subdivision 2 of section 111-k of the social services law, as amended by chapter 214 of the laws of 1998, are amended to read as follows:

1. (a) An acknowledgment of paternity of a child, as provided for in article five-B or section five hundred sixteen-a of the family court act, by a written statement, witnessed by two people not related to the signator or as provided for in section four thousand one hundred thirty-five-b of the public health law; provided, however, that an acknowledgment of paternity by a child under the age of eighteen shall be executed only before a judge or hearing examiner of the family

court. Prior to the execution of such acknowledgment by the child's mother and the respondent, they shall be advised, orally, which may be through the use of audio or video equipment, and in writing, of the consequences of making such an acknowledgment. Upon the signing of an acknowledgment of paternity pursuant to this section, the social services official or his or her representative shall file the original acknowledgment with the registrar.

* * *

2. (a) when the paternity of a child is contested, a social services official or designated representative may [order] direct the mother, the child, and the alleged father to submit to one or more genetic marker or DNA tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether or not the alleged father is the father of the child. The [order] direction may be issued prior or subsequent to the filing of a petition with the court to establish paternity, shall be served on the parties by certified mail, and shall include a sworn statement which either (i) alleges paternity and sets forth facts establishing a reasonable possibility of the requisite sexual contact between the parties, or (ii) denies paternity and sets forth facts establishing a reasonable possibility that the party is not the father. The parties shall not be required to submit to the administration and analysis of such tests if they are married or were married to each other at the time of the conception or birth of the child, if the mother was married to another individual at the time of the conception or birth of the child, if the parties sign a voluntary acknowledgment of paternity in accordance with paragraph (a) of subdivision one of this section, or if there has been a written finding by the court in a pending or prior proceeding 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.

§7. Paragraph (a) of subdivision 5 and paragraph (a) of subdivision 6 of section 111-n of the social services law, as added by chapter 398 of the laws of 1997, are amended to read as follows:

5. Objections. (a) Where there is an objection to a cost of living adjustment, either party or the support collection unit shall have thirty-five days from the date of mailing of the adjusted

order by the support collection unit to submit to the court identified thereon specific written objections, requesting a hearing on the adjustment of the order of support.

* * *

6. Adjusted order - form. The adjusted order shall contain the following information:

(a) the caption of the order of support subject to the review, the date of such order, [and] the court in which it was entered, the names, dates of birth and social security numbers of any children covered by the order and the social security numbers of the parties to the order;

§8. Paragraph (a) of subdivision 1 of section 4135-b of the public health law, as amended by chapter 214 of the laws of 1998, is amended to read as follows:

(a) Immediately preceding or following the in-hospital birth of a child to an unmarried woman, the person in charge of such hospital or his or her designated representative shall provide to the child's mother and putative father, if such father is readily identifiable and available, the documents and written instructions necessary for such mother and putative father to complete an acknowledgment of paternity witnessed by two persons not related to the signatory; provided, however, that an acknowledgment of paternity by a child under the age of eighteen shall be executed only before a judge or hearing examiner of the family court. Such acknowledgment, if signed by both parties, at any time following the birth of a child, shall be filed with the registrar at the same time at which the certificate of live birth is filed, if possible, or anytime thereafter. Nothing herein shall be deemed to require the person in charge of such hospital or his or her designee to seek out or otherwise locate a putative father who is not readily identifiable or available. The acknowledgment shall be executed on a form provided by the commissioner developed in consultation with the appropriate commissioner of the department of family assistance, which shall include the social security number of the mother and of the putative father and provide in plain language (i) a statement by the mother consenting to the acknowledgment of paternity and a statement that the putative father is the only possible father, (ii) a statement by the putative father that he is the biological father of the child, and (iii) a statement that the signing of the acknowledgment of paternity by both parties shall have the same force and effect as an order of filiation entered after a court hearing by a court of competent jurisdiction, including an obligation to provide support for the child except that, only if filed with the registrar of the district in which the birth certificate has been filed, will the acknowledgment have such force and effect

with respect to inheritance rights. Prior to the execution of an acknowledgment of paternity, the mother and the putative father shall be provided orally, which may be through the use of audio or video equipment, and in writing with such information as is required pursuant to this section with respect to their rights and the consequences of signing a voluntary acknowledgment of paternity including, but not limited to, that the signing of the acknowledgment of paternity shall establish the paternity of the child and shall have the same force and effect as an order of paternity or filiation issued by a court of competent jurisdiction establishing the duty of both parties to provide support for the child; that if such an acknowledgment is not made, the putative father can be held liable for support only if the family court, after a hearing, makes an order declaring that the putative father is the father of the child whereupon the court may make an order of support which may be retroactive to the birth of the child; that if made a respondent in a proceeding to establish paternity the putative father has a right to free legal representation if indigent; that the putative father has a right to a genetic marker test or to a DNA test when available; that by executing the acknowledgment, the putative father waives his right to a hearing, to which he would otherwise be entitled, on the issue of paternity; that a copy of the acknowledgment of paternity shall be filed with the putative father registry pursuant to section three hundred seventy-two-c of the social services law, and that such filing may establish the child's right to inheritance from the putative father pursuant to clause (B) of subparagraph two of paragraph (a) of section 4-1.2 of the estates, powers and trusts law; that, if such acknowledgment is filed with the registrar of the district in which the birth certificate has been filed, such acknowledgment will establish inheritance rights from the putative father pursuant to clause (A) of subparagraph two of paragraph (a) of section 4-1.2 of the estates, powers and trusts law; that no further judicial or administrative proceedings are required to ratify an unchallenged acknowledgment of paternity provided, however, that both the putative father and the mother of the child have the right to rescind the acknowledgment within the earlier of sixty days from the date of signing the acknowledgment or the date of an administrative or a judicial proceeding (including a proceeding to establish a support order) relating to the child in which either signatory is a party; that the "date of an administrative or a judicial proceeding" shall be the date by which the respondent is required to answer the petition; that after the expiration of sixty days of the execution of the acknowledgment, either signatory may challenge the acknowledgment of paternity in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof on the party

challenging the voluntary acknowledgment; that they may wish to consult with an attorney before executing the acknowledgment; and that they have the right to seek legal representation and supportive services including counseling regarding such acknowledgment; that the acknowledgment of paternity may be the basis for the putative father establishing custody and visitation rights to the child; if the acknowledgment is signed, it may be the basis for requiring the putative father's consent prior to an adoption proceeding; the mother's refusal to sign the acknowledgment shall not be deemed a failure to cooperate in establishing paternity for the child; and the child may bear the last name of either parent, which name shall not affect the legal status of the child. In addition, the governing body of such hospital shall insure that appropriate staff shall provide to the child's mother and putative father, prior to the mother's discharge from the hospital, the opportunity to speak with hospital staff to obtain clarifying information and answers to their questions about paternity establishment, and shall also provide the telephone number of the local support collection unit.

§9. Subparagraph (D) of paragraph 2 of subdivision (g) of section 5241 of the civil practice law and rules, as amended by chapter 214 of the laws of 1998, is amended to read as follows:

(D) In addition to the remedies herein provided and as may be otherwise authorized by law, upon a finding by the [family] court <u>that issued the income deduction order</u> that the employer or income payor failed to deduct or remit deductions as directed in the income execution, the court shall issue to the employer or income payor an order directing compliance and<u>, after giving the employer or income payor notice and an opportunity to be heard,</u> may direct the payment of a civil penalty not to exceed five hundred dollars for the first instance and one thousand dollars per instance for the second and subsequent instances of employer or income payor noncompliance.

§10. Subdivision 1 of section 5252 of the civil practice law and rules, as amended by chapter 214 of the laws of 1998, is amended to read as follows:

1. No employer shall discharge, lay off, refuse to promote, or discipline an employee, or refuse to hire a prospective employee, because one or more wage assignments or income executions have been served upon such employer or a former employer against the employee's or prospective employee's wages or because of the pendency of any action or judgment against such employee or prospective employee for nonpayment of any alleged contractual obligation. In

[addition to being subject to the] a civil action [authorized in] brought pursuant to subdivision two of this section, where any employer discharges, lays off, refuses to promote or disciplines an employee or refuses to hire a prospective employee because of the existence of one or more income executions and/or income deduction orders issued pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of this article, the court may direct the payment of a civil penalty not to exceed five hundred dollars for the first instance and one thousand dollars per instance for the second and subsequent instances of employer or income payor discrimination.

§11. This act shall take effect immediately.

III. Previously Endorsed Measures

1. Provision of appropriate educational and early intervention services to children in foster care (FCA §§756(a), 756-a, 1055(b), 1055-a; SSL §392; Ed. L. §112)

Children in the foster care system too often are caught in a vicious cycle: abuse and neglect frequently trigger disabilities and developmental delays in children while, at the same time, children with disabilities and developmental delays are at greater risk of further abuse, neglect and family disruption. Approximately 50 to 60 percent of infants and toddlers in foster care exhibit developmental delays, a rate that is four to five times the rate in the general population.[15] School-age children in foster care demonstrate poor academic achievement and deficits in behavioral and cognitive development, often exacerbated by frequent disruptions in school placements; they generally function approximately one to two years behind their peers, have poor attendance and are at greater risk of dropping out.[16]

Compounding these difficulties, children in foster care are often less likely than their peers gto receive appropriate evaluations and treatment interventions for these problems. *See*

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[15] J. SILVER, "INTEGRATING ADVANCES IN INFANT RESEARCH WITH CHILD WELFARE PO *CHILDREN'S SERVICES: PROTECTING CHILDREN: CHILDREN BIRTH TO THREE IN FOSTER CARE* 1:12, 14, 15 (2000); J. SILVER, "STARTING YOUNG, IMPROVING CHIL OUTCOMES," IN J. SILVER *ET AL.,,* EDS., *YOUNG CHILDREN AND FOSTER CARE* (1999); "AME ACADEMY OF PEDIATRICS POLICY STATEMENT: DEVELOPMENTAL ISSUES FOR YOUNG CH *PEDIATRICS* 5:1145-1150 (NOV., 2000). *SEE ALSO*, *ENSURING THE HEALTHY DEVELOPMENT OF FOSTER CHILDREN: A GUIDE FOR JUDGES, ADVOCATES AND CHILD WELFARE PROFESSIONALS* (NYS PERM. JUD. COMM. ON JUSTICE FOR CHILDR DICKER AND E. GORDON, "HARNESSING THE HIDDEN INFLUENCE OF THE COURTS TO E DEVELOPMENT OF FOSTER CHILDREN," 16 *CHILDREN'S SERVICES: PROTECTING CHILDRE CHILDREN BIRTH TO THREE IN FOSTER CARE* 1:36,40, 42 (2000); J.S.KAYE, "STRATEGIES ANI NEED FOR SYSTEMS CHANGE: IMPROVING COURT PRACTICE FOR THE MILLENNIUM," 38 *CONCILIATION COURTS REV.* 159 (APR., 2000).

[16] *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); N. TROCME AND C. CAUNCE, "THE EDUCATIONAL NEEDS OF ABUSED AND NEGLECTED CHILDREN: A REVIEW OF THE LITERA *DEVELOPMENT & CARE* 101, 112 (1995); S. KAPLAN, *ET AL.*, "CHILD AND ADOLESCENT ABUSE RESEARCH: A REVIEW OF THE PAST TEN YEARS, PART I: PHYSICAL AND EMOTIONAL ABUSE *AMER.ACAD. OF CHILD & ADOL. PSYCHIATRY* 10:1214, 1216 (OCT., 1999); "AMERICAN ACADE PEDIATRICS POLICY STATEMENT: DEVELOPMENTAL ISSUES FOR YOUNG CHILDREN IN FO *PEDIATRICS* 5:1145-1150 (NOV., 2000); *EDUCATIONAL NEGLECT: THE DELIVERY OF EDUCATIONAL SERVICES TO CHILDREN IN NEW YORK CITY'S FOSTER CARE SYSTEM* 11 (ADVOCATES FOR CHILDREN OF NEW YORK, JULY, 2000); S. DICKER AND E. GOR FOSTER CHILDREN'S RIGHTS TO HEALTH SERVICES," IN *CHILDREN'S LAW INSTITUTE* (PR INST., JULY, 1999).

generally, S. Dicker and E. Gordon, "Safeguarding Foster Children's Rights to Health Services," in *Children's Law Institute* (Practicing Law Inst., July, 1999). A recent study of New York City foster children by Advocates for Children of New York demonstrated significant under-utilization of pre-school and early intervention programs, delays in enrolling children in school programs, frequent changes in school placements, over-utilization of highly restrictive special educational settings and limited pre-college and vocational preparation for older adolescents.[17] The study recommends, *inter alia*, enactment of a law "setting forth specific guidelines for providing educational services to children in foster care..."[18]

Building upon the legislation enacted in 2000 regarding enrollment of juvenile delinquents in school and vocational programs [Laws of 2000, ch. 181] and consistent with the recommendation in the study by Advocates for Children, the Family Court Advisory and Rules Committee is recommending legislation to address these critical, continuing problems. The Family Court's responsibility to promote permanency for children, pursuant to the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7; Laws of 2000, ch. 145], demands no less. Indeed, the federal regulations promulgated to implement *ASFA* focus on the need to achieve successful outcomes for children, assuring their safety and well-being. States' compliance with *ASFA* is to be measured, in part, by the provision to children of "appropriate services to meet their educational needs" and "adequate services to meet their physical and mental health needs." 65 *Fed. Reg.* 16:4078 (Jan. 25, 2000); 45 *C.F.R.* §1355.34(b)(1)(iii). The Committee proposes, therefore, that the permanency hearing provisions of Articles 7 and 10 of the Family Court Act and section 392 of the Social Services Law be amended to incorporate consideration of these important issues into the permanency hearing process.

First, as in the 2000 legislation regarding juvenile delinquents, the proposal requires the agency with which a Person in Need of Supervision 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 and to report to the Family Court and to the parties on such efforts. Where an extension of placement is not being sought, a report would be required 30 days prior to the conclusion of the placement period. Where the agency is requesting an extension of placement and, concomitantly, a permanency hearing, the report would be required to be annexed to the petition, which must be filed 60 days prior to the date on which the permanency hearing must be held. The release plan mandated in the report would be required to delineate the steps that the agency has taken or will be taking to ensure that the juvenile would be enrolled in school promptly after release. For a juvenile not subject to the State's compulsory education law who affirmatively elects not to continue in school, the agency would be required to describe steps taken or planned to promptly ensure the juvenile's gainful employment or enrollment in a vocational program. In the case of an extension of placement/permanency hearing, this release plan would be reviewed by the Court in conjunction with its review of the permanency plan; as is

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[17] *EDUCATIONAL NEGLECT: THE DELIVERY OF EDUCATIONAL SERVICES TO CHILDREN IN NEW YORK CITY'S FOSTER CARE SYSTEM* 2-5, 27, 33- 35, 39-40, 43 (ADVOCATES FOR CHILDREN OF NEW YORK, JULY, 2000)

[18] *Id.* at 5, 53.

the case with the permanency plan, the Court's order pursuant to section 756-a of the Family Court Act would include a determination of the adequacy of the release plan and would specify any necessary modifications. These provisions would help to ameliorate the serious deficiencies in vocational programs and other assistance provided to youth upon release from foster care as identified in the study by Advocates for Children of New York and the serious decline in school attendance by PINS following release that was documented in the study by the Vera Institute of Justice. [19] Moreover, the provisions would promote compliance with the *Adoption and Safe Families Act* in its clear applicability to status offense proceedings.[20]

Second, permanency plans for children in foster care pursuant to a child protective or voluntary foster care proceeding would be required to include information on steps taken and planned by the child protective or authorized agency to ensure the children's prompt enrollment in pre-school and school programs, appropriate evaluations and referrals for early intervention and special educational services and, in the case of older adolescents, assistance in obtaining gainful employment or vocational assistance. In reviewing the permanency plan, which must be attached to the petition and served upon the parties and law guardian, the Family Court would be required to determine whether these steps are adequate or whether the plan must be modified.

These provisions will inure to the benefit of children of all ages in foster care, but their special benefits for the almost 40% of foster children in New York State who are under five years of age cannot be over-emphasized.[21] As recognized by the American Academy of Pediatrics, in its recent policy statement regarding young children in foster care, "Early interventions are key to minimizing the long-term and permanent effects of traumatic events on the child's brain."[22] Pursuant to the federal *Individuals With Disabilities and Education Act*, 20 U.S.C. §§1431-1445 (1997), children up to the age of three who are experiencing or are at risk of experiencing developmental delays are entitled to a broad range of "early intervention" services, administered in New York State by the Department of Health. *See* Public Health Law Art.25, Tit. II-A. Although foster care caseworkers are mandated referral sources for these services, their referral

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[19] *ID*. AT 4, 52; *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).

[20] *SEE GENERALLY*, V. HEMRICH, "APPLYING *ASFA* TO DELINQUENCY AND STATUS OFFE 18 *ABA CHILD LAW PRACTICE* 9:129 (NOV., 1999).

[21] S. DICKER, "THE PROMISE OF EARLY INTERVENTION FOR FOSTER CHILDREN AND TH *INTERDISCIPLINARY REPORT ON AT-RISK CHILDREN AND THEIR FAMILIES* (CIVIC RESEARCH INST., OCT., 1999); *ENSURING THE HEALTHY DEVELOPMENT OF FOSTER CHILDREN: A GUIDE FOR JUDGES, ADVOCATES AND CHILD WELFARE PROFESSIONALS* (NYS PERM. JUD. COMM. ON JUSTICE FOR CHILDREN, 1999).

[22] "AMERICAN ACADEMY OF PEDIATRICS POLICY STATEMENT: DEVELOPMENTAL ISSUES FOSTER CARE," 106 *PEDIATRICS* 5:1145-1150 (NOV., 2000).

rates have been lower than would be expected for the foster care population in New York.[23] Similarly, children between the ages of three and five identified as having a disability are eligible for pre-school special education pursuant to the federal "Pre-school Grants Program," administered in New York State by school districts pursuant to section 4410 of the Education Law. Importantly, all children in New York State, whether or not suspected of any disability or developmental delay, are eligible for pre-kindergarten services pursuant to the recently-enacted "Universal Pre-kindergarten Program" [Education Law §3602-e; Laws of 1997, ch. 436], another program found to have been under-utilized with respect to the foster care population.[24]

Finally, recognizing that cooperation by, and inter-agency collaboration with, school districts will be essential to the implementation of permanency and release plans involving provision of educational services, the proposal would amend section 112 of the Education Law to require the New York State Education Department to promulgate regulations mandating school districts to cooperate in the implementation of these plans. Further, the annual report by the Education Commissioner to the Governor and Legislature, currently mandated by section 112 of the Education Law, would be required to address educational services provided to children in, and released from, foster care, as well as compliance by local school districts with the Department's regulations.

Proposal

AN ACT to amend the family court act, the social services law and the education law, in relation to provision of educational services to children in foster care

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

Section 1. Subdivision (a) of section 756 of the family court act is amended by adding new paragraphs (iii) and (iv) to read as follows:

(iii) The local commissioner of social services or the person with whom the respondent has been placed under this section shall submit a report to the court, law guardian or attorney of record, and presentment agency, if any, not later than thirty days prior to the conclusion of the placement period; provided, however, that where the local commissioner of social services or person with whom the respondent has been placed files a petition for an extension of the

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[23] *EDUCATIONAL NEGLECT: THE DELIVERY OF EDUCATIONAL SERVICES TO CHILDREN IN NEW YORK CITY'S FOSTER CARE SYSTEM* 26-31 (ADVOCATES FOR CHILDREN OF NEW YORK, JULY, 2000).

[24] *Id.* at 33-34.

placement and a permanency hearing pursuant to section seven hundred fifty-six-a of this article, such report shall be submitted not later than sixty days prior to the date on which the permanency hearing must be held and shall be annexed to the petition.

(iv) The report submitted in accordance with paragraph (iii) of this subdivision shall include recommendations and such supporting data as is appropriate, including, but not limited to, a plan for the release of the respondent to the custody of his or her parent or other person legally responsible, to independent living or to another permanency alternative as provided in paragraph (iv) of subdivision (d) of section seven hundred fifty-six-a of this article. The release plan shall provide as follows:

(1) If the respondent is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma following release, such plan shall include, but not be limited to, the steps that the agency with which the respondent is placed has taken and will be taking to ensure the enrollment of the respondent in an appropriate school or educational program leading to a high school diploma immediately upon release or, if such release occurs during the summer recess, immediately upon the commencement of the next school term.

(2) If the agency suspects that the child may have a disability or if the child 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 agency with which the child is placed has taken and will be taking to make any necessary referrals of the child for special educational evaluations or services, as appropriate, and that appropriate evaluations and services are provided in accordance with the applicable law; or

(3) If the respondent is not subject to article sixty-five of the education law and elects not to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the 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 immediately upon release.

§2. Paragraphs (iii) and (iv) of subdivision (d) of section 756-a of the family court act, as amended by chapter 7 of the laws of 1999, are amended and a new paragraph (v) is added to read as follows:

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

(iv) whether and when the child: (A) will be returned to the parent; (B) should be placed for adoption with the social services official filing a petition for termination of parental rights; (C) should be referred for legal guardianship; (D) should be placed permanently with a fit and willing relative; or (E) should be placed in another planned permanent living arrangement if the social services official has documented to the court a compelling reason for determining that it would not be in the best interest of the child 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

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

§3. Paragraphs (iv), (v), (vi) and (vii) of subdivision (b) of section 1055 of the family court act are renumbered to be paragraphs (v), (vi), (vii) and (viii) and a new paragraph (iv) is added to read as follows:

(iv) The child's permanency plan shall be attached to any petition for an extension of placement and permanency hearing filed pursuant to this section. The permanency plan shall include, but not be limited to, up-to-date and accurate information regarding:

(A) whether and when the child will be: (1) returned to the parent, (2) placed for adoption by the social services official with custody and guardianship of the child, (3) referred for legal guardianship, (4) placed permanently with a fit and willing relative, or (5) placed in another planned permanent living arrangement, provided, however, that if the plan is for placement pursuant to paragraph (5), the permanency plan shall include documentation of a compelling reason for determining that it would not be in the best interests of the child to be placed for adoption, placed with a fit and willing relative, or placed with a legal guardian and that reasonable efforts were made to make and finalize such alternate permanent placement;

(B) the reasonable efforts that have been made and will be made to effectuate the plan described in subparagraph (A) of this paragraph, including the services offered, the provider or

providers of such services and any barriers encountered to the delivery of such services; and

(C) the steps that must be taken by the agency with which the child is placed to ensure the prompt delivery of appropriate educational and vocational services to the child, notwithstanding any change in the child's foster care placement or his or her discharge or trial discharge from foster care. The plan shall provide as follows:

(1) If the child 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 child is placed has taken and will be taking to ensure the child's continued enrollment in an appropriate school or educational program leading to a high school diploma immediately upon any change in the child's foster care placement or his or her discharge or trial discharge from foster care or, if such change in foster care placement or discharge or temporary discharge occurs during the summer recess, immediately upon the commencement of the next school term .

(2) If the child is eligible to be enrolled in a pre-kindergarten program pursuant to section three thousand six hundred two-e of the education law, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking to ensure that the child will be enrolled in an appropriate pre-kindergarten program.

(3) If the agency suspects that the child may have a developmental delay or disability or if the child had been found eligible to receive early intervention or special education services prior to or during the foster care placement, in accordance with title II-A of article twenty-five of the public health law or article eighty-nine of the education law, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking to make any necessary referrals of the child for early intervention, pre-school special educational or special educational evaluations or services, as appropriate, and that appropriate evaluations and services are provided in accordance with the applicable law; or

(4) If the child 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 agency with which the child is placed have taken and will be taking to assist the child to become gainfully employed or enrolled in a vocational program immediately upon any change in the child's foster care placement or the child's discharge or trial

discharge from foster care.

§4. Subsubparagraph 3 of subparagraph (A) of paragraph (v) of subdivision (b) of section 1055 of the family court act, such section as amended by chapter 7 of the laws of 1999 and such paragraph as renumbered by section 3 of this act, is amended and a new subparagraph 4 is added to read as follows:

(3) the extent to which such plan has been complied with by the respondent and the supervising agency during the term of the order of placement or extension thereof; and

(4) the steps that must be taken by the agency with which the child is placed to implement the education and vocational program components of the permanency plan submitted pursuant to subparagraph (C) of paragraph (iv) of this subdivision, the adequacy of such plan and any modifications that should be made to such plan.

§5. The opening sentence of subdivision 4 of section 1055-a of the family court act, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

Notice of the permanency hearing, including a statement of the dispositional alternatives of the court, the child's permanency plan and a copy of the petition shall be served upon the following, each of whom shall be a party entitled to participate in the proceeding:

§6. Section 1055-a of the family court act is amended by adding a new subdivision 4-a to read as follows:

4-a. The permanency plan, which shall be attached to the petition, shall include, but not be limited to, up-to-date and accurate information regarding:

(a) whether and when the child will be: (i) placed for adoption by the social services official with custody and guardianship of the child, (ii) referred for legal guardianship, (iii) placed permanently with a fit and willing relative, or (iv) placed in another planned permanent living arrangement, provided, however, that if the plan is for placement pursuant to subparagraph (iv), the permanency plan shall include documentation of a compelling reason for determining that it would not be in the best interests of the child to be placed for adoption, placed with a fit and willing relative, or placed with a legal guardian and that reasonable efforts were made to make and finalize such alternate permanent placement;

(b) the reasonable efforts that have been made and will be made to effectuate the plan

described in paragraph (a) of this subdivision, including the services offered, the provider or providers of such services and any barriers encountered to the delivery of such services; and

(c) the steps that must be taken by the agency with which the child is placed to ensure the prompt delivery of appropriate educational and vocational services to the child, notwithstanding any change in the foster care placement of the child or discharge or trial discharge of the child from foster care. The plan shall provide as follows:

(i) If the child 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 child is placed has taken and will be taking to ensure the child's continued enrollment in an appropriate school or educational program leading to a high school diploma immediately upon any change in the child's foster care placement or his or her discharge or trial discharge from foster care or, if such change in foster care placement or discharge or temporary discharge occurs during the summer recess, immediately upon the commencement of the next school term.

(ii) If the child is eligible to be enrolled in a pre-kindergarten program pursuant to section three thousand six hundred two-e of the education law, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking to ensure that the child will be enrolled in an appropriate pre-kindergarten program.

(iii) If the agency suspects that the child may have a developmental delay or disability or if the child had been found eligible to receive early intervention or special education services prior to or during the foster care placement, in accordance with title II-A of article twenty-five of the public health law or article eighty-nine of the education law, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking to make any necessary referrals of the child for early intervention, pre-school special educational or special educational evaluations or services, as appropriate, and that appropriate evaluations and services are provided in accordance with the applicable law; or

(iv) If the child 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 agency with which the child is placed has taken and will be

taking to assist the child to become gainfully employed or enrolled in a vocational program immediately upon any change in the child's foster care placement or his or her discharge or trial discharge from foster care.

§7. Paragraph (d) of subdivision 6 of section 1055-a of the family court act, as amended by chapter 145 of the laws of 2000, is amended to read as follows:

(d) the steps that must be taken by the agency with which the child is placed to implement the education and vocational program components of the permanency plan submitted pursuant to paragraph (c) of subdivision four-a of this section, the adequacy of such plan and any modifications that should be made to such plan.

