Report of the Family Court Advisory and Rules Committee

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

January 2006

I. 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 2005

The comprehensive legislation enacted in 2005 to improve the achievement of permanency for children in the child welfare system incorporates many longstanding OCA proposals to expedite child welfare appeals, eliminate procedural barriers to permanency, bring the State into compliance with federal permanency standards and help secure continuation of federal financial support for child welfare programs. Numerous elements of the bill are drawn from or reflect the successes of the model permanency parts in the New York courts designated by the National Council of Juvenile and Family Court Judges, including continuous calendaring of child welfare proceedings, early investigation of non-custodial parents and other potential resources for children, and continuing representation of parents and children. Among the 11 OCA proposals included in whole or in part in the omnibus legislation are:

- Clarification of time frames for preliminary proceedings in child protective actions;
- Delineation of requirements for investigation and documentation of noncustodial parents in child protective, voluntary placement and surrender proceedings;
- Clarification of mandatory issues to be addressed in permanency hearing court orders;
- Incorporation of requirements for permanency hearing reports and hearings to address issues regarding early intervention, special education, pre-kindergarten and other educational services for children in foster care;
- Delineation of procedures and requirements regarding suspended judgments in permanent neglect cases;
- Provision that in conditional surrenders contingent on adoption by a particular individual, such individual must have been investigated and certified or approved as either a foster or pre-adoptive parent, *i.e.* the full pre-adoptive investigation need not have been completed if the prospective adoptive parent was already approved as a foster parent;
- Specification that aggravated circumstances to justify orders to dispense with reasonable efforts must be proven by clear and convincing evidence;[1]
- Clarification that provisions regarding children freed for adoption do not apply to children for whom one parent had rights terminated but who have another parent who retains rights to consent to the

[1] The legislation includes this specification solely with respect to the aggravated circumstance regarding parental refusal of services. The Committee continues to propose that this standard apply to all aggravated circumstances determinations and that law guardians and authorized agencies be afforded standing to make motions for aggravated circumstances determinations pursuant to Family Court Act §1039-b.

child's adoption;

- Authorization for orders of protection to be issued in permanency hearings regarding children freed for adoption;
- Authorization for continuing representation of parents and children in post-dispositional proceedings; and
- Delineation of comprehensive procedures to expedite appeals in child welfare proceedings.

In April, 2004 and March, 2005, the Family Court Advisory and Rules Committee convened roundtables, one at the New York State Judicial Institute in White Plains and one at the New York State Bar Association in Albany, that brought all three branches of government together with professionals and advocates on all sides of the child welfare system to discuss child welfare reform in general and this legislation in particular. These roundtables, along with numerous follow-up meetings, helped to forge a consensus around many of the elements of the bill and to shape and refine its key features.

In addition to the permanency legislation, significant provisions of the Committee's proposal regarding detention and placement in Persons in Need of Supervision (PINS) proceedings were enacted as part of the 2005 New York State budget. As part of a comprehensive reform of the PINS statute, chapter 57 of the Laws of 2005 contained provisions requiring the Family Court to consider alternatives to detention prior to imposition of pre-dispositional detention and 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)].

Finally, the Legislature enacted the Committee's proposal to clarify the authority of Family Court Support Magistrates [Laws of 2005, ch. 576; S 5223-a/A 8112-a]. This measure clarifies that Family Court judges, after adjudicating contested paternity matters,[2] are authorized either to resolve outstanding issues of child support themselves or to refer the proceedings to support magistrates for issuance of final orders of child support. This is consistent with the analysis of the United States Court of Appeals in U.S. *v.* Kerley, 416 F.3d 176 (2nd Cir., 2005), which reversed a dismissal of a prosecution under the *Deadbeat Parents Punishment Act* [18 U.S.C. §228]. The Court of Appeals held that the District Court had erroneously assumed that the Family Court support magistrate, who had issued the underlying child support order after a Family Court judge had adjudicated paternity, had no jurisdiction to do so, and further held in any event that the validity of the underlying order could not be collaterally attacked in the federal case. This statute removes any ambiguity regarding the support magistrate's authority to issue support orders following adjudication of contested paternity matters.

B. New and Modified Legislative Proposals

The Committee is proposing a comprehensive legislative agenda, including 18 new and modified proposals and 14 proposals recommended in prior years. The new and modified proposals address child neglect and abuse, foster care, termination of parental rights, child support, paternity, family offense and interstate custody and visitation proceedings, thereby providing needed clarification

[2] Pursuant to the Committee's earlier proposal regarding support magistrate authority, enacted as chapter 336 of the Laws of 2004, support magistrates have authority to adjudicate all paternity proceedings except those contested cases raising equitable estoppel defenses [Family Court Act §439(a)].

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. Amendments to child welfare permanency legislation [Laws of 2005, ch. 3]: Recognizing that any new statute as comprehensive as the new permanency law sometimes requires refinement, the Committee is proposing a measure containing several minor corrections and clarifications. These include, among others:

- clarification of the right to appointed counsel at the trial level and to a law guardian on appeal;
- use of the prior-scheduled permanency hearing date certain in cases in which suspended judgments in permanent neglect cases have been extended or deemed satisfied;
- amplification of the requirements for dispositional placement orders under Family Court Act §1055 to include several of the elements addressed in permanency hearings;
- simplification of the procedures for violations of orders of suspended judgments and supervision in child protective proceedings to permit motions or orders to show cause, in lieu of petitions;
- repeal of the anachronistic provisions regarding petitions by agencies to be relieved of responsibility for children in their care;
- clarification of the definition of "child" in Family Court Act §1087 to ensure that permanency hearings are held regarding destitute children.
- clarification that permanency hearing dates certain must be set upon the approval of voluntary placement instruments under Social Services Law §358-a;
- clarification of Family Court Act §1089 to specify that the permanency hearing report must be submitted to the Family Court but should not be sent to a birth parent, if the child had been freed for adoption, and to provide that the Family Court may dispense with notice to former foster parents either *sua sponte* or upon motion;
- correction of the permanency goals for children freed for adoption to eliminate goals not legally permissible for children whose guardianship and custody have been transferred to an authorized agency, that is, return to parent, guardianship or placement with fit and willing relative;
- restoration of the automatic stay provision (Family Court Act §1112) for children in abuse or neglect proceedings who are returned home as a result of permanency hearings under Article 10-A of the Family Court Act; and
- clarification of the post-adoption contact provisions to provide that a judge in an adoption case would not be permitted to incorporate a post-adoption contact agreement into an adoption unless the judge who approved the surrender had approved the agreement as being in the child's best interests.

2. Permanency planning in juvenile delinquency and PINS proceedings: New York State statutes, as well as both the federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273, as amended in 2002] and federal regulations, implementing the federal *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7] make clear that the *ASFA* permanency planning mandates apply to all children in foster care, including those in care as a result of juvenile delinquency and PINS petitions. The Committee is proposing a comprehensive measure to realize these mandates for the juvenile justice population. The proposal includes:

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

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

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

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

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

3. <u>"One Family/One Judge": Continuity of court in termination of parental rights, surrender and adoption proceedings:</u> Impelled by the new permanency legislation and consistent with national recommendations implemented in New York's "Model Permanency Planning Parts," the Committee is proposing a measure that would reduce a significant source of delay in children's achievement of a permanent home by promoting continuity of the court and the judge. This is particularly important in cases in which a surrender is taken that includes a post-adoption contact agreement since, under Domestic Relations Law §112-b, this agreement must then be incorporated into the adoption if it had been determined to be in the child's best interests. Where a child is under the jurisdiction of the Family Court as a result of a Family Court child protective, foster care, surrender or termination of parental rights proceeding, the proposal would provide a preference for filing an adoption proceeding in the same court and a procedure for ensuring that the case would be heard, to the extent practicable, before the same judge presiding over the pending proceeding. If filed in a different court, the court in which the case is filed would be required to ascertain promptly whether the child is under the jurisdiction of a Family Court and, if so, which Court. The Court in which the adoption is pending would then be required to communicate promptly with the judge who presided over the Family Court litigation and to defer to that judge's determination as to the exercise of jurisdiction over the adoption. Factors to be considered in the determination would include, among others, the relative familiarity of each court with the facts and circumstances of the case, the convenience of each court to the residence of the adoptive parents, the ability of the law guardian to continue to represent the child and the relative ability of each court to determine the adoption proceeding expeditiously.

4. <u>Criminal history and child abuse screening of individuals with whom children are placed</u>:

Spurred on by the 2005 permanency and kinship statutes [Laws of 2005, ch. 3 and 671], by the earlier amendments to Family Court Act §1017 [Laws of 2003, ch. 657] and by the New York State statute implementing the federal *Adoption and Safe Families Act of 1997* [Public Law 105-89], more and more children are the beneficiaries of the State's increasing reliance upon alternatives to foster care, including direct placements of children with "suitable persons" and appointment of non-parent guardians and custodians. However, unlike the provisions requiring criminal records and child maltreatment screening of prospective foster and adoptive parents, pursuant to Social Services Law §378-a, comprehensive screening is not required in direct placement, custody and guardianship proceedings. Nor is any national criminal records screening performed, even of prospective foster or adoptive parents. The Committee is thus proposing legislation to remedy these gaps. The proposal would require courts to direct criminal records and child abuse screening of individuals accepting direct placements of children into their homes and of non-parents applying for custody or guardianship. Further, it would authorize the courts to direct that national criminal history checks regarding these individuals be performed and it would authorize criminal history screening of individuals over the age of 18 residing in the homes of custodial and guardianship resources. Finally, it would require national criminal history screening of prospective foster and adoptive parents, pursuant to Social Services Law §378-a.

5. Warrants, orders for emergency evaluation and orders of protection in persons in need of supervision proceedings: The comprehensive reform of the PINS statute enacted in 2005 [Laws of 2005, chapter 57, Part E] has inured to the benefit of many children and families by ensuring the provision of diversion services, in lieu of PINS prosecutions, on a more uniform basis. However, the new statute curtailed the ability of parents to secure vital emergency relief in some cases in which harm to the children or their families is imminent. The Committee is, therefore, proposing restoration of three provisions to Article 7 of the Family Court Act that would constitute narrow exceptions to the diversion requirements of the new statute. The measure would permit filing of PINS petitions without the required diversion documentation where a child has absconded and cannot be located, where a temporary order of protection is needed to avert imminent harm to the petitioner or the petitioner's family or where the child is in need of an immediate medical or psychological evaluation and will not cooperate without court intervention. In each of these circumstances, once the petition has been filed, the emergency has subsided and the child has been brought to Family Court, the Court can then refer the child and family for diversion services pursuant to Family Court Act §742.

6. Family offense cases involving respondents under 18: Article 8 of the Family Court Act is a wholly inappropriate vehicle for addressing family offenses committed by juveniles under the age of 18, who are dependent and cannot either be ejected from their homes or incarcerated in adult jails. Unfortunately, an unintended side effect of the new PINS diversion statute [Laws of 2005, ch. 57, Part E] has been a sharp escalation in the prosecution of teens by their parents under Article 8 as a means of evading the new PINS diversion requirements. The Committee is thus proposing a measure requiring that such cases be dealt with under Article 7, rather than Article 8, of the Family Court Act.

7. Stays of administrative fair hearings regarding child abuse and neglect reports: The parallel judicial and administrative systems for determining the validity of reports of child abuse and maltreatment at times operate at cross-purposes, under different time constraints and, in an escalating pattern, have produced inconsistent results. Although Social Services Law §422(8)(b) provides that a

Family Court finding of abuse or neglect creates an "irrebuttable presumption," binding in the administrative fair hearing process, that credible evidence supports an abuse or maltreatment report, all too often, the fair hearing process proceeds to a conclusion prior to the outcome of Family Court child protective proceeding. The Committee is proposing a measure to ensure that in cases in which parallel Family Court proceedings are in progress, the administrative fair hearing process would not precipitously advance without awaiting the results of the Family Court matter. The measure would require that, in a case in which a Family Court child protective proceeding is pending regarding a child named in a child abuse or maltreatment report, the time frames for requesting an administrative amendment of the report or fair hearing, as well as the time frame for the administrative agency to resolve the fair hearing, would not begin to run until the disposition or the conclusion of a period of adjournment in contemplation of dismissal in the Family Court matter.

8. Compliance with court orders in child welfare proceedings: The federal and State *Adoption and Safe Families Acts* accord the Family Court a significant tool with which to monitor and promote the timely achievement of permanency for children in foster care, that is, the requirement that the Court periodically determine whether agencies have made reasonable efforts, where appropriate, to further children's permanency plans. The Committee is proposing a measure to give necessary statutory guidance to the Family Court in making its determinations, identifying two areas in which the Court's exercise of its power to find that reasonable efforts have not been made would be a meaningful sanction short of contempt. First, the proposal would permit a finding that reasonable efforts had not been made where the agency has not complied with a specific court order for services, whether for reunification of the child with his or her family or for an alternate permanency plan. Second, with respect to cases in which adoption is the permanency plan, the proposal would require such a finding where the agency failed to comply with a court order to file a petition to terminate parental rights within 90 days of the order, unless it has returned to Court and obtained a stay, extension or modification of the order. Finally, building on successful results regarding cases of children freed for adoption, the Committee proposes that in all cases involving a foster care placement or permanency hearing, the Court 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 child's placement in foster care or to facilitate reunification of the child with his or her family.

9. Orders of protection in child abuse and neglect proceedings: Filling a glaring gap in the otherwise comprehensive statewide automated domestic violence registry, the Committee proposes to require that orders of protection in child protective proceedings be entered onto the registry. This would ensure that law enforcement agencies and the courts would have ready access to available information regarding such orders. This measure would greatly enhance the protections available to victims of domestic violence, as well as the usefulness of the registry as a resource for law enforcement agencies and the courts.

10. Orders of protection in termination of parental rights, child protective and permanency

proceedings: While permanency for children in foster care is often achieved with the understanding, agreed- upon by everyone involved, that some contact will continue with the child's birth family, there have been instances in which continuing contact with a birth parent – for example, threatening or stalking behavior by a disturbed birth parent – has endangered the child and destabilized the child's new family. Since prospective adoptive or foster parents and birth parents do not meet the definition of family contained in Article 8 of the Family Court Act, the current statutory structure provides no vehicle to protect these children and their new families short of a criminal prosecution for a non-family offense. The Family Court Advisory and Rules Committee is proposing a measure to create a Family Court remedy for this problem by authorizing orders of protection to be issued in conjunction with the disposition of termination of parental rights cases and permanency hearings regarding children freed for adoption. Additionally, the measure would permit orders of protection in child protective proceedings to require the respondent parent to stay away, *inter alia*, from a "person with whom the child has been paroled, remanded, placed or released by the court..." Finally, the proposal would accord 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 domestic violence victims and the courts by the necessity for annual extensions of protective orders.

11. Determinations of the Family Court regarding children in foster care: 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. Conforming the various provisions for such orders to the burden of proof required for termination of parental rights proceedings, it would clarify that the Family Court's determinations to dispense with reasonable efforts would have to be based upon clear and convincing evidence with respect to all "aggravated circumstances," not simply prolonged parental refusal of services. Finally, the proposal would incorporate the provision of the Social Services Law that defines "diligent efforts" into the reasonable efforts provisions. Consistent with Matter of Marino S., 100 N.Y.2d 361, 372 (2003), *cert. denied,* 124 S.Ct. 834 (2003), the measure provides that if the Family 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.

12. Service by mail and inter-court communication in *Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA]* cases; technical amendment to personal jurisdiction provision of the Civil Practice Law and Rules [CPLR]: The proposal would amend the *UCCJEA* to: (1) restore language from the former *Uniform Child Custody Jurisdiction Act* that would permit service of process out of state by mail that includes a return receipt, 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. Further, the proposal would make a technical amendment to section 302(b) of the CPLR by adding cross-references to the *Uniform Interstate Family Support Act* [Art. 5-B of the Family Court Act] and the *UCCJEA* [Art. 5-A of the Domestic Relations Law].

13. Disposition of penalties in child support proceedings: Recognizing that compliance by employers with income execution requirements is not absolute and that incidents of discrimination

against employees subject to income executions occur all too frequently, the statutes establishing this popular vehicle for child support collection and enforcement are bolstered by civil penalties that can be assessed against employers. Sections 5241 and 5252 of the Civil Practice Law and Rules both authorize imposition of civil penalties against employers or other income payors of up to $500 for the first instance and up to $1000 for subsequent instances of non-compliance or discrimination. Unfortunately, both statutes are silent regarding to whom the penalties must be paid. The Family Court Advisory and Rules Committee is proposing a measure to remedy that silence by amending both sections to provide that the child who is the beneficiary of a support order should be the recipient of any penalty ordered – or, in the case of a family receiving public assistance, the local department of social services that is seeking recoupment of benefits through a child support order.

14. Orders for genetic testing in proceedings to vacate acknowledgments of paternity: Codifying the recent decision of the Supreme Court, Appellate Division, Second Department in Matter of Westchester County Department of Social Services o/b/o/ Melissa B. *v.* Robert W.B., -A.D.3d-, 803 N.Y.S.2d 672 (2d Dept., 2005), the Committee is proposing a measure to clarify the apparently contradictory provisions applicable to proceedings regarding revocation of paternity acknowledgments. The Committee's proposal would amend Family Court Act §516-a to provide a two-step threshold test that must be met before a genetic marker or DNA test would be ordered in a proceeding to vacate a paternity acknowledgment. Where the revocation petition has been filed more than 60 days after execution of the acknowledgment, a hearing would first have to be held establishing fraud, duress or material mistake of fact. Assuming fraud, duress or material mistake of fact is proven and in all cases in which the petition has been filed less than 60 days after execution of the acknowledgment, , the Court, consistent with Family Court Act §532, would have to determine whether ordering a genetic test is in the child's best interests or, conversely, whether res judicata, equitable estoppel or the presumption of legitimacy attaching to a child born to a married woman militate against a testing order. Finally, if genetic testing is ordered and paternity is established, the Family Court would be required to enter an order of filiation.

15. Requirements for Notices of Indicated Child Maltreatment Reports and Changes in Foster Care Placements: Absolutely essential to the effort to expedite permanency for children in furtherance of the goals of the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7] and recent permanency law [Laws of 2005, ch. 3], the Committee is resubmitting its proposal to assure that the Family Court, the parties and law guardians are promptly informed of any changes in placement that may warrant Court intervention. Equally critical, in an effort to effectuate the *ASFA* precept that safety of the child is paramount, the measure would also require prompt notice of any indicated child abuse or maltreatment reports. The proposal would amend Family Court Act §§1055 and 1089, as well as Social Services Law §§358-a, 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, and to report any indicated reports of child abuse or maltreatment. Changes of placement 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 cases in which the child has been discharged from foster care on a trial or final basis.

16. Procedures for admissions and violations of orders of probation and suspended judgment in persons in need of supervision (PINS) cases: Furthering the goals of recent PINS enactments of averting unnecessary, costly out-of-home placements, the Committee is proposing that intensive probation supervision be included as one of the dispositional alternatives in PINS cases, to the extent available in a particular county. 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.

17. Violations of Adjournments in Contemplation of Dismissal, Probation and Orders of Conditional Discharge and Placements in Juvenile Delinquency Cases: In order to fill four gaps in the post-dispositional procedures applicable in juvenile delinquency cases, the Committee is submitting a proposal clarifying the various provisions of Article 3 of the Family Court Act regarding violations. 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. *See* Matter of Edwin L., 88 N.Y.2d 593 (1996). Third, the measure would permit allegations in probation violation petitions to be supported by hearsay evidence, although the ultimate proof would have to be competent. Finally, the proposal would toll juvenile delinquency placements with county Departments of Social Services where the juveniles have absconded, as is already the law where juveniles abscond from placements with the New York State Office of Children and Family Services.