(e) any further efforts [which] that have been or will be made to promote the best interests of the child.

§8. Section 392 of the social services law is amended by adding a new subdivision 3-a to read as follows:

3-a. The permanency plan submitted with the petition shall include, but not be limited to, up-to-date and accurate information regarding:

(a) whether and when the child: (1) will be returned to the parent, (2) will be placed for adoption by the social services official with custody and guardianship of the child, (3) will be referred for legal guardianship, (4) will be placed permanently with a fit and willing relative, or (5) will be placed in another planned permanent living arrangement, provided, however, that if the plan is for placement pursuant to subparagraph (5), the permanency plan shall include documentation of a compelling reason for determining that it would not be in the best interests of the child to be placed for adoption, placed with a fit and willing relative, or placed with a legal guardian and that reasonable efforts were made to make and finalize such alternate permanent placement;

(b) the reasonable efforts that have been made and will be made to effectuate the plan described in subparagraph (a) of this subdivision, including the services offered, the provider or providers of such services and any barriers encountered to the delivery of such services; and

(c) the steps that must be taken by the agency with which the child is placed to ensure the prompt delivery of appropriate educational and vocational services to the child, notwithstanding

any change in the foster care placement of the child or discharge or trial discharge of the child from foster care. The plan shall provide as follows:

(1) If the child 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 child is placed has taken and will be taking to ensure the child's continued enrollment in an appropriate school or educational program leading to a high school diploma immediately upon any change in the child's foster care placement or his or her discharge or trial discharge from foster care or, if such change in foster care placement or discharge or temporary discharge occurs during the summer recess, immediately upon the commencement of the next school term.

(2) If the child is eligible to be enrolled in a pre-kindergarten program pursuant to section three thousand six hundred two-e of the education law, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking to ensure that the child will be enrolled in an appropriate pre-kindergarten program.

(3) If the agency suspects that the child may have a developmental delay or disability or if the child had been found eligible to receive early intervention or special education services prior to or during the foster care placement, in accordance with title II-A of article twenty-five of the public health law or article eighty-nine of the education law, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking to make any necessary referrals of the child for early intervention, pre-school special educational or special educational evaluations or services, as appropriate, and that appropriate evaluations and services are provided in accordance with the applicable law; or

(4) If the child 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 agency with which the child is placed has taken and will be taking to assist the child to become gainfully employed or enrolled in a vocational program immediately upon any change in the child's foster care placement or his or her discharge or trial discharge from foster care.

§9. Paragraphs (b) and (c) of subdivision 5-a of section 392 of the social services law,

as amended by chapter 145 of the laws of 2000, are amended to read as follows:

(b) what services have been offered to strengthen and re-unite the family except as provided in [paragraph (d) of this subdivision and] subdivision six-a of this section;

(c) where return home of the child is not likely, what efforts have been or should be made to evaluate or plan for other modes of care [except as provided in paragraph (d) of this subdivision];

(d) the steps that must be taken by the agency with which the child is placed to implement the education and vocational program components of the permanency plan submitted pursuant to paragraph (c) of subdivision three-a of this section, the adequacy of such plan and any modifications that should be made to such plan;

§10. Subdivisions 1 and 2 of section 112 of the education law, as amended by chapter 181 of the laws of 2000, are amended to read as follows:

1. The department shall establish and enforce standards of instruction, personnel qualifications and other requirements for education services or programs, as determined by rules of the regents and regulations of the commissioner, with respect to the individual requirements of children who are in full-time residential care in facilities or homes operated or supervised by any state department or agency or political subdivision. The department shall cooperate with the office of children and family services, the department of mental hygiene and local departments of social services with respect to educational and vocational training programs for children placed with, committed to or under the supervision of such agencies. The department shall promulgate regulations requiring the cooperation of local school districts in facilitating the prompt enrollment of children who are released or conditionally released from residential facilities operated by or under contract with the office of children and family services, the department of mental hygiene and local departments of social services and in implementing plans for release or conditional release submitted to the family court pursuant to paragraph (c) of subdivision seven of section 353.3 and paragraphs (iii) and (iv) of subdivision (a) of section seven hundred fifty-six of the family court act and the educational components of permanency plans submitted pursuant to subparagraph (C) of paragraph (iv) of subdivision (b) of section one thousand fifty-five and paragraph (c) of subdivision 4-a of section one thousand fifty-five-a of the family court act and paragraph (c) of subdivision 3-a of section three hundred ninety-two of the social services law.

Nothing herein contained shall be deemed to apply to responsibility for the provision or payment of care, maintenance or other services subject to the provisions of the executive law, mental hygiene law, social services law or any other law.

2. The commissioner shall prepare a report and submit it to the governor, the speaker of the assembly and the temporary president of the senate by December thirty-first, nineteen hundred ninety-six and on December thirty-first of each successive year. Such report shall contain, for each facility operated by or under contract with the office of children and family services that provides educational programs, an assessment of each facility's compliance with the rules of the board of regents, the regulations of the commissioner, and this chapter. Such report shall include, but not be limited to: the number of youth receiving services under article eighty-nine of this chapter; the office's activities undertaken as required by subdivisions one, two, four and eight of section forty-four hundred three of this chapter; the number of youth receiving bilingual education services; the number of youth eligible to receive limited English proficient services; interviews with facility residents conducted during site visits; library services; the ratio of teachers to students; the curriculum; the length of stay of each youth and the number of hours of instruction provided; instructional technology utilized; the educational services provided following the release and conditional release of the youth, including, but not limited to, the implementation of requirements for the prompt enrollment of such youth in school contained in plans for release and conditional release submitted to the family court pursuant to paragraph (c) of subdivision seven of section 353.3 and paragraphs (iii) and (iv) of subdivision (a) of section seven hundred fifty-six of the family court act and in the education components of permanency plans submitted pursuant to subparagraph (C) of paragraph (iv) of subdivision (b) of section one thousand fifty-five and paragraph (c) of subdivision 4-a of section one thousand fifty-five-a of the family court act and paragraph (c) of subdivision 3-a of section three hundred ninety-two of the social services law, and the compliance by local school districts with the regulations promulgated pursuant to subdivision one of this section; and any recommendations to ensure compliance with the rules of regents, regulations of the commissioner, and this chapter.

§11. This act shall take effect on the ninetieth day after it shall have become a law. provided, however, that the office of children and family services and the education department shall promulgate necessary regulations to implement this act immediately.

2. Requirements for expeditious permanency planning with respect to children in foster care (FCA §§1017, 1055; S.S.L §§383-c, 384, 384-a, 392)

Few steps taken by child care and child protective agencies are as effective in reducing the time spent by a child in foster care as those taken immediately at the point of a child's entry into care. Efforts should be made promptly to locate the child's non-custodial parent, if any, not simply as a potential custodial resource, but also in order to ascertain any addresses that will be necessary for provision of notice of termination of parental rights proceedings in the event that preservation of the family unit proves not to be feasible. Vital assistance in this regard may be given by the custodial parent during the course of an agency's continuing casework contact and, importantly, at the point of execution of a voluntary placement or surrender instrument. Even while assisting the custodial parent in alleviating the problem precipitating the placement, an agency should be acting with dispatch to actualize a permanency plan for the child should reunification not be feasible.

Recognizing the importance of early, comprehensive investigation to the swift movement of children out of foster care, the federal *Adoption and Safe Families Act of 1997* contains an express authorization for agencies to engage in efforts to place a child in a potentially permanent placement simultaneously with efforts to reunify the family. *See* Public Law 105-89, §101; 42 U.S.C.A.§671(a)(15)(F). As recognized by the federal Department of Health and Human Services, taking immediate steps to identify and locate non-custodial parents and relatives meets the goals both of maximizing efforts to work with a child's family and preparing the case for termination of parental rights and adoption, where reunification proves inappropriate.[25] The Family Court Advisory and Rules Committee is thus proposing legislation that would obligate local departments of social services and, as applicable, authorized child care agencies, to gather information necessary for the formulation and effectuation of permanent plans promptly when a child enters care and on an ongoing basis thereafter.

First, the proposal would amend section 1017 of the Family Court Act to require child protective agencies, in abuse and neglect cases involving children removed from their homes, to conduct immediate investigations to locate suitable non-custodial parents, not simply relatives, with whom the children may reside. Even if not resulting in potential custodial resources, such investigations would be recorded in each child's "Uniform Case Record," thus providing vital information in the event that termination of parental rights proceedings are subsequently brought.

Second, the proposal would amend section 1055 of the Family Court Act to require that identifying information obtained in the course of a diligent search for parents of abandoned children be recorded in the "Uniform Case Record," thus preserving it for later use in termination of parental rights proceedings. The provision would be amended as well to clarify that, in

[25] *See Adoption 2002: The President's Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children* (U.S. Dept. of Health and Human Services, June, 1999), pages IV-10 - IV-11.

accordance with the federal *Adoption and Safe Families Act*, initial placements and extensions thereof must be measured from the date of a child's entry into care. Any period of adjournment of an extension of placement (permanency) hearing, therefore, would be included within the period of placement up to one year. *See* Public Law 105-89, §103(b); 42 U.S.C.A. §675(a)(F).

Finally, the proposal would amend sections 383-c, 384 and 384-a of the Social Services Law to require agency officials to obtain information from a parent executing a voluntary placement or surrender instrument regarding the child's other parent, as well as any person to whom the parent placing or surrendering the child had been married at the time of conception or birth of the child and any other person who would be entitled to notice of a proceeding to terminate parental rights. While the absence of such information would not invalidate the instrument, the establishment of a duty of inquiry at those stages would be likely to elicit information vital to the timely implementation of a permanency plan for a child. A similar, continuing duty of inquiry on the part of agency officials would apply throughout the period of a voluntary placement pursuant to a new subdivision (8-a) that would be added to section 392 of the Social Services Law. Once again, the information would be recorded in the child's "Uniform Case Record" and would be available for use in any subsequent termination of parental rights proceeding.

The "Special Expedited Permanency Part" in Family Court, New York County, which was designated as a "model court" by the National Council of Juvenile and Family Court Judges, has demonstrated that:

> The early identification and involvement of non-respondent parents have proven to be an important key in preventing foster care placement. Even if the non-respondent parent is unable to take custody of his or her child for a reason such as incarceration, for example, that parent nevertheless may have extended family members who can come forward to care for the child.[26]

Enactment of this measure would institutionalize these practices statewide to the benefit of children and families and would greatly enhance New York's efforts to comply with the expedited permanency time-frames of the *Adoption and Safe Families Act.*

Proposal

AN ACT to amend the family court act and the social services law, in relation to facilitating permanency planning for children in foster care

[26] Schechter, "Family Court Case Conferencing and Post-dispositional Tracking: Tools for Achieving Justice for Parents in the Child Welfare System," 70 *Ford. L.Rev.* 427, 431 (Nov., 2001).

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

Section 1. Subdivisions 1 and 2 of section 1017 of the family court act, as added by chapter 744 of the laws of 1989, are amended to read as follows:

1. In any proceeding under this article, when the court determines that a child must be removed from his or her home, pursuant to part two of this article, or placed, pursuant to section [ten hundred] one thousand fifty-five of this article, the court shall direct the local commissioner of social services to conduct an immediate investigation to locate any non-respondent parent of the child and any relatives of the child and inform them of the pendency of the proceeding and of the procedures, in the case of non-respondent parents, for [becoming foster parents or for] seeking custody or care of the child[, and] or, in the case of other relatives, for becoming foster parents of the child or for seeking custody or care of the child. The local commissioner of social services shall record the results of such investigation, including, but not limited to, the name, last-known address, social security number, employer's address and any other identifying information to the extent known regarding any non-respondent parent, in the uniform case record maintained pursuant to section four hundred nine-f of the social services law. For purposes of this section, "non-respondent parent" shall include a person entitled to notice of pendency of the proceeding and of the right to intervene as an interested party pursuant to subdivision (d) of section one thousand thirty-five of this article, and a noncustodial parent entitled to notice and the right to enforce visitation rights pursuant to subdivision (e) of section one thousand thirty-five of this article. The court shall determine:

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

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

2. The court shall, upon receipt of the report of the investigation ordered pursuant to subdivision one of this section:

(a) where the court determines that the child may reside with a suitable non-respondent

parent or other person related to such child[, either]:

(i) award temporary or permanent custody, as applicable, to such non-respondent parent or other person related to such child and conduct such other and further investigations as the court deems necessary;

(ii) remand or place the child, as applicable, with [such relative] a suitable person related to the child, other than a non-respondent parent, and conduct such other and further investigations as the court deems necessary; or

[(ii)](iii) remand or place the child, as applicable, with the commissioner of social services and direct such commissioner to have the child reside with [such relative] a suitable person related to the child, other than a non-respondent parent, and further direct such commissioner pursuant to regulations of the [department] office of [social] children and family services, to perform an investigation of the home of such relative within twenty-four hours and thereafter approve such relative, if qualified, as a foster parent. If such home is found to be unqualified for approval, the local commissioner shall report such fact to the court forthwith.

(b) where the court determines that a suitable non-respondent parent or other person related to the child cannot be located, remand or place the child with a suitable person, pursuant to subdivision (b) of section [ten hundred] one thousand twenty-seven or subdivision (a) of section [ten hundred] one thousand fifty-five of this article, or remand or place the child in the custody of the local commissioner of social services pursuant to subdivision (b) of section [ten hundred] one thousand twenty-seven or subdivision (a) of section [ten hundred] one thousand fifty-five of this article. The court in its discretion may direct that such commissioner have the child reside in a specific certified foster home where the court determines that such placement is in furtherance of the child's best interests.

§2. Paragraphs (i) and (v) and subparagraph (A) of paragraph (vii) of subdivision (b) of section 1055 of the family court act, paragraph (i) as amended by chapter 7 of the laws of 1999, paragraph (v) as added by chapter 117 of the laws of 1982 and as renumbered by chapter 538 of the laws of 1992, subparagraph (A) of paragraph (vii) as added by chapter 605 of the laws of 1990 and such paragraph as renumbered by chapter 538 of the laws of 1992, are amended to read as follows:

(i) Placements under this section may be for an initial period of up to one year from the

date of the child's entry into foster care and the court in its discretion may make successive extensions for additional periods of up to one year [each] from the expiration date of such placement or extension thereof. A petition to extend a placement accompanied by supporting affidavits or reports shall be filed at least sixty days prior to the expiration of the period of placement, except for good cause shown. For the purposes of calculating the initial period of placement, such placement shall be deemed to have commenced the earlier of the date of the fact finding of abuse or neglect of the child pursuant to section one thousand fifty-one of this article or sixty days after the date the child was removed from his or her home in accordance with the provisions of this article. Periodic court review of the status of a child who was originally placed pursuant to this section and subsequently freed for adoption will be governed by section one thousand fifty-five-a of this article.

* * *

(v) Pending final determination of a petition to extend such placement filed in accordance with the provisions of this section, the court, for good cause shown, may enter a temporary order extending the placement for a period not to exceed thirty days; provided, however, that the period of such temporary order shall be included in the one year extension of placement period pursuant to paragraph (i) of this subdivision. Such temporary order may be renewed upon good cause shown.

* * *

(vii)(A) Upon placing a child under the age of one, who has been abandoned by either of his or her parents, with a local commissioner of social services, the court shall, where either of the parents do not appear after due notice, include in its order of disposition pursuant to section [ten hundred] one thousand fifty-two of this article, a direction that such commissioner shall promptly commence a diligent search to locate the child's non-appearing parent or parents or other known relatives who are legally responsible for the child, and to commence a proceeding to commit the guardianship and custody of such child to an authorized agency pursuant to section three hundred eighty-four-b of the social services law, six months from the date that care and custody of the child was transferred to the commissioner, unless there has been communication and visitation between such child and [his] such parent or parents or other known relatives or persons legally responsible for the child. In addition to such diligent search, the local

commissioner of social services shall provide written notice to the child's parent or parents or other known relatives as provided for in this paragraph. Such notice shall be served upon such parent or parents or other known relatives in the manner required for service of process pursuant to section six hundred seventeen of this [chapter] act. Information regarding such diligent search, including, but not limited to, the name, last known address, social security number, employer's address and any other identifying information to the extent known regarding the non-appearing parent, shall be recorded in the uniform case record maintained pursuant to section four hundred nine-f of the social services law.

§3. Paragraphs (e) and (f) of subdivision 5 of section 383-c of the social services law are relettered paragraphs (f) and (g) and a new paragraph (e) is added to read as follows:

(e) Upon execution of a surrender instrument, the parent executing the surrender shall provide information to the extent known regarding the other parent, any person to whom the surrendering parent had been married at the time of the conception or birth of the child and any other person who would be entitled to notice of a proceeding to terminate parental rights pursuant to section three hundred eighty-four-c of this article. Such information shall include, but not be limited to, such parent's or person's name, last-known address, social security number, employer's address and any other identifying information. Any information provided pursuant to this paragraph shall be recorded in the uniform case record maintained pursuant to section four hundred nine-f of the social services law; provided, however, that the failure to provide such information shall not invalidate the surrender.

§4. Section 384 of the social services law is amended by adding a new subdivision 7 to read as follows:

7. Upon execution of a surrender instrument, the parent executing the surrender shall provide information to the extent known regarding the other parent, any person to whom the surrendering parent had been married at the time of the conception or birth of the child and any other person who would be entitled to notice of a proceeding to terminate parental rights pursuant to section three hundred eighty-four-c of this article. Such information shall include, but not be limited to, such parent's or person's name, last-known address, social security number, employer's address and any other identifying information. Any information provided pursuant to this subdivision shall be recorded in the uniform case record maintained pursuant to section four

hundred nine-f of the social services law; provided, however, that the failure to provide such information shall not invalidate the surrender.

§5. Section 384-a of the social services law is amended by adding a new subdivision 1-b to read as follows:

1-b. Upon accepting the transfer of care and custody of a child from the parent, guardian or other person to whom care of the child has been entrusted, a local social services official shall obtain information to the extent known from such person regarding the other parent, any person to whom the parent transferring care and custody had been married at the time of the conception or birth of the child and any other person who would be entitled to notice of a proceeding to terminate parental rights pursuant to section three hundred eighty-four-c of this article. Such information shall include, but not be limited to, name, last-known address, social security number, employer's address and any other identifying information. Any information provided pursuant to this subdivision shall be recorded in the uniform case record maintained pursuant to section four hundred nine-f of this chapter; provided, however, that the failure to provide such information shall not invalidate the transfer of care and custody.

§6. Section 392 of the social services law is amended by adding a new subdivision 8-a to read as follows:

8-a. During the period of placement pursuant to this section, a local social services official shall have a continuing duty to obtain information to the extent known from the parent or other individual who placed the child or through further investigation regarding the other parent, any person to whom the parent who placed the child had been married at the time of the conception or birth of the child and any other person who would be entitled to notice of a proceeding to terminate parental rights pursuant to section three hundred eighty-four-c of this chapter. Such information shall include, but not be limited to, name, last-known address, social security number, employer's address and any other identifying information. Any information provided pursuant to this subdivision shall be recorded in the uniform case record maintained pursuant to section four hundred nine-f of this chapter; provided, however, that the failure of the parent or other individual who placed the child to provide such information shall not invalidate the placement.

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

3. Requirements for reports of changes in foster care placements in child protective and voluntary foster care proceedings (FCA §§1055, 1055-a; SSL §§358-a, 392)

Reflecting a pronounced legislative trend at both federal and state levels, the ongoing oversight responsibility of the Family Court with respect to children in foster care has increased sharply in the past few years, culminating most recently in the passage of the federal *Adoption and Safe Families Act of 1997* [Public Law 105-89] and its state implementing legislation [Laws of 1999, ch. 7]. In few areas of the Court's functioning is its continuing jurisdiction as critical as in child welfare, where complex decisions regarding children must be adjusted to the dynamic of their constantly changing needs and circumstances. Prompt receipt by the Court, the parties and law guardians of information regarding these ever-changing circumstances is vital to the effective exercise of that continuing jurisdiction.

Recognizing that "time is of the essence" where children are concerned, the Family Court Advisory and Rules Committee is proposing legislation to assure that the Family Court, the parties and law guardians are informed promptly of any changes in placement that may warrant Court intervention. The proposal would amend sections 1055 and 1055-a of the Family Court Act , as well as sections 358-a and 392 of the Social Services Law, to require an agency with whom a child has been placed, either voluntarily or as a result of an abuse or neglect finding, or to whom guardianship and custody has been transferred as a result of the child being freed for adoption, to report to the Court, the parties and the law guardian within 30 days of any change in the child's placement status. Such changes would include, but not be limited to, cases in which the child has been moved from the foster or pre-adoptive home or program into which he or she has been placed, cases in which the foster or pre-adoptive parents move out of state with the child or, with respect to children not freed for adoption, cases in which a trial or final discharge of the child from foster care has been made. The report must provide enough information for the litigants and the Court to assess whether further Court intervention may be indicated; it must state the reasons for the change, as well as the grounds for the agency's conclusion that the change is in the best interests of the child. Acknowledging that this after-the-fact reporting may, in fact, be less than what may be called for in particular cases, the proposal includes a caveat that it is not intended to limit the authority of the Family Court to condition changes in placement, including trial and final discharges, upon <u>prior</u> notice to the Court, the parties and law guardian.[27]

While the *Adoption and Safe Families Act* increases the frequency of judicial reviews of children in foster care to 12 months, and, with respect to children freed for adoption, six months, delays of that magnitude in reporting significant changes in status of the children may seriously impede the ability of the Court and of the litigants to respond effectively and may, in some cases,

[27] Indeed, in a recent Family Court case, children who had already experienced the trauma of frequent moves were transferred by an agency into another home, notwithstanding both a prior stipulation agreement by the agency not to move the children without a prior court order and a specific denial by the Court of the agency's application for permission to move the children prior to the return date of its Order to Show Cause requesting authorization for the transfer. Unfortunately for the children involved, this case was by no means unique.

cause harm to the children involved. This proposal will facilitate timely, informed responses to changes in children's placements, prompting more expeditious and effective resolution of children's cases.

Proposal

AN ACT to amend the family court act and the social services law, in relation to reports of changes of placement in child protective and voluntary foster care placement and review proceedings

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

Section 1. The last unlettered paragraph of paragraph (vi) of subdivision (b) of section 1055 of the family court act, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

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 law guardian on the implementation of such order. Where the order of disposition is issued upon the consent of the parties and the child's law guardian, such agency shall report to the court, the parties and the child's law guardian 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. A report of any change in placement shall be required within thirty days of such change in any case in which the child is moved from the foster home or program into which he or she has been placed or in which the foster parents move out of state with the child. Each report shall state the reasons for such change, as well as the grounds for the agency's conclusion that such change is in the best interests of the child. Nothing in this section shall limit the authority of the court to order that no change in placement may be made, except in an emergency posing an imminent risk to the child, without prior notice to the court, the parties and the child's law guardian.

§2. Section 1055-a of the family court act is amended by adding a new subdivision 13 to read as follows:

13. In any order issued pursuant to this section, the court may require the social services official or authorized agency charged with guardianship and custody of the child to make progress reports to the court, the parties and the child's law guardian on the implementation of such order. A report of any change in placement shall be required within thirty days of such change in any case in which the child is moved from the foster home or program into which he or she has been placed or in which the foster parents move out of state with the child. Each report shall state the reasons for such change, as well as the grounds for the agency's conclusion that such change is in the best interests of the child. Nothing in this section shall limit the authority of the court to order that no change in placement may be made, except in an emergency posing an imminent risk to the child, without prior notice to the court, the parties and the child's law guardian.

§3. Subdivision 3 of section 358-a of the social services law is amended by adding a new paragraph (f) to read as follows:

(f) In any order issued pursuant to this section, the court may require the social services official or authorized agency charged with custody of the child to make progress reports to the court, the parties and the child's law guardian on the implementation of such order. A report of any change in placement shall be required within thirty days of such change in any case in which the child is moved from the foster home or program into which he or she has been placed or in which the foster parents move out of state with the child. Each report shall state the reasons for such change, as well as the grounds for the agency's conclusion that such change is in the best interests of the child. Nothing in this section shall limit the authority of the court to order that no change in placement may be made, except in an emergency posing an imminent risk to the child, without prior notice to the court, the parties and the child's law guardian.

§4. Section 392 of the social services law is amended by adding a new subdivision 10 to read as follows:

10. In any order issued pursuant to this section, the court may require the social services official or authorized agency charged with temporary custody or guardianship and custody of the child to make progress reports to the court, the parties and the child's law guardian on the implementation of such order. A report of any change in placement shall be required within thirty days of such change in any case in which the child is moved from the foster home or program into

which he or she has been placed or in which the foster parents move out of state with the child. Each report shall be made in any case in which the child is moved from the foster or prospective adoptive home or foster care program into which he or she has been placed or in which the foster or prospective adoptive parent or parents move out of state with the child. Nothing in this section shall limit the authority of the court to order that no change in placement may be made, except in an emergency posing an imminent risk to the child, without prior notice to the court, the parties and the child's law guardian.

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

4. Procedures and remedies for violations of orders of protection in Family Court and matrimonial proceedings (FCA §§446, 551, 656, 846-a; DRL §§240, 252)

The *Family Protection and Domestic Violence Intervention Act* of 1994 was accompanied by a legislative finding that "[t]he victims of family offenses must be entitled to the fullest protections of the civil and criminal laws." Laws of 1994, ch. 222, §1. To that end, concurrent civil and criminal jurisdiction was provided both for initial issuance and for enforcement of orders of protection. In addition to enhancing criminal penalties for violations of orders of protection, subsequent amendments strengthened civil enforcement remedies, both in Family and Supreme Courts. *See, e.g.,* Laws of 1996, ch. 644; Laws of 1999, ch. 606, 635. However, fragmentation and gaps in the civil enforcement provisions of both the Family Court Act and Domestic Relations Law impede fulfillment of the promise of the 1994 legislation.

The Family Court Advisory and Rules Committee has developed a legislative proposal designed to provide a clear road map for civil enforcement of orders of protection in Family and Supreme Courts. The proposal clarifies that the violation procedures and consequences contained in Article 8 of the Family Court Act apply to all orders of protection and temporary orders of protection issued in family offense, child support, paternity, child custody, visitation, divorce and other matrimonial proceedings.

First, sections 446, 551 and 656 of the Family Court Act would be amended to incorporate by reference:

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

• the remedies contained in Family Court Act §846-a that are available to the Family Court once a wilful violation has been found;[28] and

• the options contained in Family Court Act §847 for a victim of an alleged act constituting a family offense to seek the filing of an accusatory instrument in a criminal court,[29] as well as to file a new family offense petition or a violation petition.

Second, section 846-a of the Family Court Act would be amended to more clearly

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[28] IN CHILD SUPPORT AND PATERNITY CASES, THESE REMEDIES WOULD BE AVAILABLE ALREADY PROVIDED FOR VIOLATIONS OF CHILD SUPPORT ORDERS PURSUANT TO ARTIC COURT ACT.