18. Termination of parental rights on the ground of homicide: New York State's strong public policy against allowing individuals convicted of murdering members of their family from having custody or visitation with their surviving children, embodied in the *Lee Ann Cruz Act* of 1998 and New York State's version of the *Uniform Child Custody Jurisdiction and Enforcement Act*, is reflected incompletely in New York State's termination of parental rights statute. *See* Laws of 1998, ch. 150; Laws of 1999, ch. 378; Laws of 2001, ch. 386. The Committee is proposing a measure that would specifically include, as a ground for termination of parental rights, homicide of the child's other parent, unless the homicide was committed by a victim of domestic violence where the violence was a contributing factor to the homicide. Termination of parental grounds would also include homicide of another child in the home, not simply a sibling of the child, where the perpetrator was a person legally responsible for the child, as the term is broadly defined in Article 10 of the Family Court Act.

C. Previously Endorsed Measures

The Committee is recommending resubmission of the following 14 proposals:

1. 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 resubmitting 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 willful violators of temporary and final orders of protection in all categories of cases would be subject to the following sanctions: probation, restitution, visitation prohibition or requirement for supervision, firearms surrender, firearms license suspension or revocation and/or commitment to jail for up to six months.

2. Juvenile delinquency: intensive probation supervision and electronic monitoring: With continuing community concern about juvenile crime, the Family Court requires cost-effective responses for use in both pre- and post-dispositional phases of juvenile delinquency proceedings. In determining whether an accused juvenile delinquent should be detained prior to disposition, the Committee is resubmitting its proposal to require the Family Court to consider the availability of appropriate alternatives to detention. 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 is available and 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.

3. Duration of orders of probation in family offense cases: In 2003, the Legislature lengthened the permissible duration of orders of protection in Family Court family offense cases from one to two years and, where aggravating circumstances have been found, from three to five years. Laws of 2003, chapter 579. However, concomitant changes were not made to Family Court Act §841(c), which authorizes respondents in such cases to be placed on probation as a disposition of an Article 8 proceeding. The Family Court Advisory and Rules Committee is proposing a measure to remedy that disparity by authorizing the Family Court to place a respondent on probation for a period of up to two years or, where an order of protection pursuant to Family Court Act §842 has been issued for five years, a period of up to five years.

4. Duration of orders of probation in child support proceedings: Alone among probation provisions in both the Family Court Act and Criminal Procedure Law, the child support provisions in the Family Court Act permit a child support obligor to be placed on probation for an extended period of time, that is, the entire duration of a child support or visitation order or order of protection, and contain no provisions regarding procedures to be followed in the event of a violation of probation. The Committee is re-submitting a measure to make the duration of probation commensurate with that in persons in need of supervision (PINS) cases – one year, with a one-year extension for "exceptional circumstances" – and to require a verified petition and an opportunity to be heard as prerequisites to revocation of probation in the event of a willful violation.

5. Modification of orders of child support: The enactment of the "cost of living adjustment" (COLA) provisions in the child support statute, pursuant to the federal *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* [Public Law 104-193], created a disparity in the ability of litigants in child support matters to obtain modifications of child support orders. Only those cases covered by the COLA provisions – cases in which custodial parents are on public assistance, which are adjusted every three years automatically, and cases in which custodial parents request child support services in accordance with Title IV-D of the federal *Social Security Act*, which are adjusted upon

request – are subject to periodic modification. In accordance with the Court of Appeals decision in Tompkins County Support Collection Unit on behalf of Linda S. Chamberlin *v.* Boyd M. Chamberlin, 99 N.Y.2d 328 (2003), a challenge to a COLA brings up the whole child support order for review, not simply the COLA itself. Those cases not covered by the COLA provisions are limited to the traditional prerequisites for modification, a change in circumstances or newly discovered evidence. The Committee proposes to remedy this disparity by authorizing applications to modify all child support orders every three years, unless the parties have specifically opted out in a written agreement or stipulation to a court order of child support.

6. 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 – a windfall unlikely to recur or an income that is not likely to remain at that high 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 is thus re-submitting its proposal to authorize the Court to direct that the non-custodial parent 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.

7. 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 that the inflexible minimum $25 per month child support obligation was unconstitutional.

8. Child support and paternity: The Committee is again 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 18. The proposal requires such acknowledgments to be executed before a judge or support magistrate and clarifies procedures applicable to "cost of living adjustment" proceedings and petitions to challenge administrative genetic testing directives.

9. Preclusion of remedies in court-approved agreements and compromises in paternity proceedings: The Committee is re-submitting 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.

10. 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 to facilitate an accurate determination of their "best interests." Building upon these provisions, the Committee is again proposing 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 investigations determine that any allegations are "indicated," to direct the child protective agency to file child protective petitions with respect to those allegations. Prior to any 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).

11. 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 again 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, but not require, courts to request probation departments to conduct pre-dispositional or pre-sentence investigations in criminal and Family Court family offense cases.

12. 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 1, 115, 905 orders of protection, as of December 16, 2005, the need to ensure its security and integrity grows ever more critical. The Committee is thus re-submitting its proposal delineating civil and criminal penalties for unauthorized release of data from the statewide automated registry of orders of protection and warrants.

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

14. 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 is again proposing 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.

* * *

In addition to its legislative efforts, implementation of both the permanency legislation and comprehensive PINS reform presented major challenges and consumed much of the energy of the Committee in 2005. Members participated in meetings with executive agencies to facilitate a smooth transition to the new law and, through the New York State Judicial Institute, presented numerous training sessions statewide. The Committee developed and revised 125 of the official Family Court

forms for pleadings, process and orders and recommended comprehensive amendments to the *Uniform Rules of the Family Court* that were promulgated in late December, 2005. The forms and court rules have been placed on the Internet for easy access by attorneys, litigants and the public. *See* http://www.nycourts.gov. Further, the Committee presented comments to the Matrimonial Commission, chaired by Hon. Sondra Miller, regarding supervised visitation, child support and law guardian and forensic issues. The Committee also submitted comments to the New York State Office for Temporary and Disability Assistance regarding proposed child support regulations.

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

Hon. Sara Schechter and Peter Passidomo, Co-Chairs
Janet R. Fink, Counsel
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. Amendments to child welfare permanency legislation [Laws of 2005, ch. 3] (F.C.A. §§262, 633, 1017, 1055, 1071, 1072, 1074, 1087, 1089, 1118, 1121; S.S.L. §358-a; D.R.L. §112-b)

Enactment of comprehensive child welfare permanency legislation in 2005 was a landmark achievement that will inure to the benefit of countless children and families in New York State, while at the same time significantly facilitating New York State's compliance with federal requirements for receipt of substantial foster care funding. As is often the case such far-reaching legislation, however, there are several provisions in need of minor correction or clarification in order to fully realize the goals of the legislation. The Family Court Advisory and Rules Committee is, therefore, submitting a measure containing amendments to chapter 3 of the laws of 2005.

In brief, these amendments include the following:

• Family Court Act §262 would be clarified to provide that a parent, foster parent or other person having physical or legal custody of a child has a right to appointed counsel, if indigent, in child protective proceedings and permanency hearings under Articles 10 and 10-A of the Family Court Act, respectively.

• Family Court Act §633 would be amended to provide that where a suspended judgment in a permanent neglect case has been satisfied or extended, but the child nonetheless remains in foster care, the next permanency hearing would be held on the previously scheduled date certain, that is, six months from the completion of the prior permanency hearing. No reason exists to require a permanency hearing within 60 days of the court's order either extending or deeming the suspended judgment to have been satisfied. The statute would retain the requirement, however, that where the suspended judgment has been revoked and guardianship and custody transferred to the authorized agency for purposes of adoption, the first freed-child permanency hearing would be to be completed immediately following or no later than 60 days after the earlier of the Family Court's announcement of its decision or issuance of a written order.

• Family Court Act §1055(b) would be amended to restore necessary provisions regarding elements of a dispositional order that had been eliminated, most likely inadvertently, when these sections were incorporated into the permanency hearing order sections of the new Article 10-A of the Family Court Act. The Family Court would be required to state the reasons for any placement ordered, to give a copy of a placement order and service plan to the respondent parent, and to include the following in any placement order: a description of the visitation plan; a direction that the respondent parent or parents be notified of any planning conferences and of their right to attend the conference with counsel or other representatives or companions; a date certain for the next permanency hearing, which would most likely be the date already scheduled; and a notice that if the child remains in foster care for 15 of the most recent 22 months, the agency may be required to file a petition to terminate parental rights.

• Family Court Act §1055 would also be amended to restore the provisions authorizing the Family Court to direct the agency to undertake diligent efforts to encourage and strengthen the parental relationship, when consistent with the child's best interests, or, where legal grounds exist, to direct the agency to file a termination of parental rights petition to free the child for adoption. If the agency does not file the petition

within 90 days of the order, the child's foster parent or parents would be permitted to so file. No reason exists to delay issuance of these orders until the permanency hearing stage. Including these provisions at the dispositional stage as well will further the legislative goal of expediting the achievement of permanency for children in placement.

• Family Court Act §§1071 and 1072 would be amended to delineate procedures for violations of orders of suspended judgment and supervision in child protective proceedings. In furtherance of the legislative goal of simplification, proceedings regarding violations would be able to be initiated by motions or orders to show cause, in lieu of petitions. The period of an order of suspended judgment or supervision would be tolled pending disposition of the violation proceeding.

• Family Court Act §1074, which authorizes an agency to file a petition in Family Court to be relieved of responsibility for child placed in its care, would be repealed. This archaic provision has been rendered unnecessary by the Family Court's continuing jurisdiction over all children in out-of-home placement pursuant to the permanency statute. *See* Family Court Act §1088.

• The definition of "child" in section 1087(a) of the Family Court Act would be amended to add a destitute child placed in foster care pursuant to Social Services Law §371, thus eliminating confusion over the status of destitute children and clarifying the need to conduct periodic permanency hearings in their cases.

• Section 1089 of the Family Court Act and section 358-a of the Social Services Law would be amended to require a date certain to be set for a permanency hearing upon the Family Court's approval of a voluntary foster care placement instrument. As in other cases of children in placement, the hearing would have to be scheduled not more than eight months from the date of initial removal of the child from home. Interim orders prior to the permanency hearing date, including, among others, orders of placement under Family Court Act §1055, would have to contain the permanency hearing date.

• Section 1089 of the Family Court Act would be amended to clarify that the birth parent of a child freed for adoption would not be notified of a permanency hearing and that the permanency report would have to be submitted to the Family Court, in addition to being disseminated to designated parties, counsel and the law guardian. Further, the Court, on motion of any party or on its own motion, would be able to direct that notice not be given to particular former foster parents who had custody of the child for 12 months. While the requirement to provide notice to former foster parents broadens the possible resources available to assist in permanency planning for children, there may be circumstances in which it would be inappropriate or even harmful to require such notice, *e.g.*, cases in which a child had been removed from a foster parent's care because of abuse or neglect by the foster parent.

• With respect to children freed for adoption, section 1089 of the Family Court Act would be amended to eliminate permanency goals that are not legally permissible in such cases, that is, return to parents, referral for legal guardianship and permanent placement with a fit and willing relative. Further, the direction to file a termination of parental rights petition would be qualified to exclude cases in which a petition had already been filed.

• The automatic stay provision of Family Court Act §1112 would be amended to apply as well to

permanency hearing proceedings that had originated as child protective proceedings. The stay provision had always applied to Family Court orders directing return of children in extension of placement, as well as in preliminary removal and placement proceedings. Therefore, adding the reference to this category of permanency hearings preserves the ability of the parties to obtain needed emergency relief pending appeal.

• In order to obtain poor person relief and assignment of counsel on appeal without a formal motion, Family Court Act §1118 would be clarified to provide that attorneys representing adult parties would be required to file a certification attesting to the continued indigency of their clients, but law guardians would simply need to certify that they had been assigned in the Family Court. It is presumed, without a showing of indigency, that independent counsel would be unavailable for law guardians' child clients.

• Social Services Law §358-a(12) would be amended to correct a statutory reference.

• Section 112-b of the Domestic Relations Law would be amended to clarify that the judge approving the adoption would not be permitted to incorporate a post-adoption contact agreement into the adoption order unless the judge who approved the surrender had determined and stated in its order that the post-adoption contact agreement would be in the child's best interests. This should end confusion regarding whether the adoption judge must follow the determination of the surrender judge or must make a *de novo* determination. Additionally, since the adoption order itself is confidential, the provision would be amended to provide that the parties to the post-adoption contact agreement would be given a copy of a separate court order incorporating the agreement. *See* Uniform Family Court Adoption Form 14-A (available at www.nycourts.gov) .

Proposal

AN ACT to amend the family court act, the social services law and the domestic relations law, in relation to dispositions in child protective proceedings, permanency hearings of children in foster care and direct placement, suspended judgments in termination of parental rights proceedings, appeals in proceedings regarding children and adoption 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 262 of the family court act, as amended by chapter 3 of the laws of 2005, is amended to read as follows:

(iv) the parent, foster parent, or other person having physical or legal custody of the child in any proceeding under article 10 or 10-A of this act or section three hundred fifty-eight-a, three hundred eighty-four or three hundred eighty- four-b of the social services law, and a non-custodial parent or grandparent served with notice pursuant to paragraph (e) of subdivision two of section three hundred eighty-four-a of the social services law;

§2. Subdivision (g) of section 633 of the family court act, as added by chapter 3 of the laws of 2005, is amended to read as follows:

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 fifty-eight-a of the social services law, a permanency hearing shall be completed as previously scheduled pursuant to section one thousand eighty-nine of this act [immediately following], but no later than [sixty days] six months after the [earlier] completion of the [court's statement of its order on the record or issuance of its written order.] last permanency hearing. 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 paragraph one of subdivision (a) of section one thousand eighty-nine 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.

§3. Paragraph (i) of subdivision (b) of section 1055 of the family court act, as amended by chapter 3 of the laws of 2005, is amended to read as follows:

(i) In any order of placement made under this section the court shall state on the record its findings supporting the placement. The order of placement shall include, but not be limited to:

(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, and of their right to have counsel or other representative or companion with them;

(C) a date certain for the permanency hearing, which may be the previously-scheduled date certain, but in no event more than eight months from the date of removal of the child from his or home; and

(D) 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.

A copy of the court's order and the service plan shall be given to the respondent. Children placed under this section shall be placed until the court completes the initial permanency hearing scheduled pursuant to article ten-A of this act. Should the court determine pursuant to article ten-A of this act that placement shall be extended beyond completion of the scheduled permanency hearing, such extended placement and any such successive extensions of placement shall expire at the completion of the next scheduled permanency hearing, unless the court shall deter mine, pursuant to article ten-A of this act, to continue to extend such placement.

§4. Subdivisions (c), (d), (e), (f) and (g) of section 1055 of the family court act, as amended by chapter 3 of the laws of 2005, are re-lettered subdivisions (e), (f), (g), (h) and (i) and new subdivisions (c)

and (d) are added to read as follows:

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

(d) In addition to an order of placement made pursuant to subdivision (b), the court may make an order directing a social services official or other duly authorized agency to institute a proceeding to legally free the child for adoption, if the court finds reasonable cause to believe that grounds therefor exist. Upon a failure by such official or agency to institute such a proceeding within ninety days after entry of such order, the court shall permit the foster parent or parents in whose home the child resides to institute such a proceeding, unless the social services official or other duly authorized agency caring for the child, for good cause shown and upon due notice to all parties to the proceeding, has obtained a modification or extension of such order, or unless the court has reasonable cause to believe that such foster parent or parents would not obtain approval of their petition to adopt the child in a subsequent adoption proceeding.

§5. Section 1071 of the Family Court Act, as added by chapter 962 of the laws of 1970, is amended to read as follows:

If, prior to the expiration of the period of the suspended judgment, a motion or order to show cause is filed that alleges that a parent or other person legally responsible for a child's care [is brought before the court for failing to comply with] violated the terms and conditions of a suspended judgment issued under section one thousand fifty three [and if] of this article, the period of the suspended judgment shall be tolled pending disposition of the motion or order to show cause. If, after hearing, the court is satisfied by competent proof that the parent or other person legally responsible [did so] violated the order of

suspended judgment, the court may revoke the suspension of judgment and enter any order that might have been made at the time judgment was suspended.

§6. The opening paragraph of section 1072 of the Family Court Act, as amended by chapter 1039 of the laws of 1973, is amended to read as follows:

If, prior to the expiration of the period of an order of supervision pursuant to section one thousand fifty-four or one thousand fifty-seven of this article, a motion or order to show cause is filed that alleges that a parent or other person legally responsible for a child's care [is brought before the court for failing to comply with] violated the terms and conditions of an order of supervision issued under one thousand fifty-four or [of an order of protection issued under section one thousand fifty-six or section one thousand twenty-seven and if,] one thousand fifty-seven of this article, the period of the order or supervision shall be tolled pending disposition of the motion or order to show cause. If, after hearing, the court is satisfied by competent proof that the parent or other person legally responsible [did so] violated the order of supervision willfully and without just cause, the court may:

§7. Section 1074 of the family court act, as added by chapter 962 of the laws of 1970, is REPEALED.

[REPEAL NOTE: Family Court Act §1074, proposed to be repealed by this act, authorizes an agency in which a child has been placed to petition the Family Court for release of responsibility for the child under the placement]

§8. Subdivision (a) of section 1087 of the family court act, as added by chapter 3 of the laws of 2005, is amended to read as follows:

(a) "Child" shall mean a person under the age of eighteen who is placed in foster care pursuant to section three hundred fifty-eight-a, three hundred eighty-four or three hundred eighty-four-a of the social services law or pursuant to section one thousand twenty-two, one thousand twenty-seven, or one thousand fifty-two of this act; or placed in foster care as a destitute child as defined in section three hundred seventy-one of the social services law; or directly placed with a relative pursuant to section one thousand seventeen or one thousand fifty-five of this act; or who has been freed for adoption or a person between the ages of eighteen and twenty-one who has consented to continuation in foster care.

§9. Paragraph 2 of subdivision (a) of section 1089 of the family court act, as added by chapter 3 of the laws of 2005, is amended to read as follows:

(2) All other permanency hearings. At the conclusion of the hearing pursuant to section one thousand twenty-two or one thousand twenty-seven of this act at which the child was remanded or placed

and upon the court's approval of a voluntary placement instrument pursuant to section three hundred fifty-eight-a of the social services law, the court shall set a date certain for an initial permanency hearing [and], advise all parties in court of the date set and include the date in the order. Orders issued in subsequent court hearings prior to the permanency hearing, including, but not limited to, the order of placement issued pursuant to section one thousand fifty-five of the family court act, shall include the date certain for the permanency hearing. The initial permanency hearing shall be commenced no later than six months from the date which is sixty days after the child was removed from his her home and shall be completed within thirty days of commencement.

§10. Subparagraph (i) of paragraph 1 of subdivision (b) of section 1089 of the family court act, as added by chapter 3 of the laws of 2005, is amended to read as follows:

(i) the child's parent (unless the child has been freed for adoption), including any non-respondent parent and any other person legally responsible for the child's care, at the most recent address or addresses known to the local social services district or agency, and the foster parent in whose home the child currently resides, each of whom shall be a party to the proceeding; and

§11. Paragraph 2 of subdivision (b) of section 1089 of the family court act, as added by chapter 3 of the laws of 2005, is amended to read as follows:

(2) The notice and the permanency hearing report shall also be provided to any pre-adoptive parent or relative providing care for the child and shall be submitted to the court. The notice of the permanency hearing only shall be provided to a former foster parent in whose home the child previously had resided for a continuous period of twelve months in foster care, if any [. Provided, however, that] , unless the court, on motion of any party or on its own motion, dispenses with such notice. However, such pre-adoptive parent, relative, or former foster parent, on the basis of such notice, shall have an opportunity to be heard but shall not be a party to the permanency hearing. The failure of such pre-adoptive parent, relative or former foster parent to appear at a permanency hearing shall constitute a waiver of the opportunity to be heard. Such failure to appear shall not cause a delay of the permanency hearing nor be a ground for the invalidation of any order issued by the court pursuant to this section.