[29] THIS OPTION IS, OF COURSE, CIRCUMSCRIBED BY CONSIDERATIONS OF PROSECUT THE ELEMENTS OF THE CRIME ALLEGED ARE IDENTICAL TO THOSE ALLEGED IN A FAMILY CONSTITUTIONAL DOUBLE JEOPARDY PRINCIPLES. *SEE* UNITED STATES V. DIXON, 509 U.S N.Y.2D 509 (2000); PEOPLE V ARNOLD, 174 MISC.2D 585 (SUP. CT., KINGS CO., 1997). PURSUA OF 1999, A COMPLAINANT'S ELECTION TO PROCEED IN FAMILY COURT DOES NOT DIVES JURISDICTION TO PROCEED.

delineate the powers of the Family Court to impose sanctions upon a finding of a wilful violation of an order of protection or temporary order of protection and to modify or issue a new order of protection or temporary order of protection. The Court's authority to place a violator on probation and to require, as a condition of probation, *inter alia*, that the violator participate and pay the costs of a batterer's education program would be articulated – a recommendation consistent with the recent report issued by the New York State Office for the Prevention of Domestic Violence and Division of Criminal Justice Services regarding the 1994 legislation.[30] Where a violator is already on probation, the Court would be authorized to revoke or modify the order of probation. Additionally, the Court's power to compel payment of legal fees and costs, law guardian fees and costs, restitution and medical expenses would be clarified, as would the Court's authority to suspend an order of visitation or require that visitation be supervised. Consolidating several scattered provisions, the proposal would also enumerate the options available to the Court to commit the violator to jail for up to six months,[31] revoke or suspend a firearms license and direct the surrender of firearms.

Finally, similar enforcement remedies would be clearly enumerated in sections 240(3-d) and 252(10) of the Domestic Relations Law. While recent legislation regarding matrimonial orders of protection [Laws of 1999, ch. 606] included references to restitution, firearms license suspension and revocation, and firearms surrender, it did not clearly spell out the additional options available to the Supreme Court upon a finding of a wilful violation: probation, imposition of legal and medical fees and costs, suspension of visitation or direction that visitation be supervised and commitment to jail.

With increased issuance of temporary and permanent orders of protection resulting from the 1999 legislation, it would be helpful for the Domestic Relations Law to delineate specific sanctions available to Supreme Court for violations. Section 7(b) of Article 6 of the New York State Constitution accords to the Supreme Court the powers of the Family Court, thereby conferring authority upon the Supreme Court to apply the provisions in Article 8 of the Family Court Act in matrimonial proceedings. However, the explicit articulation in the Domestic Relations Law of the full range of powers of the Supreme Court with respect to violations of orders of protection and temporary orders of protection would add needed clarity to the statutory framework and would facilitate a more effective response to domestic violence incidents occurring in the context of matrimonial proceedings.

Proposal

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[30] *FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1994: EVALUATION OF THE MANDATORY ARREST PROVISIONS: THIRD INTERIM REPORT TO THE GOVERNOR AND THE LEGISLATURE* (OCT., 2000), PP. 14, 30.

[31] CONSECUTIVE TERMS MAY BE IMPOSED FOR EACH VIOLATION INCIDENT. WALKER V

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

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

Section 1. Section 446 of the family court act is amended by adding a final unnumbered paragraph to read as follows:

A violation of an order of protection issued pursuant to this section shall be dealt with in accordance with part five of this article or sections eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act.

§2. Section 551 of the family court act is amended by adding a final unnumbered paragraph to read as follows:

A violation of an order of protection issued pursuant to this section shall be dealt with in accordance with part five of article four or sections eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act.

§3. Section 656 of the family court act is amended by adding a final unnumbered paragraph to read as follows:

A violation of an order of protection issued pursuant to this section shall be dealt with in accordance with sections eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act.

§4. Section 846-a of the family court act, as amended by chapter 597 of the laws of 1998, is amended to read as follows:

§846-a. Powers on failure to obey order. If a respondent is brought before the court for failure to obey any lawful order issued under this [article] act, or an order of protection or temporary order of protection issued under the domestic relations law or by a court of competent jurisdiction of another state, territorial or tribal jurisdiction in a proceeding, and if, after hearing, the court is satisfied by competent proof that the respondent has wilfully failed to obey [any] such order, the court may do one or more of the following:

1. modify an existing order or temporary order of protection to add reasonable conditions of behavior to the existing order [of protection,] or temporary order or make a new order of

protection or temporary order of protection in accordance with section eight hundred twenty-eight or eight hundred forty-two of this article, [may 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] as applicable;

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

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

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

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

6. order the respondent to provide, either directly or by means of medical and health insurance, for expenses incurred for medical care and treatment arising from the incident or incidents forming the basis for the issuance of the order or its violation;

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

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

the respondent for the remainder of the original sentence, or suspend the remainder of such sentence[. If]; and

9. revoke or, in the case of a violation of a temporary order of protection, suspend any license of the respondent to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law immediately, and arrange for the immediate surrender and disposal of any firearm such respondent owns or possesses, if the court determines that the willful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, stalking, 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 and disposal of any firearm such respondent owns or possesses]. If the willful failure to obey such order involves the infliction of serious physical injury as defined in subdivision ten 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 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.

§5. The last two unnumbered paragraphs of subdivision 3 of section 240 of the domestic relations law, as added by chapter 606 of the laws of 1999, are amended and a new subdivision 3-d is added to such section to read as follows:

f. Any party moving for a temporary order of protection pursuant to this subdivision during hours when the court is open shall be entitled to file such motion or pleading containing such prayer for emergency relief on the same day that such person first appears at such court, and a hearing on the motion or portion of the pleading requesting such emergency relief shall be held on the same day or the next day that the court is in session following the filing of such motion or pleading.

g. Upon issuance of an order of protection or temporary order of protection [or upon a violation of such order], the court may make an order in accordance with section eight hundred forty-two-a of the family court act directing the surrender of firearms, revoking or suspending a party's firearms license, and/or directing that such party be ineligible to receive a firearms license. Upon issuance of an order of protection pursuant to this section [or upon a finding of a violation

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

* * *

3-d. If a party is brought before the court for failure to obey an order of protection or temporary order of protection issued by the court or by a court of competent jurisdiction of another state, territorial or tribal jurisdiction in a proceeding and if, after hearing, the court is satisfied by competent proof that such party has wilfully failed to obey such order, the court may do one or more of the following:

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

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

c. if the party found to have violated the order of protection or temporary order of protection is already on probation pursuant to such section, revoke such order of probation or modify the conditions of such probation, provided, however, that pending the determination of a violation of probation, the period of probation shall be tolled as of the date of filing of the

violation petition or motion;

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

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

f. order the party found to have violated the order of protection or temporary order of protection to provide, either directly or by means of medical and health insurance, for expenses incurred for medical care and treatment arising from the incident or incidents forming the basis for the issuance of the order or its violation;

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

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

i. in accordance with paragraph g of subdivision three of this section and section eight hundred forty-six-a of the family court act, immediately revoke or, in the case of a violation of a temporary order of protection, suspend any license to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law of the party found to have violated the order, and arrange for the immediate surrender and disposal of any firearm such party owns or possesses, if the court determines that the wilful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, stalking, assault or attempted assault. If the wilful failure to obey such order involves the infliction of serious physical injury as defined in subdivision ten 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 and disposal of any firearm owned or possessed by such party shall be mandatory, pursuant to subdivision eleven of section 400.00 of the penal law.

§6. Subdivision 9 of section 252 of the domestic relations law, as added by chapter 606 of the laws of 1999, is amended and a new subdivision 10 is added to such section to read as follows:

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

10. If a party is brought before the court for failure to obey an order of protection or temporary order of protection issued by the court or by a court of competent jurisdiction of another state, territorial or tribal jurisdiction in a proceeding and if, after hearing, the court is satisfied by competent proof that such party has wilfully failed to obey any such order, the court may do one or more of the following:

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

b. place the party found to have violated the order of protection or temporary order of protection on probation in accordance with subdivision (c) of section eight hundred forty-one of the family court act upon such conditions as the court shall direct, which may include, but not be limited to, a direction that the party found to have violated the order of protection or temporary order of protection participate in a batterer's education program designed to help end violent behavior, which may include referral to

drug and alcohol counseling, and to pay the costs thereof if the party has the means to do so; provided, however, that nothing in this subdivision shall be deemed to require payment of the costs of any such program by any other party, the state or any political subdivision thereof;

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

d. order the party found to have violated the order of protection or temporary order of protection to pay restitution in accordance with subdivision nine of this section or, if such party has already been so ordered and has wilfully violated such order, modify such order;

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

f. order the party found to have violated the order of protection or temporary order of protection to provide, either directly or by means of medical and health insurance, for expenses incurred for medical care and treatment arising from the incident or incidents forming the basis for the issuance of the order or its violation;

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

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

i. in accordance with subdivision nine of this section and section eight hundred forty-six-a of the family court act, immediately revoke , or in the case of a violation of a temporary order of protection, suspend any license to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law of the party found to have violated the order, and arrange for the immediate surrender and disposal of any firearm such party owns or possesses, if the court determines that the wilful failure to

obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, stalking, assault or attempted assault. If the wilful failure to obey such order involves the infliction of serious physical injury as defined in subdivision ten 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 and disposal of any firearm owned or possessed by such party shall be mandatory, pursuant to subdivision eleven of section 400.00 of the penal law.

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

5. Pretrial detention, dispositional alternatives and procedures for acceptance of admissions and violations of orders of probation and suspended judgment in persons in need of supervision proceedings (FCA §§739, 743, 754, 757, 776, 779, 779-a)

The increase in the maximum age of jurisdiction for persons in need of supervision (PINS) proceedings and the recently-enacted restrictions upon detention and placement of PINS over the age of 16 sharply focused attention upon the critical need to examine and modernize the statutory structure governing these proceedings. *See* Laws of 2000, ch. 596; Laws of 2001, ch. 383. The major recodification effort undertaken by the Temporary State Commission on Child Welfare that resulted in the enactment of a separate juvenile delinquency article (Article 3) in the Family Court Act in 1982 [Laws of 1982, chs. 920, 926] left the legislative framework governing PINS proceedings virtually unchanged since its original enactment as part of the Family Court Act of 1962. The sole amendments to the PINS statute (Article 7 of the Family Court Act) were those repealing juvenile delinquency provisions. Thus, significant case law affecting PINS proceedings has not been codified; nor has the Legislature clarified which, if any, of the procedural changes incorporated into Article 3 with respect to juvenile delinquents should apply in PINS cases. The Family Court Advisory and Rules Committee proposes that four provisions of Article 7 of the Family Court Act be amended to address these matters.

First, the Committee proposes that section 739 of the Family Court Act be amended to require consideration of alternatives to detention and to incorporate the provision, analogous to section 320.5(2) of the Family Court Act, authorizing release of the respondent juvenile upon appropriate terms and conditions. Incorporation of a mandate for the Family Court to consider whether there are alternatives to the use of detention adds a measure of precision to the furtherance of the same goal – "avoid[ance of] unnecessary and expensive institutional placements in foster care or detention" – as in the recently-enacted requirement for the Family Court to find "special circumstances" prior to imposition of pre-dispositional detention or foster care. *See* Memorandum in Support of Governor's Program Bill #94; Family Court Act §720(5)[Laws of 2001, ch. 383, Part V, §2].

Second, the Committee's measure would amend section 754 of the Family Court Act to add a provision, adapted from section 352.2(2)(a) of the Family Court Act, to require that any disposition ordered be the "least restrictive available alternative" consistent with the respondent juvenile's needs and best interests. This mandate is consistent both with the goal of reducing the use of non-cost-effective placements and with long-standing case law regarding PINS. *See*, e.g., Matter of Theresa C., 222 A.D.2d 1107 (4th Dept., 1995); Matter of Sandra XX, 169 A.D.2d 992 (3rd Dept., 1991); Matter of John H., 48 A.D.2d 879 (2nd Dept., 1975). Closely related to this principle, the proposal authorizes the Family Court to place any adjudicated person in need of supervision, who would otherwise be placed, into an intensive probation supervision program for all or part of the period of probation. The New York State Division of Probation and Correctional Alternatives would be directed to promulgate regulations regarding local probation department operation of such programs, addressing such issues as: maximum probation officer caseloads; special training requirements for intensive supervision probation officers; nature and frequency of the probation contacts with the juveniles, schools and other agencies; and the level and type of supervision, treatment and other program components. Intensive supervision is a critically-needed dispositional alternative, particularly in light of removal of placement in facilities operated by the New York State Office of Children and Family Services as a permissible alternative.

See Laws of 1996, ch. 309. While some State funding has been appropriated for intensive supervision programs for juvenile delinquents since 1994, no such reimbursement was made available in persons in need of supervision cases, despite the obvious cost-effectiveness of such alternatives to far more expensive placements.

Each of these provisions is consistent with the conclusions reached by the Vera Institute of Justice in the recent study, entitled *Changing the PINS System in New York: A Study of the Implications of Raising the Age Limit for Persons in Need of Supervision (PINS)* (Vera Inst., Sept., 2001), that was commissioned by the New York State Office of Children and Family Services. That study characterized detention and placement as the "most expensive" and "least satisfying" pre-dispositional and dispositional options for the juveniles, their families and the system as a whole – options that have not been demonstrated to improve either the truancy or absconding problems that form the gravamen of most PINS petitions and that have drained resources away from more promising solutions. *Id*., at p. 34, 38.

Third, the Committee's proposal adds a new section 743 to the Family Court Act, establishing a judicial allocution procedure for accepting admissions in PINS cases analogous to the allocution required in juvenile delinquency cases [Family Court Act §321.3]. The Committee's proposal requires the Family Court, before accepting an admission in a PINS case, to ascertain that the juvenile respondent committed the act or acts to which an admission is being entered, is voluntarily waiving his or her right to a hearing and is aware of the dispositional alternatives that may be ordered as a result of the adjudication that is the likely consequence of the admission. Additionally, the measure affords discretion to Family Court judges to utilize the guardian *ad litem* provisions of Article 12 of the Civil Practice Law and Rules – discretion that may be necessary where the initiation of the case by parents or other persons legally responsible for the juvenile respondents [Family Court Act §733(b)] creates an adversarial relationship between the parent or legally responsible person and the child, or, in cases brought by police, school officials or others, where neither the parent nor other legally responsible individual appears in Family Court.

In Matter of Tabitha L.L., 87 N.Y.2d 1009 (1996), the Court of Appeals held that it would be inappropriate to incorporate section 321.3 of the Family Court Act into Article 7 in the absence of specific legislative authorization. It did not determine whether an allocution procedure is constitutionally required, since that issue was not preserved for appellate review. In a subsequent case, Matter of Tabitha E., 271 A.D.2d 719, 720 (3rd Dept., 2000), however, the Appellate Division, Third Department, held it to be reversible error for the Family Court to accept an admission in a PINS proceeding without first advising the respondent of her right to remain silent. *Accord*, Matter of Jody W., 295 A.D.2d 659 (3rd Dept., 2002); Matter of Shaun W., 288 A.D.2d 708 (3rd Dept., 2001). The Committee submits that considerations of due process -- equally compelling in PINS as in juvenile delinquency cases -- militate in favor of equivalent protections and, therefore, urges the Legislature to enact a provision for PINS cases comparable to the allocution requirement applicable to juvenile delinquency proceedings.

Finally, the proposal delineates the procedures for violations of orders of suspended judgment and probation, drawing upon existing juvenile delinquency procedures. *See* Family Court Act §§360.2,

360.3. Violations of both orders of probation and suspended judgment require the filing of a verified petition, a hearing at which the juvenile is represented by counsel and a determination by competent proof that the juvenile committed the violation charged without just cause. Periods of dispositions of suspended judgment and probation are tolled during the pendency of the violation petition.

Upon a finding of a violation, the Family Court may adjourn the matter for a new dispositional hearing in accordance with subdivision (b) or (c) of section 749 of the Family Court Act . *See* Matter of Josiah RR, 277 A.D.2d 654 (3rd Dept., 2000)(reversed summary disposition of PINS violation of probation case, where juvenile did not have an opportunity for an evidentiary hearing). The Court may revoke, continue or modify the order of probation or suspended judgment. If the order is revoked, the Court must order a different dispositional alternative enumerated in section 754(a), must state the reasons for its determination and must make the findings required by section 754(b) of the Family Court Act. *See* Matter of Nathaniel JJ, 265 A.D.2d 660 (3rd Dept., 1999), *after remittitur*, 270 A.D.2d 783 (3rd Dept., 2000)(PINS probation violation matter remanded twice for specific findings, first with respect to the reasons for the disposition and second as to the 16-year old respondent's needs, if any, for independent living services).[32] In matters, such as Nathaniel J.J., in which the juvenile is placed pursuant to section 756 of the Family Court Act, these findings are mandated as well by both the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch.7; Laws of 2000, ch. 145].

Proposal

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

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

Section 1. SUBDIVISION (A) OF SECTION 739 OF THE FAMILY COURT ACT IS AM
UNLETTERED PARAGRAPH AT THE END THEREOF TO READ AS FOLLOWS:

THE COURT SHALL NOT DIRECT DETENTION UNLESS IT HAS CONSIDERED W
ALTERNATIVES TO DETENTION WOULD BE APPROPRIATE, INCLUDING, BUT NOT L
RELEASE IN ACCORDANCE WITH SUBDIVISION (D) OF THIS SECTION.

2. SECTION 739 OF THE FAMILY COURT ACT IS AMENDED BY ADDING A NEW
FOLLOWS:

(D) RULES OF COURT SHALL DEFINE PERMISSIBLE TERMS AND CONDITIONS
ITS DISCRETION RELEASE THE RESPONDENT UPON SUCH TERMS AND CONDITIO

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

RESPONDENT SHALL BE GIVEN A WRITTEN COPY OF ANY SUCH TERMS AND COND
AND AN OPPORTUNITY TO BE HEARD TO THE RESPONDENT THROUGH HIS OR H
MAY MODIFY OR ENLARGE SUCH TERMS AND CONDITIONS AT ANY TIME PRIOR T
RESPONDENT'S RELEASE.

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

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

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

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

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

(b) For purposes of subdivision (a) of this section, in any case in which the parent or other person legally responsible is the petitioner or fails to appear in the proceeding, the court may, where it deems it necessary, appoint a guardian ad litem pursuant to article twelve of the civil practice law and rules, in addition to the law guardian appointed pursuant to section two hundred forty-nine of this act.

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

4. PARAGRAPH (A) OF SUBDIVISION 2 OF SECTION 754 OF THE FAMILY COUR
CHAPTER 7 OF THE LAWS OF 1999, IS AMENDED TO READ AS FOLLOWS:

(A) THE ORDER SHALL STATE THE COURT'S REASONS FOR THE PARTICULA
DETERMINING AN APPROPRIATE ORDER OF DISPOSITION, THE COURT SHALL CO
AVAILABLE ALTERNATIVE ENUMERATED IN SUBDIVISION ONE THAT IS CONSISTEN
INTERESTS OF THE RESPONDENT. IF THE COURT PLACES THE CHILD IN ACCOR
HUNDRED FIFTY-SIX OF THIS PART, THE COURT IN ITS ORDER SHALL DETER
CONTINUATION IN THE CHILD'S HOME WOULD BE CONTRARY TO THE BEST IN
WHERE APPROPRIATE, THAT REASONABLE EFFORTS WERE MADE PRIOR TO THE D

HEARING HELD PURSUANT TO THIS ARTICLE TO PREVENT OR ELIMINATE THE
CHILD FROM HIS OR HER HOME AND, IF THE CHILD WAS REMOVED FROM HIS
DATE OF SUCH HEARING, THAT SUCH REMOVAL WAS IN THE CHILD'S BEST INTE
REASONABLE EFFORTS WERE MADE TO MAKE IT POSSIBLE FOR THE CHILD TO
COURT DETERMINES THAT REASONABLE EFFORTS TO PREVENT OR ELIMINATE T
CHILD FROM THE HOME WERE NOT MADE BUT THAT THE LACK OF SUCH EFFOR
CIRCUMSTANCES, THE COURT ORDER SHALL INCLUDE SUCH A FINDING; AND
HAS ATTAINED THE AGE OF SIXTEEN, THE SERVICES NEEDED, IF ANY, TO ASSIST
TRANSITION FROM FOSTER CARE TO INDEPENDENT LIVING. NOTHING IN THI
CONSTRUED TO MODIFY THE STANDARDS FOR DIRECTING DETENTION SET FO
THIRTY-NINE OF THIS ARTICLE.

5. SUBDIVISION (B) OF SECTION 757 OF THE FAMILY COURT ACT, AS AMEND
OF 1996, IS AMENDED TO READ AS FOLLOWS:

(B) THE MAXIMUM PERIOD OF PROBATION SHALL NOT EXCEED ONE YEAR, W
PROBATION SUPERVISION, IN ACCORDANCE WITH SUBDIVISION (E) OF THIS SEC
PROBATION. IF THE COURT FINDS AT THE CONCLUSION OF THE ORIGINAL PERI
CIRCUMSTANCES REQUIRE AN ADDITIONAL YEAR OF PROBATION, THE COURT MA
ADDITIONAL YEAR.

6. SECTION 757 OF THE FAMILY COURT ACT IS AMENDED BY ADDING A NEW
FOLLOWS:

(E) IF THE RESPONDENT HAS BEEN FOUND TO BE A PERSON IN NEED OF SUP
FURTHER FINDS THAT, ABSENT INTENSIVE PROBATION SUPERVISION, THE RESPO
PURSUANT TO SECTION SEVEN HUNDRED FIFTY-SIX OF THIS ACT, THE COURT MA
COOPERATE WITH A PROGRAM OF INTENSIVE PROBATION SUPERVISION DURING
PROBATION. THE LOCAL PROBATION DEPARTMENT SHALL PROVIDE INTENSIVE P
RESPONDENTS SO DIRECTED PURSUANT TO THIS SUBDIVISION IN ACCORDANCE
PROMULGATED BY THE STATE DIVISION OF PROBATION AND CORRECTIONAL AL
SUBDIVISION ONE OF SECTION TWO HUNDRED FORTY-THREE OF THE EXECUTIV

§7. Section 776 of the family court act, as added by chapter 686 of the laws of 1962, is amended to read as follows:

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

§8. Section 779 of the family court act, as added by chapter 686 of the laws of 1962, is amended to read as follows:

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

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

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

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

§779-a. [Declaration of delinquency concerning juvenile delinquents and persons in need of

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

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

(c) Upon the filing of a violation petition, the court [then must promptly take reasonable and appropriate action] shall issue a summons or warrant in accordance with section seven hundred twenty-five of this article to cause the respondent to appear before [it for the purpose of enabling] the court [to make a final determination with respect to the alleged delinquency. The]. Where the respondent is on probation pursuant to section seven hundred fifty-seven of this article, the time for prompt court action shall not be construed against the probation service when the respondent has absconded from probation supervision and the respondent's whereabouts are unknown. The court must be notified promptly of the circumstances of any such probationers.

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

(e) Hearing on violation. The court may not revoke an order of probation or suspended judgment unless the court has found by competent proof that the respondent has violated a condition of such order without just cause and that the respondent has had an opportunity to be heard. The respondent is entitled to a hearing promptly after a violation petition has been filed. The respondent is entitled to counsel at

all stages of the proceeding and may not waive representation by counsel or a law guardian except as provided in section two hundred forty-nine-a of this act.

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

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

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

(C) determine whether the respondent should be released or detained pursuant to section 720 of this article; and

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

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

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

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

10. SUBDIVISION 1 OF SECTION 243 OF THE EXECUTIVE LAW, AS AMENDED BY C
AMENDED TO READ AS FOLLOWS:

1. THE DIRECTOR SHALL EXERCISE GENERAL SUPERVISION OVER THE ADMIN
THROUGHOUT THE STATE, INCLUDING PROBATION IN FAMILY COURTS AND SHA
INFORMATION AND MAKE RECOMMENDATIONS REGARDING THE ADMINISTRAT
COURTS. HE OR SHE SHALL ENDEAVOR TO SECURE THE EFFECTIVE APPLICATION
ENFORCEMENT OF THE PROBATION LAWS AND THE LAWS RELATING TO FAMILY C
AFTER CONSULTATION WITH THE STATE PROBATION COMMISSION, HE OR SHE S
SHALL REGULATE METHODS AND PROCEDURE IN THE ADMINISTRATION OF PRO
INVESTIGATION OF DEFENDANTS PRIOR TO SENTENCE, AND CHILDREN PRIOR T
WORK, RECORD KEEPING, AND ACCOUNTING, PROGRAM PLANNING AND RESEAR
EFFECTIVE APPLICATION OF THE PROBATION SYSTEM AND THE MOST EFFICIENT
LAWS THROUGHOUT THE STATE. SUCH RULES SHALL PROVIDE FOR THE ESTABLIS
PROBATION SUPERVISION FOR ALL JUVENILES DIRECTED TO RECEIVE SUCH SERVI
SECTION SEVEN HUNDRED FIFTY-SEVEN OF THE FAMILY COURT ACT AND SHALL
SPECIFICATION OF THE MAXIMUM CASELOAD LEVELS AND TRAINING REQUIRED
PROBATION OFFICERS; THE FREQUENCY AND NATURE OF PROBATION CONTACTS
SCHOOLS AND OTHER AGENCIES; AND SUPERVISION, TREATMENT AND OTHER SE
JUVENILES. SUCH RULES SHALL PROVIDE THAT THE PROBATION INVESTIGATION
DESIGNATED FELONY ACT CASES UNDER SUBDIVISION ONE OF SECTION 351.1 OF
PRIORITY OVER OTHER CASES ARISING UNDER ARTICLES THREE AND SEVEN OF SU
BINDING UPON ALL PROBATION OFFICERS AND WHEN DULY ADOPTED SHALL HA
BUT SHALL NOT SUPERSEDE RULES THAT MAY BE ADOPTED PURSUANT TO THE FA
KEEP [HIMSELF] INFORMED AS TO THE WORK OF ALL PROBATION OFFICERS AND
INTO AND REPORT UPON THEIR CONDUCT AND EFFICIENCY. HE OR SHE MAY IN
PROBATION BUREAU OR PROBATION OFFICER AND SHALL HAVE ACCESS TO ALL R
OR SHE MAY ISSUE SUBPOENAS TO COMPEL THE ATTENDANCE OF WITNESSES OR
PAPERS. HE OR SHE MAY ADMINISTER OATHS AND EXAMINE PERSONS UNDER OA
THE APPROPRIATE AUTHORITIES THE REMOVAL OF ANY PROBATION OFFICER. HE
GOVERNOR NOT LATER THAN FEBRUARY FIRST OF EACH YEAR AN ANNUAL REPOR
PROBATION AND CORRECTIONAL ALTERNATIVES FOR THE PRECEDING CALENDA
INFORMATION RELATIVE TO THE ADMINISTRATION OF PROBATION AND CORRE

THE STATE AS MAY BE APPROPRIATE. HE OR SHE MAY FROM TIME TO TIME PUBLIS
INCLUDING PROBATION IN FAMILY COURTS, AND THE OPERATION OF THE PROB
PROBATION IN FAMILY COURTS AND ANY OTHER INFORMATION REGARDING PR
DETERMINE PROVIDED EXPENDITURES FOR SUCH PURPOSE ARE WITHIN AMOUN

11. THIS ACT SHALL TAKE EFFECT ON THE NINETIETH DAY AFTER IT SHALL H
HOWEVER, THAT (I) SECTIONS 5, 6, 7, 8 AND 9 OF THIS ACT SHALL APPLY TO JUVEN
ACTS THAT ARE THE BASES FOR ADJUDICATING THEM TO BE PERSONS IN NEED O
OCCURRED ON OR AFTER THE EFFECTIVE DATE OF SUCH SECTIONS, AND (II) SEC
EFFECT IMMEDIATELY.

6. Judicial authority to order intensive probation supervision and electronic monitoring in juvenile delinquency proceedings (FCA §§353.2, 353.3; Exec. L. §243)

As public concern about youth crime continues to rise, the juvenile justice system must be able to respond effectively -- protecting society, as well as juveniles themselves, by instilling the skills and commitment necessary for them to develop into productive, law-abiding adults. The Family Court Act places upon the Family Court the grave responsibility of issuing appropriate orders of disposition, achieving the delicate balance between the juveniles' "needs and best interests" and the "need for protection of the community." Family Court Act §§141, 301.1. The Court is only able to discharge this duty if it has sufficient options to fashion dispositional orders that will accomplish that delicate balance. In an era of increasingly severe fiscal constraints, those options must include cost-effective alternatives both to pre-dispositional detention and placement.

The Family Court Advisory and Rules Committee has developed a proposal that would provide the Family Court with sufficient discretion to ensure that juveniles released prior to disposition would be rigorously monitored and that after disposition, probation supervision would provide effective intervention, not merely perfunctory, intermittent "contacts." The measure would provide a meaningful alternative to detention and would greatly increase the likelihood that youth placed on probation receive the supervision and services required to correct and redirect anti-social patterns of behavior.

First, in determining whether an accused juvenile delinquent should be detained prior to disposition, the Family Court would be required to consider whether there are available, appropriate alternatives to detention. Where the Court determines that grounds for detention exist under current statutory standards, the Court would have the discretion to release a juvenile on condition of cooperation with a program of electronic monitoring to be administered by a local probation department, if such a program would obviate the concerns that otherwise would have caused the juvenile to be detained, that is, if electronic monitoring would ensure the juvenile's likely appearance in Family Court or minimize the risk of commission of an act that would be a crime if committed by an adult, as applicable. Such an alternative to otherwise costly detention has been used extensively in the federal system and in other jurisdictions. *See, e.g.,* Colorado Children's Code, Col. Rev. Stat., Tit. 19, Art. 2, Pt.3, §19-2-302(4)(h). As a form of conditional release, obviating the necessity of detention, it would be consistent with cases in the criminal arena.[33]

Second, the measure would authorize the Family Court to direct that an adjudicated juvenile delinquent, who would otherwise be placed, be required to participate in an intensive probation supervision program for all or part of the period of probation. In light of the requirement in section 303.1(a) of the Family Court Act that Criminal Procedure Law provisions be "specifically prescribed" in the Family Court

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[33] *See, e.g.*, Halikipoulos v. Dillon, 139 F.Supp. 2d 312 (E.D.N.Y., 2001)(requirement of attendance at "Stoplift" education program permissible as condition of bail in State criminal proceedings); People *ex rel* Tannuzzo v. City of New York, 174 A.D.2d 443 (1st Dept., 1991)(bail set on condition defendant would report to police at 6 P.M. every day, surrender his passport and refrain from re-applying until close of case); People *ex rel* Moquin v. Infante, 134 A.D.2d 764 (3rd Dept., 1987) (bail set on condition defendant enroll in alcoholic rehabilitation program, not operate a motor vehicle and surrender her driver's license); People v. Bongiovanni, 183 Misc.2d 104 (Sup. Ct., Kings Co., 1999)(attendance at batterers' education program is permissible condition of bail).

Act in order to be applicable, this provision would provide the necessary analogue to section 65.10(4) of the Criminal Procedure Law, the statutory response to the decision of the Court of Appeals in People v. McNair, 87 N.Y.2d 772 (1996). *See* Laws of 1996, ch. 653. A program of electronic monitoring would be permissible as a component of an intensive supervision regimen, but it would not replace the in-person contacts so vital to the success of probation, particularly as applied to juveniles. Enactment of an authorization for electronic monitoring in New York is long-overdue. Several other states utilize this option as a vital component of a dispositional plan in juvenile delinquency cases.[34]

Finally, the New York State Division of Probation and Correctional Alternatives would be directed to promulgate regulations regarding the operation by local probation departments of both electronic monitoring and intensive probation supervision programs, addressing such issues as: maximum probation officer caseloads; special training requirements for intensive supervision probation officers; nature and frequency of the probation contacts with the juveniles, schools and other agencies; and the level and type of supervision, treatment and other program components.

Intensive supervision is a critically-needed dispositional alternative. Enhanced state reimbursement has been available for several years for intensive probation supervision for adults. Far smaller amounts were first made available for juvenile delinquents starting in 1994, but these were encumbered by a budgetary stipulation limiting the program's availability to the rare instance where the Family Court has determined that a juvenile had been drug-involved at the time of the offense.

Notwithstanding the limited funding, juvenile intensive supervision programs established and largely funded by local probation departments, such as the program operating in New York City, have been effective in providing a meaningful alternative to costly placements, albeit reaching but a small number of the juveniles who would benefit from such programs. The New York City program, for example, is a rigorous one utilizing a 1:15 probation officer-to-juvenile ratio, requiring two home visits by the officer per month and participation by youth in community service efforts. Nationally, such programs are recognized as providing cost-effective, safe alternatives to residential placement. *See generally*, Home-based Services for Serious and Violent Offenders, Center for the Study of Youth Policy (Oct., 1994); M. JONES AND B. KRISBERG, *IMAGES AND REALITY: JUVENILE CRIME, YOUTH VIOLENCE AND PUBLIC POLICY*, NATIONAL COUNCIL ON CRIME AND DELINQUENCY (JUNE, 1994), *COMPREHENSIVE STRATEGY FOR SERIOUS, VIOLENT AND CHRONIC OFFENDERS: PROGRAM SUMMARY*, U.S. DEPT. OF JUSTICE, OFFICE OF JUVENILE JUS DELINQUENCY PREVENTION (DEC., 1993), P. 21.

SIGNIFICANTLY, NOT ONLY DOES INTENSIVE PROBATION SUPERVISION SA FACILITATE ACCESS TO FEDERAL DOLLARS . FUNDS FROM THE FEDERAL CHILD W AVAILABLE TO LOCALITIES FOR THESE PROGRAMS IF THE DIVISION OF PROBATIO

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

AND LOCAL PROBATION DEPARTMENTS WORK IN PARTNERSHIP WITH THE NEW Y
FAMILY SERVICES AND LOCAL SOCIAL SERVICES DISTRICTS. IF INTENSIVE SUPERV
TO YOUTH IN ORDER TO PREVENT PLACEMENT ARE EXPLICITLY INCLUDED IN TH
WELFARE SERVICES, FEDERAL REIMBURSEMENT AT A RATE OF 75% WOULD BE AVAI
TITLE IV-B OF THE SOCIAL SECURITY ACT. 42 U.S.C.A. §§622, 623 [Social Security Act, Title IV-
96-272].[35] Federal reimbursement for child welfare services to prevent placement of juvenile delinquents is contemplated, so long as the facilities where the youth would have been placed are eligible for federal foster care funding -- that is, they are not secure detention centers or forestry camps or training schools housing over 25 juveniles. 42 U.S.C. §672(c) [Social Security Act, Title IV-E; Public Law 96-272]. Indeed, in order to increase its eligibility for foster care reimbursement under this section, the Office of Children and Family Services (Division for Youth) in recent years has moved toward conversion of its facilities to house under 25 residents.

The New York State Legislature has recognized the applicability of the federal MANDATES TO JUVENILE DELINQUENCY CASES, INCLUDING MOST RECENTLY, THE *ADOPTION A* *ACT* [PUBLIC LAW 105-89], BY INCORPORATING INTO STATE LAW THE REQUIREME MAKE FINDINGS, PRIOR TO ORDERING BOTH DETENTION AND PLACEMENTS OF FOR FEDERAL REIMBURSEMENT, THAT "REASONABLE EFFORTS" HAVE BEEN MADE T FAMILY COURT ACT 352.2(2)(B); LAWS OF 1999, CH. 7; LAWS OF 2000, CH. 145. ELIMI OF JUVENILE DELINQUENTS WILL FACILITATE STATE COMPLIANCE WITH, AND C FUNDING FROM, THE FEDERAL *ADOPTION AND SAFE FAMILIES ACT*, IN LIGHT O APPLICABILITY OF THE STRICT PERMANENCY PLANNING MANDATES TO ALL JUV ARE IN RECEIPT OF FEDERAL FOSTER CARE FUNDING. *SEE* V. HEMRICH, "APPLYING STATUS OFFENDER CASES," 18 *ABA CHILD LAW PRACTICE* 9: 129, 133 (NOVEMBER, 19

EVEN APART FROM FEDERAL OR STATE FUNDING ELIGIBILITY, INVESTING I RESOURCES IN YOUTH WHO WOULD OTHERWISE BE LIKELY TO BE PLACED WOUL PLACEMENT DOLLARS, SINCE PROBATION SUPERVISION, EVEN WITH ENHANCED ELECTRONIC MONITORING PROGRAMS, REPRESENTS BUT A FRACTION OF THE C

PROPOSAL

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[35] Reimbursable "child welfare services" are defined as "public social services," directed, *inter alia*, at "preventing or remedying, or assisting in the solution of problems which may result in the neglect, abuse, exploitation or delinquency of children." 42 U.S.C. §625(a)(1)(B) [Social Security Act, Title IV-B; Public Law 96-272]. The federal regulations implementing the Act enumerate counseling and other services determined to be "necessary and appropriate," including "intensive, home-based family services." 45 C.F.R. §1357.15.

[36] By analogy, the New York City "Family Ties" program provided intensive, home-based services to juveniles, thereby enabling them to be placed on intensive probation supervision rather than in residential care. The program demonstrated a net savings of $11,043,318 in placement costs from its inception in 1989 through the end of 1991, but was eliminated from the City's budget a few years later. S*ee* ***FAMILY TIES: A FINANCIAL ANALYSIS***, N.Y.C. Dept. of Juvenile Justice (June, 1993), p.7.

AN ACT TO AMEND THE FAMILY COURT ACT AND THE EXECUTIVE LAW, IN RELATI
AND CONDITIONS OF PROBATION IN JUVENILE DELINQUENCY CASES

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND AS

SECTION 1. Subdivision 3 of section 320.5 of the family court act is amended to add an unlettered paragraph at the end thereof to read as follows:

The court shall not direct detention unless it has considered whether available alternatives to detention would be appropriate, including, but not limited to, conditional release in accordance with subdivision two of this section. If the court makes a finding, pursuant to paragraph (a) or (b) of this subdivision, that detention is nonetheless necessary, the court may consider whether utilization of electronic monitoring as a condition of release would significantly reduce the substantial probability that the respondent will not return to court on the return date or the substantial risk that the respondent may before the return date commit an act that if committed by an adult would constitute a crime, as applicable. If the court so finds, the court may order the probation department to supervise the respondent through a program of electronic monitoring, which shall be implemented in accordance with regulations to be promulgated by the division of probation and correctional alternatives PURSUANT TO SUBDIVISION ONE OF SECTION TWO HUNDRED FORTY-THREE OF THE EXECUTIVE LAW.

2. SUBDIVISION 3 OF SECTION 353.2 OF THE FAMILY COURT ACT, AS AMEN
OF 1992, IS AMENDED BY RE-LETTERING PARAGRAPHS (E) AND (F) AS (F) AND (G) AN
SUCH SUBDIVISION TO READ AS FOLLOWS:

(E) COOPERATE WITH A PROGRAM OF INTENSIVE SUPERVISION BY THE PRO
PERIOD OF PROBATION OR A SPECIFIED PORTION THEREOF UPON A FINDING ON
ABSENT COOPERATION WITH SUCH A PROGRAM, PLACEMENT OF THE RESPONDE
PROGRAM SHALL BE CONDUCTED IN ACCORDANCE WITH REGULATIONS TO BE
PROBATION AND CORRECTIONAL ALTERNATIVES AND MAY REQUIRE THE RESPON
TO COMPLY WITH A PROGRAM OF ELECTRONIC MONITORING AS PROVIDED BY S
HUNDRED FORTY-THREE OF THE EXECUTIVE LAW;

3. SUBDIVISION 6 OF SECTION 353.2 OF THE FAMILY COURT ACT, AS AMEN
1993, IS AMENDED TO READ AS FOLLOWS:

6. THE MAXIMUM PERIOD OF PROBATION SHALL NOT EXCEED TWO YEARS, W
PROBATION SUPERVISION, IN ACCORDANCE WITH PARAGRAPH (E) OF SUBDIVISIO
THE TERM OF PROBATION. IF THE COURT FINDS AT THE CONCLUSION OF THE O
HEARING THAT EXCEPTIONAL CIRCUMSTANCES REQUIRE AN ADDITIONAL YEAR O
CONTINUE THE PROBATION FOR AN ADDITIONAL YEAR.

4. SUBDIVISION 1 OF SECTION 243 OF THE EXECUTIVE LAW, AS AMENDED BY
IS AMENDED TO READ AS FOLLOWS:

1. THE DIRECTOR SHALL EXERCISE GENERAL SUPERVISION OVER THE ADMIN
THROUGHOUT THE STATE, INCLUDING PROBATION IN FAMILY COURTS AND SHA
INFORMATION AND MAKE RECOMMENDATIONS REGARDING THE ADMINISTRAT
COURTS. HE OR SHE SHALL ENDEAVOR TO SECURE THE EFFECTIVE APPLICATION
ENFORCEMENT OF THE PROBATION LAWS AND THE LAWS RELATING TO FAMILY C
AFTER CONSULTATION WITH THE STATE PROBATION COMMISSION, HE OR SHE SH
SHALL REGULATE METHODS AND PROCEDURE IN THE ADMINISTRATION OF PRO
INVESTIGATION OF DEFENDANTS PRIOR TO SENTENCE, AND CHILDREN PRIOR TO
WORK, RECORD KEEPING, AND ACCOUNTING, PROGRAM PLANNING AND RESEAR
EFFECTIVE APPLICATION OF THE PROBATION SYSTEM AND THE MOST EFFICIENT
LAWS THROUGHOUT THE STATE. SUCH RULES SHALL PROVIDE FOR THE ESTABLIS
PROBATION SUPERVISION FOR ALL JUVENILES DIRECTED TO RECEIVE SUCH SERVI
SUBDIVISION THREE OF SECTION 353.2 OF THE FAMILY COURT ACT AND SHALL IN
SPECIFICATION OF THE MAXIMUM CASELOAD LEVELS AND TRAINING REQUIRED F
PROBATION OFFICERS; THE FREQUENCY AND NATURE OF PROBATION CONTACTS
SCHOOLS AND OTHER AGENCIES; AND SUPERVISION, TREATMENT AND OTHER SE
JUVENILES. SUCH RULES SHALL FURTHER PROVIDE FOR THE ESTABLISHMENT OF A
MONITORING FOR ACCUSED JUVENILE DELINQUENTS WHO WOULD OTHERWISE
PURSUANT TO SUBDIVISION THREE OF SECTION 320.5 OF THE FAMILY COURT ACT
DELINQUENTS PLACED ON PROBATION ON CONDITION OF COOPERATION WITH
MONITORING PURSUANT TO PARAGRAPH (E) OF SUBDIVISION THREE OF SECTION
SUCH RULES SHALL PROVIDE THAT THE PROBATION INVESTIGATIONS ORDERED
FELONY ACT CASES UNDER SUBDIVISION ONE OF SECTION 351.1 OF THE FAMILY C

OTHER CASES ARISING UNDER ARTICLES THREE AND SEVEN OF SUCH ACT. SUCH
PROBATION OFFICERS AND WHEN DULY ADOPTED SHALL HAVE THE FORCE AND
SUPERSEDE RULES THAT MAY BE ADOPTED PURSUANT TO THE FAMILY COURT ACT
INFORMED AS TO THE WORK OF ALL PROBATION OFFICERS AND SHALL FROM TIM
REPORT UPON THEIR CONDUCT AND EFFICIENCY. HE OR SHE MAY INVESTIGATE
BUREAU OR PROBATION OFFICER AND SHALL HAVE ACCESS TO ALL RECORDS AND
ISSUE SUBPOENAS TO COMPEL THE ATTENDANCE OF WITNESSES OR THE PRODUC
SHE MAY ADMINISTER OATHS AND EXAMINE PERSONS UNDER OATH. HE OR SHE
APPROPRIATE AUTHORITIES THE REMOVAL OF ANY PROBATION OFFICER. HE OR
GOVERNOR NOT LATER THAN FEBRUARY FIRST OF EACH YEAR AN ANNUAL REPOR
PROBATION AND CORRECTIONAL ALTERNATIVES FOR THE PRECEDING CALENDA
INFORMATION RELATIVE TO THE ADMINISTRATION OF PROBATION AND CORREC
THE STATE AS MAY BE APPROPRIATE. HE OR SHE MAY FROM TIME TO TIME PUBLIS
INCLUDING PROBATION IN FAMILY COURTS, AND THE OPERATION OF THE PROB
PROBATION IN FAMILY COURTS AND ANY OTHER INFORMATION REGARDING PR
DETERMINE PROVIDED EXPENDITURES FOR SUCH PURPOSE ARE WITHIN AMOUN

5. THIS ACT SHALL TAKE EFFECT ON THE NINETIETH DAY AFTER IT SHALL
APPLY TO JUVENILES FOUND TO HAVE COMMITTED ACTS OF JUVENILE DELINQUE
SUCH EFFECTIVE DATE, PROVIDED, HOWEVER, THAT SECTION 4 OF THIS ACT SHA

7. Judicial authority to order electronic monitoring as a condition of probation and pre-dispositional bail and release in child support and family offense cases
(FCA §§153, 453, 454, 841, 846-a; Exec. L. §243)

In recent years, the role of the Family Court in the rigorous enforcement of orders against adult respondents has greatly accelerated, particularly in child support and family offense cases. Both the *Child Support Standards Act* [Laws of 1989, ch. 567] and the *Family Protection and Domestic Violence Intervention Act* [Laws of 1994, ch. 222,224] and subsequent amendments articulate the critical responsibility of the Court to compel respondents' appearances in court to face violations and to impose appropriate sanctions for non-support of children and commission of family offenses. However, the options available to the Family Court are limited. Prior to disposition, the Family Court may release (parole) an arrested respondent or set bail, but no statutory provisions authorize conditional release or conditional parole. At disposition, the Court may place a respondent on probation or may order incarceration for up to six months per violation incident, but, again, no intermediate sanctions are available. The Family Court Advisory and Rules Committee proposes to remedy these gaps by establishing electronic monitoring as an alternative to pre- and post-dispositional incarceration.

First, the Committee's proposal would authorize the Family Court to set reasonable conditions of bail or parole, which may include electronic monitoring, where necessary to ensure respondent's appearance in court to answer a family offense petition or a petition for violation of an order of support, an order of protection or other order issued in a family offense case. This option would be available only upon a respondent's return on a warrant, that is, in cases in which a respondent's earlier non-appearance had demonstrated a likelihood of further non-appearance necessitating issuance of a warrant. A program of electronic monitoring would have to be implemented in accordance with regulations to be promulgated by the New York State Division of Probation and Correctional Alternatives.

Setting reasonable conditions of this sort in order to assure respondent's presence in court is a cost-effective alternative to jail and is consistent with precedents in the area of criminal law. *See, e.g.*, Halikipoulos v. Dillon, 139 F.Supp. 2d 312 (E.D.N.Y., 2001)(requirement of attendance at "Stoplift" education program permissible as condition of bail in State criminal proceedings); People *ex rel* Tannuzzo v. City of New York, 174 A.D.2d 443 (1st Dept., 1991)(bail set on condition defendant would report to police at 6 P.M. every day, surrender his passport and refrain from re-applying until close of case); People *ex rel* Moquin v. Infante, 134 A.D.2d 764 (3rd Dept., 1987) (bail set on condition defendant enroll in alcoholic rehabilitation program, not operate a motor vehicle and surrender her driver's license); People v. Bongiovanni, 183 Misc.2d 104 (Sup. Ct., Kings Co., 1999)(attendance at batterers' education program is permissible condition of bail).

Second, the proposal would permit the Family Court to require a respondent, found to have committed a family offense or to have violated an order issued in a family offense or child support case, to comply with a program of electronic monitoring and/or follow a schedule regulating respondent's daily movements as a condition of probation. Electronic monitoring would be limited to those cases in which an explicit finding has been made that, absent such a requirement, respondent would otherwise be incarcerated. Recognizing that following the decision of the Court of Appeals in People v. McNair, 87 N.Y.2d 772 (1996), imposition of such conditions would not be permissible

without statutory authorization, the proposal would incorporate section 65.10(4) of the Penal Law specifically by reference.[37] Consistent with section 65.10(4) of the Penal Law, these conditions would have to implemented in accord with uniform procedures developed by the New York State Division of Probation and Correctional Alternatives.

Enactment of this measure would enhance the limited menu of dispositional options available to the Family Court in family offense cases and in cases involving violations of child support and orders of protection. Monitoring the movements of respondents in child support violation cases would further their compliance by allowing them to work to earn the money to satisfy their obligations – providing a less expensive alternative to the weekend detention or other incarcerative sentences currently imposed and, perhaps most importantly, facilitating the payment of support to children and, in public assistance cases, the recoupment of assistance by local social services districts. Concomitantly, monitoring the movements of respondents in family offense cases would greatly enhance family safety, an integral aim of the *Family Protection and Domestic Violence Intervention Act*. *See* Legislative Findings, Laws of 1994, ch. 222, §1. Finally, as noted above, it would provide a vital alternative to incarceration prior to adjudication in cases where a warrant had already been issued for a respondent – increasing the likelihood that such cases will reach disposition by providing an additional means of minimizing a respondent's risk of flight.

Proposal

AN ACT to amend the family court act and the executive law, in relation to electronic monitoring as a condition of probation and pre-dispositional bail and release in child support and family offense proceedings

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

Section 1. Section 153 of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

§153. Subpoena, warrant and other process to compel attendance. The family court may issue a subpoena or in a proper case a warrant or other process to secure or compel the attendance of an adult respondent or child or any other person whose testimony or presence at a hearing or proceeding is deemed by the court to be necessary, and to admit to, fix or accept bail, or parole him or her pending the completion of the hearing or proceeding. [The] Where a petition has been filed alleging a violation of an order of support pursuant to section four hundred fifty-three, a family offense

[37] People v. McNair, *supra*, held that electronic monitoring, not mentioned in the Penal Law at that time, did not properly fall within the catch-all provision for non-enumerated probation and conditional discharge conditions "reasonably related to...rehabilitation." [Penal Law §65.10(2)(l)]. Immediately after the decision, the Legislature authorized electronic monitoring where it would "advance public safety, probationer control or probationer surveillance." [Penal Law §65.10(4); Laws of 1996, ch. 653].

pursuant to section eight hundred twenty-one or a violation of an order of protection or other lawful order of the court pursuant to section eight hundred forty-six of this act and a respondent is brought before the court following issuance of a warrant, a judge of the family court may set reasonable conditions of bail or parole designed to compel the respondent's attendance in court when required for completion of the hearing or proceeding. Such conditions may include, but are not limited to, a requirement that respondent cooperate with a program of electronic monitoring by the probation department, WHICH SHALL BE IMPLEMENTED IN ACCORDANCE WITH REGULATIONS DIVISION OF PROBATION AND CORRECTIONAL ALTERNATIVES. In any proceeding under also authorized to issue a subpoena duces tecum in accordance with the applicable provisions of the [civil practice act and, upon its effective date, in accordance with the applicable provisions of the] CPLR. A judge of the family court is also authorized to hear and decide motions relating to child support subpoenas issued pursuant to section one hundred eleven-p of the social services law.

§2. Subdivision (d) of section 453 of the family court act, as added by chapter 456 of the laws of 1978, is amended to read as follows:

(d) Issuance of warrant. The court may issue a warrant, directing that the respondent be arrested and brought before the court, pursuant to section four hundred twenty-eight of this article. When the respondent is brought before the court, a judge of the family court may set reasonable conditions of bail or parole designed to compel the respondent's attendance in court when required for completion of the hearing or proceeding. Such conditions may include, but are not limited to, a requirement that respondent cooperate with a program of electronic monitoring by the probation department, WHICH SHALL BE IMPLEMENTED IN ACCORDANCE WITH REGULATIONS DIVISION OF PROBATION AND CORRECTIONAL ALTERNATIVES.

§3. Paragraph (c) of subdivision 3 of section 454 of the family court act, as amended by chapter 699 of the laws of 1996, is amended to read as follows:

(c) place the respondent on probation under such conditions as the court may determine and in accordance with the provisions of the criminal procedure law[; or]. Upon a finding by a family court judge that absent such a requirement respondent would otherwise be committed to jail pursuant to paragraph (a) of this subdivision, the judge may require respondent to cooperate with a program of electronic monitoring by the probation department and/or follow a schedule regulating respondent's daily movements in accordance with subdivision four of section 65.10 of the penal law during the period of probation or a specified portion thereof.

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

(c) placing the respondent on probation for a period not exceeding one year, [and] upon conditions determined by the court, which may include, but are not limited to, requiring respondent to participate in a batterer's education program designed to help end violent behavior, [which may include referral to] requiring respondent to cooperate with a program of electronic monitoring by the probation department and/or follow a schedule regulating respondent's daily movements in accordance with subdivision four of section 65.10 of the penal law during the period of probation or a specified portion thereof, requiring respondent to participate in drug and alcohol counseling, and requiring respondent to pay the costs [thereof] of such batterer's education and/or drug and alcohol counseling program if respondent has the means to do so, provided however that nothing contained herein shall be deemed to require payment of the costs of any such program by the petitioner, the state or any political subdivision thereof; or

§5. Section 846-a of the family court act, as amended by chapter 597 of the laws of 1998, is amended to read as follows:

§846-a. Powers on failure to obey order. If a respondent is brought before the court for failure to obey any lawful order issued under this article or an order of protection issued by a court of competent jurisdiction of another state, territorial or tribal jurisdiction in a proceeding 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 modify an existing order to add reasonable conditions of behavior to the existing order of protection, make a new order of protection in accordance with section eight hundred forty-two, [may 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 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 commit the respondent to jail for a term not to exceed six months. Such commitment may be suspended or may be served upon certain specified days or parts of days as the court may direct, and the court may, at any time within the term of such sentence, revoke such suspension and commit the respondent for the remainder of the original sentence, or suspend the remainder of such sentence. In lieu of commitment of the respondent to jail, the court may place or continue the respondent on probation pursuant to subdivision (c) of section eight hundred forty-one of this article upon conditions determined by the court which may include, but are not limited to , a requirement that respondent cooperate with a program of electronic monitoring by the

probation department and/or follow a schedule regulating respondent's daily movements in accordance with subdivision four of section 65.10 of the penal law during the period of probation or a specified portion thereof. 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 and disposal of any firearm such respondent owns or possesses. If the willful failure to obey such order involves the infliction of serious physical injury as defined in subdivision ten 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 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.