§12. Paragraph 1 of subdivision (c) of section 1089 of the family court act, as added by chapter 3 of the laws of 2005, is amended to read as follows:

(1) the child's current permanency goal, which may be:

(i) return to the parent or parents, unless the child has been freed for adoption;

(ii) placement for adoption with the local social services official filing a petition for

termination of parental rights, unless such a petition has already been filed;

(iii) referral for legal guardianship, unless the child has been freed for adoption;

(iv) permanent placement with a fit and willing relative, unless the child has been freed for adoption; or

(v) placement in another planned permanent living arrangement that includes a significant connection to an adult who is willing to be a permanency resource for the child, including documentation of the compelling reason for determining that it would not be in the best interests of the child to be returned home, placed for adoption, placed with a legal guardian, or placed with a fit and willing relative;

§13. Subparagraph (i) of paragraph 2 of subdivision (d) of section 1089 of the family court act, as added by chapter 3 of the laws of 2005, is amended to read as follows:

(i) whether the permanency goal for the child should be approved or modified and the anticipated date for achieving the goal. The permanency goal may be determined to be:

(A) return to parent , unless the child has been freed for adoption;

(B) placement for adoption with the local social services official filing a petition for termination of parental rights unless such a petition has already been filed;

(C) referral for legal guardianship, unless the child has been freed for adoption;

(D) permanent placement with a fit and willing relative , unless the child has been freed for adoption; or

(E) placement in another planned permanent living arrangement that includes a significant connection to an adult willing to be a permanency resource for the child if the local 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 placed for adoption, placed with a fit and willing relative, or placed with a legal guardian;

§14. Subdivision (b) of section 1112 of the family court act, as amended by chapter 34 of the laws of 1991,is amended to read as follows:

b). In any proceeding pursuant to article ten of this act or in any proceeding pursuant to article ten-a of this act that originated as a proceeding under article ten of this act where the family court issues an order which will result in the return of a child previously remanded or placed by the family court in the custody of someone other than the respondent, such order shall be stayed until five p.m. of the next business day after the day on which such order is issued unless such stay is waived by all parties to the proceeding by written stipulation or upon the record in family court. Nothing herein shall be deemed to affect the discretion of a

judge of the family court to stay an order returning a child to the custody of a respondent for a longer period of time than set forth in this subdivision.

§15. Section 1118 of the family court act, as amended by chapter 3 of the laws of 2005, is amended to read as follows:

§1118. Applicability of civil practice law and rules. The provisions of the civil practice law and rules apply where appropriate to appeals under this article, provided, however, that the fees required by section eight thousand twenty-two of the civil practice law and rules shall not be required where the attorney for the appellant or attorney for the movant, as applicable, certifies that such appellant or movant has been assigned counsel or a law guardian pursuant to section two hundred forty-nine, two hundred sixty-two or eleven hundred twenty of this act or section seven hundred twenty-two of the county law, or is represented by a legal aid society or a legal services program or other nonprofit organization, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society or organization. Where the attorney for the appellant or the attorney for the movant certifies in accordance with procedures established by the appropriate appellate division that the appellant or movant has been represented in family court by assigned counsel or a law guardian, pursuant to section two hundred forty-nine, two hundred sixty-two or eleven hundred twenty of this act or section seven hundred twenty-two of the county law, or is represented by a legal aid society or legal services program or some other nonprofit organization, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf or under the auspices of such society or organization, and that the appellant, who has indicated an intention to appeal, or movant, continues to be [indigent and to be] eligible for assignment of counsel <u>and, in the case of counsel assigned to represent an adult party, continues to be indigent</u>, the appellant or movant shall be presumed eligible for poor person relief pursuant to section eleven hundred one of the civil practice law and rules and for assignment of counsel on appeal without further motion. The appointment of counsel and granting of poor person relief by the appellate division shall continue for the purpose of filing a notice of appeal or motion for leave to appeal to the court of appeals.

§16. Subdivisions 3 and 5 of section 1121 of the family court act, as amended by chapter 3 of the laws of 2005, are amended to read as follows:

3. It shall also be the duty of such counsel or law guardian to ascertain whether the party represented by such attorney wishes to appeal and, if so, to serve and file the necessary notice of appea and, as applicable, to apply for leave to appeal as a poor person, to file a certification of continued

[indigency and continued] eligibility for appointment of counsel pursuant to section eleven hundred eighteen of this article, and to submit such other documents as may be required by the appropriate appellate division.

5. Where a party wishes to appeal, it shall also be the duty of such counsel or law guardian, where appropriate, to apply for assignment of counsel for such party pursuant to applicable provisions of this act, the judiciary law and the civil practice law and rules, and to file a certification of continued [indigency and continued] eligibility for appointment of counsel and, in the case of counsel assigned to represent an adult party, continued indigency, pursuant to section eleven hundred eighteen of this article, and to submit such other documents as may be required by the appropriate appellate division.

§17. Paragraph (b) of subdivision (2-a) of section 358-a of the social services law, as amended by chapter 3 of the laws of 2005, is amended to read as follows:

(b) [A foster parent or parents in whose home the child resides may make a motion to the] The court [to], upon approving an instrument under this section, shall schedule a permanency hearing pursuant to article ten-A of the family court act[, upon a showing of reasonable cause to believe that grounds exist to institute a proceeding pursuant to paragraph (b) of subdivision four of section three hundred eighty-four-b of this chapter to legally free such child for adoption] for a date certain not more than eight months after the placement of the child into foster care. Such date certain shall be included in the order approving the instrument.

§18. Subdivision 12 of section 358-a of the social services law, as amended by chapter 3 of the laws of 2005, is amended to read as follows:

(12) For the purposes of this section, aggravated circumstances means where a child has been either severely or repeatedly abused, as defined in subdivision eight of section three hundred eighty-four-b of this chapter; or where a child has subsequently been found to be an abused child, as defined in paragraph (i) or (iii) of subdivision (e) of [this] section one thousand twelve of the family court act, within five years after return home following placement in foster care as a result of being found to be a neglected child, as defined in subdivision (f) of [this] section one thousand twelve of the family court act, provided that the respondent or respondents in each of the foregoing proceedings was the same; or where the court finds by clear and convincing evidence that the parent of a child in foster care has refused and has failed completely, over a period of at least six months from the date of removal, to engage in services necessary to eliminate the risk of abuse or neglect if returned to the parent, and has failed to

secure services on his or her own or otherwise adequately prepare for the return home and, after being informed by the court that such an admission could eliminate the requirement that the local department of social services provide reunification services to the parent, the parent has stated in court under oath that he or she intends to continue to refuse such necessary services and is unwilling to secure such services independently or otherwise prepare for the child's return home; provided, however, that if the court finds that adequate justification exists for the failure to engage in or secure such services, including but not limited to a lack of child care, a lack of transportation, and an inability to attend services that conflict with the parent's work schedule, such failure shall not constitute an aggravated circumstance; or where a court has determined a child five days old or younger was abandoned by a parent with an intent to wholly abandon such child and with the intent that the child be safe from physical injury and cared for in an appropriate manner.

§19. Subdivision 2 of section 112-b of the domestic relations law, as added by chapter 3 of the laws of 2005, is amended to read as follows:

2. Agreements regarding communication [with] or contact between an adoptive child, adoptive parent or parents, and a birth parent or parents and/or biological siblings or half-siblings of an adoptive child shall not be legally enforceable unless the terms of the agreement are incorporated into a written court order entered in accordance with the provisions of this section. The court shall not incorporate an agreement regarding communication or contact into an order unless the terms and conditions of the agreement have been set forth in writing and consented to in writing by the parties to the agreement, including the law guardian representing the adoptive child. The court shall not enter a proposed order unless [it has] the court that approved the surrender of the child [found] determined and stated in its order that the communication with or contact between the adoptive child, the prospective adoptive parent or parents and a birth parent or parents and/or biological siblings or half-siblings, as agreed upon and as set forth in the agreement, would be in the adoptive child's best interests. Notwithstanding any other provision of law, a copy of [any] the order entered pursuant to this section incorporating the post-adoption contact agreement shall be given to all parties who have agreed to the terms and conditions of such order.

§20 . This act shall take effect immediately.

2. Permanency planning in juvenile delinquency and persons in need of supervision proceedings
(F.C.A. §§312.1, 320(2), 353.3, 355.3, 355.5, 741, 756, 756-a; Ed. L. §112; Soc. Ser. L. §409-e)

When the Legislature enacted the landmark child welfare permanency legislation in 2005, it deferred a significant constellation of issues for future consideration, those relating to permanency planning and permanency hearings with respect to juvenile delinquents and Persons in Need of Supervision (PINS). These issues, however, are critically important and should be addressed comprehensively in 2006. The permanency hearing provisions are vital for the successful resolution of these cases for the children involved, their families and their communities, and are essential to New York State's compliance with the federal *Adoption and Safe Families Act.* 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, it must make determinations of comparable specificity and the parties must have the benefit of continuity of legal representation. To that end, the Family Court Advisory and Rules Committee has developed a proposal that incorporates essential elements of the new permanency hearing article of the Family Court Act (Article 10-A) into the permanency hearing provisions of Articles 3 and 7 of the Family Court Act. Briefly, the proposal contains the following provisions:

1. Summonses for non-custodial parents: In order to ensure that all possible resources are engaged in the resolution of juvenile delinquency proceedings, the proposal would require that non-custodial parents, if any, be summonsed to appear in Family Court, a supplement to the existing requirement that a summons be issued for an accused juvenile's parent or other person legally responsible. The local probation department that generally interviews parties at the outset for adjustment purposes, as well as the presentment agency, would be charged with the responsibility of asking the custodial parent for the necessary contact information for parents other than those already notified. The presentment agency would be required to serve the summons, along with a copy of the petition, upon the non-custodial parent or parents either personally at least 24 hours prior to the date indicated for appearance or by mail at least five days before the appearance date. Consistent with Family Court Act §341.2(3), however, failure of the noticed parent to appear in court would not be grounds to delay the proceedings.

Just as in child abuse, child neglect and persons in need of supervision (PINS) proceedings, so, too, in juvenile delinquency proceedings the child's non-custodial parent may be a critical participant in the dispositional process. Sometimes a non-custodial parent or his or her extended family may provide vitally-needed placement resources for a child, both temporarily during the pendency of the action and on a more extended basis at disposition, or may at the very least provide helpful participation that may positively influence the child's behavior. However, unlike the statutory provisions applicable to child protective and PINS proceedings, the Family Court Act contains no mandate to even notify non-custodial parents of, let alone engage them in resolving, their children's juvenile delinquency proceedings. This measure would fill that gap.

2. Continuity of counsel: The measure would provide necessary continuity in law guardian representation in juvenile delinquency and PINS cases. Similar to the requirement in Family Court Act §1016 for the appointment of the law guardian in a child protective proceeding to continue during the life of

a dispositional or post-dispositional order, Family Court Act §§320.2(2) and 741(a) would be amended to continue the law guardian's appointment in a juvenile delinquency and PINS proceedings for the entire period of a dispositional order, an adjournment in contemplation of dismissal and any extensions of placement, violation hearings or other post-dispositional proceedings. As in child protective cases, the appointment would automatically continue unless the court relieves the law guardian or grants the law guardian's application to be relieved, in which case the court must immediately appoint another law guardian. While the current practice of the law guardian submitting a voucher for payment at the close of a proceeding would continue, the law guardian would be able, as in child protective proceedings, to submit a separate application for compensation for post-dispositional services rendered.

One of the central precepts underlying the New York State Family Court Act is the necessity of representation of juveniles at every stage of the proceedings, a precept "based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition." Family Court Act §241. The Act recognizes that juveniles "often require the assistance of counsel to help protect their interests and to help them express their wishes to the court." *Id.* Both the juvenile delinquency and persons in need of supervision (PINS) statutes explicitly require appointment of a law guardian at the outset of proceedings, require the law guardian's personal appearance at every hearing and provide for the continuation of the appointment on appeal. *See* Family Court Act §§307.4(2), 320.2(2), 320.3, 341.2(1), 728(a), 741(a), 1120(b). What is less clear, however, is whether the appointment of a law guardian, absent an appeal, continues after the disposition of a juvenile delinquency or PINS proceeding. This measure would eliminate that ambiguity. Representation of juveniles in such cases after disposition in case conferences and subsequent reviews is critically important to efforts to ensure that effective permanency planning takes place. In the juvenile delinquency and PINS context, this representation may significantly further the goal of ensuring that services are in place to facilitate the juvenile's successful reintegration into his or her community.

3. Permanency planning goals and services for adolescents: As in the permanency legislation, the proposal would require the Family Court to consider the services necessary to assist juveniles 14 and older, instead of 16 and older, to make the transition from foster care to independent living in juvenile delinquency and PINS cases. *See* Family Court Act §1089(d)(2)(vii)(G). Further, as in the permanency statute, it would require, for those juveniles who are neither returning home, nor getting adopted, that if the permanency planning goal is "another planned permanent living arrangement," it must include "a significant connection to an adult willing to be a permanency resource for the child." *See* Family Court Act §1089(d)(2)(i)(E). Unquestionably, these features of the permanency legislation, most specifically addressing the needs of adolescents in out-of-home care, are equally critical for the adolescents who comprise the juvenile delinquency and PINS caseloads of the Family Courts statewide.

4. Educational and vocational release planning in PINS proceedings: Conforming the PINS statute to the 2000 legislation regarding juvenile delinquents and the 2005 permanency legislation applicable to children in foster care, the proposal would require the agency with which a PINS is placed – the local Department of Social Services or an authorized child care agency operating under contract – to engage in constructive planning for the child's release 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 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, that records would be promptly transferred and that special education services, if any, would continue until such time as the new local education agency develops and implements a new Individual Education Plan, as necessary. 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 an extension of placement/ permanency hearing, this release plan would be reviewed by the Court in conjunction with its review of the permanency plan and the Court's order would include a determination of the adequacy of the release plan and would specify any necessary modifications. Recognizing that of all children in out-of-home care, PINS children are among the most likely to have serious educational deficits and needs, these provisions would help to ameliorate the serious deficiencies in agency referrals of youth to school and vocational programs upon release from foster care as identified in recent studies. [3]

5. Placement and permanency hearing orders: Permanency hearings would be required for juveniles placed with local Departments of Social Services and with the New York State Office of Children and Family Services for limited and non-secure facilities. Although New York State does not receive federal Title IV-E foster care reimbursement for youth in limited secure facilities, these youth may well, during the course of placement, be transferred into IV-E- eligible non-secure facilities. Convening permanency hearings for such youth would greatly facilitate the planning process and assure compliance with the federally-required time-limits applicable once the youth are transferred . *See, e.g.*, Matter of Donovan Z., 6 Misc.3d 1023(a)(Fam. Ct. , Monroe Co., 2005). Further, as in the permanency legislation, the measure would require that permanency hearing orders in juvenile delinquency and PINS proceedings include: a description of the visiting plan between the juvenile and his or her parent or legally-responsible adult; a service plan designed to fulfill the permanency goal for the juvenile; [4] 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 be required to be provided to the parent or other legally responsible individual. *See* Family Court Act §§1089(d)(2)(vii)(A), 1089(e). Similar requirements would apply to the dispositional orders placing the juvenile.

That conformity to the requirements of the federal *Adoption and Safe Families Act* ["*ASFA,*" Public

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[3] *Educational Neglect: The Delivery of Educational Services to Children in New York City's Foster Care System* (Advocates for Children of New York, July, 2000); *Changing the PINS System in New York: A Study of the Implications of Raising the Age Limit for Persons in Need of Supervision (PINS)*, p. 34 (Vera Inst., Sept., 2001); *Changing the Status Quo for Status Offenders: New York State's Efforts to Support Troubled Teens* (Vera Inst., Dec., 2004).

[4] 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.

Law 105-89] is necessary in juvenile delinquency and PINS cases is clear in both State and federal law and regulations. The reauthorization of the federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273] in 2002 made compliance with *ASFA* a requirement, not only for New York State to receive federal foster care assistance pursuant to Title IV-E of the *Social Security Act* [42 U.S.C.], but also for eligibility for federal juvenile justice funding from the Department of Justice. The enactment of amendments in 2000 to New York State's legislation implementing the federal *ASFA* underscored the Legislature's recognition that the reasonable efforts, permanency planning and permanency hearing requirements of *ASFA* are fully applicable to juvenile delinquency and PINS proceedings in Family Court and are critical aspects of the State's compliance with federal foster care [*Social Security Act*, 42 U.S.C. Title IV-E] funding mandates. *See* Laws of 2000, ch. 145; Senate Memorandum in Support of S 7892-a.[5] That these amendments were compelled by federal law is evident from the regulations promulgated on January 25, 2000 by the Children's Bureau of the United States Department of Health and Human Services. 45 *C.F.R.* Parts 1355-1357; 65 *Fed.Reg.* 4019-4093 (Jan. 25, 2000).

The Committee's proposal is vital to address the current conundrum faced by the Family Court: 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, if law guardian representation is continued without interruption 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. The importance of these provisions are underscored as well in the nationally recognized guidelines recently approved by the National Council of Juvenile and Family Court Judges.[6] As one child welfare expert has written:[7]

> If *ASFA* and Title IV-E are applied properly, consistently and with a view toward reunification, rehabilitation and safe permanent homes for the children involved, the results can be extraordinary. One outcome –collaboration among courts, agencies, and lawyers – can result in fewer delinquency, status offender, and dependency [child abuse and neglect] cases; more youths and families involved with one another and their communities; and fewer future adult crimes. Collaboration also is efficient under a cost-benefit analysis since it provides extra funding for juvenile justice initiatives and preventive services.

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[5] The 2000 amendments require case-specific, rather than categorical, exclusions of juvenile delinquency and PINS proceedings from the mandate to file termination of parental rights proceedings for juveniles who have been in care for 15 of the most recent 22 months. Particularized findings must be made at the earliest pre-trial detention hearings regarding whether reasonable efforts had been made to prevent detention or facilitate return home and whether detention is in the child's best interests. Significantly, the amendments clarify that permanency hearings must be held in juvenile delinquency proceedings within 30 days of a finding that reasonable efforts are not required or, if no such finding has been made, no later than 12 months after the child entered foster care and every 12 months thereafter. *Id.* McKinney's Session Laws of New York(Aug., 2000), No.5, p.A-424, A-426, A-427.

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

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

ASFA and Title IV-E can be important tools to reform the juvenile justice field. They can provide juvenile justice agencies with added means to control and oversee youths, work preventively with families at risk, and get community involvement and "buy-in."

Proposal

AN ACT to amend the family court act, the education law and the social services law, in relation to permanency planning in juvenile delinquency and persons in need of supervision cases

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

Section 1. Section 312.1 of the family court act is amended by adding a new subdivision 4 to read as follows:

4. Upon the filing of a petition under this article, the court shall issue a summons to each parent of the respondent, including a non-custodial parent, in addition to the parent or person legally responsible named in subdivision one of this section, provided that the address of each parent has been provided to the court. The probation department and presentment agency shall ask the custodial parent or person legally responsible for information regarding any other parent or parents of the respondent. The summons shall provide notice to the parent or parents of the right to appear and participate in the proceeding and to seek temporary release or, upon disposition, direct placement, of the respondent. The presentment agency shall personally serve the summons and petition at least twenty-four hours before the time stated therein for appearance or by mailing such summons and petition at least five days before such date. The failure of such noticed parent to appear shall not be cause for delay of the respondent's initial appearance, as defined by section 320.1 of this article.