6. SUBDIVISION 1 OF SECTION 243 OF THE EXECUTIVE LAW, AS AMENDED BY 1985, IS AMENDED TO READ AS FOLLOWS:

1. THE DIRECTOR SHALL EXERCISE GENERAL SUPERVISION OVER THE ADMI SERVICES THROUGHOUT THE STATE, INCLUDING PROBATION IN FAMILY COURTS STATISTICAL AND OTHER INFORMATION AND MAKE RECOMMENDATIONS REGAR PROBATION SERVICES IN THE COURTS. HE OR SHE SHALL ENDEAVOR TO SECURE THE PROBATION SYSTEM AND THE ENFORCEMENT OF THE PROBATION LAWS ANI COURTS THROUGHOUT THE STATE. AFTER CONSULTATION WITH THE STATE PRO SHE SHALL ADOPT GENERAL RULES WHICH SHALL REGULATE METHODS AND PRO ADMINISTRATION OF PROBATION SERVICES, INCLUDING INVESTIGATION OF DE AND CHILDREN PRIOR TO ADJUDICATION, SUPERVISION, CASE WORK, RECORD K PROGRAM PLANNING AND RESEARCH SO AS TO SECURE THE MOST EFFECTIVE API SYSTEM AND THE MOST EFFICIENT ENFORCEMENT OF THE PROBATION LAWS THI RULES SHALL PROVIDE FOR THE ESTABLISHMENT OF A PROGRAM OF ELECTRONIC SECTIONS ONE HUNDRED FIFTY-THREE, FOUR HUNDRED FIFTY-THREE, FOUR HU HUNDRED FORTY-ONE AND EIGHT HUNDRED FORTY-SIX-A OF THE FAMILY COUR PROVIDE THAT THE PROBATION INVESTIGATIONS ORDERED BY THE COURT IN D UNDER SUBDIVISION ONE OF SECTION 351.1 OF THE FAMILY COURT ACT SHALL H

ARISING UNDER ARTICLES THREE AND SEVEN OF SUCH ACT. SUCH RULES SHALL
PROBATION OFFICERS AND WHEN DULY ADOPTED SHALL HAVE THE FORCE AND
SUPERSEDE RULES THAT MAY BE ADOPTED PURSUANT TO THE FAMILY COURT ACT
[HIMSELF] INFORMED AS TO THE WORK OF ALL PROBATION OFFICERS AND SHALL
INTO AND REPORT UPON THEIR CONDUCT AND EFFICIENCY. HE OR SHE MAY IN
PROBATION BUREAU OR PROBATION OFFICER AND SHALL HAVE ACCESS TO ALL R
OFFICES. HE OR SHE MAY ISSUE SUBPOENAS TO COMPEL THE ATTENDANCE OF W
OF BOOKS AND PAPERS. HE OR SHE MAY ADMINISTER OATHS AND EXAMINE PERS
MAY RECOMMEND TO THE APPROPRIATE AUTHORITIES THE REMOVAL OF ANY PR
SHALL TRANSMIT TO THE GOVERNOR NOT LATER THAN FEBRUARY FIRST OF EACH
THE WORK OF THE DIVISION OF PROBATION AND CORRECTIONAL ALTERNATIVE
YEAR, WHICH SHALL INCLUDE SUCH INFORMATION RELATIVE TO THE ADMINIST
CORRECTIONAL ALTERNATIVES THROUGHOUT THE STATE AS MAY BE APPROPRIAT
TIME PUBLISH REPORTS REGARDING PROBATION INCLUDING PROBATION IN FA
OPERATION OF THE PROBATION SYSTEM INCLUDING PROBATION IN FAMILY COU
INFORMATION REGARDING PROBATION AS HE OR SHE MAY DETERMINE PROVID
PURPOSE ARE WITHIN AMOUNTS APPROPRIATED THEREFOR.

7. THIS ACT SHALL TAKE EFFECT ON THE NINETIETH DAY AFTER IT SHALL
APPLY TO PETITIONS BROUGHT ON OR AFTER THAT DATE; PROVIDED, HOWEVER,
SHALL TAKE EFFECT IMMEDIATELY.

8. Authority of Supreme and Family Courts to direct child protective investigations and, if indicated, the filing of child protective petitions in conjunction with custody or visitation proceedings (DRL §240; FCA §§657, 817)

In adjudicating various types of proceedings in Family Court, the ability of the Family Court judges to call upon local social services districts to perform child protective investigations pursuant to section 1034 of the Family Court Act has often proven invaluable both to protect children before the Court and to assist the Court in fulfilling its statutory duty to accurately determine the children's "best interests." It has been utilized to obtain an independent investigation, for example, where an allegation of child abuse or neglect has been made by a party or by the law guardian or where it becomes evident during the course of a proceeding that child maltreatment may have occurred. Where the investigation results in a determination by the agency that the child maltreatment allegation is "indicated" – *i.e.*, supported by credible evidence, as provided by section 412(12) of the Social Services Law – the Court may direct an individual to file a child protective petition, pursuant to section 1032(b) of the Family Court Act, where the child protective agency has not already done so. *See* Family Court Act §1034, "Practice Commentary" (McKinney, 1999). What is not altogether clear, however, is whether the Family Court has the authority to direct a child protective agency, not only to investigate, but also to file a child protective petition.[38]

The Family Court Advisory and Rules Committee proposes that both the Family Court Act and Domestic Relations Law be amended to authorize Supreme and Family Court judges in the course of pending custody cases to direct investigations pursuant to section 1034 of the Family Court Act and, if the investigation determines that any allegations are "indicated," to direct the child protective agency to file a child protective petition with respect to those allegations. In the interests of judicial economy, the Court would have the discretion to retain the case before it, rather than have fragmented proceedings litigated before different judges or even different courts.

The new provisions, section 657 of the Family Court Act and section 240(1-d) of the Domestic Relations Law, as well as existing section 817 of the Family Court Act, would provide that prior to directing the child protective agency to file a child abuse or neglect petition, both the agency and the individual named as the subject of the "indicated" allegations would have to be given notice and an opportunity to be heard. Where a child protective agency indicates opposition to filing a petition, the Court would be authorized either to direct the law guardian or other individual to file a petition pursuant to section 1032(b) of the Family Court Act or nonetheless to direct the child protective agency to file the petition. Since it is difficult for the law guardian or other individual to represent the interests of the State, as is necessary in the prosecution of a child protective petition, the Court may utilize section 254 of the Family Court Act to require either a County Attorney or, in New York City, the Corporation Counsel to "present the case in support of the petition."[39]

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[38] One Family Court judge has determined that it does not have that authority under current law. *See* Matter of Tiffany A., 183 Misc.2d 391 (Fam.Ct., Qns. Co., 2000), *aff'd on other grounds,* 279 A.D. 2d 522 (2d Dept., 2001).

[39] As noted in the "Practice Commentary" to section 254 of the Family Court Act, the County Attorney or Corporation Counsel does not actually "represent" the petitioner, as in the case of a typical attorney-client relationship, but, rather, represents the State with the attendant obligation to "seek justice." Family Court Act §254, Practice Commentary (McKinney, 1999). *See also, Lawyer's Code of*

The importance of delineating specific authority to the Family and Supreme Court to direct investigations and, if indicated, filings of child protective petitions cannot be overstated. All too often, child protective investigations are performed and result in an "indicated" report, only to be closed the same day without any petition being drawn or services being provided to the families to ensure protection of the children or remediation of the problems found.[40] While many such cases should be addressed through provision of services, rather than filing of a petition, there are instances where a petition, often in addition to services, would be more appropriate. For example, where serious concerns exist as to the safety of children from abusive parents, simply granting custody to relatives in the absence of a child protective petition may provide insufficient protection both to the children and their kin; kinship homes may be better supported in the context of a child protective proceeding. This measure will help to ensure that where specific allegations of child maltreatment have been found upon investigation to be supported by credible evidence, the Family or Supreme Court would be able to direct the filing of a petition and thereby to facilitate appropriate court intervention to further the protection of the children and assistance to the family.

Proposal

AN ACT to amend the domestic relations law and the family court act, in relation to the authority of the court to direct filing of child protective petitions

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

Section 1. Section 240 of the domestic relations law is amended by adding a new subdivision1-d to read as follows:

1-d. On its own motion or on the motion of any party or the law guardian in proceedings under this section, the court may direct an investigation pursuant to section one thousand thirty-four of the family court act. If the investigation results in an indicated report as defined in subdivision twelve of section four hundred twelve of the social services law, the court, after giving the local social services commissioner and the subject of the report notice and an opportunity to be heard, may direct the commissioner to file a child protective petition under article ten of the family court act with respect to allegations found in the investigation to be indicated. The court may direct that the child protective petition be heard by the judge presiding over proceedings under this section.

Professional Responsibility, Ethical Consideration 7-14. Significantly, in child abuse cases, the New York City Corporation Counsel and, outside New York City, the District Attorney is a "necessary party" to the proceeding. Family Court Act §254(b).

[40] It has been estimated that in 1998, "almost 40% or about 20,000 [indicated cases] were closed the same day they were indicated;" indicated cases represented 34% of the 145,478 reports investigated in New York State in 1998. *See* "A Different Front Door: Essential Reforms in Child Protection Services," 1 *SCAA Reports* #3 (Schuyler Center for Analysis and Advocacy, Special Spring 2001 Edition), p. 3.

§2. The family court act is amended by adding a new section 657 to read as follows:

§657. Order directing filing of child protective petition. On its own motion or on the motion of any party or the law guardian in proceedings under this part, the family court judge may direct an investigation pursuant to section one thousand thirty-four of this act. If the investigation results in an indicated report as defined in subdivision twelve of section four hundred twelve of the social services law, the judge, after giving the local social services commissioner and the subject of the report notice and an opportunity to be heard, may direct the commissioner to file a child protective petition under article ten of this act with respect to allegations found in the investigation to be indicated. The judge may direct that the child protective petition be heard by the judge presiding over proceedings under this part.

§3. Section 817 of the family court act, amended by chapter 391 of the laws of 1978, is amended to read as follows:

§817. Support, paternity and child protection. On its own motion or on the motion of any party or the law guardian and at any time in proceedings under this article, the family court judge may direct an investigation pursuant to section one thousand thirty-four of this act. If the investigation results in an indicated report as defined in subdivision twelve of section four hundred twelve of the social services law, the family court judge, after giving the local social services commissioner and the subject of the report notice and an opportunity to be heard, may direct the [filing of] commissioner to file a child protective petition under article ten of this [chapter,] act with respect to allegations found in the investigation to be indicated. On its own motion or on the motion of any party or the law guardian and at any time in proceedings under this article, the judge may also direct the filing of a support petition under article four or a paternity petition under article five of this act [and consolidate the proceedings]. The judge may direct that any petition filed pursuant to this section be heard by the judge presiding over proceedings under this part.

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

9. Dispositional options available to the Family Court in proceedings to terminate parental rights (FCA §§631, 635; SSL §384-b)

New York State's termination of parental rights statute reflects the Legislature's intention "to provide procedures not only assuring that the rights of the natural parent are protected, but also where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs and rights of the child by terminating parental rights and freeing the child for adoption." Social Services Law §384-b(1). In light of the emphasis upon expeditious permanency planning for children in both the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7; Laws of 2000, ch. 145], it is critically important to ensure that appropriate dispositional options are available in termination of parental rights proceedings to facilitate prompt adoptions for those children who are freed. For many children, the goal of adoption is best furthered through a commitment of custody and guardianship to the authorized child care agency that served as petitioner in the termination of parental rights action, an option contained in section 384-b(3)(a) of the Social Services Law, as well as sections 631 and 634 of the Family Court. For others, including those in direct placement with a relative or other suitable person,[41] as well as foster children for whom a relative or other suitable person intervenes in the action, the goal may be best served through a commitment of guardianship and custody directly to that individual for purposes of adoption. However, New York State's statutory framework does not provide the latter option in the Family Court Act and permits commitments to relatives, but not other suitable persons, in the Social Services Law.

The Family Court Advisory and Rules Committee is proposing a measure that will fill that gap and provide needed consistency between the Social Services Law and Family Court Act. Although section 384-b(3)(a) of the Social Services Law includes commitment of guardianship and custody to a foster parent or to a relative caring for the child as a possible outcome of proceedings to terminate parental rights, section 631 of the Family Court Act includes neither of these alternatives among the dispositional options in a permanent neglect proceeding. Pursuant to section 631 of the Family Court Act, the sole options include dismissal, suspended judgment and commitment of guardianship and custody to an authorized child care agency. Neither the Social Services Law nor the Family Court Act include commitment of guardianship and custody to a "suitable person" as an authorized disposition.

The Committee's proposal, therefore, would add "suitable person" to section 384-b(3)(a) of the Social Services Law and would add "foster parent, relative or other suitable person" to section 631 of the Family Court Act. A new section 635 of the Family Court Act would be created that mirrors the

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[41] IN MATTER OF DALE P., 84 N.Y.2D 72 (1994), FOR EXAMPLE, THE COURT OF APPEALS AF
LOCAL SOCIAL SERVICES COMMISSIONER TO FILE A PETITION TO TERMINATE PARENTAL
ABANDONED CHILD WHO HAD BEEN PLACED DIRECTLY BY THE FAMILY COURT WITH A
PERSON" WHO WAS CLEARLY AN ADOPTIVE RESOURCE FOR THE CHILD, NOTWITHSTAND
WAS NOT IN THE COMMISSIONER'S CUSTODY AS A FOSTER CHILD. A DISPOSITIONAL OU
COMMITMENT OF GUARDIANSHIP AND CUSTODY TO THAT "SUITABLE PERSON" FOR PU
BE APPROPRIATE FOR SUCH A CHILD, AS WELL AS CHILDREN FOR WHOM RELATIVES OR
THE COURSE OF THE TERMINATION PROCEEDING, BUT THIS OPTION IS NOT CLEARLY A
SEVERAL APPELLATE CASES HAVE UPHELD TERMINATIONS OF PARENTAL RIGHTS INVOLV
DIRECTLY PLACED WITH "SUITABLE PERSONS." *SEE, E.G.,* MATTER OF HANNAH D., 292 A.D.
2002)(DIRECT KINSHIP PLACEMENT); MATTER OF ANTHONY JULIUS A., 231 A.D.2D 462 (1ST

corresponding provisions of subdivision (3)(a) of section 384-b of the Social Services Law. In accordance with the current provisions of the Social Services Law, this direct commitment option would be available where the foster parent, relative or suitable person intends to adopt the child. Where the individual fails to institute a proceeding within six months of the order, the Court would be able to exercise its continuing jurisdiction to revoke or modify the commitment order. Where an adoption proceeding is filed but is subsequently denied or dismissed, the Court would be required to revoke the commitment order and instead commit the child to an authorized agency, another relative or other suitable person.

Enactment of this measure would promote the achievement of permanency for the many children placed directly with relatives or suitable persons in accordance with sections 1017 and 1055 of the Family Court Act, many of whom would be appropriate adoptive resources for the children. Consistent with the goals of *ASFA*, children should not lose critical opportunities to become permanent members of their families.

Proposal

AN ACT to amend the family court act and the social services law, in relation to commitments of guardianship and custody to a foster parent, relative or other suitable person upon an adjudication of permanent neglect

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

Section 1. Section 631 of the family court act, as amended by chapter 666 of the laws of 1976, is amended to read as follows:

§631. Disposition on adjudication of permanent neglect. At the conclusion of a dispositional hearing on a petition for the commitment of the guardianship and custody of a child, the court shall enter an order of disposition:

(a) dismissing the petition in accord with section six hundred thirty-two; or

(b) suspending judgment in accord with section six hundred thirty-three; or

(c) committing the guardianship and custody of the child in accord with section six hundred thirty-four; or

(d) committing the guardianship and custody of the child to a foster parent, relative or other suitable person in accord with section six hundred thirty-five.

An order of disposition shall be made, pursuant to this section, solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular disposition.

§2. The family court act is amended by adding a new section 635 to read as follows:

§ 635. Commitment of guardianship and custody to a foster parent, relative or other suitable person; further orders. The court may enter an order under section six hundred thirty-one of this article committing the guardianship and custody of the child to a foster parent authorized pursuant to section three hundred ninety-two of the social services law or to section one thousand fifty-five of this act to institute a proceeding under this article, or to a relative or other suitable person. Where such guardianship and custody is committed to a foster parent, relative or other suitable person, the family court shall retain continuing jurisdiction over the parties and the child and may, upon its own motion or the motion of any party, revoke or modify its order if the foster parent, relative or other suitable person fails to institute a proceeding for the adoption of the child within six months after the entry of the order committing the guardianship and custody of the child to such foster parent, relative or other suitable person. Where the foster parent, relative or other suitable person institutes a proceeding for the adoption of the child and the adoption petition is finally denied or dismissed, the court that committed the guardianship and custody of the child to the foster parent, relative or other suitable person shall revoke the order of commitment. Where the court revokes an order committing the guardianship and custody of a child to a foster parent, relative or other suitable person, it shall commit the guardianship and custody of the child to an authorized agency, another relative or other suitable person.

§3. Paragraph (a) of subdivision 3 of section 384-b of the social services law, as amended by chapter 601 of the laws of 1994, is amended to read as follows:

(a) The guardianship of the person and the custody of a destitute or dependent child may be committed to an authorized agency, or to a foster parent authorized pursuant to section three hundred ninety-two of this chapter or to section one thousand fifty-five of the family court act to institute a proceeding under this section, or to a relative [with care and custody of the child] or to another suitable person, by order of a surrogate or judge of the family court[, as hereinafter provided]. Where such guardianship and custody is committed to a foster parent [or to a], relative [with care and custody of the child] or other suitable person, the family court or surrogate's court shall retain continuing jurisdiction over the parties and the child and may, upon its own motion or the motion of any party, revoke[,] or modify [or extend] its order, if the foster parent [or], relative or other suitable person fails to institute a proceeding for the adoption of the child within six months after the entry of the order committing the guardianship and custody of the child to such foster parent [or], relative or other suitable person. Where the foster parent [or], relative or other suitable person institutes a proceeding for the adoption of the child and the adoption petition is finally denied or dismissed, the court [which] that committed the guardianship and custody of the child to the foster parent [or], relative or other suitable person shall revoke the order of commitment.

Where the court revokes an order committing the guardianship and custody of a child to a foster parent [or], relative or other suitable person, it shall commit the guardianship and custody of the child to an authorized agency, another relative or other suitable person.

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

10. Dispositional and permanency hearings in juvenile delinquency and person in need of supervision proceedings (FCA §§353.3, 355.5, 756, 756-a)

The recently-enacted reauthorization of the federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273] makes compliance with the *Adoption and Safe Families Act* 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. The enactment of recent amendments to New York State's legislation implementing the federal *Adoption and Safe Families Act* ["*ASFA,"* Public Law 105-89] underscored the Legislature's recognition that the reasonable efforts, permanency planning and permanency hearing requirements of *ASFA* are fully applicable to juvenile delinquency and persons in need of supervision ("PINS") proceedings in Family Court and, in fact, 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* Laws of 2000, ch. 145; Senate Memorandum in Support of S 7892-a.[42] The 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.* 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).

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 the same information that is required to be presented in other child welfare proceedings and it must make determinations of comparable specificity. To that end, the Family Court Advisory and Rules Committee has developed a proposal to conform the dispositional and permanency hearing provisions of Articles 3 and 7 to those in Article 10 of the Family Court Act. The proposal extends the *ASFA* requirements to juvenile delinquency and PINS proceedings in order to provide the Family Court and litigants with the information needed to fulfill these requirements.

The measure would require that dispositional and permanency hearing orders in juvenile delinquency and PINS proceedings involving foster care placements include: a description of the visitation plan between the juvenile and his or her parent or legally-responsible adult; a service plan designed to fulfill the permanency goal for the juvenile; [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

[42] MCKINNEY'S SESSION LAWS OF NEW YORK(AUG., 2000), NO.5, P.A-424, A-426, A-427.

[43] If a service plan has not been prepared by the date of disposition, it must be disseminated to the Family Court, presentment agency, law guardian and parent or person legally responsible for the child's care within 90 days of the issuance of the dispositional order.

service plan would be required to be provided to the parent or other legally responsible individual.

This measure is vital to address the current conundrum faced by the Family Court: it 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 and if the agency's responsibilities to work with, and provide appropriate visitation to, the juveniles' parents and other legally-responsible adults is clearly articulated, the likelihood of successful permanency planning is significantly increased – a benefit not only to New York State in its efforts to demonstrate compliance with *ASFA*, but also to the juveniles and their families. As one child welfare expert has written:

> If *ASFA* and Title IV-E are applied properly, consistently and with a view toward reunification, rehabilitation and safe permanent homes for the children involved, the results can be extraordinary. One outcome –collaboration among courts, agencies, and lawyers – can result in fewer delinquency, status offender, and dependency [child abuse and neglect] cases; more youths and families involved with one another and their communities; and fewer future adult crimes. Collaboration also is efficient under a cost-benefit analysis since it provides extra funding for juvenile justice initiatives and preventive services.
>
> *ASFA* and Title IV-E can be important tools to reform the juvenile justice field. They can provide juvenile justice agencies with added means to control and oversee youths, work preventively with families at risk, and get community involvement and "buy-in."

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

Proposal

AN ACT to amend the family court act, in relation to dispositional and permanency hearings in juvenile delinquency and persons in need of supervision proceedings

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

Section 1. Section 353.3 of the family court act is amended by adding a new subdivision 4-a to read as follows:

4-a. When the respondent is placed in a nonsecure facility or foster care home pursuant to paragraph (c) of subdivision three or subdivision 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 visitation plan;

(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, law guardian and parent or other

person or persons legally responsible for the care of the respondent no later than ninety days from the date the disposition was made; and

(c) a direction that the parent or other person or persons legally responsible for the respondent shall be notified of any planning conferences, of their right to attend the conferences, and of their right to have counsel or another representative or companion with them. If the respondent is placed with the commissioner of social services, the order shall contain a direction that the parent 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.

A copy of the court's order and attachments shall be given to the parent 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 may be required by law to file a petition to terminate the parental rights of the parent or person legally responsible for the respondent.

§2. Section 355.5 of the family court act is amended by adding a new subdivision 9 to read as follows:

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

(a) a description of the visitation plan;

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

(c) a direction that the parent or other person or persons legally responsible for the respondent shall be notified of any planning conferences, including those held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and their right to have counsel or another representative or companion with them.

A copy of the court's order and the attachments shall be given to the parent or other person or persons legally responsible for the respondent. The order shall also contain a notice that if the respondent remains in foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate the parental rights of the parent or person legally responsible for the

respondent.

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

(d) when 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;

(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, law guardian and parent or other person or persons legally responsible for the care of the respondent no later than ninety days from the date the disposition was made; and

(iii) a direction that the parent or 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.

A copy of the court's order and attachments shall be given to the parent 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 may be required by law to file a petition to terminate the parental rights of the parent or person legally responsible for the respondent.

§4. Subdivisions (e) and (f) of section 756-a of the family court act are re-lettered (f) and (g) and such section is amended by adding a new subdivision (e) to read as follows:

(e) If the order from the permanency hearing extends the respondent's placement or if the respondent continues in placement under a prior order, the order or an attachment to the order incorporated into the order by reference shall include:

(i) a description of the visitation plan;

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

(iii) a direction that the parent or other 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.

A copy of the court's order and the service plan shall be given to the parent or other person or persons legally responsible for the respondent. The order shall also contain a notice that if the respondent remains in foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate the parental rights of the parent or other person legally responsible for the respondent.

§5. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to all petitions filed on or after that date.

11. Extension of the permissible duration and entry of orders of protection and temporary orders of protection issued in child abuse and neglect cases onto the statewide automated order of protection and warrant registry (FCA §§ 1029, 1056; Exec. L. §221-a)

The statewide registry of orders of protection and warrants, established pursuant to the *Family Protection and Domestic Violence Intervention Act of 1994* [Laws of 1994, ch. 222, 224], has become an invaluable tool both for law enforcement and the courts. With 903,987 orders of protection in the database, as of December 5, 2002,[44] and with the database now connected to the national "protection order file" maintained by the National Crime Information Center (Federal Bureau of Investigation), the registry helps to assure informed judgments at all stages of domestic violence cases.

As use of the database becomes more and more routine, however, its limitations become more apparent, specifically the gaps in the data contained in the system. While the registry purports to contain all orders of protection issued in domestic violence cases, the statute establishing the registry specifies only orders of protection and related warrants issued in criminal and Family Court family offense, matrimonial, child support, paternity and child custody cases, as well as orders of protection issued in non-family offense criminal cases against victims of domestic violence. *See* Executive Law §221-a(1). Orders of protection and related warrants issued in child abuse and neglect cases, pursuant to Article 10 of the Family Court Act, are not required to be entered onto the registry. As a result of this omission, law enforcement and courts are seriously hampered in their inquiries regarding both the existence of outstanding orders, including possibly conflicting orders, and the parties' histories of orders of protection. Significantly, the requirement that courts, when issuing protective orders, inquire as to the existence of other orders of protection with respect to the parties does not apply in child protective proceeding. Moreover, although the family violence to be prevented may be just as serious, if not more so, as that in matrimonial cases, section 1056 of the Family Court Act permits an order of protection against respondent parents or legal guardians to last only as long as a dispositional order, that is, one year, subject to annual extensions.

The Family Court Advisory and Rules Committee, therefore, is offering a legislative proposal to remedy this gap. The proposal would require that information regarding orders of protection and related warrants in child protective proceedings brought pursuant to Article 10 of the Family Court Act be included on the statewide registry. It would require Family Court, when issuing temporary and final orders of protection, pursuant to sections 1029 and 1056 of the Family Court Act, to make inquiry as to the existence of other orders of protection issued with respect to the parties. Additionally, it would permit orders of protection in such cases to be of comparable duration to those permitted in matrimonial cases under sections 240(3) and 252 of the Domestic Relations Law.

Article 10 of the Family Court Act specifically requires courts to consider issuing orders of protection to exclude domestic violence perpetrators from the home in lieu of removing the child; no requirement exists, nor would one be appropriate, for custodial parents in such situations to bring separate Article 8 proceedings to obtain orders of protection. Yet orders of protection in Article 10 cases are not entered onto the registry, creating an impression that they are not taken as seriously as domestic violence orders in other cases and, importantly, creating confusion for both law enforcement and the courts in

[44] SOURCE: NYS OFFICE OF COURT ADMINISTRATION DIVISION OF TECHNOLOGY.

obtaining a complete order of protection picture with respect to an alleged abuser.

This proposal would recognize that domestic violence is often inextricably linked with child abuse and that victims of domestic violence in child abuse and neglect cases require as much protection as in other proceedings. That domestic violence and child abuse frequently coexist in homes has been widely recognized, with estimates of the overlap ranging from 40% to 60%.[45] Research has estimated that children are abused at a rate 1,500 times higher than the national average in homes where domestic violence is also present.[46] Significantly, child sexual abuse has also been closely correlated with domestic violence.[47] Therefore, inclusion of orders of protection in such cases on the registry, as well as authorization for the orders to continue for longer periods, will significantly advance the Legislature's goal of providing an integrated response in all family violence cases.