§2. Subdivision 2 of section 320.2 of the family court act, as added by chapter 920 of the laws of 1982, is amended to read as follows:

2. At the initial appearance the court must appoint a law guardian to represent the respondent pursuant to the provisions of section two hundred forty-nine if independent legal representation is not available to such respondent. Whenever a law guardian has been appointed by the family court to represent a child in a proceeding under this article, such appointment shall continue without further court order or appointment during the period covered by any order of disposition issued by the court, an adjournment in contemplation of dismissal, or any extension or violation thereof, or during any permanency hearing, other post-dispositional proceeding or appeal. All notices and reports required by law shall be provided to such law guardian. Such appointment shall continue unless another appointment of a law guardian has been made

by the court or unless such law guardian makes application to the court to be relieved of his or her appointment. Upon approval of such application to be relieved, the court shall immediately appoint another law guardian to whom all notices and reports required by law shall be provided. A law guardian shall be entitled to compensation pursuant to applicable provisions of law for services rendered up to and including disposition of the petition. The law guardian shall, by separate application, be entitled to compensation for services rendered after the disposition of the petition. Nothing in this section shall be construed to limit the authority of the court to remove a law guardian from his or her assignment.

§3. Section 353.3 of the family court act is amended by adding a new subdivision 4-a to read as follows:

4-a. Where the respondent is placed with a commissioner of social services or the office of children and family services 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 parents or other person or persons legally responsible for the care of the respondent no later than ninety days from the date the disposition was made; and

(iii) a direction that the parent or parents or other person or persons legally responsible for 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 parents or other person or persons legally responsible for the care of the respondent. The order shall also contain a notice that if the respondent remains in placement for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

§4. Paragraph (ii) of subdivision 4 of section 355.3 of the family court act, as amended by chapter 198 of the laws of 1991, is amended to read as follows:

4. At the conclusion of the hearing, the court may, in its discretion, order an extension of the placement for not more than one year. The court must consider and determine in its order:

* * *

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

§5. The opening paragraphs of subdivisions 2 and 3 and paragraphs (b) and (d) of subdivision 7 of section 355.5 of the family court act are amended and a new subdivision 9 is added to read as follows:

2. Where a respondent is placed with a commissioner of social services or the office of children and family services pursuant to section 353.3 of this article for a period of twelve or fewer months and resides in a foster home or non-secure or limited secure facility:

* * *

3. Where a respondent is placed with a commissioner of social services or the office of children and family services pursuant to section 353.3 of this article for a period in excess of twelve months and resides in a foster home or non-secure or limited secure facility:

* * *

7. At the permanency hearing, the court must consider and determine in its order:

* * *

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

* * *

(d) with regard to the completion of placement ordered by the court pursuant to section 353.3 or 355.3 of this article: whether and when the respondent: (i) will be returned to the parent or parents; (ii) should be placed for adoption with the local commissioner of social services filing a petition for termination of parental rights; (iii) should be referred for legal guardianship; (iv) should be placed permanently with a fit and willing relative; or (v) should be placed in another planned permanent living arrangement that includes a significant connection to an adult willing to be a permanency resource for the child if the local commissioner of social services has documented to the court a compelling reason for determining that it would not be in the best interest of the respondent to return home, be referred for termination of parental rights and placed for adoption, placed with a fit and willing relative, or placed with a legal guardian; and

* * *

9. If the order resulting from the permanency hearing extends the respondent's placement pursuant to section 355.3 of this article in a foster home or non-secure or limited secure 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 parents or other person or persons legally responsible for the respondent shall be notified of any planning conferences, including those held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and their right to have counsel or another representative or companion with them.

A copy of the court's order and the attachments shall be given to the parent or parents or other person or persons legally responsible for the respondent. The order shall also contain a notice that if the respondent remains in foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

§6. Subdivision (a) of section 741 of the family court act, as amended by chapter 920 of the laws of 1982, is amended and a new subdivision (d) is added to such section to read as follows:

(a) At the initial appearance of a respondent in a proceeding and at the commencement of any hearing under this article, the respondent and his or her parent or other person legally responsible for his or her care shall be advised of the respondent's right to remain silent and of his or her right to be represented by counsel chosen by him or her or his or her parent or other person legally responsible for his or her care, or by a law guardian assigned by the court under part four of article two. [Provided, however, that in] In the event of the failure of the respondent's parent or other person legally responsible for his or her care to appear, after reasonable and substantial effort has been made to notify such parent or responsible person of the commencement of the proceeding and such initial appearance, the court shall appoint a law guardian and shall, unless inappropriate, also appoint a guardian ad litem for such respondent, and in such event, shall inform the respondent of such rights in the presence of such law guardian and any guardian ad litem.

* * *

d. Whenever a law guardian has been appointed by the family court to represent a respondent in a proceeding under this article pursuant to subdivision (a), such appointment shall continue without further court order or appointment during an order of disposition issued by the court, an adjournment in contemplation of dismissal, or any extension or violation thereof, or any permanency hearing, other post-dispositional proceeding or appeal. All notices and reports required by law shall be provided to such law

guardian. Such appointment shall continue unless another appointment of a law guardian has been made by the court or unless such law guardian makes application to the court to be relieved of his or her appointment. Upon approval of such application to be relieved, the court shall immediately appoint another law guardian to whom all notices and reports required by law shall be provided. A law guardian shall be entitled to compensation pursuant to applicable provisions of law for services rendered up to and including disposition of the petition. The law guardian shall, by separate application, be entitled to compensation for services rendered after the disposition of the petition. Nothing in this section shall be construed to limit the authority of the court to remove a law guardian from his or her assignment.

§7. 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 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 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 parents or other person or persons 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 in conjunction with the local education agency to ensure the immediate enrollment of the respondent in an appropriate school or educational program leading to a high school diploma and the transfer of necessary records in advance of or 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 has reason to believe that the respondent may have a disability or if the respondent

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

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

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

(d) where the respondent is placed pursuant to this section, the dispositional order or an attachment to the order incorporated by reference into the order shall include:

(i) a description of the visitation plan;

(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 parents or other person or persons legally responsible for the care of the respondent no later than ninety days from the date the disposition was made; and

(iii) a direction that the parent or parents or other person or persons legally responsible for 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 parents or other person or persons legally responsible for the care of the respondent. The order shall also contain a notice that if the respondent remains in placement for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

§9. Paragraphs (ii), (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:

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

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

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

(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.

§10. 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 parents or other person or persons legally responsible for the respondent shall be notified of any planning conferences to be held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences and of their right to have counsel or another representative or companion with them.

A copy of the court's order and the service plan shall be given to the parent or parents or other person or persons legally responsible for the respondent. The order shall also contain a notice that if the

respondent remains in foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate the parental rights of the parent or parents of the respondent.

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

1. The department shall establish and enforce standards of instruction, personnel qualifications and other requirements for education services or programs, as determined by rules of the regents and regulations of the commissioner, with respect to the individual requirements of children who are in full-time residential care in facilities or homes operated or supervised by any state department or agency or political subdivision. 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 hearing reports submitted pursuant to section one thousand eighty-nine of the family court act. Such regulations regarding the educational components of permanency hearing reports submitted pursuant to section one thousand eighty-nine of the family court act shall be developed in conjunction with the office of children and family services. Such regulations shall facilitate the retention of children placed or remanded into foster care in their original schools and, if that is not feasible or determined to be in the child's best interests, the immediate enrollment of the children in school and transfer of necessary records. Nothing herein contained shall be deemed to apply to responsibility for the provision or payment of care, maintenance or other services subject to the provisions of the executive law, mental hygiene law, social services law or any other law.

2. The commissioner shall prepare a report and submit it to the governor, the speaker of the assembly and the temporary president of the senate by December thirty-first, nineteen hundred ninety-six and on December thirty-first of each successive year. Such report shall contain, for each facility operated by or under contract with the office of children and family services that provides educational programs, an assessment of each facility's compliance with the rules of the board of regents, the regulations of the

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

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

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

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

3. Implementation of "one family/one judge" in termination of parental rights, surrender and adoption proceedings (FCA §115; 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, is the linchpin of New York's recently-enacted landmark permanency legislation [Laws of 2005, ch. 3] 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.[8] Significantly, research has demonstrated that the filing of an adoption petition in the same county and before the same judge can measurably reduce the average time between freeing a child for adoption and finalization of the adoption from over one year to under six months.[9] This finding is particularly noteworthy 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 adopted were already residing in their adoptive homes at the time they were freed.[10]

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

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[8] 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.

[9] 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).

[10] Children adopted in New York City during a four-year period averaged 23 months between termination of parental rights and adoption finalization , 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).

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 provide a preference for filing an adoption proceeding in the same court and, to the extent practicable, before the same judge that heard the most recent proceeding involving a child who is the currently subject of a Family Court child protective, foster care, surrender or termination of parental rights proceeding. If such an adoption petition is filed in a different court, the Court in which the case is filed would be required to ascertain whether the child is under the jurisdiction of a Family Court and, if so, which Court. The Court in which the petition is filed would then be required to communicate promptly with the judge who presided over the most recent litigation and to defer to that judge's determination as to the exercise of jurisdiction over the case. Sensitive to cases in which the two courts are located far from each other, the measure has been modified from its 2004 version to provide guidance to the court in its determination. Factors to be considered would include, among others, the relative familiarity of each court with the facts and circumstances of the case, the convenience of each court to the residence of the adoptive parents, the ability of the law guardian to continue to represent the child and the relative ability of each court to determine the adoption proceeding expeditiously. Similar preferences would be provided to assure continuity in surrender and termination of parental rights proceedings.

The 2005 permanency legislation greatly increases the need for this measure, particularly the critical need for continuity in the judge who addresses issues regarding post-adoption contact agreements. *See* D.R.L. §112-b. Surely the same judge who approves a surrender based upon such an agreement should be the same judge who determines whether the agreement should be incorporated into an order of adoption –and ultimately, the same judge responsible for enforcing the agreement, should the need arise. Further, enactment of this measure would significantly advance the efforts of the Unified Court System, through Chief Judge Judith S. Kaye's "Adoption Now" collaborative initiative 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 – over 4, 000 at any given time – 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 1. 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 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) by reason of the death of one or both parents, where no guardian of the person of the child has been lawfully appointed, or by reason of the abandonment of the child for a period of six months immediately prior to the filing of the petition, where a child is under the jurisdiction of the family court as a result of a placement in foster care by the family court pursuant to article ten of this act or section three hundred fifty-eight-a or three hundred ninety-two of the social services law, unless the court declines jurisdiction pursuant to section three hundred eighty-four-b of the social services law;

§2. Paragraph (a) of subdivision 3 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. 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 of this chapter, 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.

§3. The opening paragraph of paragraph (b) of subdivision 4 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. If the child being surrendered is in foster care as a result of a proceeding before the family court pursuant to article ten or ten-a of the family court act or section three hundred fifty-eight-a of this chapter, 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:

§4. 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, except that if the child is being surrendered as a result of, or in connection with, a proceeding before the family court pursuant to article ten or ten-a of the family court act, the instrument shall be executed and acknowledged in the family court that exercised jurisdiction over such proceeding and shall be assigned, wherever practicable, to the judge who last presided over the 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.

§5. 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. If the child is being surrendered as a result of, or in connection with, a proceeding before the family court pursuant to article ten or ten-a of the family court act, the petition shall be filed in the family court that exercised jurisdiction over such proceeding and shall be assigned, wherever practicable, to the judge who last presided over the 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.

§6. Paragraph (c) of subdivision 3 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 or continued in foster care pursuant to article ten or ten-a of the family court act or section three hundred fifty-eight-a of this chapter, 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 of this chapter 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 or continued in foster care with the same commissioner pursuant to section [ten hundred] one thousand fifty-five or one thousand eighty-nine 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 or ten-a 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 termination of parental rights 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 or continuation in out-of-home care pursuant to a permanency hearing and, if so, which court exercised jurisdiction over

the most recent proceeding. If the court determines that the child is under the jurisdiction of a different family court, the court in which the termination of parental rights petition was filed shall stay its proceeding for not more than thirty days and shall 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. The court that exercised jurisdiction over the most recent proceeding shall determine whether it will accept or decline jurisdiction over the termination of parental rights petition. This determination of jurisdiction shall be incorporated into an order regarding jurisdiction that shall be issued by the court in which the termination of parental rights petition was filed within thirty days of such filing. If the court that exercised jurisdiction over the most recent proceeding determines that it should exercise jurisdiction over the termination of parental rights petition, the order shall require that the petition shall be transferred to that court 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 heard the most recent proceeding. If the court that exercised jurisdiction over the most recent proceeding declines to exercise jurisdiction over the adoption petition, the court in which the termination of parental rights petition was filed shall issue an order incorporating that determination and 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.

§7. 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. (a) The agreement of adoption shall be executed by such authorized agency.

(b)(i) 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.

(ii) 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 of the social services law had been heard, whichever occurred last, or 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. The following procedures shall be applicable in cases where the child is under the jurisdiction of a family court, but where the adoption petition has been filed in a court other than the court that presided over the termination of parental rights, surrender or most recent proceeding under article ten or ten-a of the family court act or section three hundred fifty-eight-a of the social services law, whichever occurred last:

(A) Before hearing such an adoption proceeding, the court in which the adoption petition was filed shall ascertain whether the child is under the jurisdiction of a family court as a result of a placement under article ten or ten-a of the family court act or section three hundred fifty-eight-a of the social services law, a surrender under section three hundred eighty-three-c or three hundred eighty-four of the social services law or an order committing guardianship and custody under article six of the family court act or section three hundred eighty-four-b of the social services law, and, if so, which court exercised jurisdiction over the most recent permanency or other proceeding involving the child.

(B) If the court determines that the child is under the jurisdiction of a different family court, the court in which the adoption petition was filed shall stay its proceeding for not more than thirty days and shall communicate with the family court judge who exercised jurisdiction over the most recent permanency or other proceeding involving the child. 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.

(C) The family court judge who exercised jurisdiction over the most recent permanency or

other proceeding involving the child shall determine whether he or she should assume or decline jurisdiction over the adoption proceeding. In making its determination, the family court judge shall consider, among other factors: the relative familiarity of each court with the facts and circumstances regarding permanency planning for, and the needs and best interests of, the child; the ability of the law guardian to continue to represent the child in the adoption proceeding, if appropriate; the convenience of each court to the residence of the prospective adoptive parent or parents; and the relative ability of each court to hear and determine the adoption petition expeditiously. The court in which the adoption petition was filed shall issue an order incorporating this determination of jurisdiction within thirty days of the filing of the adoption petition.

(D) If the family court that exercised jurisdiction over the most recent permanency or other proceeding determines that it should exercise jurisdiction over the adoption petition, the order of the court in which the adoption petition was filed shall direct the transfer of the proceeding 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 family court judge who heard the most recent permanency or other proceeding involving the child.

(E) If the family court that exercised jurisdiction over the permanency or other proceeding involving the child declines to exercise jurisdiction over the adoption petition, the court in which the adoption petition was filed shall issue an order incorporating that determination and shall proceed forthwith.

(iii) 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.

§8. 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 effective date.

4. Criminal and child maltreatment history screening of persons with whom children are directly placed and non-parents seeking guardianship or custody of, or visitation with, children (DRL §240(1-a); FCA §§ 653, 662, 1017, 1027, 1055, 1089; S.S.L. §378-a; SCPA § 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] made substantial strides toward assuring the safety and well-being of children. *See* Laws of 1999, ch. 7; Laws of 2000, ch. 145. However, a significant, albeit unsurprising, side effect of ASFA has been the increasing reliance upon alternatives to foster care, including direct temporary remands and long-term placements of children with "relatives or other suitable persons" and appointment of non-parents as guardians and custodians. The emphasis upon relatives has been further underscored by the enactment of Chapter 671 of the Laws of 2005 , which amended Family Court Act §1017 to require local child protective agencies to commence investigations to locate relatives, including all "suitable" relatives identified by respondent and non-respondent parents and all relatives identified by children over the age of five who play or have played "a significant positive role in [the child's] life," as well as non-respondent parents and all grandparents. They must be notified of the pendency of the proceeding and, in the case of grandparents and other relatives, of the "opportunity for becoming foster parents or for seeking custody or care of the child, and that the child may be adopted by foster parents if attempts at reunification with the birth parent are not required or are not successful."

Unlike the provisions requiring criminal records and child maltreatment screening of prospective foster and adoptive parents, pursuant to Social Services Law §378-a, comprehensive screening is not required in direct remand or placement and in non-parent custody or guardianship proceedings. Nor is national criminal history screening required in any case, including agency screening of prospective foster and adoptive parents. Since Judges of the Family and Surrogate's Courts must be confident that children before them will be adequately protected and well-cared for in any home into which they are placed and with any adult with whom they regularly spend time, the Committee is proposing legislation to remedy these gaps.

The measure would authorize national, not merely in-state, criminal records checks, in recognition of the increasing mobility of families. One recent case underscored the importance of national screening. Because prospective adoptive parents of a New York State foster child moved out of state, the adoption case became an *Interstate Compact on Placement* case and the parents' new state performed the criminal history check. That state obtained an FBI report that revealed that the adoptive father had a conviction for a sex offense against a child in a third state, a record that would not have come to light had the family stayed in New York, where the criminal history report would have been confined to NYS convictions. Once this record came to light, further investigation revealed that the child herself may have been sexually abused by her prospective adoptive father. If New York State is to fulfill the fundamental precept of federal and state ASFA that safety of the child is paramount, the Family Court must be able to obtain full, national criminal records regarding prospective custodians, guardians and adoptive parents and the New York State Office of Children and Family Services must likewise obtain such records in screening prospective foster and adoptive parents.

The Committee's proposal would require criminal records and child abuse screening of non-parents applying for custody and would authorize the Supreme or Family Court to direct screening of individuals over the age of 18 residing in their homes. Domestic Relations Law §240 and Family Court Act §653 would be amended to require the Court, prior to entering a final order, to direct the provision of a criminal history report from the New York State Division of Criminal Justice Services regarding the non-parent applicant, would authorize the Court to order an FBI screening and would permit screening as well of other adults residing in the applicant's home. Increasingly, often at the suggestion of child protective agencies, custody petitions by non-parents have been brought in Family Court in lieu of, or as a means of resolving, child protective petitions against parents. In assessing the appropriateness of such petitions, the Family Court must be provided with all relevant information regarding the prospective custodian. Significantly, a criminal history report may be vital to the Court's determination of whether the custody application is in the child's best interests, since, among other factors, the Court is required to consider proven domestic violence.

Further, the measure would require Family and Surrogate's Courts to direct criminal records screening of prospective guardians, would authorize the Court to order an FBI screening and would permit orders to screen individuals over the age of 18 residing in their homes. The Surrogate's Court Procedure Act was amended in 2000 to provide that when the Court is informed that a prospective guardian or individual over the age of 18 residing in the home has been the subject of an indicated report of child abuse or maltreatment, the Court shall obtain the records and consider the report in its determination. See Laws of 2000, ch. 477. However, no concomitant provision was added regarding criminal record screening, although criminal records may be equally relevant to determinations of the appropriateness of prospective guardians. As in non-parent custody cases, guardianship proceedings have increasingly been used in lieu of, or as a means of resolving, child protective proceedings and, as in such cases, the Court must be able to gather all information probative of the child's best interests.