With this legislation, courts handling all types of family violence cases would be able to make more informed decisions as to the appropriateness of issuing protective orders or warrants and the need for particular conditions. Importantly, the courts would then be able to determine whether orders of protection issued would be in conflict with any other such orders outstanding in *any* criminal, matrimonial or Family Court proceeding statewide, including child protective proceedings, and the courts would be cognizant of the respondent's prior history with respect to compliance with orders of protection. Further, in child protective proceedings, the Family Court would be able to enter orders of duration appropriate to the circumstances of particular cases, thereby eliminating the need to request annual extensions or to initiate independent actions.

Proposal

AN ACT to amend the family court act and the executive law, in relation to orders of protection in child protective proceedings

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

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[45] *See* "The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association" (Amer. Bar Assoc., 1994), p. 18; "Diagnostic and Treatment Guidelines on Domestic Violence" (Amer. Medical Assoc.,1992). *See also* M, Fields, "The Impact of Spouse Abuse on Children, and its Relevance in Custody and Visitation Decisions in New York State," 3 *Cornell J. of Law and Pub. Policy* 222, 224 (1994); A. Jones, *Next Time She'll be Dead* 84 (1994) [citing, E. Stark and A. Flitcraft, "Women and Children at Risk: A Feminist Perspective on Child Abuse," 18 *Int'l. J. Health Services* 1:97 (1988); L. McKibben, *et al.*, "Victimization of Mothers of Abused Children: A Controlled Study," 84 *Pediatrics* #3 (1989); L. Walker, *The Battered Woman Syndrome* 59 (1984)].

[46] "The Violence Against Women Act of 1990: Hearings on S. 2754," Senate Committee on the Judiciary, Report 1-545, 101st Cong., 2d Sess. 37 (1990)[cited in J. Zorza, "Woman Battering: A Major Cause of Homelessness," *Clearinghouse Review* (Special Issue, 1991)].

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

Section 1. Subdivision (a) of section 1029 of the family court act, as amended by chapter 673 of the laws of 1988, is amended to read as follows:

(a) The family court, upon the application of any person who may originate a proceeding under this article, for good cause shown, may issue a temporary order of protection, before or after the filing of such petition, which may contain any of the provisions authorized on the making of an order of protection under section [ten hundred] one thousand fifty-six. Prior to issuing a temporary order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties. If such order is granted before the filing of a petition and a petition is not filed under this article within ten days from the granting of such order, the order shall be vacated. In any case where a petition has been filed and a law guardian appointed, such law guardian may make application for a temporary order of protection pursuant to the provisions of this section.

§2. The opening unlettered paragraph of subdivision 1 and subdivision 4 of section 1056 of the family court act, as amended by chapter 483 of the laws of 1995, are amended to read as follows:

1. The court may [make] issue an order of protection in assistance or as a condition of any other order made under this part. Prior to issuing an order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties. Such order of protection shall remain in effect concurrently with, shall expire no later than the expiration date of, and may be extended concurrently with, such other order [made] issued under this part, [except as provided in subdivision four of this section] provided, however, that for good cause shown, the court may direct that an order of protection issued under this section shall remain in effect for a specified period beyond the expiration of the dispositional order, but in no event beyond the eighteenth birthday of the youngest child as to whom a finding of child abuse or neglect has been made. The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by a person who is before the court and is a parent or a person legally responsible for the child's care or the spouse of the parent or other person legally responsible for the child's care, or both. Such an order may require any such person:

* * *

4. The court may enter an order of protection independently of any other order made under this part, against a person who was a member of the child's household or a person legally responsible as defined in section one thousand twelve of this chapter, and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household. An order of protection entered pursuant to this subdivision may be for [any] the period of time [up to the child's eighteenth birthday] and upon such conditions as [the court deems necessary and

proper to protect the health and safety of the child and the child's caretaker] are authorized by subdivision one of this section.

§3. Subdivision 1 of section 221-a of the executive law, as amended by chapter 462 of the laws of 2002, is amended to read as follows:

1. The superintendent, in consultation with the division of criminal justice services, office of court administration, the division of probation and correctional alternatives, the state office for the prevention of domestic violence and the division for women, shall develop a comprehensive plan for the establishment and maintenance of a statewide computerized registry of all orders of protection issued pursuant to articles four, five, six [and], eight and ten of the family court act, section 530.12 of the criminal procedure law and, insofar as they involve victims of domestic violence as defined by section four hundred fifty-nine-a of the social services law, section 530.13 of the criminal procedure law and sections two hundred forty and two hundred fifty-two of the domestic relations law, and orders of protection issued by courts of competent jurisdiction in another state, territorial or tribal jurisdiction, and all warrants issued pursuant to sections one hundred fifty-three and eight hundred twenty-seven of the family court act, and arrest and bench warrants as defined in subdivisions twenty-eight, twenty-nine and thirty of section 1.20 of the criminal procedure law, insofar as such warrants pertain to orders of protection; provided, however, that warrants issued pursuant to section one hundred fifty-three of the family court act pertaining to articles three[,] and seven [and ten] of such act and section 530.10 of the criminal procedure law shall not be included in the registry. The superintendent shall establish and maintain such registry for the purposes of ascertaining the existence of orders of protection, temporary orders of protection and warrants and for enforcing the provisions of paragraph (b) of subdivision four of section 140.10 of the criminal procedure law.

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

12. Criminal and child maltreatment history screening of persons with whom children are placed and persons seeking custody or visitation (DRL §112; Exec. L. §837; FCA §§ 653, 662, 1017, 1027, 1055; SSL §§376, 377, 378-a, 421; S.C.P.A. § 1707)

In requiring fingerprinting of prospective foster and adoptive parents and adults over the age of 18 residing in their homes, the legislation implementing the federal *Adoption and Safe Families Act* ["ASFA"; Public Law 105-89] makes significant strides toward assuring the safety and well-being of children. *See* Laws of 1999, ch. 7; Laws of 2000, ch. 145. However, the new statute fails to address the equally important issue of child abuse registry screening of prospective foster and adoptive families, as well as both criminal history and child abuse registry screening in cases involving custody, visitation, direct placements and guardianships. Judges of the Family Court must be confident that children before them will be adequately protected and well-cared for in <u>any</u> home into which they are placed and with any adult with whom they regularly spend time.

Consistent with the central precept of *ASFA* that safety of the child is paramount, this measure authorizes child abuse and maltreatment, not simply criminal history, screening of prospective foster parents, including kinship foster parents, as well as prospective adoptive parents, guardians and individuals accepting direct placements of children. The measure would amend sections 376, 377 and 378-a of the Social Services Law to require authorized agencies to pre-screen prospective foster parents and applicants for licenses to "receive, board or keep" children for child abuse and maltreatment histories through the State Office of Children and Family Services. For those prospective foster parents and direct placement resources not pre-screened for child abuse or criminal histories, including kinship foster parents and individuals accepting direct placements of children, the proposal would amend sections 1017, 1027 and 1055 of the Family Court Act to permit Family Court to require such screening within 30 days of the initial remand or placement.

While not addressed in *ASFA*, reports of suspected child abuse or maltreatment, particularly reports that culminated in Family Court Act Article 10 child protective proceedings, are equally as important as criminal histories in assuring the safety of homes for children. Clearances of prospective adoptive parents and guardians, first required in 1987, were narrowed in 1991 to require disclosure of reports in which the proposed guardian or adoptive parent was the "subject of an indicated report" of child maltreatment, thereby deleting the requirement for screening of other adults in the home. *See* Laws of 1987, ch. 636; Laws of 1991, ch. 164. As the Legislature recently recognized, however, in enacting chapter 423 of the Laws of 1998, maltreatment may be committed by *any* person regularly in the household, including relatives or members of an informal extended family. While chapter 423 requires such screenings in proceedings brought pursuant to the Surrogate's Court Procedure Act, this proposal would extend these requirements to adoption proceedings brought pursuant to the Domestic Relations Law and guardianship proceedings under the Family Court Act.

The proposal also addresses the difficult problems posed in interstate cases. The federal *Adoption and Safe Families Act* recognized that proceedings involving more than one state often present obstacles to expeditious resolution of children's cases. Similarly, the federal Office of Juvenile Justice and Delinquency Prevention recommended that states take steps to increase interstate "communication, coordination, and cooperation" in order to facilitate the prompt screening of individuals who work with

children.[48] In order to respond to the persistent problem of delays in obtaining information regarding prospective custodial or adoptive resources residing in other states, the proposal would amend sections 378-a and 421 of the Social Services Law and section 837 of the Executive Law to require the New York State Office of Children and Family Services and the Division of Criminal Justice Services, respectively, to take "all reasonable and necessary steps to establish reciprocal agreements" with comparable authorities in other states to facilitate the prompt sharing of necessary information.

Finally, the proposal also permits, but does not require, the Family Court to require applicants for custody of, or visitation with, children to supply the court with a criminal history report from the New York State Division of Criminal Justice Services. With such information, the courts adjudicating matters of custody and visitation will be able to implement recently-enacted requirements with respect to domestic violence (and particularly, homicide of a spouse or child) and will be better equipped to assure that custodial and visitation environments are safe for children. *See* Laws of 1999, ch. 378; Laws of 1998, ch. 150; Laws of 1996, ch. 85.

Proposal

AN ACT to amend the domestic relations law, the executive law, the family court act, the social services law and the surrogate's court procedure act, in relation to criminal records and child abuse and maltreatment screening of prospective foster parents, adoptive parents, persons with whom children are placed and persons seeking custody or visitation with children

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

Section 1. Subdivision 2 of section 112 of the domestic relations law, as amended by chapter 164 of the laws of 1991, is amended to read as follows:

2. The adoptive parents or parent and the adoptive child if over eighteen years of age must present to such judge or surrogate (a) a petition stating the names and place of residence of the petitioners; whether they are of full age; whether they are married or unmarried and, if married, whether they are living together as husband and wife; the first name, date and place of birth of the adoptive child as nearly as the same can be ascertained; a statement on information and belief that there will be annexed to the petition a schedule verified by a duly constituted official of the authorized agency as required by this section; the religious faith of the petitioners; the religious faith of the adoptive child and his or her parents as nearly as the same can be ascertained; the manner in which the adoptive parents obtained the adoptive child; whether the child was placed or brought into the state of New York from out of state for the purpose of

[48] *See Guidelines for the Screening of Persons Working with Children, the Elderly, and Individuals with Disabilities in Need of Support* (U.S. Office of Juvenile Justice and Delinquency Prevention, Apr., 1998), p. 13.

adoption, whether the placement was subject to the provisions of section three hundred seventy-four-a of the social services law and if the placement was subject to the provisions of such section, whether the provisions of such section were complied with; the period of time during which the adoptive child has resided with the adoptive parents; the occupation and approximate income of the petitioners, including support and maintenance, if any, to be received on behalf of the adoptive child from a commissioner of social services, pursuant to the social services law, and the new name, if any, by which the adoptive child is to be known; whether the adoptive parent or parents has or have knowledge that an adoptive parent, or any person over the age of sixteen years who regularly resides in the proposed adoptive home, is the subject of an indicated report, as such terms are defined in section four hundred twelve of the social services law, filed with the statewide central register of child abuse and maltreatment pursuant to title six of article six of the social services law, or has been the [subject of or the] respondent in a child protective proceeding commenced under article ten of the family court act, which proceeding resulted in an order finding that [the] a child is an abused or neglected child; that no previous application has been made to any court or judge for the relief sought or if so made, the disposition of it and a statement as to whether the adoptive child had been previously adopted, all of which statements shall be taken prima facie as true; (b) an agreement on the part of the adoptive parents or parent to adopt and treat the adoptive child as their or his or her own lawful child; (c) the consents required by section one hundred eleven of this article.

§2. Subdivision 7 of section 112 of the domestic relations law, as amended by chapter 164 of the laws of 1991, is amended to read as follows:

7. Before making an order of adoption the judge or surrogate shall inquire of the department of social services and the department shall inform the court whether an adoptive parent, or any person over the age of sixteen years who resides in the proposed adoptive home, is the subject of an indicated report, as such terms are defined in section four hundred twelve of the social services law, filed with the statewide central register of child abuse and maltreatment pursuant to title six of article six of the social services law and shall cause to be made an investigation by a disinterested person or by an authorized agency specifically designated by the judge or surrogate to examine into the allegations set forth in the petition and to ascertain such other facts relating to the adoptive child and adoptive parents as will give such judge or surrogate adequate basis for determining the propriety of approving the adoption. A written report of such investigation shall be submitted before the order of adoption is made. As used in this subdivision, “disinterested person” includes the probation service of the family court. Such an inquiry shall not be required if the findings of such an inquiry made within the past twelve months is available to the judge or surrogate.

§3. Subdivision 1-a of section 240 of the domestic relations law, as amended by chapter 452 of the laws of 1988, is amended to read as follows:

1-a. In any proceeding brought pursuant to this section to determine the custody or visitation of minors, a report made to the statewide central register of child abuse and maltreatment, pursuant to title six of article six of the social services law, or a portion thereof, which is otherwise admissible as a business record pursuant to rule forty-five hundred eighteen of the civil practice law and rules shall not be admissible in evidence, notwithstanding such rule, unless an investigation of such report conducted pursuant to title six of article six of the social services law has determined that there is some credible evidence of the alleged abuse or maltreatment and that the subject of the report has been notified that the report is indicated. In addition, if such report has been reviewed by the state commissioner of social services or his or her designee and has been determined to be unfounded, it shall not be admissible in evidence. If such report has been so reviewed and has been amended to delete any finding, each such deleted finding shall not be admissible. If the state commissioner of social services or his or her designee has amended the report to add any new finding, each such new finding, together with any portion of the original report not deleted by the commissioner or his or her designee, shall be admissible if it meets the other requirements of this subdivision and is otherwise admissible as a business record. If such a report, or portion thereof, is admissible in evidence, but is uncorroborated, it shall not be sufficient to make a fact finding of abuse or maltreatment in such proceeding. Any other evidence tending to support the reliability of such report shall be sufficient corroboration. Before entry of a final order of custody or visitation, the court may require that the prospective custodian or applicant for visitation be fingerprinted or that a digital image be taken, that the fingerprints or digital image be forwarded to the division of criminal justice services, accompanied by the appropriate processing fee, if any, and that a report from the division of criminal justice services setting forth any existing criminal record of such prospective custodian or applicant for visitation be submitted to the court.

§4. Section 837 of the executive law is amended by adding a new subdivision 7-a to read as follows:

7-a. Take all reasonable and necessary steps to establish reciprocal agreements with criminal history repository agencies in other states authorizing the prompt exchange of information for the purpose of establishing identity and previous criminal record.

§5. Section 653 of the family court act, as amended by chapter 580 of the laws of 1966, is amended to read as follows:

§653. Rules of court; criminal history check. Rules of court, not inconsistent with any law, may authorize the probation service to interview such persons and obtain such data as will aid the court in determining a habeas corpus or custody proceeding under section six hundred fifty-one. Before entry of a final order of custody or visitation, the court may require that the prospective custodian or applicant for visitation be fingerprinted or that a digital image be taken, that the fingerprints or digital image be forwarded to the division of criminal justice services, accompanied by the appropriate processing fee, if any, and that a report from the division of criminal justice services setting forth any existing criminal record of such prospective custodian or applicant for visitation be submitted to the court.

§6. Section 662 of the family court act is amended to read as follows:

§662. Rules of court; criminal history check. Rules of court, not inconsistent with any law, may authorize the probation service to interview such persons and obtain such data as will aid the court in exercising its power under section six hundred sixty-one. Before entry of a final order of custody or visitation, the court may require that the prospective custodian or applicant for visitation be fingerprinted or that a digital image be taken, that the fingerprints or digital image be forwarded to the division of criminal justice services, accompanied by the appropriate processing fee, if any, and that a report from the division of criminal justice services setting forth any existing criminal record of such prospective custodian or applicant for visitation be submitted to the court.

§7. Paragraph (a) of subdivision 2 of section 1017 of the family court act, as added by chapter 744 of the laws of 1989, is amended to read as follows:

(a) where the court determines that the child may reside with a suitable person related to such child, either:

(i) place the child with such relative and conduct such other and further investigations as the court deems necessary. The court may require that within thirty days of such placement:

(A) a fingerprint or digital image be taken of such relative or other suitable person, that the fingerprint or digital image be forwarded to the division of criminal justice services and that a report from the division of criminal justice services be submitted to the court setting forth any existing criminal record; and

(B) an inquiry be made to the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether such relative or other suitable person has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law, and that a report

be made by the office of children and family services to the court setting forth any indicated reports; or

(ii) remand or place the child with the commissioner of social services and direct such commissioner to have the child reside with such relative and further direct such commissioner pursuant to regulations of the department of social services, to perform an investigation of the home of such relative within twenty-four hours and thereafter approve such relative, if qualified, as a foster parent. The court shall require the commissioner to take appropriate steps to ensure that within thirty days of such remand or placement:

(A) a fingerprint or digital image be taken of such relative or other suitable person in accordance with section three hundred seventy-eight-a of the social services law, that the fingerprint or digital image be forwarded to the division of criminal justice services and that a report from the division of criminal justice services be submitted to the court setting forth any existing criminal record; and

(B) an inquiry be made to the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether such relative or other suitable person has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law, and that a report be made by the office of children and family services to the court setting forth any indicated reports. If such home is found to be unqualified for approval, the commissioner shall report such fact to the court forthwith.

§8. Subdivision (b) of section 1027 of the family court act is amended by adding a new paragraph (v) to read as follows:

(v) If the court issues an order remanding or placing a child with a local social services district to reside with a relative or other suitable person or remanding or placing a child with a suitable person other than the respondent, the court shall require the commissioner of such district to take appropriate steps to ensure that within thirty days of such remand or placement:

(A) a fingerprint or digital image be taken of such relative or other suitable person in accordance with section three hundred seventy-eight-a of the social services law, that the fingerprint or digital image be forwarded to the division of criminal justice services and that a report from the division of criminal justice services be submitted to the court setting forth any existing criminal record; and

(B) an inquiry be made to the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether such relative or other suitable person has been the subject of an

indicated report, as such terms are defined in section four hundred twelve of such law, and that a report be made by the office of children and family services to the court setting forth any indicated reports.

§9. Subdivision (a) of section 1055 of the family court act, as added by chapter 962 of the laws of 1970, is amended to read as follows:

(a) For purposes of section one thousand fifty-two the court may place the child in the custody of a relative or other suitable person, or of the commissioner of social services or of such other officer, board or department as may be authorized to receive children as public charges, or a duly authorized association, agency, society or in an institution suitable for the placement of a child. Prior to issuing an order under this subdivision placing a child in the custody of a relative or suitable person, the court may require that:

(i) a fingerprint or digital image be taken of such relative or other suitable person, that the fingerprint or digital image be forwarded to the division of criminal justice services and that a report from the division of criminal justice services be submitted to the court setting forth any existing criminal record; and

(ii) an inquiry be made to the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether such relative or other suitable person has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law, and that a report be made by the office of children and family services to the court setting forth any indicated reports.

§10. Subdivisions 1 and 3 of section 376 of the social services law, as amended by chapter 677 of the laws of 1985, are amended to read as follows:

1. An authorized agency which shall board out any [child/or minor] child under the age of eighteen years shall issue to the person receiving such child [and/or minor] for board a certificate to receive, board, or keep a child [and/or minor] under the age of eighteen years. Prior to issuing such certificate, the agency shall require that an applicant set forth: his or her employment history, provide personal and employment references and sign a sworn statement indicating whether the applicant, to the best of his or her knowledge, has ever been convicted of a crime in this state or any other jurisdiction. The agency shall also require that an inquiry be made to the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether the applicant has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law, and that a report be made by the

office of children and family services to the authorized agency setting forth any indicated reports. Not until all inquiries are completed and evaluated shall the agency cause such certificate to be issued.

3. No person shall be certified by more than one authorized agency but any person so certified may receive for [care at] board or otherwise a child [and/or minor] under the age of eighteen years from other sources upon the written consent and approval of the certifying agency as to each such child [and/or minor].

§11. Subdivision 1 of section 377 of the social services law, as amended by chapter 677 of the laws of 1985, is amended to read as follows:

1. Application for a license to receive, board or keep any child shall be made in writing to the commissioner of social services, in and for the social services district wherein the premises to be licensed are located, in the form and manner prescribed by the department. The department shall require that an applicant set forth: his or her employment history, provide personal and employment references and sign a sworn statement indicating whether, to the best of his or her knowledge, he or she has ever been convicted of a crime in this state or any other jurisdiction. The department shall also require that an inquiry be made to the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether the applicant has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law, and that a report be made by the office of children and family services to the authorized agency setting forth any indicated reports. Not until all inquiries are completed and evaluated shall the commissioner of social services cause such license to be issued.

§12. The title and subdivision 1 of section 378-a of the social services law, as amended by chapter 7 of the laws of 1999, are amended to read as follows:

§378-a. Access to conviction records by authorized agencies; interstate cooperation. 1. Subject to rules and regulations of the division of criminal justice services, an authorized agency shall have access to conviction records maintained by state law enforcement agencies pertaining to persons (i) who have applied for and are under active consideration for employment by such authorized agency in positions where such persons will be engaged directly in the care and supervision of children; and (ii) persons who have applied for a certificate or license to board children under the age of eighteen years.

§13. Subdivision 2 of section 378-a of the social services law is amended by adding a new paragraph (m) to read as follows:

(m) In cooperation with the division of criminal justice services, the office of children and family services shall take steps to establish reciprocal agreements with agencies in other states to promote the prompt exchange of criminal history information and information regarding indicated reports of child abuse and maltreatment for the purpose of screening prospective foster and adoptive parents and other persons with whom children may be placed.

§14. Section 421 of the social services law is amended by adding a new subdivision 9 to read as follows:

9. take all reasonable and necessary steps to establish reciprocal agreements with agencies in other states that maintain a statewide registry of child abuse or maltreatment or its equivalent which would authorize the prompt exchange of information for the purpose of establishing a previous record of indicated reports of child abuse or maltreatment.

§15. Subdivision 1 of section 1707 of the surrogate's court procedure act, as amended by chapter 423 of the laws of 1998, is amended to read as follows:

1. If the court be satisfied that the interests of the infant will be promoted by the appointment of a guardian of [his] the infant's person or [of his] property, or of both, it must make a decree accordingly. The same person may be appointed guardian of both the person and the property of the infant or the guardianship of the person and of the property may be committed to different persons. The court may appoint a person other than the parent of the infant or the person nominated by the petitioner. Before making a decree appointing a guardian of an infant, the court shall require that the prospective guardian be fingerprinted or that a digital image be taken, that the fingerprints or digital image be forwarded to the division of criminal justice services, accompanied by the appropriate processing fee, if any, and that a report from the division of criminal justice services be submitted to the court setting forth any existing criminal record of such prospective guardian. When the court is informed that the infant, a person nominated to be a guardian of such infant, the petitioner, or any individual eighteen years of age or over who resides in the home of the proposed guardian is a subject of or another person named in an indicated report, as such terms are defined in section four hundred twelve of the social services law, filed with the statewide register of child abuse and maltreatment pursuant to title six of article six of the social services law or is or has been the subject of or the respondent in or a party to a child protective proceeding commenced under article ten of the family court act which resulted in an order finding that the child is an abused or neglected child the court shall obtain such records regarding

such report or proceeding as it deems appropriate and shall give the information contained therein due consideration in its determination.

§16. This act shall take effect on the ninetieth day after it shall have become law and shall be applicable to all petitions, whenever filed, that are pending on such date.

13. Judicial authority to direct restitution of unreimbursed medical expenses in juvenile delinquency proceedings (FCA §§351.1, 353.6)

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Section 353.6 of the Family Court Act authorizes the Family Court to order restitution in juvenile delinquency cases, a vital component of the "balanced and restorative justice" model that has become a prototype for juvenile justice systems nationally. Directing juveniles to make financial restitution to victims is a means of holding juveniles accountable for their actions. It facilitates the juveniles' understanding of the extent of the harms they have caused, restores to victims what they have lost and, at the same time, provides work opportunities and vocational programs that may be both educational and conducive to the juveniles' development into productive, law-abiding adults. *See Guide for Implementing the Balanced and Restorative Justice Model* (U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, December, 1998), p. 9.

The scope of losses covered by the restitution provision in the Family Court Act, however, is artificially circumscribed. While justifiably limited in amount to $1500, in view of juveniles' limited means and earning capacities, the statute also restricts the payment of restitution to "a fair and reasonable cost to replace the property or repair the damage caused by the respondent..." Family Court Act §353.6(1)(a). This implies erroneously that damage or destruction of property should be the only compensable loss and wholly ignores the equally, if not more, serious physical harm to victims. In so doing, the statute sends a distorted message to the juvenile respondents and fails in its goal of making victims whole.

The Family Court Advisory and Rules Committee, therefore, is recommending that subdivision (1)(a) of section 353.6 of the Family Court Act be amended to authorize compensation of unreimbursed medical expenses, if any, within the $1500 limit. Further, the Committee proposal would amend subdivision four of section 351.1 of the Family Court Act to clarify that victim impact statements, prepared by local probation departments as part of their pre-dispositional Investigation and Report, should contain information regarding the "amount of unreimbursed medical expenses, if any," so long as the dispositional hearing is not delayed by the effort to obtain such information.

New York State would not be alone in broadening the scope of its juvenile restitution statute. Several states currently allow for restitution to be made in the form of unreimbursed medical expenses when the juvenile has inflicted personal injury. *See* Ariz. Rev. Stat. §12-661 (1999); Ark. Code. Ann. §9-27-330(8) (1999); Cal. Civ. Code §1714.1 (West 1999); Colo. Rev. Stat. §19-2-919 (1999); Conn. Gen. Stat. §52-572 (1999); Ga. Code Ann. §51-2-3 (1999); Mich. Comp. Laws §600.2913 (1999); Ohio Rev. Code Ann. §3109.09 (West 1999).[49] Enactment of this measure would, therefore, be consistent with juvenile delinquency statutes nationally and provide the Family Court with fuller options for designing meaningful, appropriate dispositions for juveniles.

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[49] Additionally, with reference to federal domestic violence crimes, the *Violence Against Women Act* restitution provision includes "medical services relating to physical, psychiatric or psychological care" in its definition of "full amount of victim's losses." *See* 18 U.S.C. §2264(b)(3)(A) [Public Law 103-322].

Proposal

AN ACT to amend the family court act, in relation to orders of restitution in juvenile delinquency proceedings

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

Section 1. Subdivision 4 of section 351.1 of the family court act, as amended by chapter 418 of the laws of 1986, is amended to read as follows:

4. When it appears that such information would be relevant to the findings of the court or the order of disposition, each investigation report prepared pursuant to this section shall contain a victim impact statement which shall include an analysis of the victim's version of the offense, the extent of injury or economic loss or damage to the victim, including the amount of unreimbursed medical expenses, if any, and the views of the victim relating to disposition including the amount of restitution sought by the victim, subject to availability of such information. In the case of a homicide or where the victim is unable to assist in the preparation of the victim impact statement, the information may be acquired from the victim's family. Nothing contained in this section shall be interpreted to require that a victim or his or her family supply information for the preparation of an investigation report or that the dispositional hearing should be delayed in order to obtain such information.

§2. Paragraph (a) of subdivision 1 of section 353.6, as amended by chapter 877 of the laws of 1983, is amended to read as follows:

(a) recommend as a condition of placement, or order as a condition of probation or conditional discharge, restitution in an amount representing a fair and reasonable cost to replace the property [or], repair the damage caused by the respondent or provide the victim with compensation for unreimbursed medical expenses, not, however, to exceed one thousand five hundred dollars. In the case of a placement, the court may recommend that the respondent pay out of his or her own funds or earnings the amount of replacement [or], damage or unreimbursed medical expenses, either in a lump sum or in periodic payments in amounts set by the agency with which he or she is placed, and in the case of probation or conditional discharge, the court may require that the respondent pay out of his or her own funds or earnings the amount of replacement [or], damage or unreimbursed medical

expenses, either in a lump sum or in periodic payments in amounts set by the court; and/or

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

14. Criteria for determining under what circumstances the consent of the biological father is required when a non-marital child under the age of six months is placed for adoption (DRL §111(1)(e))

Section 111(1)(e) of the Domestic Relations Law, governing the rights of biological fathers 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). That same year, the Committee joined interested legislative and bar groups in attempting to secure passage of a measure to replace the statute. Those efforts ultimately failed and, in 1991, the Committee drafted and submitted its own legislative proposal, which also failed to secure enactment. After the decision of the Court of Appeals in Matter of Robert O. v. Russell K., 80 N.Y. 2d 254 (1992), the Committee amended its earlier proposal. In 1999, the legislation enacted to implement the federal *Adoption and Safe Families Act*, designed to expedite permanency planning for children in foster care, underscored the critical importance of clarifying the rights of biological parents at the earliest possible point in children's lives. That statute, in fact, included abandonment of a child by a parent as a ground for a court to authorize an agency to dispense with the requirement to make reasonable efforts to reunify the family, to convene an expedited permanency hearing and, if appropriate, to file a petition to terminate parental rights without delay. Whether a child has truly been abandoned or whether there is, in fact, a biological parent with an interest in the child must, therefore, be clarified as early as possible. The Committee's revised proposal furthers the children's interests in prompt permanency planning and creates a balanced framework for the protection of the rights of all individuals with an interest in adoption proceedings.

Section 111(1)(e) had required the biological father's consent only if, during the six months preceding the 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 in Raquel Marie X. held that the "living together" requirement was unacceptable, because it has no bearing on the question of the father's relationship to the newborn infant, and "can easily be used to block the father's rights." Concluding that the Legislature had intended the three statutory requirements to operate together, the Court held the statute unconstitutional in its entirety, and called upon the Legislature to enact a new law containing "unambiguous standards that both encapsulate the qualifying relationship and protect all of the important interests involved." The Court of Appeals stated:

> The State can deny a right of consent to all unwed fathers who do not come forward to immediately assume their parental responsibilities, and it can prescribe conditions for determining whether the unwed father's manifestation of interest in his child is sufficiently prompt and substantial to require full constitutional protection.

In the absence of statutory guidance, courts have had to determine on a case-by-case basis whether the consent of the father of an infant born out-of-wedlock is required before the adoption can be approved. This process has undermined the confidence with which adoptions can be planned and has the potential to jeopardize the integrity of adoption decrees, to the detriment not

only of the adults involved, but, more importantly, the infants whose futures are at stake.

The uncertain state of the law following the Raquel Marie X. decision was illustrated by the Robert O. case. In Robert O., the Court of Appeals was confronted with the question of whether the birth mother or the state is obliged to inform a birth father of his pending or actual paternity. In Robert O., a biological father who had remained ignorant of the pregnancy and birth attempted, some 10 months after the child's adoption, to assert a right to withhold his consent. He argued that the birth mother or the State owed him a duty to inform him of his paternity, so that he might grasp the opportunity to establish a relationship with the newborn infant that would qualify him, under the Raquel Marie X. holding, for the right to withhold his consent to the adoption. The Court of Appeals rejected that argument, noting that:

> No one, however, let alone any State actor, prevented petitioner from finding out about [the] pregnancy. * * * Nothing in Raquel Marie or the Supreme Court decisions on which it rests suggests that the protection of constitutional due process must or should be extended to him under these circumstances.

Robert O. thus indicates that there is no affirmative constitutional duty to inform a father who does not inquire. *Accord,* Matter of Baby S., -A.D.2d-, *N.Y.L.J.*, 12/22/2000 (Fam.Ct., Dutchess Co., 2000). At the same time, a father who is prevented from obtaining information regarding his child or from taking affirmative steps to hold himself out as the father may not be impeded in asserting his constitutional rights. *See,* Adoption of Baby Girl S., 76 N.Y.2d 387(1990).

The four criteria presented in the Committee's proposed proposal appropriately afford the right to withhold consent to an adoption to those biological fathers 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. Such fathers are defined, first, as those otherwise entitled to receive notice of a judicial proceeding concerning the child by reference to sections 111-a of the Domestic Relations Law and 384-c of the Social Services Law. Those two sections specify several categories, including men who have been adjudicated the father in a court proceeding, those identified by the mother in a written, sworn statement, and those who have filed notice of intent to claim paternity or an acknowledgment of paternity. The constitutional adequacy of those sections was reviewed by the Supreme Court in Lehr v. Robertson, 463 U.S. 248 (1982), and was found acceptable.

The measure's second and third criteria are based on the former statute's requirements concerning holding oneself out as the father and paying financial support. A "saving clause" is provided to prevent affirmative fraud or deception by the birth mother from nullifying the father's rights. In Adoption of Baby Girl S., 76 N.Y.2d 387(1990), the companion case to Raquel Marie X., the Court concluded that the mother's outright and repeated deception of the biological father, who made persistent efforts to learn the truth and to assume parental obligations, constituted a fraud that denied him significant rights and warranted vacatur of the completed adoption. The

Committee's proposal therefore requires the father to "hold himself out as the father" and pay child support "unless prevented from so doing by the person or agency having lawful custody of the child." In deference to the admonition in Robert O. that the relevant time period for prompt action by the father be "measured in terms of the baby's life not by the onset of the father's awareness," the time period is specified as the period immediately preceding the baby's placement for adoption.

The fourth and final requirement gives the biological father 30 days in which to respond to notice of the adoption proceeding by asserting his claim to paternity and requesting full custody of the child. If the biological father meets this and the other three statutory criteria, the child may not be adopted without his consent or termination of his parental rights.

This measure promotes the sound policy of encouraging birth mothers to identify the biological father, so that he may be given notice and his interest, if any, may be resolved as soon as possible. If he is identified and given notice, he has only 30 days in which to respond. If, however, the mother refuses to identify the biological father, claims that no one is entitled to receive notice of the proceeding or prevents the father from obtaining information or taking affirmative steps, the father may nonetheless assert his claims to paternity and custody. Enactment of this measure would, therefore, protect future adoptions from disruptive challenges such as those presented in the Raquel Marie X. and Robert O. cases and would further the aims of prompt permanency for children enunciated in the *Adoption and Safe Families Act*.

Proposal

AN ACT to amend the domestic relations law, in relation to the rights of biological fathers

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

Section 1. Paragraph (e) of subdivision 1 of section 111 of the domestic relations law, as added by chapter 575 of the laws of 1980, is amended to read as follows:

(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he or she is placed for adoption, but only if: (i) such father [openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption] 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 openly held himself out to be the father of such child during [such] the period immediately preceding the placement of the child for adoption, unless prevented from so doing

by the person or agency having lawful custody of the child; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child or child support, unless prevented from so doing by the person or agency having lawful custody of the child; and (iv) upon receiving notice of an adoption proceeding pursuant to the provisions of this chapter, or a notice of a proceeding to terminate parental rights pursuant to section three hundred eighty-four-b of the social services law, or a notice of the commitment of the guardianship and custody of the child by voluntary surrender instrument pursuant to section three hundred eighty-three-c or section three hundred eighty-four of the social services law, or a notice of a proceeding to grant temporary guardianship of the child to a proposed adoptive parent pursuant to section one hundred fifteen-c of this article, such father filed a motion to intervene in the proceeding, including an assertion of paternity and a request for custody, within thirty days of the date of such notice. Such consent shall not be required unless paternity is established in accordance with the relevant and otherwise consistent provisions of the family court act, social services law and public health law.

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

15. Probation access to the statewide automated order of protection and warrant registry for the purpose of conducting pre-dispositional and pre-sentence investigations in family offense and other Family Court cases (Exec. L. §221-a; FCA §835; CPL §§390.20, 390.30)

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

To that end, the Family Court Advisory and Rules Committee is proposing legislation expressly authorizing local probation departments to obtain access to necessary information on the statewide automated registry of orders of protection and warrants, established pursuant to section 221-a of the Executive Law. Information regarding an individual's history of such orders may be essential, not only for the resolution of family offense cases, but also for custody, visitation, juvenile delinquency, persons in need of supervision (PINS) and criminal proceedings. Significantly, the proposal authorizes the courts to call upon local probation departments to perform investigations that will assist the courts in their disposition of family offense matters, and enables probation departments to obtain access to domestic violence registry information for these and other pre-dispositional investigations.

The family offense article of the Family Court Act implies, but does not explicitly authorize, involvement by probation departments in gathering information in aid of the Family Court's dispositions. While dispositional hearings "may commence immediately" upon completion of a fact-finding hearing, the article provides that the dispositional hearing may be adjourned by the Court "to enable it to make inquiry into the surroundings, conditions, and capacities of the persons involved in the proceedings." Family Court Act §§835(a), 836(b). Although not delegating the duty to make that inquiry to probation, subdivision (b) of section 835 of the Family Court Act provides that "[r]eports prepared by the probation service for use by the court at any time prior to the making of an order of disposition shall be deemed confidential information," which may "not be furnished to the court prior to the completion of a fact-finding hearing, but may be used in a dispositional hearing."

The Committee's proposal resolves this ambiguity by making explicit the Family Court's discretion to order local probation departments to prepare investigations and reports for use in dispositional proceedings in family offense matters. While not limiting the scope of the information that can be requested in such an investigation, the proposal enumerates four areas of inquiry. First, the measure permits inquiry into "the presence or absence of aggravating circumstances," since the Court may order up to a three-year, rather than a one-year, order of protection where such circumstances, as defined in section 827(a)(vii) of the Family Court Act, have been found. Second, it permits investigation of "the extent of injuries or out-of-pocket losses to the victim which may form the basis

for an order of restitution," a dispositional order authorized pursuant to subdivision (e) of section 841 of the Family Court Act. Third, in order to prevent issuance of inconsistent orders and provide insight as to the respondent's record of compliance, the proposal permits inquiry into "the history of the respondent with respect to family offenses and orders of protection in this or other courts." Significantly, if the completion of the fact-finding stage coincides with the first appearance of both parties before the Family Court, this investigation may assist the Court in fulfilling its duty, pursuant to subdivision six of section 821-a of the Family Court Act, to "inquire as to the existence of any other orders of protection between the parties." Finally, the proposal permits inquiry into whether the respondent is licensed to possess and is in fact in possession of firearms, an inquiry that will aid the Court in setting conditions for orders of protection and, in cases of serious violation, will facilitate enforcement of the laws authorizing and, under certain circumstances, requiring suspension or revocation of firearms licenses and surrender of firearms. *See* Family Court Act §§842-a, 846-a; Laws of 1996, ch. 644; Laws of 1993, ch. 498.

Additionally, the proposed legislation allows criminal courts to obtain assistance from local probation departments to conduct pre-sentence investigations where relevant to the issuance of an order of protection, including instances in which such investigations are not required under the Criminal Procedure Law. Some family offenses currently require pre-sentence investigations, while others do not. Section 390.20 of the Criminal Procedure Law requires pre-sentence investigations in felony cases and in misdemeanor cases where a sentence of incarceration in excess of 90 days has been imposed, where consecutive incarcerative sentences aggregating in excess of 90 days have been imposed or, unless waived by the parties and the court, where a sentence of probation has been imposed. In all other cases, pre-sentence investigations are purely discretionary as an aid to the court in sentencing. While not altering the courts' discretion with respect to ordering pre-sentence investigations in non-mandated cases, this proposal explicitly adds an authorization for the courts to order such inquiries for the purpose of "issuance of an order of protection" pursuant to section 530.12 of the Criminal Procedure Law.

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

Proposal

AN ACT to amend the family court act, the criminal procedure law and the executive law, in relation to pre-dispositional and pre-sentence investigations in family offense cases

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

Section 1. Subdivision 4 of section 221-a of the executive law, as amended by chapter 349 of the laws of 1995, is amended to read as follows:

4. Courts and law enforcement officials shall have the ability to disclose and share information with respect to such orders and warrants consistent with the purposes of this section, subject to applicable provisions of the family court act, domestic relations law and the criminal procedure law concerning the confidentiality, sealing and expungement of records. Designated representatives of a local probation service shall have access to information in the statewide registry of orders of protection and warrants necessary in order to respond to a judicial request for information pursuant to subdivision six of section eight hundred twenty-one-a of the family court act or subdivision six-a of section 530.12 of the criminal procedure law, or to prepare an investigation and report in proceedings conducted pursuant to sections 351.1, six hundred forty-two, six hundred fifty-six, six hundred sixty-two, seven hundred fifty, eight hundred thirty-five and subdivision (b) of section one thousand forty-seven of the family court act or article three hundred ninety of the criminal procedure law.

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

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

possession of any firearms and, if so, whether the respondent is licensed or otherwise authorized to be in possession of such firearms.

§3. Subdivision 3 of section 390.20 of the criminal procedure law is amended to read as follows:

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

§4. Subdivision 4 of section 390.30 of the criminal procedure law, as amended by chapter 618 of the laws of 1992, is amended to read as follows:

4. Abbreviated investigation and short form report. In lieu of the procedure set forth in subdivisions one, two and three, where the conviction is of a misdemeanor or family offense, as defined in subdivision one of section 530.11 of this law, other than a felony, the scope of the pre-sentence investigation may be abbreviated and a short form report may be made. The use of abbreviated investigations and short form reports, the matters to be covered therein and the form of the reports shall be in accordance with the general rules regulating methods and procedures in the administration of probation as adopted from time to time by the state director of probation and correctional alternatives pursuant to the provisions of article twelve of the executive law. No such rule, however, shall be construed so as to relieve the agency conducting the investigation of the duty of investigating and reporting upon:

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

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

and ongoing danger to the complainant or members of the complainant's family or household and any other information relevant to the issue of whether an order of protection, in addition to any other disposition, should be issued in accordance with subdivision five of section 530.12 of this chapter, or

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

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

16. Elimination of the bar to subsequent remedies for court-approved agreements or compromises of child support with respect to out-of-wedlock children (FCA §516)

Section 516 of the Family Court Act, which requires court approval of an agreement between the mother and putative father for the support and education of an out-of-wedlock child and, when so approved, bars other remedies for the support and education of the child, has long generated constitutional controversy and serious questions as to its continued efficacy. Most recently, in Matter of Clara C. v. William L., 96 N.Y.2d 244 (2001), the Court of Appeals, in a 4-3 decision, declined to rule on the constitutionality of section 516 of the Family Court Act on the ground that a narrower ground for decision was available. The Court held that the Family Court's failure to adequately review the compromise agreement before approving it contravened the statutory proviso that an agreement is binding "only when the court determines that adequate provision has been made" for the support of the child. Three judges of the Court of Appeals, however, would have ruled that the statute was unconstitutional as applied in that it denied the out-of-wedlock child equal protection of the laws:

> Our concurring position at minimum raises serious doubts as to the continued general efficacy of compromise arrangements under section 516, even when the Family Court meticulously performs its statutory obligation to ensure the adequacy of the child support provisions of the agreement...Leaving the constitutional issue in limbo until another case makes it way to our Court in which the settlement was properly approved – so that the constitutional issue would have to be reached – does not serve the best interests of nonmarital children, their mothers or putative fathers in paternity matters.

96 N.Y.2d at 253 (concurring opinion). The Family Court Advisory and Rules Committee proposes that the issue not be left in limbo and that this now-obsolete, discriminatory statute be repealed.

This proposal finds support, not only in the concurrence in Clara C., but also in the decision of the United States District Court in Williams v. Lambert, 902 F. Supp. 460 (S.D.N.Y., 1995). The Court in Williams held that section 516 can withstand constitutional challenge only if its operative language is deemed not to bar other remedies -- i.e., if out-of-wedlock children are not foreclosed from seeking remedies available to children born of marriages, including actions to modify child support.

Section 516 of the Family Court Act, enacted in 1962 but derived from the old Domestic Relations Law, originally served two purposes. First, it encouraged putative fathers to settle paternity claims, thereby reducing the necessity for legal proceedings. Agreements under section 516 offered the putative father certainty and a limitation on his future support obligation, while the interests of the child and mother were protected by the requirement for judicial review. Second, the statute helped ensure that the child would not be without support from the father. By furnishing an incentive to settle, the statute sought to prevent support of the out-of-wedlock child from becoming lost in the intricacies of the paternity adjudicatory process and the uncertainties of its outcome.

Bacon v. Bacon, 46 N.Y.2d 477, 480 (1979).

As noted in both the concurrence in Clara C. and the federal court Williams, however, the linchpin of the Bacon decision -- the "complex and difficult problems of proof" in paternity cases -- no longer stands as a justification for retention of section 516 of the Family Court Act. Technological advances in blood genetic marker testing, the statutory enactments requiring their use, and the evidentiary weight the courts are mandated to accord such test results combine to simplify the proof in paternity proceedings, thus rendering them far less daunting as a means of obtaining orders of filiation and support for children. Indeed, in the Clara C. case, blood tests indicated a 99.9% probability that William L. was the father. Consequently, it would not have been difficult to prove paternity and afford the child the benefits of all available child support remedies, including the ability to seek modification, all of which were barred because of the section 516 agreement.

Although blood grouping tests had been in use in paternity proceedings for many years, until 1981 they were admissible only for the purposes of excluding the respondent as the father. As a result of scientific advances in the field, the Legislature, impressed by the increasing accuracy of the tests, amended section 532 of the Family Court Act to permit the use of blood tests as positive evidence of paternity as well. The most recent amendments of both state and federal law, as well as appellate decisions, have accorded weight to blood and other genetic test results in some cases that is tantamount to evidentiary certitude. *See* Laws of 1997, ch. 398; Laws of 1994, ch. 170; *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* [Public Law 104-193]; Barber v. Davis, 120 A.D.2d 364 (1st Dept., 1986); Nancy M. G. v. Dann OO, 148 A.D.2d 714 (2nd Dept., 1989); Discenza v. James M., 148 A.D.2d 196 (3rd Dept., 1989).

Williams v. Lambert, *supra*, is consistent with a long line of decisions casting constitutional doubt on the the disparate treatment of children who are born out-of-wedlock, as compared to children born to married couples. *See, e.g.,* Levy v. Louisiana, 391 U.S.68 (1968); Gomez v. Perez, 409 U.S. 535 (1973); Pickett v. Brown, 462 U.S.1 (1983); Clark v. Jeter, 486 U.S. 456 (1988); Mills v. Habluetzel, 456 U.S. 91 (1982). In Clark, the Supreme Court held that a six-year statute of limitations for paternity actions violated the equal protection clause in unacceptably differentiating between in-wedlock and out-of-wedlock children. Thereafter, the United States Supreme Court remanded Gerhardt v. Estate of Moore, 407 N.W. 2d 895 (1987), *judgment vacated*, 486 U.S. 1050 (1988), to the Supreme Court of Wisconsin for further consideration in light of Clark v. Jeter, *supra*. That case concerned a Wisconsin statute that allowed defendants in paternity proceedings to enter into settlements whereby they admitted paternity and paid off their child support obligation in one lump sum – a statute that, like section 516 of the Family Court Act, barred the child from further remedies. Upon reconsideration, the Wisconsin Supreme Court found that the same principle that rendered the differential treatment of children born out-of-wedlock, as opposed to marital children, unconstitutional in Clark v. Jeter applied to preclude enforcement of a paternity settlement as a bar to a child's subsequent independent action for support. Gerhardt v. Estate of Moore, 441 N.W. 2d 734 (1989).

Significantly, New York courts have held that individuals who were not parties to agreements under section 516 of the Family Court Act could not be deemed to be foreclosed from pursuing child support remedies. The New York Court of Appeals held, in Matter of Commissioner of Social

Services of the City of New York v. Ruben O., 80 N.Y.2d 409 (1992), that a welfare official, as assignee of the rights of a mother who had signed a section 516 agreement, is permitted to compel payment of child support despite the father's compliance with the court-approved agreement. Further, holding that the lower court had "failed in its duty to make an independent determination of the best interests of the child," the Supreme Court, Appellate Division, Fourth Department, in Matter of Michelle W. v. Forest James P., 218 A.D.2d 175, 178-9 (4th Dept., 1996), held an agreement under section 516 of the Family Court Act to be void and against public policy, where it released the obligor from any child support obligations beyond three years. In upholding a challenge by the law guardian, the Court stated:

> Indeed, a contract depriving a child of his rights is not binding upon the child [citations omitted]. Agreements cannot be upheld where children are treated as chattels and their rights bartered away...Here, the parties have in effect bargained away the birthright of the child. This agreement not only set forth the parental rights and support obligation of respondent, it completely eradicated his parental responsibilities. A parent cannot buy another parent's rightsor sell his or her own rights. A contract exchanging parental rights for compensation simply cannot be countenanced by the courts. [citation omitted].

Accord, Andre v. Warren, 248 A.D.2d 271 (1st Dept., 1998)(remand for appointment of law guardian and hearing on issue of whether agreement fulfills child's best interests); Department of Public Aid *ex rel* Cox v. Miller, 146 Ill.2d 399, 586 N.E.2d 1251 (S.Ct., Ill., 1992); Okla. Dept. of Human Services *ex rel* KAG v. TDG, 1993 Ok. 193, 861 P.2d 990 (1993). Significantly, section 513 of the Family Court Act has been amended to make it clear that in-wedlock and out-of-wedlock children must be treated similarly for the purposes of support, thus ending uncertainty about support awards for out-of-wedlock children.

These developments have rendered unnecessary, inappropriate and no longer in the child's best interests the compromise procedure and preclusion of further remedies contained in section 516 of the Family Court Act. Section 516 agreements that, like the one in Clara C., have been perfunctorily approved with limited judicial inquiry, are at the very least not enforceable and rest on a shaky constitutional limb. Section 516 of the Family Court Act, therefore, should be repealed.

Proposal

AN ACT to amend the family court act, in relation to agreement or compromise of support in paternity proceedings

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

Section 1. Section 516 of the family court act is REPEALED.

§2. This act shall take effect immediately.

REPEAL NOTE -- Section 516 of the family court act, proposed to be repealed by this act, provides for court approval of a written agreement or compromise for child support between a putative father and a mother or person on behalf of a child, which, when so approved, bars other remedies for child support.

17. Compensation of guardians *ad litem* appointed for children and adults in civil proceedings out of public funds (CPLR §1204)

This measure amends section 1204 of the Civil Practice Law and Rules to provide compensation from state or county funds for guardians *ad litem* appointed for children and adults in civil proceedings. It is also supported by the Chief Administrative Judge's Advisory Committee on Civil Practice.

There are a variety of situations in which children and adults may be deemed by judges to require the protection afforded by a guardian *ad litem*. For example, in Family Court the respondent in a child protective proceeding (the parent of the child who is allegedly mistreated) may be under 18 years of age. Adults may require guardians *ad litem* when their own mental capacity is challenged, for instance, in termination of parental rights proceedings based on the parents' mental illness or retardation. There often is also a need to appoint a guardian *ad litem* for a child who is the subject of a custody proceeding in Supreme Court.

While judges now have the authority to make these appointments, they are reluctant to do so because they cannot guarantee that the guardian *ad litem* will receive any payment. Section 1204 of the Civil Practice Law and Rules authorizes payment for the services of a guardian *ad litem* by "any other party or from any recovery had on behalf of the person whom such guardian represents or from such person's other property." Neither the Family Court Act nor the CPLR provide for payment where there is no monetary corpus from which payment can be made, and the courts have ruled that no public funds may be used in such circumstances. *See* Matter of Wood v. Cordello, 91 A.D. 2d 1178 (4th Dept. 1983). In Family Court proceedings, there is rarely an available monetary corpus.

This measure authorizes payment for the services of the guardian *ad litem* out of public funds, as a state charge, in the instance of a child, and as a county charge, if for an adult, consistent with the present statutory sources of funding for assignment of counsel. By virtue of section 165 of the Family Court Act, section 1204 of the CPLR, as amended, would apply to Family Court proceedings. In addition, if the proceeding is one in which there is a subsequent monetary recovery, the funds may be recovered pursuant to section 1103 of the CPLR.

Proposal

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

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

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

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

§2. This act shall take effect immediately.

18. Penalties for unauthorized release of information from the statewide automated order of protection and warrant registry (Exec. L. §221-a)

Recognizing the importance of security to the operation of computer systems, the Family Court Advisory and Rules Committee recommends the enactment of civil and criminal penalties for unauthorized disclosure of information from the statewide automated registry of orders of protection and warrants. This proposal is consistent with the requirement, contained in the federal *PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996* [Public Law 104-193, §303], for all states to have safeguards in place by October 1, 1997 against unauthorized disclosure of information with respect to paternity establishment or child support, or with respect to the whereabouts of a party for whom a protective order has been issued or as to whom the State has reason to believe physical or emotional harm might result from such disclosure.

One of the most important features of the *Family Protection and Domestic Violence Intervention Act of 1994* [Laws of 1994, ch. 222, 224] was its enactment of section 221-a of the Executive Law mandating the establishment of an automated statewide registry of orders of protection and warrants. The registry, which commenced operations on October 1, 1995, is designed to ensure that courts and law enforcement officials have available a system that will provide timely and accurate information relating to pending and prior orders of protection and warrants. It currently comprises a substantial database of sensitive information; according to the Office of Court Administration, as of December 5, 2002, 903, 987 orders of protection have been entered onto the registry.

Orders of protection in matrimonial, criminal and Family Court cases and related warrants are required to be included in the registry. Various forms of identifying information regarding the parties must be included, particularly where, for example, in matrimonial and Family Court cases, fingerprint identification is not available. Additionally, the system includes court action information, an indication of the date process was served, the date of expiration of the order and the terms and conditions of the order. See Executive Law §221-a.

Much of the information to be contained in the registry is derived from records which would otherwise be shielded from such disclosure. By virtue of subdivision one of section 235 of the Domestic Relations Law, matrimonial records must be kept confidential for 100 years and may not be disclosed to non-parties or their attorneys without a court order. Section 166 of the Family Court Act protects Family Court records against "indiscriminate public inspection." Section 205.5 of the Uniform Rules for the Family Court gives definition to this statute, enumerating parties, their attorneys, agencies with which children are placed, and, by amendment in 1994, prosecutors insofar as necessary for a pending criminal investigation, as those who are authorized to have access to Family Court records without first obtaining a court order. However, possibly through inadvertence, the Legislature provided no sanction against unauthorized disclosure of information contained in the registry.