Additionally, in child protective proceedings under Article 10 of the Family Court Act, the proposal would require criminal records and child maltreatment screening of any "relative or other suitable person" with whom the child is temporarily remanded, pursuant to Family Court Act §§1017 and 1027, or with whom the child is placed, pursuant to subdivision (a) of the Family Court Act §1055. The measure would accord discretion to the Family Court to direct national screening, as well as screening regarding individuals over the age of 18 residing in the person's home. Although not involving foster care, direct remands and direct placements under Article 10 of the Family Court Act clearly involve removals of children from their homes, implicating constitutionally-recognized interests, and thus require the same balancing of relative harms recognized by the Court of Appeals in its recent decision in Nicholson *v.* Scoppetta, 3 N.Y.3d 357 (2004). The Court must be assured that in remanding a child to a non-parent, it is truly protecting the child from an imminent risk to his or her life or health and not creating another source of risk to the child. In placing a child on a long-term basis, the Court must find that it is in the child's best interests and that it would be contrary to the child's welfare to be returned home. Clearly, judicial decisions regarding direct remands and placements must be as fully informed as those regarding placements, both temporary and long-term, of children in foster and adoptive homes. To that end, enactment of the Committee's criminal history and child maltreatment screening proposal is critically important.

Finally, the measure would amend Social Services Law §378-a to require that screening of

prospective foster and adoptive parents include a national criminal history check, again, a critical protection to ensure fulfillment of the statutory precept that safety of the child is paramount.

Proposal

AN ACT to amend the domestic relations law, the family court act, the social services law and the surrogate's court procedure act, in relation to criminal history and child abuse and maltreatment screening of persons with whom children are directly remanded or placed and non-parents seeking guardianship or custody of, or visitation with, children

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

Section 1. 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 where the prospective custodian is not a parent of the child, the court shall require a criminal history report from the New York state division of criminal justice services regarding the prospective custodian, may require the division of criminal justice services report to include a national criminal history report from the federal bureau of

investigation and may require a criminal history report regarding individuals over the age of eighteen residing in the home of the prospective custodian.

§2. 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 where the prospective custodian is not a parent of the child, the court shall require a criminal history report from the New York state division of criminal justice services regarding the prospective custodian, may require the division of criminal justice services report to include a national criminal history report from the federal bureau of investigation and may require a criminal history report regarding individuals over the age of eighteen residing in the home of the prospective custodian.

§3. 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 guardianship where the prospective guardian is not a parent of the child, the court shall require a criminal history report from the New York state division of criminal justice services regarding such prospective guardian, may require the division of criminal justice services report to include a national criminal history report from the federal bureau of investigation and may require a criminal history report regarding individuals over the age of eighteen residing in the home of the prospective guardian.

§4. Subparagraph (i) of paragraph (a) of subdivision 2 of section 1017 of the family court act, as amended by chapter 3 of the laws of 2005, is amended to read as follows:

(a) where the court determines that the child may reside with a suitable non-respondent parent or other relative or other suitable person, either:

(i) place the child temporarily in the custody of such non-respondent parent, other relative or other suitable person [pursuant to article six of this act] during the pendency of the proceeding or until further order of the court, whichever is earlier, and [conduct] order such other and further

investigations and reports as the court deems necessary. The court shall direct the petitioner to obtain a report from 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 person has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law, and may require such reports regarding persons over the age of eighteen residing in such person's home. With respect to a relative or other suitable person, the court shall direct the petitioner to obtain a criminal history report from the division of criminal justice services regarding such person and may require the report to include a national criminal history report from the federal bureau of investigation and a criminal history report regarding individuals over the age of eighteen residing in the home of such person; or

§5. 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 or is considering issuing an order pursuant to paragraph (i) placing a child in the custody of a suitable person other than the respondent, the court shall require the commissioner of such district to perform such other and further investigations and to obtain such reports as the court deems necessary. The court shall direct the petitioner to obtain a report from 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 person has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law, and may require such reports regarding persons over the age of eighteen residing in such person's home. With respect to a relative or other suitable person, the court shall direct the petitioner to obtain a criminal history report from the division of criminal justice services regarding such person and may require the report to include a national criminal history report from the federal bureau of investigation and a criminal history report regarding individuals over the age of eighteen residing in the home of such person.

§6. Subdivision (a) of section 1055 of the family court act, as amended by chapter 3 of the laws of 2005, is amended to read as follows:

(a) For purposes of section one thousand fifty-two of this part, the court may place the child in the custody of a relative or other suitable person, or of the local 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 entry of an order under this subdivision placing a child directly in the custody of a relative or other suitable person, the court shall require the local commissioner of social services to perform such other and further investigations and to obtain such reports as the court deems necessary. The court shall direct the petitioner to obtain a report from 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 person has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law, and may require such reports regarding persons over the age of eighteen residing in such person's home. The court shall also direct the petitioner to obtain a criminal history report from the division of criminal justice services regarding such person and may require the report to include a national criminal history report from the federal bureau of investigation and a criminal history report regarding individuals over the age of eighteen residing in the home of such person.

§7. Paragraph (c) of subdivision 2 of section 378-a of the social services law, as added by chapter 7 of the laws of 1999,is amended to read as follows:

(c) The division of criminal justice services shall promptly provide to the office of children and family services a criminal history record, if any, with respect to the prospective foster parent or prospective adoptive parent and any other person over the age of eighteen who resides in the home of the prospective foster parent or prospective adoptive parent, or a statement that the individual has no criminal history record. Such criminal history record shall include a national criminal history report from the federal bureau of investigation.

§8. Subdivision 1 of section 1707 of the surrogate's court procedure act, as amended by chapter 477 of the laws of 2000, is amended to read as follows:

1. If the court [be] is satisfied that the interests of the infant will be promoted by the appointment of a guardian or by the issuance of temporary letters of guardianship of [his] the infant's person or [of his] property, or 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 the person of an infant who is not the parent of the infant, the court shall

direct the provision of a criminal history report from the division of criminal justice services regarding the prospective guardian, may require the division of criminal justice services report to include a national criminal history report from the federal bureau of investigation, and may direct the provision of a criminal history report regarding individuals over the age of eighteen residing in the home of the 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.

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

5. Warrants, orders for emergency evaluations and orders of protection in persons in need of supervision proceedings (F.C.A. §735)

The landmark reform of the Persons in Need of Supervision (PINS) statute, enacted as part of the 2005 New York State budget, added statewide uniformity to the provisions regarding diversion of cases from the Family Court and furthered the salutary legislative goals of reducing unnecessary PINS prosecutions and placements and of ensuring that families in crisis would receive appropriate services. *See* Laws of 2005, ch. 57, Part E. However, the new statute eliminated the ability of parents to obtain necessary emergency relief in the infrequent but alarming cases in which their children pose an imminent risk to themselves, their parents or their families. The Family Court Advisory and Rules Committee, therefore, is proposing a measure that would carve out three narrowly-defined exceptions to the pre-petition diversion requirements, thus restoring remedies that existed in the PINS statute prior to the 2005 reform.

First, the measure would permit a potential PINS petitioner to file a PINS petition and to request a warrant for a child who has absconded and cannot be located. In such a circumstance, the child is not able to appear at the diversion conference and the designated diversion agency is, therefore, not able to provide the required documentation of its diligent efforts to prevent the filing of a petition through the convening of the conference. *See* Matter of James S. *v.* Jessica B., 9 Misc.3d 229 (Fam. Ct., Suff. Co., 2005). This warrant exception would provide an avenue of relief for parents in critical emergency situations in which a child has run away and may be living on the street under dangerous circumstances, not cases in which children abscond to the home of another parent or identifiable friend or relative and may still be available to participate in diversion conferences. As was the prevalent practice in Family Courts statewide prior to the 2005 legislation, once a child has been apprehended on the warrant and appears in Family Court, the Court may then refer the family to the diversion agency, pursuant to Family Court Act §742(b), and, if the agency is successful in resolving the family problem through provision of services, the Court may then dismiss the PINS petition.

Second, the measure would permit a potential PINS petitioner to file a PINS petition in order to request an order of protection in the rare, but serious, case in which a child poses an imminent risk to the petitioner and/or a member of his or her household. Again, this would provide emergency relief in cases in which the need for protection is immediate, that is, cases in which the requirement for the diversion agency to convene a conference with the child and potential petitioner would impede efforts to prevent injury. Once the emergency has abated and the child and petitioner are before the Court, the Court may then refer the parties to the diversion agency, pursuant to Family Court Act §742(b), and, if diversion efforts are successful, the Court may then dismiss the petition. This remedy is absolutely essential not only to prevent harm, but also to stem an increasingly disturbing trend that has become evident in Family Courts statewide. In the absence of a means of obtaining an immediate order of protection in cases of child-against-parent violence or threats of violence, all too often, parents file family offense petitions, pursuant to Article 8 of the Family Court Act, as a means of evading the diversion requirements, protections and services available under the PINS statute. If meaningful relief were available under the PINS statute, the salutary purposes of the PINS law would be preserved while necessary protection is provided.

Finally, the measure would permit a potential PINS petitioner to file a petition in order to secure an immediate evaluation of a child by a physician, psychiatrist or psychologist, pursuant to Family Court Act §251, in cases in which the child refuses to submit to such an examination voluntarily but in which the child appears so disturbed as to pose an imminent risk to himself or herself, the potential petitioner or a member or members of the petitioner's household. Again, this exception would be invoked in rare, but serious, emergencies, most often, psychiatric emergencies in which parents have no other avenue of relief. Once again, once the situation has stabilized and the parties appear before the Court, the Court retains its authority to refer the family to the diversion agency, pursuant to Family Court Act §742, in order to resolve the PINS petition.

Enactment of this measure would strengthen the PINS statute by restoring much-needed remedies for emergency situations that existed prior to the 2005 enactment, while at the same time furthering the legislative goals of diversion of PINS cases wherever possible. By filling these gaps in the available relief with the narrowly-constructed exceptions contained in the Committee's proposal, the Legislature would ensure that the PINS statute would provide an effective avenue to resolve family problems.

Proposal

AN ACT to amend the family court act, in relation to warrants, orders for emergency evaluations and orders of protection 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 (g) of section 735 of the family court act, as added by chapter 57 of the laws of 2005, is amended to read as follows:

(g) (i) The designated lead agency shall promptly give written notice to the potential petitioner whenever attempts to prevent the filing of a petition have terminated, and shall indicate in such notice whether efforts were successful. The notice shall also detail the diligent attempts made to divert the case if a determination has been made that there is no substantial likelihood that the youth will benefit from further attempts. No persons in need of supervision petition may be filed pursuant to this article during the period the designated lead agency is providing diversion services. A finding by the designated lead agency that the case has been successfully diverted shall constitute presumptive evidence that the underlying allegations have been successfully resolved in any petition based upon the same factual allegations. No petition may be filed pursuant to this article by the parent or other person legally responsible for the youth where diversion services have been terminated because of the failure of the parent or other person legally responsible for the youth to consent to or actively participate.

(ii) [The] Except as provided in paragraph (iii) of this subdivision, the clerk of the court shall accept

a petition for filing only if it has attached thereto the following notices:

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

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

(iii) The clerk of the court shall accept a petition for filing if:

(A) the potential petitioner is requesting that the court issue a warrant pursuant to section seven hundred thirty-eight of this article, because the respondent has absconded from the home and is unable to be located; or

(B) the potential petitioner is requesting that the court issue a temporary order of protection or order of protection, pursuant to section seven hundred forty or seven hundred fifty-nine of this article, because the respondent poses an imminent risk of harm to the potential petitioner or member of his or her household; or

(C) the potential petitioner is requesting that the court direct an immediate examination by a physician, psychiatrist or psychologist, pursuant to section two hundred fifty-one of this act, because the respondent poses an imminent risk of harm to himself or herself, to the potential petitioner or member of his or her household, and because the respondent is unwilling to cooperate with such examination.

§2. 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 effective date.

6. Jurisdiction of the Family Court with respect to family offenses committed by juveniles under the age of eighteen (F.C.A. §812(1); C.P.L. §530.11(1))

As part of the 2005 New York State budget, the Legislature enacted landmark legislation significantly expanding the requirements for services to be provided to children and families as a means of preventing unnecessary prosecutions and costly out-of-home placements of Persons in Need of Supervision (PINS). *See* Laws of 2005, ch. 57. Unfortunately, all too often, prosecutions of juveniles by their parents under the family offense provisions in Article 8 of the Family Court Act have become a rapidly escalating means of evading the clear requirements and protections for youth, as well as the family services available, under the 2005 PINS legislation. The Family Court Advisory and Rules Committee is proposing legislation, therefore, to close that loophole by specifying that family offenses committed by juveniles under the age of 18 against their parents or guardians should be dealt with as Persons in Need of Supervision (PINS) proceedings in accordance with Article 7 of the Family Court Act, rather than as family offense proceedings pursuant to Article 8 of the Family Court Act. The increase in the PINS age ceiling to 18 and the delineation of diversion requirements that must be followed in such cases collectively expresses the clear legislative intent that intra-familial problems arising between parents and children in such cases should be addressed through the utilization of the comprehensive statutory framework of Article 7.

Article 8 of the Family Court Act is an inappropriate vehicle for proceeding against juveniles as it lacks important statutory protections, 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.

The remedies of exclusion and incarceration available under Article 8 for family offense proceedings are wholly inappropriate when applied in the context of dependent children prosecuted by their parents or guardians. Parents have a responsibility to support their children until the age of 21 and may be charged with abusing or neglecting them until the children reach the age of 18. *See* Family Court Act §§413(1), 1012; Social Services Law §101. Unmarried minors may not obtain public assistance independent of their parents until they reach the age of 18. *See* Social Services Law §131(6). Thus, orders of protection excluding respondents from their homes, a common remedy in family offense cases, should not be permitted in cases involving juveniles under the age of 18, as this remedy would relegate children to the streets with no means of support. Further, incarceration in jail for violations of orders of protection, authorized under Article 8 for up to six months per violation, contravenes federal law when applied to juvenile respondents. 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). No authority exists under Article 8 or under the Executive Law to detain or place children charged with family offenses in juvenile facilities.

The PINS statute provides full protection for victims of family offenses committed by juveniles against parents and guardians, while, at the same time, furthering the special needs of juveniles and retaining the constitutional and statutory protections applicable to them. 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." *See* Family Court Act §733. Article 7 authorizes issuance of orders of protection and temporary orders of protection, permits detention in juvenile non-secure detention and foster care facilities in appropriate cases, permits orders of restitution, and provides for dispositions in juvenile programs tailored specifically to the juveniles' needs and their presenting problems. *See* Family Court Act §§ 720, 740, 754, 758-a, 759. Since Article 7 contains each of these remedies, the legislation should be clear that it is both inappropriate and unnecessary for a juvenile to be adjudicated both for a family offense and as a PINS as had been the case 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), and 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), where a 15 year-old juvenile was found guilty of a family offense against her mother and adjudicated as a PINS.

By requiring that juveniles who commit family offenses against their parents or guardians be dealt with pursuant to Article 7, rather than Article 8, of the Family Court Act,, the Family Court Advisory and Rules Committee proposal will assure that family offenses committed by such juveniles are addressed appropriately and in accordance with both state and federal law.

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 eighteen

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:

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. Family offenses alleged to have been committed by a child under the age of eighteen against a parent or guardian shall be addressed in accordance with article seven, rather than this article, of this act. 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:

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 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. Family offenses alleged to have been committed by a child under the age of eighteen against a parent or guardian shall be addressed in accordance with article seven of the family court act. 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 effective date.

7. Stays of administrative fair hearings regarding reports of child abuse or maltreatment (F.C.A. §§1039, 1051; S.S.L. §§22(4), 422(8), 424-a(1))

Two parallel systems, one judicial and one administrative, coexist to determine the validity of reports of suspected child abuse or maltreatment contained in the statewide central registry. Because these systems operate on different tracks with different time-frames, they sometimes produce disparate results that can be extremely harmful to the children and families involved. Because fair hearings are being held in increasing numbers and with greater dispatch, the problem of harmful, disparate results has escalated. The Family Court Advisory and Rules Committee is proposing a measure to ensure that, in cases in which a parallel Family Court proceeding is in progress, the administrative fair hearing process would not precipitously advance without awaiting the outcome of the Family Court matter.

Under existing law, a report of suspected child abuse or maltreatment that is found upon investigation to be supported by credible evidence may form the basis for a child protective petition in Family Court pursuant to Article 10 of the Family Court Act. In accordance with the due process protections afforded by the Act, judges of the Family Court may make findings of child abuse or neglect by a preponderance of the evidence or, in particularly serious cases, may make findings of severe or repeated child abuse by clear and convincing evidence. Once findings are made, cases proceed to disposition, which results in final determinations of whether children are in need of protection. *See* Family Court Act §§1047, 1051, 1052. Alternatively, on consent of the parties, cases may be adjourned in contemplation of dismissal for a period not to exceed one year upon designated terms and conditions which, if complied with, result in dismissal of the proceedings. *See* Family Court Act §§1039, 1039-a.

Persons who are the subjects of reports of suspected child abuse or maltreatment may challenge those reports administratively by requesting that the findings be amended, even while Family Court proceedings are pending. In fact, they are required to request such amendments within 90 days of being notified that the child protective agency has found the report to be "indicated," *i.e.*, supported by credible evidence. The investigating child protective agency must send the relevant records to the New York State Office of Children and Family Services within 20 days of a request by OCFS and OCFS must make its determination regarding the request to amend within 15 days of receiving the records. *See* Social Services Law §422(8). Reports deemed upon this review not to meet the credible evidence test must be amended to be "unfounded," which would preclude their use in court or for any purpose other than limited use by child protective agencies in subsequent investigations. *See* Social Services Law §422(5). If OCFS declines to amend the report within 90 days, or if the report is found upon the agency's review to be supported by credible evidence, the report may be the subject of a fair hearing at which the agency has the burden of sustaining the report (or, as the case may be, supporting its disclosure as reasonably related to employment) by a preponderance of the evidence. *See* Matter of Lee T.T *v.* Dowling, 87 N.Y.2d 699 (1996).

In many cases, the Family Court proceeding has concluded prior to the resolution of the administrative review and fair hearing process. Indeed, the Legislature clearly contemplated that the administrative process would be informed by and, in cases in which a judicial adjudication has been made, bound by the results of the judicial proceeding. Section 422(8)(b) of the Social Services Law provides that the fact that the Family Court has made a finding of child abuse or neglect regarding an

allegation forming the basis of a report of child abuse or maltreatment creates an "irrebuttable presumption" that credible evidence supports the allegation. A Family Court finding is thus conclusive proof by statute of the fact that a report is "indicated" and, as noted, is dispositive as well of whether an allegation of abuse or neglect against the subject of the report (the "Respondent" in the Family Court proceeding) has been proven by a preponderance of the evidence or, in cases of severe or repeated child abuse, by the higher level of clear and convincing evidence. The conclusive effect of a Family Court finding was recognized by the Supreme Court, Appellate Division, First Department in the recent case of McReynolds *v.* City of New York, 18 A.D.3d 316 (1st Dept., 2005)(Family Court abuse finding supports retention of maltreatment reports on State Central Register).

However, all too frequently, the Family Court proceeding is still pending when the deadline looms for resolution of the administrative process. Unfortunately, the statute is silent on what impact the pendency of an unresolved Family Court case should have on the administrative process. This has led to anomalous results, including cases in which the administrative review or fair hearing resulted in a determination that the report had been "unfounded," although the Family Court ultimately determined the case to be fully proven under Article 10 of the Family Court Act. One disturbing example was an adoption case in which the prospective adoptive parent received a clearance from the child abuse registry, even though she had been adjudicated in Family Court for child abuse. In some instances in which the administrative amendment of the report as "unfounded" has occurred prior to the adjudication of the Family Court proceeding, the conversion of the report to "unfounded" has precluded its admissibility in the Family Court proceeding, notwithstanding its clear admissibility pursuant to Family Court Act §1046(a)(v). In other cases, the administrative process has operated entirely without reference to the Family Court process, with administrative law judges unaware that Family Court judges have made adjudications that should, in fact, trigger the irrebuttable presumption that such reports are "indicated."