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

Accordingly, the Family Court Advisory and Rules Committee proposes an amendment to section 221-a of the Executive Law to create criminal and civil penalties for unauthorized disclosure of data from the registry. This proposal was revised in 1996 to address the concerns raised by the Governor with respect to similar legislation that was vetoed in 1995 [S 3940, Veto Message #21], but the Committee's original 1995 version was again passed by the Legislature and vetoed by the Governor in 1996 [A 9809, Veto Message #11].[50] Under the revised proposal, knowing and wilful disclosure of information to individuals not authorized to receive it will subject violators to prosecution for a class A misdemeanor, the same criminal penalty that applies to the unauthorized wilful disclosure of information from the statewide child abuse register, pursuant to subdivision 12 of section 422 of the Social Services Law, and similar to that which applies to the wilful disclosure of confidential HIV-related information under subdivision two of section 2783 of the Public Health Law. Such violators also may be subject to a civil fine of up to $5,000, as will be persons who, through gross negligence, release or permit the release of information from the registry to individuals not authorized to receive it.

Proposal

AN ACT to amend the executive law, in relation to penalties for unauthorized disclosure of information from the statewide automated registry of orders of protection and warrants

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

Section 1. Subdivision 5 of section 221-a of the executive law, as amended by chapter 224 of the laws of 1994, is amended to read as follows:

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

[50] No action has been taken on this matter by the Legislature since 1996.

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

§2. Section 221-a of the executive law is amended by adding a new subdivision 7 to read as follows:

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

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

19. Jurisdiction of the Family Court with respect to family offenses committed by juveniles under the age of sixteen (FCA §812(1); CPL §530.11(1))

The Family Court Advisory and Rules Committee is proposing legislation specifying that juvenile delinquency or Persons in Need of Supervision (PINS) proceedings, brought in accordance with Article 3 or 7 of the Family Court Act, rather than family offense proceedings pursuant to Article 8 of the Family Court Act, are the appropriate vehicles for addressing family offenses committed by juveniles under the age of 16.

The enactment of the ***FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1994*** [Laws of 1994, chs. 222, 224] reflected the Legislature's recognition that domestic violence is "criminal conduct" that has a "corrosive" effect upon families, particularly upon women and children, and that "warrants stronger intervention" [Laws of 1994, ch. 222, §1]. The Legislature found:

> Abuse of a parent is detrimental to children whether or not they are physically abused themselves. Children who witness domestic violence are more likely to experience delayed development, feelings of fear, depression and helplessness and are more likely to become batterers themselves.

Id. Nowhere, however, in the Act or in the debate or hearings leading up to its enactment did the Legislature contemplate or consider children as the abusers. Left untouched by the Act were existing provisions in both section 812(1) of the Family Court Act and section 530.11(1) of the Criminal Procedure Law that specify that "if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the Penal Law, then the family court shall have exclusive jurisdiction over such proceeding."

A literal reading of those statutory provisions appears to permit family offense petitions to be brought against juveniles in accordance with Article 8 of the Family Court Act, notwithstanding the statutory framework established for juvenile delinquents and PINS pursuant to Articles 3 and 7 of the Act. Indeed, the Appellate Division, Second Department, in Marsha C. v. Latoya D., 224 A.D.2d 522, 638 N.Y.S.2d 129 (2d Dept., 1996), *leave to app. denied,* 88 N.Y.2d 804 (1996), held that a family offense, as defined in subdivision one of section 812 of the Family Court Act, where proven by a preponderance of the evidence, can be found to have been committed by a 15 year-old juvenile against her mother.

Article 8 of the Family Court Act is an inappropriate vehicle for proceeding against juveniles as it lacks important statutory provisions, some constitutionally required and some required by federal law, applicable to juveniles, including, *inter alia*, the right to a law guardian, proof beyond a reasonable doubt, consideration for adjustment or diversion, detention and placement in juvenile facilities separate and apart from adults, and orders of disposition appropriate to their needs and

best interests. *See, e.g.*, Family Court Act §§249, 304.1, 308.1, 342.2, 352.2, 720, 734, 735, 754. The rights to law guardian representation and to proof beyond a reasonable doubt have been held to be of constitutional magnitude and, under New York law, are equally applicable in juvenile delinquency and PINS proceedings. *See* In re Gault, 387 U.S. 1 (1967); In re Winship, 397 U.S. 358 (1970); In re Iris R., 33 N.Y.2d 987 (1974). Unlike attorney representation in Article 8 proceedings pursuant to section 262 of the Family Court Act, law guardian representation in juvenile delinquency and PINS cases is presumptively non-waivable. *See* Family Court Act §249-a.

As Article 8 lacks provisions for detention and incarceration of juveniles, contempt penalties cannot be applied to them. The proscription against confinement of juveniles in adult jails, lock-ups and prisons, contained in New York law [Family Court Act §§ 304.1(2), 720(1)], is required as a condition of State funding under the federal *JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 1974,* 42 U.S.C. §5633(a)(13). While there is no legal authority to confine juveniles in juvenile detention or long term juvenile placement facilities pursuant to Article 8 of the Family Court Act, such juveniles are also foreclosed from incarceration in adult facilities. Nor may juveniles be brought to criminal courts during hours when the family courts are closed in view of the lack of separate juvenile detention facilities in criminal courts.

The juvenile delinquency and PINS statutes provide full protection for victims of family offenses committed by juveniles, while, at the same time, furthering the special needs of juveniles and retaining the constitutional and statutory protections applicable to them. Articles 3 and 7 both authorize issuance of orders of protection and temporary orders of protection, permit detention in juvenile facilities in appropriate cases, permit orders of restitution, and provide for dispositions in juvenile programs tailored specifically to the juveniles' needs, their presenting problems and, in juvenile delinquency cases, considerations of public safety. *SEE* Family Court Act §§ 301.1, 304.1, 304.2, 320.5, 352.2, 352.3, 353.6, 720, 740, 754, 758-a, 759. Indeed, Article 8 proceedings are potentially duplicative of these other remedies. For example, the juvenile in Marsha C. was simultaneously adjudicated a Person in Need of Supervision for the same acts, thus raising a question as to the need for a family offense adjudication. *See* Matter of Latoya D., 224 A.D.2d 524, 638 N.Y.S.2d 128 (2d Dept., 1996), *leave to app. denied,* 88 N.Y.2d 804 (1996).

Victims' perspectives and allegations may be fully presented in both PINS and juvenile delinquency proceedings. More specifically, juvenile delinquency cases may be initiated by the filing of a petition by a presentment agency, containing allegations of behavior that would constitute misdemeanors or felonies if committed by adults. Family Court Act §§310.1, 311.1. PINS cases may be initiated by petitions filed, *inter alia*, by peace or police officers, parents or legal guardians or "any person who has suffered injury as a result of the alleged activity of a person alleged to be in need of supervision, or a witness to such activity." Family Court Act §733.

By requiring that juveniles who commit family offenses be dealt with pursuant to Article 3 or 7 of the Family Court Act, as applicable in particular cases, the Family Court Advisory and Rules Committee proposal will assure that family offenses committed by such juveniles are addressed

appropriately.

Proposal

AN ACT to amend the family court act and the criminal procedure law, in relation to family offenses alleged to have been committed by juveniles under the age of sixteen

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 812 of the family court act, as amended by chapter 635 of the laws of 1999, is amended to read as follows:

1. Jurisdiction. The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household, except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding in accordance with article three or seven of this act, as applicable. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this article, "members of the same family or household" shall mean the following:

§2. The opening paragraph of subdivision 1 of section 530.11 of the criminal procedure law, as amended by chapter 635 of the laws of 1999, is amended to read as follows:

1. Jurisdiction. The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the

second degree or assault in the third degree or attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household, except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding in accordance with article three or seven of the family court act, as applicable. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this section, "members of the same family or household" shall mean the following:

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

20. Procedures and powers of the Supreme and Family Courts with respect to violations of orders of custody and visitation (FCA §657; DRL §242)

Throughout New York State, custody and visitation cases comprise an increasingly significant proportion of the caseload of the Family Court[51] and are prevalent in contested matrimonial proceedings in Supreme Court. These sensitive, often volatile, cases raise some of the most difficult issues before the courts, with serious ramifications for both children and parents. Unfortunately, the statutory framework governing custody and visitation proceedings provides scant guidance and only limited powers for the courts in responding to violations of court orders. Apart from contempt, with its sanction of up to six months of incarceration, the statutes are silent as to available sanctions and procedures for enforcement of custody and visitation orders. *See* Family Court Act §156 (incorporating Article 19 of the Judiciary Law by reference). The Family Court Advisory and Rules Committee, therefore, is submitting a legislative proposal to address these omissions.

The proposal adds a new section 657 to the Family Court Act and a new section 242 to the Domestic Relations Law setting forth the powers of the courts and procedures to be followed when custody and visitation orders and related orders of protection are violated. The proposal requires a hearing, upon notice to all parties and the law guardian, if any, to determine whether competent proof establishes an alleged violation and, if so, whether the violation was wilful. Where a violation has been established, the measure provides that the court may require that visitation with the child or children be supervised, that the violator participate in an available rehabilitative program and pay the costs of such program, and that the violator comply with the terms and conditions of a new or modified order of protection. In the event of a wilful violation, the measure also authorizes the court to impose a sentence of incarceration, including intermittent or weekend detention, for a period of up to six months, probation for a period of up to one year, and/or to direct the violator to pay restitution, including out-of-pocket expenses and attorneys' fees incurred as a result of the violation. Finally, the proposal provides that a party placed on probation for violating an order of custody or visitation can be prosecuted for a violation of probation, which, if proven, may result in revocation of the order of probation and imposition of alternative sanctions.

In custody and visitation cases, Supreme and Family Courts are charged with responsibility for determining the best interests of children, both to protect family relationships that are vital to healthy child development and, at the same time, to protect children against the damaging effects of family violence where it has occurred. In order to fulfill these goals, it is essential that the courts have adequate procedural vehicles and a wide range of appropriate powers with which to enforce their orders. Enactment of the Committee's proposal would provide the Family and Supreme Courts with these needed mechanisms.

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[51] According to New York State Office of Court Administration figures, during the past eleven years, custody filings in Family Courts statewide increased 98%, from 85,334 in 1990 (16% of the total 540,209 petitions filed) to 169,111 in 2001 (24.7 % of the total 683,390 petitions filed), reflecting an escalation that continues to date.

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to violations of custody and visitation orders

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 657 to read as follows:

§657. Powers of the court on violation of a custody or visitation order. (a) If a party is brought before the court for failure to obey an order of custody or visitation or an order of protection or temporary order of protection issued under this article, the court shall hold a hearing, upon notice to the parties and law guardian, if any, in order to determine whether competent proof exists that the party has failed to obey any such order and, if so, whether such violation was wilful.

(b) If the court determines that such violation was wilful, the court may

(i) commit the party to jail for a term not to exceed six months, provided, however, that if appropriate, the court may direct that such commitment may be served upon certain specified days or parts of days or that the commitment be suspended; provided further that at any time within the term of such sentence, the court may revoke such suspension upon good cause shown;

(ii) place the party on probation for up to one year under such conditions as the court may determine and in accordance with the provisions of the criminal procedure law;

(iii) direct the party to pay restitution to the petitioner for expenses incurred as a result of such violation, including, but not limited to, out-of-pocket expenses incurred as a result of the party's failure to cooperate with an order of custody or visitation, and to pay the fees and reasonable expenses of petitioner's counsel and of the law guardian, if any, that were incurred as a result of such violation; and

(iv) make an order in accordance with subdivision (c) of this section.

(c) If the court determines that the party violated an order issued under this article, whether or not such violation was wilful, the court may:

(i) require any visitation to be supervised by a person or agency designated by the court;

(ii) require the respondent to participate in an available rehabilitative program, including, but not limited to, a non-residential substance abuse program or educational program or parent education program, and to pay the costs of such participation; and

(iii) issue or modify an order of protection or temporary order of protection in accordance with section six hundred fifty-five or six hundred fifty-six of this article.

(d) If the court has reasonable cause to believe that a party, who has been placed on probation in accordance with this section, has violated the terms and conditions of probation, the court, after giving notice and an opportunity to be heard to the parties and law guardian, if any, may revoke such order of probation and make any other order authorized by this section. The period of probation shall be deemed tolled as of the date of filing of the probation violation petition or motion, but, in the event that the court does not find that the order of probation was violated, the period of such interruption shall be credited to the period of probation.

§2. The domestic relations law is amended by adding a new section 242 to read as follows:

§242. Powers of the court on violation of a custody or visitation order.

1. If a party is brought before the court for failure to obey an order of custody or visitation or an order of protection or temporary order of protection issued under this article, the court shall hold a hearing, upon notice to the parties and law guardian, if any, in order to determine whether competent proof exists that the party has failed to obey any such order and, if so, whether such violation was wilful.

2. If the court determines that such violation was wilful, the court may

a. commit the party to jail for a term not to exceed six months, provided, however, that if appropriate, the court may direct that such commitment may be served upon certain specified days or parts of days or that the commitment be suspended; provided further that at any time within the term of such sentence, the court may revoke such suspension upon good cause shown;

b. place the party in violation on probation for up to one year under such conditions as the court may determine and in accordance with the provisions of the criminal procedure law;

c. direct the party to pay restitution to the other party for expenses incurred as a result of such violation, including, but not limited to, out-of-pocket expenses incurred as a result of the party's

failure to cooperate with an order of custody or visitation, and to pay the fees and reasonable expenses of petitioner's counsel and of the law guardian, if any, that were incurred as a result of such violation; and

d. make an order in accordance with subdivision three of this section.

3. If the court determines that the party violated an order issued under this article, whether or not such violation was wilful, the court may:

a. require any visitation to be supervised by a person or agency designated by the court; and

b. require the party to participate in an available rehabilitative program, including, but not limited to, a non-residential substance abuse program or educational program or parent education program, and to pay the costs of such participation; and

c. issue an order of protection or temporary order of protection in accordance with subdivision three of section two hundred forty of this chapter.

4. If the court has reasonable cause to believe that a party, who has been placed on probation in accordance with this section, has violated the terms and conditions of probation, the court, after giving notice and an opportunity to be heard to the parties and law guardian, if any, may revoke such order of probation and make any other order authorized by this section. The period of probation shall be deemed tolled as of the date of filing of the probation violation petition or motion, but, in the event that the court does not find that the order of probation was violated, the period of such interruption shall be credited to the period of probation.

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

21. Procedures for violations of adjournments in contemplation of dismissal and conditional discharges in juvenile delinquency cases (FCA §§315.3, 360.2)

In 1996, appellate courts in New York State identified two significant gaps in the procedural framework governing juvenile delinquency cases, both in the area of violations of court orders. The Family Court Advisory and Rules Committee is proposing legislation to eliminate both of these gaps by clarifying applicable procedures in cases of alleged violations of adjournments in contemplation of dismissal (ACD's) and of orders of conditional discharge.

Article 3 of the Family Court Act is completely silent as to the procedures to be followed and the threshold showing required, not only to establish a violation of the conditions of an ACD sufficient to restore the case to the calendar, but also to trigger either a fact-finding or dispositional hearing, as applicable. Subdivision one of section 315.3 of the Family Court Act simply provides that "[u]pon ex parte motion by the presentment agency, or upon the court's own motion, made at the time the order is issued or at any time during its duration, the Family Court may restore the matter to the calendar."

In Matter of Edwin L., 88 N.Y.2d 593 (1996), the Court of Appeals declined to incorporate a specific hearing requirement for violations of conditions in cases adjourned in contemplation of dismissal into Article 3 of the Family Court Act in the absence of explicit legislation. The Court stated:

> We hold that the requirements of due process are satisfied when a Family Court determines, after conducting an inquiry into the allegations of the violation petition, and providing the juvenile with an opportunity to respond to those allegations, that there is a legitimate basis for concluding that the juvenile has violated a condition of an ACD order and states the reasons, on the record, for reaching that determination.

88 N.Y.2d, at 603. Noting that the scope of the hearing will vary according to the circumstances of particular cases, the Court left a determination of the degree of formality required to the discretion of the Family Court. It did, however, assume, in the absence of statutory guidance, that a violation petition would be filed, providing notice to the juvenile of the violation, that the juvenile would be given an opportunity to respond to the petition with or without a hearing, and that hearsay evidence would be admissible to establish the allegations of the petition.

The Committee's proposal codifies these elements of the holding in Matter of Edwin L. and provides needed amplification of the applicable procedures. The proposal requires a verified petition, which must be served on the respondent juvenile, for restoration to the calendar of a juvenile delinquency matter adjourned in contemplation of dismissal and provides the respondent

with an opportunity to respond to the motion. Filling a gap in the Family Court Act, the proposal authorizes the Family Court to order that the respondent juvenile be detained and provides for an expedited determination of the violation petition in such cases, consistent with the criteria and time frames applicable in other detention cases. The measure codifies the direction in Matter of Edwin L. that hearsay evidence should be admissible.[52] If the petition to restore the matter to the calendar is sustained, the case would be set down for a fact-finding or dispositional hearing, depending upon whether the matter had been adjourned in contemplation of dismissal before or after entry of a fact-finding order. Similar to the provision regarding probation violations [Family Court Act §§360.2(4), (5)], the proposal further provides that the period of the ACD would be tolled during the pendency of the petition, and that, if the petition to restore the matter to the calendar is dismissed, the period during which the petition was pending would be credited to the period of the adjournment in contemplation of dismissal.

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

Proposal

AN ACT to amend the family court act, in relation to violations of adjournments in contemplation of dismissal and orders of conditional discharge in juvenile delinquency cases

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

Section 1. Subdivision 1 of section 315.3 of the family court act, as amended by chapter 237

[52] In light of the Governor's veto of this measure in 1999, the measure has been revised to delete reference to a specific burden of proof.

of the laws of 1991, is amended to read as follows:

1. Except where the petition alleges that the respondent has committed a designated felony act, the court may at any time prior to the entering of a finding under section 352.1 and with the consent of the respondent order that the proceeding be "adjourned in contemplation of dismissal." An adjournment in contemplation of dismissal is an adjournment of the proceeding, for a period not to exceed six months, with a view to ultimate dismissal of the petition in furtherance of justice. Upon issuing such an order, providing such terms and conditions as the court deems appropriate, the court must release the respondent. The court may, as a condition of an adjournment in contemplation of dismissal order, in cases where the record indicates that the consumption of alcohol may have been a contributing factor, require the respondent to attend and complete an alcohol awareness program established pursuant to [paragraph six-a of subdivision (a) of] section [19.07] 19.25 of the mental hygiene law. [Upon *ex parte* motion by the presentment agency, or upon the court's own motion, made at the time the order is issued or at] At any time during [its] the duration of an order issued pursuant to this section, the court may restore the matter to the calendar in accordance with subdivision four of this section. If the proceeding is not restored, the petition is, at the expiration of the order, deemed to have been dismissed by the court in furtherance of justice.

§2. Section 315.3 of the family court act is amended by adding a new subdivision 4 to read as follows:

4. An application to restore the matter to the calendar in accordance with subdivision one of this section shall be in the form of a verified petition which shall be served on the respondent, who shall have an opportunity to be heard with respect thereto. The petition shall state the factual basis for the restoration, including the condition or conditions alleged to have been violated and the time, place and manner in which such violation occurred. The respondent is entitled to counsel at all stages of a proceeding under this section, and the court shall advise the respondent of such right at the initial appearance on any petition filed hereunder. Upon request, the court shall grant a reasonable adjournment to the respondent in order to respond to the petition and, if the factual allegations of the petition are contested, to prepare for a hearing. If the court determines that the respondent should be detained in accordance with the criteria in subdivision three of section 320.5, the court shall hear and determine the petition within three days; provided, however, that for good cause shown, the court may adjourn the matter for not more than three additional days. If, after

hearing the petition, the court finds that the presentment agency has demonstrated by relevant and material evidence that one or more conditions of the order have been violated, the court shall state on the record the reasons for such determination, grant the petition, restore the matter to the calendar and schedule the proceeding for a fact-finding hearing or dispositional hearing, as applicable. Upon filing the petition, the period of the adjournment in contemplation of dismissal shall be interrupted. Such interruption shall continue until such time as the court determines the petition. If the court denies the petition, the period during which the petition was pending shall be credited to the period of the adjournment in contemplation of dismissal.

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

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

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

§4. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to orders of adjournment and conditional discharge issued on or after such date.

IV. Future Matters:

Under the leadership of the Committee's Chair, Hon. Sharon Townsend, Administrative Judge of the Eighth Judicial District, the Family Court Advisory and Rules Committee was reorganized in 2002, with its mission broadened to encompass a more creative, operational role with respect to Family Courts statewide. In addition to proposing legislation, court rules and forms, the Committee is providing leadership in developing uniform policies and procedures for the administration and operation of the Family Courts and in spearheading reform initiatives. A critical element of this restructuring is the addition of a Court Administration Subcommittee, composed of the Administrative Judge of the New York City Family Court and Supervising Judges of Family Courts outside New York City. In addition to reviewing legislative and other proposals, the Committee's six subcommittees are expected to be actively engaged in the following projects, among others, during the coming year:

• **Court Administration**: development of court rules to implement "one judge/one family" and other "best practices" identified from model court and other initiatives; review of the authority of judicial hearing officers and court attorney referees, as well as data collection, forms and coordination issues related to implementation of the Universal Case Management System (UCMS); development of proposals for Family Court training programs to be submitted to the New York State Judicial Institute; and coordination with all committees and task forces undertaking Family Court-related initiatives in the Unified Court System so that the diverse initiatives will foster a consistent "best practices" vision for the Family Court.

• **Child Welfare**: assistance in training regarding the *Interstate Compact on the Placement of Children* [Social Services Law §374-a]; collaboration with the Appellate Divisions in initiatives to expedite Family Court appeals and with the Family Courts in child welfare mediation, expedited adoption and other projects; advocacy of subsidized guardianship, post-adoption contact and Section 8 housing assistance for families, as well as other reforms to expedite achievement of permanency for children; continuation of efforts to enhance implementation of the federal and New York State *Adoption and Safe Families Acts* [Public Law 105-89; Laws of 1999, ch. 7] and to develop a more stream-lined, seamless judicial process for all cases of children in foster care; and development of further proposals, in conjunction with Court Administration Subcommittee, to incorporate elements of "Model Court" initiatives into Family Court practice and to promote "one family, one judge" system of processing.

• **Juvenile Justice:** exploration of alternative approaches to address problems of status offenders, with particular focus upon chronic runaways and upon the impact of the new law expanding the age for status offense jurisdiction to 18 that became effective on July 1, 2002 [Laws of 2001, ch. 383]; continued review of the implications of the *Adoption and Safe Families Act* and *Project SAVE: Safe Schools Against Violence in Education Act of 2000* [Laws of 2000, ch. 181] for juvenile delinquency and PINS cases; and examination of utilization and availability of probation, diversion and placement resources.

• **Child Support and Paternity:** review of proposed amendments to the *Uniform Interstate Family Support Act* [Family Court Act Article 5-B] and consideration of whether an intra-state version should be proposed; development of a court rules regarding *UIFSA* filing dates, inter-county transfers of cases and expedited support procedures; continued development of recommendations regarding support in joint, split and shared custody and multiple family situations; and development of proposals regarding modifications of orders and remedies to enforce orders against self-employed obligors.

• **Custody, Visitation and Domestic Violence:** finalization of proposed court rules regarding address confidentiality and electronic testimony and inter-court communications under the *Uniform Child Custody Jurisdiction and Enforcement Act* [Domestic Relations Law Article 5-A; Laws of 2001, ch. 386]; review of implementation of the *UCCJEA* in order to identify further needs for court rules, forms and training; continued development (in conjunction with the Matrimonial Advisory Committee) of recommendations for better coordination between Supreme and Family Courts and for forms and procedures reflecting best practices regarding appointments of law guardians, guardians *ad litem* and forensic experts in custody proceedings; and continued development of proposals to address domestic violence.

• **Forms and Technology:** simplification of current uniform forms to enhance access to justice for self-represented litigants; streamlining of comprehensive forms to implement the *Adoption and Safe Families Act*; development of proposed legislation to simplify and modernize the statutory Family Court data collection requirements in Family Court Act §§ 213, 385(1) and Judiciary Law §§ 212(2)(e), 216; and coordination of forms efforts with the implementation of the Uniform Case Management System ("UCMS") in Family Courts statewide.

This substantial agenda reflects the Committee's sustained focus upon fulfillment of Chief Justice Judith S. Kaye's vision of the courts as problem-solvers, not simply as case processors – a vision articulated as well in resolutions of the national Conference of Chief Justices and Conference of State Court Administrators.[53] Rigorous judicial oversight and effective enforcement of court orders are critical elements of this vision. Whether it be non-compliance by a juvenile respondent in a delinquency or person in need of supervision case, a parent or child protective or child care agency in a child welfare matter or an adult respondent in a support, paternity, custody or family offense proceeding, the Committee is seeking to enhance mechanisms to ensure that Family Courts receive

[53] Conference of Chief Justices/Conference of State Court Administrators, CCJ Resolution 22/COSCA Resolution 4 In Support of Problem-solving Courts (Aug. 3, 2000)[in Casey, P. and Hewitt, W., *Court Responses to Individuals in Need of Services: Promising Components of a Service Coordination Strategy for the Courts,* Appendix A, pps. 57, 58 (Nat'l. Center for State Courts, 2001)]. *See also* J.S. Kaye, "Strategies and Need for Systems Change: Improving Court Practice for the Millennium," 38 *Fam. & Conciliation Cts. Rev.* 159 (Apr., 2000); J. S. Kaye, "Making the Case for Hands-On Courts: Judges are learning that a problem-solving approach can stop the cycles of drug use and dysfunction," *Newsweek,* Oct. 11, 1999; J.S. Kaye, "Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run," 48 *Hastings L.J.* 851, 860 (July, 1997).

necessary information on a timely basis, convene hearings promptly that comport with due process and are able to secure compliance with judicial orders through imposition of diverse sanctions that are appropriate in severity and responsive to the individual problems presented. Equally as important are the Committee's efforts to incorporate, to the extent feasible, the principles of "front-loading" of services and conferencing, expedited judicial processes and continuous judicial monitoring into Family Court law and practice that have already demonstrated success in the "Model Courts" in Erie and New York County, in "Family Treatment Courts" in Suffolk and New York County and in various reform initiatives statewide.[54]

The Committee, which includes experienced judges, hearing examiners, Family Court clerks and court attorneys, practitioners and law school professors drawn from throughout New York State, brings a variety of valuable perspectives to the task of addressing the complex problems facing the Family Court. The substantial expertise of the Committee's active and diverse membership contributed to significant accomplishments in 2002, including major legislative enactments and the promulgation of over 100 new and revised forms, each of which have been posted on the Unified Court System's Internet web-site for ready public access (http://www.courts.state.ny.us). In 2003, the Committee hopes to compile a similar record of achievement as it grapples with the many difficult issues within its jurisdiction during these most difficult of times.

In conclusion, the Committee pledges to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman its continuing deep dedication in 2003 to improving the functioning of the Family Court and the quality of justice it delivers.

Respectfully submitted,

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Hon. Jo Anne Assini
Frank Boccio, Esq.
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[54] *See Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, 1995); *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, 2000); Schechter, "Owning *ASFA*," 53 *Juv. & Fam. Ct. Judges Journal* #4:1 (Fall, 2002); Schechter, "Family Court Case Conferencing and Post-dispositional Tracking: Tools for Achieving Justice for Parents in the Child Welfare System," 70 *Ford. L.Rev.* 427, 428 (Nov., 2001); M. Mentaberry, "OJJDP Fact Sheet: Model Courts Serve Abused and Neglected Children" (U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Jan., 1999).

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