The Family Court Advisory and Rules Committee is proposing a simple solution to this conundrum that is designed to harmonize the administrative and judicial processes. The measure would amend sections 22(4), 422(8) and 424-a(1) of the Social Services Law to provide that where a proceeding pursuant to Article 10 of the Family Court Act is pending in Family Court with respect to a child named in a child abuse or maltreatment report, the time periods for requesting and resolving fair hearings should not begin to run until the Family Court matter has been concluded, that is, either through a disposition of the proceeding or through the conclusion of the period of an adjournment in contemplation of dismissal. Further, where a Family Court proceeding is pending, the local child protection agency (the Petitioner in the Family Court matter) would be required to report the status of the action to OCFS, which would then defer its administrative review and determination until the conclusion of the Family Court case. This automatic stay and status report will prevent the administrative and judicial processes from operating at cross-purposes and from arriving at inconsistent results. In ensuring that administrative processes will be resolved with the benefit of knowledge of the outcome of the Family Court cases, and in protecting the admissibility of necessary records in Family Court, this measure will significantly further the goals of justice and accuracy in both the administrative and judicial realms.

Proposal

AN ACT to amend the family court act and social services law, in relation to administrative fair hearings regarding reports of child abuse or maltreatment in the state central registry

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

Section 1. Subdivision (f) of section 1039 of the family court act, as added by chapter 707 of the laws of 1975, is amended to read as follows:

(f) If the proceeding is not so restored to the calendar, the petition is, at the expiration of the adjournment period, deemed to have been dismissed by the court in furtherance of justice unless an application is pending pursuant to subdivision (e) of this section. If such application is granted, the petition shall not be dismissed and shall proceed in accordance with the provisions of such subdivision (e). The petitioner shall notify the office of children and family services, in accordance with sections 422 and 424 of the social services law, of the outcome of the adjournment in contemplation of dismissal, including dismissal of the petition upon expiration of the adjournment or, where the proceeding has been restored to the calendar, of any proceedings under this article following such restoration.

§2. Section 1051 of the family court act is amended by adding a new subdivision (g) to read as follows:

(g) The petitioner shall notify the office of children and family services, in accordance with sections 422 and 424 of the social services law, of any findings of abuse or neglect and of any orders of dismissal entered pursuant to this section.

§3. Paragraph (a) of subdivision 4 of section 22 of the social services law, as added by chapter 473 of the laws of 1978, is amended to read as follows:

(a) Except as provided in paragraph (c) of subdivision two of section four hundred twenty-four-a of this chapter and in paragraph (b) of this subdivision, any appeal pursuant to this section must be requested within sixty days after the date of the action or failure to act complained of. However, where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in a child abuse or maltreatment report that is the subject of an appeal pursuant to sections four hundred twenty-two or four hundred twenty-four-a of this chapter, the period to request an appeal shall not commence and the appeal shall not be determined until the disposition of such family court proceeding or until the conclusion of the period of any adjournment

of such proceeding in contemplation of dismissal, whichever is later.

§4. Paragraphs (a) and (b) of subdivision 8 of section 422 of the social services law, as amended by chapter 12 of the laws of 1996, are amended to read as follows:

(a)(i) At any time subsequent to the completion of the investigation but in no event later than ninety days after the subject of the report is notified that the report is indicated the subject may request the commissioner to amend the record of the report. If the commissioner does not amend the report in accordance with such request within ninety days of receiving the request, the subject shall have the right to a fair hearing, held in accordance with paragraph (b) of this subdivision, to determine whether the record of the report in the central register should be amended on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this title. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in the child abuse or maltreatment report that is the subject of a request to amend under this section, the ninety-day period to request an amendment of the report and the ninety-day period for the commissioner to amend the report shall not commence until the disposition of such family court proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later.

(ii) Upon receipt of a request to amend the record of a child abuse and maltreatment report the department shall immediately send a written request to the child protective service or the state agency which was responsible for investigating the allegations of abuse or maltreatment for all records, reports and other information maintained by the service or state agency pertaining to such indicated report. The service or state agency shall as expeditiously as possible but within no more than twenty working days of receiving such request, forward all records, reports and other information it maintains on such indicated report to the department. Where a proceeding pursuant to article ten of the family court act is pending regarding a child named in the child abuse or maltreatment report that is the subject of a request to amend under this section, the child protective service or state agency, as applicable, shall report the status of the family court proceeding to the department, which shall defer its review and determination pending the disposition of the proceeding or conclusion of any period of adjournment of the proceeding in contemplation of dismissal, whichever is later. Immediately upon the disposition of the proceeding or conclusion of any adjournment in contemplation of dismissal, the child protective service or state agency, as

applicable, shall report the disposition of the proceeding or outcome of the adjournment in contemplation of dismissal, to the department. The department shall as expeditiously as possible but within no more than fifteen working days of receiving such materials from the child protective service or state agency, review all such materials in its possession concerning the indicated report and determine, after affording such service or state agency a reasonable opportunity to present its views, whether there is some credible evidence to find that the subject committed the act or acts of child abuse or maltreatment giving rise to the indicated report and whether, based on guidelines developed by the department pursuant to subdivision five of section four hundred twenty-four-a of this title, such act or acts could be relevant and reasonably related to employment of the subject of the report by a provider agency, as defined by subdivision three of section four hundred twenty-four-a of this title, or relevant and reasonably related to the subject of the report being allowed to have regular and substantial contact with children who are cared for by a provider agency, or relevant and reasonably related to the approval or disapproval of an application submitted by the subject of the report to a licensing agency, as defined by subdivision four of section four hundred twenty-four-a of this title.

(iii) If it is determined at the review held pursuant to this paragraph (a) that there is no credible evidence in the record to find that the subject committed an act or acts of child abuse or maltreatment, the department shall amend the record to indicate that the report is "unfounded" and notify the subject forthwith.

(iv) If it is determined at the review held pursuant to this paragraph (a) that there is some credible evidence in the record to find that the subject committed such act or acts but that such act or acts could not be relevant and reasonably related to the employment of the subject by a provider agency or to the subject being allowed to have regular and substantial contact with children who are cared for by a provider agency or the approval or disapproval of an application which could be submitted by the subject to a licensing agency, the department shall be precluded from informing a provider or licensing agency which makes an inquiry to the department pursuant to the provisions of section four hundred twenty-four-a of this title concerning the subject that the person about whom the inquiry is made is the subject of an indicated report of child abuse or maltreatment. The department shall notify forthwith the subject of the report of such determinations and that a fair hearing has been scheduled pursuant to paragraph (b) of this subdivision. The sole issue at such

hearing shall be whether the subject has been shown by some credible evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report.

(v) If it is determined at the review held pursuant to this paragraph (a) that there is some credible evidence in the record to prove that the subject committed an act or acts of child abuse or maltreatment and that such act or acts could be relevant and reasonably related to the employment of the subject by a provider agency or to the subject being allowed to have regular and substantial contact with children cared for by a provider agency or the approval or disapproval of an application which could be submitted by the subject to a licensing agency, the department shall notify forthwith the subject of the report of such determinations and that a fair hearing has been scheduled pursuant to paragraph (b) of this subdivision.

(b)(i) If the department, within ninety days of receiving a request from the subject that the record of a report be amended, does not amend the record in accordance with such request, the department shall schedule a fair hearing and shall provide notice of the scheduled hearing date to the subject, the statewide central register and, as appropriate, to the child protective service or the state agency which investigated the report. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in a child abuse or maltreatment report that is the subject of a request to amend under this section, the period to schedule the fair hearing regarding the failure to amend shall not commence and the fair hearing shall not be determined until the disposition of such family court proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later.

(ii) The burden of proof in such a hearing shall be on the child protective service or the state agency which investigated the report, as the case may be. In such a hearing, the fact that there is a family court finding of abuse or neglect against the subject in regard to an allegation contained in the report shall create an irrebuttable presumption that said allegation is substantiated by some credible evidence. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in the child abuse or maltreatment report that is the subject of a fair hearing under this section, the department shall defer its determination until the disposition of such family court proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later.

§5. Subparagraph (ii) of paragraph (e) of subdivision 1 of section 424-a of the social

services law, as amended by chapter 12 of the laws of 1996 , is amended to read as follows:

(ii) If the subject of an indicated report of child abuse or maltreatment has not requested an amendment of the record of the report within the time specified in subdivision eight of section four hundred twenty-two of this title or if the subject had a fair hearing pursuant to such section prior to January first, nineteen hundred eighty-six and an inquiry is made to the department pursuant to this subdivision concerning the subject of the report, the department shall, as expeditiously as possible but within no more than ten working days of receipt of the inquiry, determine whether, in fact, the person about whom an inquiry is made is the subject of an indicated report. Upon making a determination that the person about whom the inquiry is made is the subject of an indicated report of child abuse and maltreatment, the department shall immediately send a written request to the child protective service or state agency which was responsible for investigating the allegations of abuse or maltreatment for all records, reports and other information maintained by the service or state agency on the subject. The service or state agency shall, as expeditiously as possible but within no more than twenty working days of receiving such request, forward all records, reports and other information it maintains on the indicated report to the department. The department shall, within fifteen working days of receiving such records, reports and other information from the child protective service or state agency, review all records, reports and other information in its possession concerning the subject and determine whether there is some credible evidence to find that the subject had committed the act or acts of child abuse or maltreatment giving rise to the indicated report. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in the child abuse or maltreatment report, the child protective service or state agency, as applicable, shall report the status of the proceeding to the department, which shall defer its review and determination until the disposition of such proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later. Immediately upon the disposition of the proceeding or conclusion of any adjournment in contemplation of dismissal, the child protective service or state agency, as applicable, shall report the disposition of the proceeding or outcome of the adjournment in contemplation of dismissal, to the department.

§6. This act shall take effect immediately and shall apply to requests for appeals and fair hearings pending as of such effective date.

8. Ensuring compliance with court orders in child welfare cases (FCA §§1055(b), (d); 1089)

The requirement in the federal *Adoption and Safe Families Act* [P.L. 105-89] for Family Courts to determine whether agencies have made reasonable efforts to further the achievement of permanency for children in foster care reflects the statute's overriding goal of reducing the time children linger in the limbo of foster care. Whether a child's permanency plan is reunification, adoption or an alternative permanent living arrangement, the agency caring for the child must demonstrate to the Family Court on a periodic basis that it has taken active steps to ensure timely achievement of permanency. Neither the federal statute, nor the implementing statutes in New York State [Laws of 1999,ch. 7; Laws of 2000. Ch. 145; Laws of 2005, ch. 3], contain guidance or criteria for the Family Court in making these case-specific determinations. The Family Court Advisory and Rules Committee is submitting a proposal to define certain circumstances that may, and in some cases must, result in a finding that reasonable efforts, as required, have not been made.

First, the measure would amend Family Court Act §§1055(b) and 1089 to provide that an agency's failure to provide services ordered by the Family Court, whether to assist family reunification or an alternate permanency plan, may constitute grounds for a finding that required reasonable efforts have not been made. Under current law, the only reference to a sanction for violating a direction by the Court is the authorization in Family Court Act §1015-a to punish a violation of an order for services by contempt under Judiciary Law §753. Utilization of the Court's authority to make a "no reasonable efforts" finding provides a meaningful and less drastic alternative mechanism to secure compliance. Importantly, this determination is curable, that is, an agency can demonstrate compliance and suffer the penalty only for the period of violation. *See* 45 C.F.R. §1356.21(b)2).[11]

Agency failures to comply with judicial orders for services may cause serious harm to children and their families and warrant effective judicial responses. In accordance with Family Court Act §1015-a, an agency may be directed to provide services to the child and family, authorized by the comprehensive annual social services plan,"to facilitate the protection of the child, the rehabilitation of the family and, as appropriate, the discharge of the child from foster care." Pursuant to Family Court Act §§1055(c) and 1089(d)(2)(viii), an agency may be directed to "undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the best interests of the child..." In addition to encouraging and facilitating visitation between the child, parents, siblings and grandparents, the court order may include a specific plan of action for the agency including, but not limited to, "requirements that such agency assist the parent in obtaining adequate housing, employment, counselling, medical care or psychiatric treatment." Further, Family Court Act §1089(d)(2)(viii) authorizes the Family Court, in a review of a child freed for adoption, to direct the agency to place the child in an adoptive home and/or to provide services to the child and prospective adoptive parent or parents.

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[11] This is in contrast to the "reasonable efforts" determination made by the Family Court when a child first enters foster care. If the Court finds that the agency should have made appropriate reasonable efforts to prevent the child's removal from home into foster care, the finding compels a loss of federal foster care reimbursement for the child's entire stay in foster care. *See* 45 C.F.R.§1356.21(b)(1)(ii).

Second, with respect to children for whom adoption is the permanency plan, the proposal would amend Family Court Act §§1055(b) and 1089 to provide that a failure by an agency to comply with a court order to file a petition to terminate parental rights within 90 days of the order would be grounds for a determination that appropriate reasonable efforts had not been made to further the child's permanency plan. An exception would be made if the agency, for good cause shown and upon notice to all parties, including the law guardian, obtained a stay, modification or extension of the order. While Social Services Law §384-b(3) authorizes foster parents to file the petition where the agency fails to do so on a timely basis, the measure would provide that the fact that the foster parents either filed or could have filed a termination of parental rights petition would not relieve the agency of the responsibility to comply with the court order. Once again, the Family Court's finding of "no reasonable efforts" can be rectified, that is, an agency can demonstrate compliance and suffer the penalty only for the period of violation. *See* 45 C.F.R.§1356.21(b)2).

Third, the landmark permanency legislation enacted in 2005 authorizes the Family Court to recommend in orders regarding children freed for adoption 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* Family Court Act §1089(d)(viii)(B)(III).[12] 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 is clearly equally as great. The Family Court Advisory and Rules Committee proposes to remedy this gap.

The Committee's proposal would thus amend section 1089 of the Family Court Act to provide that in all permanency hearings conducted pursuant to Article 10-A of the Family Court Act, 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.

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 section 156 of the Family Court Act and Article 19 of the Judiciary Law in appropriate cases. In a case

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[12] This provision derived from a similar requirement in Laws of 1986, ch. 902,later broadened by Laws of 1988, ch. 638.

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 1089(d)(viii)(B)(II) 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 the OCFS referral provision with respect to freed children [former Family Court Act §1055-a(7), now F.C.A. §1089(d)(viii)(B)(III)] provides strong support for 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 that the child be 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.

Children's sense of time – weeks or months may seem like a life-time for a child – require everyone involved in the child welfare system to treat every case with a sense of urgency. The Family Court's important, federally-imposed responsibility in this regard is to keep up the momentum, using all available means to minimize the disruption in children's lives and to ensure that, as quickly as possible, they can achieve stability, either through return to their families or through another permanent home. Rigorous judicial monitoring of each case, including enforcement of court orders through prompt imposition of sanctions, where necessary, is a critical element of the standards governing the "Model Courts" designated in New York and Erie Counties by the National Council of Juvenile and Family Court Judges, which have been replicated in various other counties. *See Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, 1995). It is a central element as well of the "problem-solving"

approach to the mission of the courts long championed by Chief Judge Judith Kaye and recognized by the national Conference of Chief Justices and Conference of State Court Administrators in a joint resolution in 2000.[13] Significantly, it was highlighted in the *Trial Court Performance Standards*, published by the Bureau of Justice Assistance of the United States Justice Department:[14]

> Courts should not direct that certain actions be taken or be prohibited and then allow those bound by their orders to honor them more in the breach than in the observance.

A determination that necessary reasonable efforts have not been made is a less severe sanction than contempt and, as noted, is reversible through demonstration of compliance. A no-reasonable-efforts determination is an important corrective measure that can be used judiciously to promote fulfillment of the directives the Family Court. Children and their families deserve no less.

Proposal

AN ACT to amend the family court act and the social services law, in relation to compliance with court orders to further permanency plans regarding children in foster care

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

Section 1. 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 by adding a final unnumbered paragraph to read as follows:

The court may make a finding pursuant to subparagraph (B) of this paragraph that reasonable efforts, where appropriate, have not been made upon grounds stated on the record and included in its order, including, but not limited to, the failure of a social services official or agency to comply with a direction by the court to provide services and assistance in accordance with subdivision (c) of this section or section one thousand fifteen-a of this article. Except as provided by subdivision (d) of this section, the failure of a social services official or agency to institute a proceeding to legally free the child for adoption within ninety days of entry of an order so directing

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[13] 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)

[14] *Trial Court Performance Standards with Commentary*, Standard 3.5 (Bureau of Justice Assistance, U.S. Dept. of Justice, 1997).

shall result in a finding pursuant to subparagraph (B) of this paragraph that reasonable efforts, where appropriate, have not been made in furtherance of the permanency plan of adoption.

§2. Section 1055 of the family court act, as amended by chapter 3 of the laws of 2005, is amended by adding a new subdivision (d) to read as follows:

(d) In addition to an order of placement made pursuant to subdivision (b), the court may make an order directing a social services official or other duly authorized agency to institute a proceeding to legally free the child for adoption, if the court finds reasonable cause to believe that grounds therefor exist. Upon a failure by such official or agency to institute such a proceeding within ninety days after entry of such order, the court shall permit the foster parent or parents in whose home the child resides to institute such a proceeding, unless the social services official or other duly authorized agency caring for the child, for good cause shown and upon due notice to all parties to the proceeding, has obtained a modification or extension of such order, or unless the court has reasonable cause to believe that such foster parent or parents would not obtain approval of their petition to adopt the child in a subsequent adoption proceeding. The failure of the social services official or agency to institute such a proceeding within ninety days of entry of an order by the court directing such official or agency to do so shall result in a finding by the court, pursuant to subparagraph (B) of paragraph (iv) of subdivision (b) of this section, that reasonable efforts have not been made to further the child's permanency plan of adoption, unless the social services official or other duly authorized agency caring for the child, for good cause shown and upon due notice to all parties to the proceeding, including the law guardian, has obtained a stay, modification or extension of such order. The fact that the foster parent or parents or the law guardian filed or could have filed a proceeding to legally free the child shall not relieve the agency or social services official of the finding that reasonable efforts, where appropriate, have not been made to further the child's permanency plan of adoption and of other remedies provided by law for failure to comply with a court order.

§3. Subparagraph (viii) of paragraph (2) of subdivision (d) of section 1089 of the family court act, as added by chapter 3 of the laws of 2005, is amended by adding new subsections (I) and (J) to read as follows:

I. The court may make a finding pursuant to subparagraph (iii) of this paragraph that reasonable efforts have not been made to ensure and expedite the child's permanency plan upon

grounds stated on the record and included in its order, including, but not limited to, the failure of a social services official or agency to comply with a direction by the court to provide services and assistance to the child and/or the respondent parent or parents or, in the case of a child freed for adoption, the failure of the agency charged with the guardianship and custody of the child to comply with a direction by the court to provide services and assistance to the child and the prospective adoptive parents, pursuant to this section or section one thousand fifteen-a or one thousand fifty-five of this act, and such district or agency fails to comply with such order. Where the child's permanency plan is adoption and the court has ordered the local social services district or authorized agency caring for the child to institute a proceeding to terminate the child's parental rights and the district or agency fails to do so within ninety days of entry of the order, the court shall make a finding pursuant to subparagraph (iii) of this paragraph, that reasonable efforts have not been made to further the child's permanency plan, unless the social services official or authorized agency, for good cause shown and upon due notice to all parties to the proceeding, including the law guardian, has obtained a stay, modification or extension of the order. The fact that the foster parent or parents or the law guardian filed or could have filed a proceeding to legally free the child shall not relieve the agency or social services official of the finding that reasonable efforts have not been made to further the child's permanency plan of adoption and of other remedies provided by law for failure to comply with a court order.

(J) Where the court has reason to believe that the local social services district has failed to comply on a timely basis with applicable state and federal laws and regulations, the court may make an order recommending that the state office of children and family services investigate the facts and circumstances concerning the discharge of responsibilities for the care and welfare of such child by a social services district pursuant to section three hundred ninety-five of the social services law and/or other applicable state and federal laws and regulations. The court shall make such an order in any case in which the court has made a finding, pursuant to subparagraph (iii) of this paragraph or subdivision (a) of section one thousand twenty-two, subdivision (b) of section one thousand twenty-seven, section one thousand twenty-eight or section one thousand fifty-two of this act, that required reasonable efforts, where appropriate, should have been but were not made. The court shall make available to the state office of children and family services all relevant court records relating to the proceeding or any related proceedings. Nothing in this section shall limit

the authority of the court pursuant to section one hundred fifty-six of this act and article nineteen of the judiciary law.

§4. Subparagraph (iv) of paragraph (l) of subdivision 3 of section 384-b of the social services law, as amended by chapter 145 of the laws of 2000, is amended to read as follows:

(iv) In the event that the social services official or authorized agency having care and custody of the child fails to file a petition to terminate parental rights within sixty days of the time required by this section, or within ninety days of a court direction to file a proceeding not otherwise required by this section, such proceeding may be filed by the foster parent of the child without further court order or by the law guardian on the direction of the court. In the event of such filing, the social services official or authorized agency having care and custody of the child shall be served with notice of the proceeding and shall join the petition. The fact that the foster parent or parents or the law guardian filed or could have filed a proceeding to legally free the child shall not relieve the agency or social services official of a finding, pursuant to subparagraph (B) of paragraph (iv) of subdivision (b) of section one thousand fifty-five or subparagraph (iii) of paragraph 2 of subdivision (d) of section one thousand eighty-nine of the family court act, that reasonable efforts have not been made to further the child's permanency plan of adoption and of other remedies provided by law for failure to comply with a court order.

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

9. Entry of orders of protection issued in child protective and permanency proceedings onto the statewide automated order of protection and warrant registry (FCA §§ 1029, 1056, 1072, 1089; 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 1,115, 905 orders of protection in the database, as of December 16, 2005,[15] and with the database connected to the comprehensive national "Protection Order File" maintained by the National Crime Information Center (Federal Bureau of Investigation), the registry helps to assure informed judgments at all stages of domestic violence cases.

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 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 proceedings.

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.

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 obtaining a complete order of protection picture with respect to an alleged abuser.

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[15] Source: NYS Office of Court Administration Division of Technology.

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 from their abusers as in other proceedings . As the Court of Appeals recognized, in its decision in Nicholson v. Scoppetta, 3 N.Y.3d 357 (2004), victims of domestic violence may not be charged with child neglect by reason of their children's exposure to domestic violence unless they have failed to exercise a minimum degree of care and unless the child is thereby placed in imminent risk of impairment. If a child neglect proceeding is brought against the abuser, the order of protection issued to protect both the abuse victim and the children should provide as much protection as orders of protection issued in family offense and all other cases – a precept that compels inclusion of the order on the statewide domestic violence registry, and consequently, on the federal "Protection Order File" as well. That domestic violence and child abuse frequently coexist in homes has been widely recognized, with estimates of the overlap ranging from 40% to 60%.[16] 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.[17] Significantly, child sexual abuse has also been closely correlated with domestic violence.[18] Therefore, inclusion of orders of protection in such cases on the registry will significantly advance the Legislature's goal of providing an integrated response in all family violence cases and of protecting all victims of domestic abuse, both parents and children, from suffering further violence.

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.

Proposal

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[16] *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)].

[17] "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)].

[18] 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].

AN ACT to amend the family court act and the executive law, in relation to the entry of orders of protection onto the statewide registry of orders of protection

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

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 of section 1056 of the family court act, as amended by chapter 483 or the laws of 1995, is amended to read as follows:

The court may [make] issue an order of protection in assistance or as a condition of any other order made under this part. [Such] Prior to issuing an order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties and the children. An order of protection issued under this section shall remain in effect concurrently with, shall expire no later than the expiration date of, and may be extended concurrently with, [such other] another order [made] issued under this part, except as provided in subdivision four of this section. The order of protection may set forth reasonable conditions of behavior that the court deems necessary and proper to protect the health and safety of the child and the child's caretaker 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 order may require any such person:

§3. Subsection (D) of subparagraph (vii) of paragraph 2 of subdivision (d) of section 1089 of the family court, added by chapter 3 of the laws of 2005, is amended by adding two new sentences at

the end thereof to read as follows:

D. The court may make an order of protection in the manner specified by section one thousand fifty-six of this act in assistance or as a condition of any other order made under this section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified period of time by a person before the court. Prior to issuing an order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties and the children.

§4. 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, ten and ten-a 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.

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

10. Orders of protection in termination of parental rights proceedings, child protective proceedings and permanency hearings regarding children freed for adoption
(FCA §§634, 1056, 1072, 1089; SSL §384-b)

In most cases, the conclusion of a termination of parental rights proceeding marks the beginning of a new phase for a child in foster care, a significant step toward a stable, permanent home, most often through adoption. Sometimes, particularly in the case of kinship adoptions or mediated agreements, permanency is achieved with the understanding, agreed upon by everyone involved, that some contact would continue with the child's birth family and that such contact would be in the child's best interests. However, in some instances, continuing contact with the birth family would endanger the child and destabilize the child's new family. Indeed, in rare cases, stalking behavior by disturbed birth parents has posed a serious impediment to the adoption of their children, has caused prospective adoptive parents to become ambivalent about whether to finalize the adoptions and has caused serious upset and harm to the children themselves. Unfortunately, since prospective adoptive or foster parents and birth parents do not meet the definition of family contained in Article 8 of the Family Court Act, the current statutory structure provides no vehicle to protect these children and their new families short of a criminal prosecution for a non-family offense. Additionally, 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 in child protective proceedings to last only as long as a dispositional order, that is, one year, subject to annual extensions.

The Family Court Advisory and Rules Committee is proposing a measure to create a Family Court remedy for these problems. First, the proposal would amend the termination of parental rights and permanent neglect statutes, Family Court Act §634 and Social Services Law §384-b, to add authority for the Family Court, for good cause after giving the birth parent notice and an opportunity to be heard, to issue an order of protection in conjunction with an order of disposition committing guardianship and custody of the child. The order of protection, which may remain in effect until the child's 18th birthday, may, among other conditions, prohibit the birth parent from contact with the child and the child's foster or pre-adoptive parent. Second, the proposal would amend Family Court Act §1089 to authorize such an order to be issued as part of the disposition of a permanency hearing regarding a child freed for adoption. Third, the measure would amend Family Court Act §1056 to add a condition to orders of protection in child protective proceedings requiring the respondent to stay away, inter alia, from a "person with whom the child has been paroled, remanded, placed or released by the court..." and would permit orders of protection to last for a duration appropriate to the circumstances of particular cases, thereby eliminating the need for the child protective agency, acting on behalf of a domestic violence victim, to request annual extensions or to initiate independent family offense actions. Finally, in order to optimize their effectiveness, the measure would require these orders of protection to be entered onto the statewide registry of orders of protection and warrants.

Enactment of this measure would fill a significant gap in the current statutory framework governing child welfare cases and would further the fundamental precept underlying the federal and New York State Adoption and Safe Families Acts, that is, that "the health and safety of children is of

paramount importance." See Social Services Law §384-b(1); 42 U.S.C. §§629b(a)(9), 670, 671(a).

Proposal

AN ACT to amend the family court act, the social services law and the executive law, in relation to orders of protection in termination of parental rights proceedings, child protective proceedings and permanency hearings regarding children freed for adoption

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

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

§634. Commitment of guardianship and custody; further orders.

The court may enter an order under section six hundred thirty-one committing the guardianship and custody of the child to the petitioner on such conditions, if any, as it deems proper. For good cause shown, the court may issue an order of protection under section six hundred fifty-six of this article to protect the health and safety of the child and the child's foster or pre-adoptive parent or parents or to prevent the commission of a criminal offense against them. The order may direct the respondent to observe reasonable conditions that may include, among others, that the respondent stay away from the child and from the home, school, business or place of employment of the child or the child's foster or pre-adoptive parent or parents. Prior to issuing the order, the court shall inquire as to the existence of any other orders of protection involving the parties and shall give the respondent notice and an opportunity to be heard. The court shall state its reasons on the record for issuing the order. The order may remain in effect until the child's eighteenth birthday, unless the court, on notice to the respondent, the child's current custodian and the law guardian, modifies or vacates the order.

§2. The opening unlettered paragraph and paragraph (a) 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. [Such] Prior to issuing an order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties. An order of protection issued under this section shall remain in effect concurrently with, shall expire no

later than the expiration date of, and may be extended concurrently with, [such other] another order [made] issued under this part[, except as provided in subdivision four of this section]. However, for good cause shown, where the court deems it necessary to protect the health and safety of the child and the child's caretaker or to prevent the commission of a criminal offense against them, the court may direct that an order of protection issued under this section shall remain in effect for a specified period up to the eighteenth birthday of the youngest child for whom a finding of child abuse or neglect has been made, unless the court, on notice to the respondent, the child's current custodian and the law guardian, modifies or vacates the order. The order of protection may set forth reasonable conditions of behavior that the court deems necessary and proper to protect the health and safety of the child to be observed for a specified time by a person who is before the court and is a parent or a person legally responsible for the child's care or the spouse of the parent or other person legally responsible for the child's care, or both. Such an order may require any such person:

(a) to stay away from the home, school, business or place of employment of the other spouse, parent or person legally responsible for the child's care, person with whom the child has been paroled, remanded, placed or released by the court or the child, and to stay away from any specific location designated by the court;

* * *

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. Subsection (D) of subparagraph (vii) of paragraph 2 of subdivision (d) of section 1089 of the family court, added by chapter 3 of the laws of 2005, is amended by adding two new sentences at the end thereof to read as follows:

D. The court may make an order of protection in the manner specified by section one thousand fifty-six of this act in assistance or as a condition of any other order made under this

section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified period of time by a person before the court. In the case of a child freed for adoption, the court, for good cause shown, where necessary to protect the health and safety of the child and the child's foster or pre-adoptive parent or parents or to prevent the commission of a criminal offense against them, may issue an order of protection directing a person whose parental rights had been terminated or surrendered to observe reasonable conditions enumerated therein. The conditions may include, among others, that such person shall stay away from the child and from the home, school, business or place of employment of the child or the child's foster or pre-adoptive parent or parents. 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. The order may only be issued after the person or persons restrained by the order have been given notice and an opportunity to be heard . The court shall state its reasons on the record for issuing the order. The court may direct that the order remain in effect for a specified period up to the child's eighteenth birthday, unless the court, on notice to the person or persons restrained by the order, the child's current custodian and the law guardian, modifies or vacates the order.

§5. Section 384-b of the social services law is amended by adding a new subdivision 13 to read as follows:

13. For good cause shown, the court may issue an order of protection to protect the health and safety of the child and the child's foster or pre-adoptive parent or parents or to prevent the commission of a criminal offense against them. The order may direct the respondent to observe reasonable conditions that may include, among others, that the respondent stay away from the child and from the home, school, business or place of employment of the child or the child's foster or pre-adoptive parent or parents. Prior to issuing the order, the court shall inquire as to the existence of any other orders of protection involving the parties and shall give the respondent notice and an opportunity to be heard. The court shall state its reasons on the record for issuing the order. The order may remain in effect until the child's eighteenth birthday, unless the court, on notice to the respondent, the child's current custodian and the law guardian, modifies or vacates the order.

§6. 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, ten and ten-a 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 384-b 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.

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

11. Determinations of the Family Court regarding children in foster care (FCA §§352.2, 754, 1039-b, 1052(b)(i)(A); SSL §§358-a)

The statutory provisions implementing the federal *Adoption and Safe Families Act* [Public Law 105-89] in New York State, as well as the recent permanency legislation, delineate the rare 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 – egregious cases in which severe or repeated child abuse by a parent, a parent's conviction for an enumerated serious felony, involuntary termination of the parental rights of the child's sibling or half-sibling, prolonged refusal by the parent to accept services, placement of a child on an abuse finding after return home from a child neglect placement and abandonment of a child five days old or younger at a safe haven -- militate toward expediting the child to permanency through adoption or other permanent alternative to return to the parent's care. *See* Laws of 2005, ch. 3; 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 1999 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.

Unfortunately, the statutory provisions implementing the federal mandate are a patchwork of inconsistent provisions, only one of which articulates a burden of proof or quantum of evidence required and only one of which contains a procedural framework for the judicial determination to dispense with reasonable efforts. 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). Only the aggravated circumstance of parental refusal of services articulates the quantum of proof required (clear and convincing evidence) and only the child abuse and neglect provisions [Family Court Act §§1039-b and 1052(b)] delineate a motion procedure. 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, and of leaving ambiguous the level of evidence required. The proposal of the Family Court Advisory and Rules Committee seeks to remedy these disparities.

As in the provision regarding parental refusal of services, the proposal would codify the numerous recent cases that have required clear and convincing evidence for all determinations under Family Court Act §1039-b to dispense with reasonable efforts, a threshold consistent with the quantum of proof required in termination of parental rights cases by the United States Supreme Court in Santosky *v.* Kramer, 455 U.S. 745 (1982). *See, e.g.,* Matter of Jaime S., 9 Misc.3d 460 (Fam. Ct., Monroe Co., 2005) [reiterated in 9 Misc.3d 1118(A) (Fam. Ct., Monroe Co., 2005)]; Matter of S.H.,

6 Misc.3d 851 (Fam. Ct., Onon. Co., 2004); Matter of Edwin L., 3 Misc.3d 1108(a)(Fam. Ct., Kings Co., 2004); Matter of Carl D., 195 Misc.2d 741 (Fam. Ct., Genessee Co., 2003); Matter of Sarah B., 2003 *WL* 1923540 (Fam. Ct., Kings Co., 2003); Matter of Jasbin H., 184 Misc.2d 23, 25 (Fam. Ct., Oneida Co., 2000).

Further, the 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 conform the statute to the Court of Appeals' decision in Matter of Marino S., 100 N.Y.2d 361 (2003), *cert. denied*, 124 S.Ct. 834 (2003), 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. In Matter of Marino S., the Court of Appeals affirmed the Appellate Division, First Department, conclusion 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., 5 A.D.3d 489 (2d Dept., 2004); Matter of La'Asia S., 191 Misc.2d 28, 45 (Fam. Ct., N.Y.Co., 2002).

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.

Consistent with the case law and clear intent of the statute, 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. Significantly, it 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 and social services law, in relation to determinations by the family court regarding children in foster care

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

Section 1. The opening sentence of (c) of subdivision 2 of section 352.2 of the family court act, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

For the purpose of this section, when an order is entered pursuant to section 353.3 or 353.4 of this article, reasonable efforts to prevent or eliminate the need for removing the respondent from [the] his or her home [of the respondent] or to make it possible for the respondent to return to [the] his or her home [of the respondent] shall not be required where the court determines by clear and convincing evidence that:

§2. The opening sentence of paragraph (b) of subdivision 2 of section 754 of the family court act, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

For the purpose of this section, reasonable efforts to prevent or eliminate the need for removing the child from [the] his or her home [of the child] or to make it possible for the child to return safely to [the] his or her home [of the child] shall not be required where the court determines by clear and convincing evidence that:

§3. Subdivision (a), the opening sentence of subdivision (b) and subdivision (c) of section 1039-b of the family court act, as added by chapter 7 of the laws of 1999, are 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.

(b) For the purpose of this section, reasonable efforts to make it possible for the child to return safely to his or her home shall not be required where the court determines by clear and convincing evidence that:

* * *

(c) For the purposes of this section, in determining reasonable [effort] efforts to be made with respect to a child, and in making such reasonable efforts, the child's health and safety shall be the paramount concern[; and].

* * *

(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.

§4. 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:

whether continuation in the child's home would be contrary to the best interests of the child and, where appropriate, that reasonable efforts were made prior to the date of the dispositional hearing held pursuant to this article to prevent or eliminate the need for removal of the child from his or her home and if the child was removed from the home prior to the date of such hearing, that such removal was in the child's best interests and, where appropriate, reasonable efforts were made to make it possible for the child to safely return home. If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that the lack of such efforts was appropriate under the circumstances, the court order shall include such a finding, or 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, the court order shall include a finding that reasonable efforts are being made to make and finalize such alternate permanent placement.

For the purpose of this section, reasonable efforts to prevent or eliminate the need for removing the child from [the] his or her home [of the child] or to make it possible for the child to return safely to [the] his or her home [of the child] shall not be required where, upon motion with notice by the social services official, authorized agency or law guardian, the court determines by clear and convincing evidence that:

§5. The opening sentence of paragraph (b) of subdivision (3) of section 358-a of the social services law, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

For the purpose of this section, reasonable efforts to prevent or eliminate the need for

removing the child from [the] his or her home [of the child] or to make it possible for the child to return safely to [the] his or her home [of the child] shall not be required where the court determines by clear and convincing evidence that:

§6. This act shall take effect immediately.

12. 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*; technical amendment to Civil Practice Law and Rules (DRL §§75-g, 75-i, 75-j, 77-h; CPLR 302(b))

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. Now the law in 42 states, plus the District of Columbia and the United States Virgin Islands,[19] the *UCCJEA* has proven to be invaluable. At the same time, experience under the *UCCJEA* has revealed a few areas necessitating fine-tuning. The Family Court Advisory and Rules Committee has developed a proposal that strengthens three provisions of the statute and increases access to justice for all litigants 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 by other means directed by the Court.[20] The absence of specific provisions in the *UCCJEA* for service by mail out of state, both for plenary and enforcement actions, 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 that are designed to provide actual notice. 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

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[19] Source: National Conference of Commissioners on Uniform State Laws, *A Few Facts About the UCCJEA* (Dec., 2005) (www.nccusl.org).

[20] This proposal has been modified from its 2005 version to restore the language of former D.R.L. §75-f verbatim, thus requiring a return receipt when service is made by mail.

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.

Third, the proposal clarifies that depositions or testimony taken by telephone, audio-visual or other electronic means must be recorded and preserved for transcription, an essential prerequisite for preserving a record for appeal. Courts would be 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 ruling on objections in depositions.

Finally, the proposal would make a technical amendment to section 302(b) of the Civil Practice Law and Rules, that is, to add cross-references to the *Uniform Interstate Family Support Act* [Article 5-B of the Family Court Act] and the *Uniform Child Custody Jurisdiction and Enforcement Act* [Article 5-A of the Domestic Relations Law] to the provision regarding Family Court jurisdiction over non-resident respondents.

Especially in light of its rapid enactment throughout the country, the *UCCJEA* has become an increasingly useful vehicle for the resolution of the frequent inter-jurisdictional issues that arise in custody cases. Enactment of the Committee's proposal would significantly ease the burden on litigants in initiating and conducting proceedings under the *UCCJEA* and would make a needed correction to the personal jurisdiction provision of the Civil Practice Law and Rules .

Proposal

AN ACT to amend the domestic relations law and the civil practice law and rules, 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 the 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 in such manner as the court upon motion directs. 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. Section 77-h of the domestic relations law, as added by chapter 386 of the laws of 2001, is amended to read as follows:

§ 77-h. Service of petition and order. Except as otherwise provided in section seventy-seven-j of this title, the petition and order must be served, by any method authorized by the law of this state, upon respondent and any person who has physical custody of the child. 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 in such manner reasonably calculated to give actual notice as the court upon motion directs.

§5. Subdivision (b) of section 302 of the civil practice law and rules, as amended by chapter 441 of the laws of 1995, is amended to read as follows:

(b) Personal jurisdiction over non-resident defendant in matrimonial actions or family court proceedings. A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the

plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state. The family court may exercise personal jurisdiction over a non-resident respondent to the extent provided in sections one hundred fifty-four and one thousand thirty-six and article 5-B of the family court act and article 5-A of the domestic relations law.

§6. This act shall take effect immediately.

13. Disposition of penalties in child support proceedings
(CPLR 5241, 5252)

Imposition of an income execution – an automatic deduction by an employer from an employee's paycheck – has become the centerpiece of the child support collection process, one of the most effective and efficient tools for ensuring that children receive the support that they are due. Generally accepted by support obligors and payees alike, income executions are widely utilized, both to provide a simple, reliable means of collecting support in the first instance and as a remedy in an enforcement proceeding. Recognizing that compliance by employers with income execution requirements is not absolute and that incidents of discrimination against employees subject to income executions occur all too frequently, however, the governing statutes are bolstered by civil penalties that can be assessed against employers. Sections 5241 and 5252 of the Civil Practice Law and Rules both authorize imposition of civil penalties against employers or other income payors of up to $500 for the first instance and up to $1000 for subsequent instances of non-compliance or discrimination. Unfortunately, both statutes are silent regarding to whom the penalties must be paid. The Family Court Advisory and Rules Committee is proposing a measure to remedy that silence.

Considerations of equity and fairness dictate that the child who is the beneficiary of a support order should be the recipient of any penalty ordered – or, in the case of a family receiving public assistance, the local department of social services that is seeking recoupment of benefits through a child support order. The Committee's measure would amend Section 5241 of the Civil Practice Law and Rules to provide that penalties imposed against employers for failure to deduct or remit deductions as required by an income execution would be paid to the creditor – either the custodial parent or, in the case of an assignment of rights, the local department of social services – and would be enforceable in the same manner as a child support or other judgment. A similar amendment would be made to Section 5252 of the Civil Practice Law and Rules, which prohibits discrimination against an employee or prospective employee based upon the pendency or existence of a child support income execution or wage assignment. Discrimination subject to a civil penalty includes refusal to hire or promote an employee, as well as the discharge, laying off or disciplining of an employee, by reason of the existence of one or more income executions. Again, the penalty would be enforceable in the same manner as a child support or other judgment.

This measure is needed because the omission of a specific directive as to the disposition of the penalties has led to a lack of uniformity statewide, with some courts directing that the penalties be paid to the county and others ordering the penalties to be payable to the State or custodial parent. The ambiguity in the law, in all likelihood, has contributed to a reluctance to impose penalties in some circumstances in which penalties would be appropriate and, in turn, to a failure by employers to take seriously the income execution requirements and proscription against discrimination. Enactment of the Committee's proposal, therefore, would enhance the effectiveness of both the income execution and anti-discrimination statutes and would, therefore, improve the collection and enforcement of support for the benefit of children in New York State.

Proposal

AN ACT to amend the civil practice law and rules, in relation to child support proceedings in family court

The People, represented in Senate and Assembly, do enact as follows:

Section one. 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 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 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. The penalty shall be paid to the creditor and may be enforced in the same manner as a child support judgment or in any other manner permitted by law.

§ 2. 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 civil action authorized in 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. The penalty shall be paid to the creditor and may be enforced in the same manner as a child support judgment or in any other manner permitted by law.

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

14. Orders for genetic testing in proceedings to vacate acknowledgments of paternity (F.C.A. §516-a)

The increasing use of acknowledgments of paternity as a means of establishing filiation, in lieu of prosecution of paternity petitions in Family Court, has revolutionized paternity law and has facilitated the collection of child support for untold numbers of children. However, the governing statutes, the Family Court Act and Public Health Law, lack clarity in one critical respect, that is, regarding procedures for revoking a paternity acknowledgment. Recently, the Supreme Court, Appellate Division, Second Department, in Matter of Westchester County Department of Social Services o/b/o/ Melissa B. *v.* Robert W.B., -A.D.3d-, 803 N.Y.S.2d 672 (2d Dept., 2005), provided a clear road-map for the Family Courts to follow. The Family Court Advisory and Rules Committee is proposing a measure to clarify paternity acknowledgment revocation procedures that would, in effect, codify the Melissa B. decision to expand its reach throughout New York State.

Consistent with Melissa B., the Committee's proposal would amend Family Court Act §516-a to provide a two-step threshold test that must be met before a genetic marker or DNA test would be ordered in a proceeding to vacate a paternity acknowledgment that has been initiated more than 60 days after its execution. First, a hearing would have to be held establishing fraud, duress or material mistake of fact. Second, assuming fraud, duress or material mistake of fact is proven, the Court, consistent with Family Court Act §532, would have to determine whether ordering a genetic test is in the child's best interests or, conversely, whether res judicata, equitable estoppel or the presumption of legitimacy attaching to a child born to a married woman militate against a testing order. *See also* Matter of Mary R. *v.* Sidi M.T., -Misc.2d-, *New York Law Journal*, Apr. 6, 2004, p. 17, col. 1 (Fam. Ct., Kings Co., 2004)(issue of equitable estoppel should have been determined prior to ordering genetic testing). The Committee's proposal would also provide that with respect to petitions to vacate paternity acknowledgments filed within 60 days of their execution, where fraud, duress or mistake of fact need not be shown, the Court would be required to order genetic testing unless it determines that it is not in the child's best interests by reason of res judicata, equitable estoppel or the presumption of legitimacy.

In directing that these prerequisites must be met prior to ordering a genetic test, the Court in Melissa B. rejected the holding of the Supreme Court, St. Lawrence County, in Wilson *v.* Lumb, 181 Misc.2d 1033 (Sup. Ct., St Lawrence Co., 1999), a case that has generated much confusion statewide. In Wilson, the Court sustained an Article 78 proceeding brought to direct the ordering of genetic testing on the ground that issuance of such a testing order was said to be a ministerial act that should have occurred automatically upon the filing of the vacatur petition. Relying upon the language of current Family Court Act §516-a(b)("the court shall order..."), the Court ruled that the support magistrate (then called a hearing examiner) should have directed genetic testing notwithstanding the fact that the petition to vacate the paternity acknowledgment had been brought more than 60 days after its execution. Recognizing the lack of clarity in the statutes, the Court in Wilson assumed that the issues of fraud, duress and mistake of fact, as well as the child's best interests, could and would be addressed after the genetic testing was performed. However, Family Court Act §516-a(b) appears to require vacatur of a paternity acknowledgment either if the Court determines the putative father is not the father (e.g., as a result of the genetic test) or if fraud, duress or mistake of fact are found, notwithstanding the requirement that the latter be proven in order to vacate an acknowledgment more than 60 days after its execution. Compounding the difficulty, Family

Court Act §516-a contains no reference to the child's best interests and thus would appear to require vacatur of a paternity acknowledgment even in a circumstance in which a child has had a long-standing relationship with the acknowledged father and would be harmed by its disruption.

These flaws in the statute cry out for correction – correction that in the Committee's view would best be accomplished by codifying the procedure outlined in Melissa B. The Committee's measure would provide needed clarity to Family Court Act §516-a and would thereby better protect children who are the subjects of petitions to vacate their paternity. The measure would articulate the fraud, duress and mistake of fact threshold issues applicable to vacatur petitions filed more than 60 days after the execution of the acknowledgment of paternity. With respect to vacatur petitions filed both within and in excess of 60 days of the execution of the paternity acknowledgment at issue, it would incorporate the best interests considerations of Family Court Act §532 that must be addressed prior to the ordering of genetic testing. Finally, the measure would make clear that if genetic testing is ordered and paternity is established, the Family Court must enter an order of filiation.

Proposal

AN ACT to amend the family court act, in relation to acknowledgments of paternity

The People, represented in Senate and Assembly, do enact as follows:

Section one. Subdivision (b) 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:

(b) (i) 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 may be rescinded by either signator's filing of a petition with the court to vacate the acknowledgment within the earlier of sixty days of 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 signator is a party. For purposes of this section, the "date of an administrative or a judicial proceeding" shall be the date by which the respondent is required to answer the petition. The court shall order genetic marker tests or DNA tests for the determination of the child's paternity. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman. If the court determines, following the test, that the person who signed the acknowledgment is the father of the child, the court shall make a finding of paternity and enter an order of filiation. If the court determines that the person who signed the acknowledgment is not the father of the child, the acknowledgment shall be vacated.

(ii) After the expiration of sixty days of the execution of the acknowledgment, either signator may

challenge the acknowledgment of paternity in court [only on the basis of] by alleging and proving fraud, duress, or material mistake of fact [, with the burden of proof on the party challenging the voluntary acknowledgment. Upon receiving a party's challenge to an acknowledgment] . If the petitioner proves to the court that the acknowledgment of paternity was signed under fraud, duress, or due to a material mistake of fact, the court shall order genetic marker tests or DNA tests for the determination of the child's paternity [and shall make a finding of paternity, if appropriate, in accordance with this article]. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman. If the court determines, following the test, that the person who signed the acknowledgment is the father of the child, the court shall make a finding of paternity and enter an order of filiation. If the court determines that the person who signed the acknowledgment is not the father of the child, the acknowledgment shall be vacated.

(c) Neither signator's legal obligations, including the obligation for child support arising from the acknowledgment, may be suspended during the challenge to the acknowledgment except for good cause as the court may find. [If a party petitions to rescind an acknowledgment and if the court determines that the alleged father is not the father of the child, or if the court finds that an acknowledgment is invalid because it was executed on the basis of fraud, duress, or material mistake of fact, the court shall vacate] If the court vacates the acknowledgment of paternity [and], the court shall immediately provide a copy of the order to the registrar of the district in which the child's birth certificate is filed and also to the putative father registry operated by the department of social services pursuant to section three hundred seventy-two-c of the social services law. In addition, if the mother of the child who is the subject of the acknowledgment is in receipt of child support services pursuant to title six-A of article three of the social services law, the court shall immediately provide a copy of the order to the child support enforcement unit of the social services district that provides the mother with such services.

([c]d) A determination of paternity made by any other state, whether established through the parents' acknowledgment of paternity or through an administrative or judicial process, must be accorded full faith and credit, if and only if such acknowledgment meets the requirements set forth in section [452(a)(7)] 652(a)(7) of title IV-D of the social security act.

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

15. Requirements for notices of indicated maltreatment reports and changes in foster care placements in child protective and voluntary foster care proceedings (FCA §§1055, 1089; SSL §§358-a)

Reflecting a pronounced legislative trend at both federal and state levels, the ongoing oversight responsibility of the Family Court with respect to children in foster care has increased sharply in the past 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; Laws of 2005, ch. 3]. Both the federal and State *Adoption and Safe Families Act*s emphasize that the safety of the child is paramount, compelling the conclusion that the Court must be informed on a timely basis of all events affecting child safety, especially indicated reports of abuse or maltreatment. Equally as important, the federal *ASFA* measures success in terms of outcomes, that is, the States' ability to reach federally-established targets for timely achievement of permanency for children. The first "Child and Family Service Review (CFSR)," conducted by the Administration for Children and Families of the United States Department of Health and Human Services (HHS), concluded that New York State, with among the lowest scores in the nation, demonstrated how far New York State has to go to achieving the federal targets.[21] New York State's inadequate performance compels legislative action before the next CFSR – scheduled to occur after the conclusion of the implementation by the New York State Office of Children and Family Services of its "Program Improvement Plan"– in order to ensure that the Family Courts can exercise their important monitoring functions on the basis of complete, timely information. The recently-enacted permanency legislation, with its salutary provisions for continuing jurisdiction, is an important step, but further legislation is necessary to ensure that information in the most compelling of circumstances is conveyed to the Court, the law guardian and the parties on a timely basis. The Committee's proposal to require prompt notice of indicated reports of child abuse or maltreatment and of changes in children's placements is a critically-needed next step in the effort to bring New York State into compliance with *ASFA*.

In few areas of the Court's functioning is its continuing jurisdiction as critical as in child welfare, where complex decisions regarding children must be adjusted to the dynamic of their constantly changing needs and circumstances. The federal and state statutes emphasize that safety of the child must be deemed the paramount consideration and that timely achievement of permanence must be the central goal. Not only are these matters of statutory imperative, but they are also determinative of New York State's eligibility for several hundred million dollars of annual federal foster care aid. Prompt receipt by the Court, the parties and law guardians of information regarding the child's ever-changing circumstances, both as to any child maltreatment suffered by the child and as to changes in the child's placement, is vital to the effective exercise of the Family Court's continuing jurisdiction and is a critical component of New York State's ability to comply with the *ASFA* funding eligibility mandates.

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[21] New York achieved reunification within one year of only 54.2% of the children in foster care in Fiscal Year 1999, compared to the national target of 76.2%. Even more serious, only 3% of the adoptions in New York State in Fiscal Year 1999 were finalized within two years of the children's placement into foster care, compared to the national target of 34%. *See Final Report of the Child and Family Services Review of New York State: Executive Summary*, p. 2 (2002)(available at http://www.acf.hhs.gov/programs/cb/cwrp/executive/ny/html) .

Recognizing that "time is of the essence" where children are concerned, the Family Court Advisory and Rules Committee is submitting an expanded version of its earlier proposal 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 1089 of the Family Court Act , as well as section 358-a 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 and within five days of the date that any report of abuse or maltreatment is found to be indicated. The two types of reports, in fact, are related, as the existence of an indicated report of maltreatment may bear directly upon the suitability of a planned status change.[22]

Changes in placement covered by the notification requirement would include, but not be limited to, cases in which the child has been moved from the foster or pre-adoptive home or program into which he or she has been placed, cases in which the foster or pre-adoptive parents move out of state with the child and, with respect to children not freed for adoption, cases in which a trial or final discharge of the child from foster care has been made. The report 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. This notification requirement does not contemplate court action in every case; nor does it interfere with the discretion of social services agencies to make necessary changes. However, 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 current discretion of the Family Court to condition changes in placement, including trial and final discharges, upon prior notice to the Court, the parties and law guardian.[23]

Both the *Adoption and Safe Families Act* and recent permanency legislation increase the frequency of judicial reviews of children in foster care, thus minimizing the problem of stale information. However, the ability of the Court and of the litigants to respond effectively is seriously impeded – and harm to children may be compounded – if information regarding significant changes in status of the children, and, importantly, indicated reports of neglect or abuse of the children, is not conveyed to the court or parties until the next permanency hearing, often a delay of several months. This proposal will facilitate timely, informed responses to changes in children's placements and incidents of maltreatment, thus prompting more expeditious and effective resolution of their cases.

Proposal

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

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[22] A recent case in which an agency sought to finalize an adoption without disclosing a serious, founded abuse report illustrates this point.

[23] In one case, children who had already experienced the trauma of frequent moves were again transferred, notwithstanding both a prior stipulation 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.

placement and review proceedings

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

Section 1. Paragraph (i) of subdivision (b) of section 1055 of the family court act, as amended by chapter 3 of the laws of 2005, is amended to read as follows:

(i) Children placed under this section shall be placed until the court completes the initial permanency hearing scheduled pursuant to article ten-A of this act. Should the court determine pursuant to article ten-A of this act that placement shall be extended beyond completion of the scheduled permanency hearing, such extended placement and any such successive extensions of placement shall expire at the completion of the next scheduled permanency hearing, unless the court shall deter mine, pursuant to article ten-A of this act, to continue to extend such placement. 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. A report shall also be required to be submitted to the court, the parties and the law guardian of any indicated report of child abuse or maltreatment in which the child or another child residing in the same home is the subject within five days of the indication of the report; provided, however, that where the indicated report concerns a child in a foster boarding or prospective adoptive home, the agency may redact the address of the home.

§2. Subparagraph (vii) of paragraph 2 of subdivision (d) of section 1089 of the family court act, as added by chapter 3 of the laws of 2005, is amended by adding a new subsection (H) to read as follows:

(H) a requirement that the social services official or authorized agency charged with guardianship and custody of the child shall report any change in placement within thirty days of such change in any case in which the child is moved from the foster home, relative's or other suitable person's home or program into which he or she has been placed or in which the foster parents or relatives or other suitable persons with whom the child is placed 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. A report shall also be required to be submitted to the court, the parties and the law guardian of any indicated report of child abuse or maltreatment where the child or another child in the same home is the subject within five days of the indication of the report; provided, however, that where the indicated report concerns a child in a foster boarding or prospective adoptive home, the agency may redact the address of the home.

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

(g) In any order issued pursuant to this section, the court may require the social services official or authorized agency charged with custody of the child to report any change in placement 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. A report shall also be required to be submitted to the court, the parties and the law guardian of any indicated report of child abuse or maltreatment where the child or another child in the same home is the subject within five days of the indication of the report; provided, however, that where the indicated report concerns a child in a foster boarding or prospective adoptive home, the agency may redact the address of the home.

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

16. 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 §§ 743, 754, 757, 776, 779, 779-a)

The increase in the maximum age of jurisdiction for persons in need of supervision (PINS) proceedings, the statutory restrictions placed upon detention and placement of PINS over the age of 16 and, most recently, the major reform in the area of PINS diversion, 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; Laws of 2005, ch. 57, Part E. 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) at that time 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, consistent with the requirement in the new PINS statute that dispositions be the "least restrictive available alternative" consistent with the respondent juvenile's needs and best interests, the Committee's measure would amend authorize the Family Court to place an adjudicated person in need of supervision, who would otherwise be placed out of the home, into an intensive probation supervision program, where available, for all or part of the period of probation to the extent such a program is available. The New York State Division of Probation and Correctional Alternatives would be directed to promulgate regulations to guide local probation departments that elect to operate such programs, addressing such issues as: maximum probation officer caseloads; special training requirements for the probation officers carrying out the intensive supervision program; the 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.

This provision is consistent with the conclusions reached by the Vera Institute of Justice in its two studies, *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) and *Changing the Status Quo for Status Offenders: New York State's Efforts to Support Troubled Teens* (Vera Inst., Dec., 2004), that were commissioned by the New York State Office of Children and Family Services. The 2001 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. The 2004

study highlights the efficacy of the use of creative alternatives to detention and placement for PINS.

Second, 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.

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 Steven Z., 19 A.D.3d 783 (3d Dept., 2005); Matter of Matthew RR, 9 A.D.3d 514 (3d Dept., 2004); Matter of Nichole A., 300 A.D.2d 947 (3rd Dept., 2002); Matter of Jody W., 295 A.D.2d 659 (3rd Dept., 2002); Matter of Shaun U., 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. The juvenile must be advised of his or her rights. *See, e.g.,* Matter of Jessica GG., 19 A.D.3d 765 (3d Dept., 2005); Matter of Ashley A., 296 A.D.2d 627 (3rd Dept., 2002).

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 or, at minimum, provide the juvenile with an opportunity to present evidence. See Matter of Casey W., 3 A.D.3d 785 (3d Dept., 2004); Matter of Josiah RR, 277 A.D.2d 654 (3rd Dept., 2000). 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).[24] In matters, such

[24] 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.

as Nathaniel J.J., in which the juvenile is placed pursuant to Family Court Act §756, these findings are mandated as well by the federal and state *Adoption and Safe Families Acts* [Pub. 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 adjudication, 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. The family court act is amended by adding a new section 743 to read as follows:

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

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

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

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

The provisions of this subdivision shall not be waived.

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

§2. Subdivision (b) of section 757 of the family court act, as amended by chapter 309 of the laws of 1996, is amended and a new subdivision (e) is added to read as follows:

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

* * *

(e) If the respondent has been found to be a person in need of supervision, and if the court further finds that, absent intensive probation supervision, the respondent would be placed pursuant to section seven hundred fifty-six of this act, the court may direct the respondent to cooperate with a program of

intensive probation supervision during all or part of the term of probation. The local probation department may provide intensive probation supervision to respondents so directed pursuant to this subdivision in accordance with regulations to be promulgated by the state division of probation and correctional alternatives pursuant to subdivision one of section two hundred forty-three of the executive law.

§3. 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 [a] 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.

§4. 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.

§5. 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 specify the condition or conditions of the order violated and a reasonable description of the date, time, place and manner in which the violation occurred. Non-hearsay allegations of the factual part of the petition or of any supporting depositions must establish, if true, every violation charged.

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

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

(e) Hearing on violation. (i) The court may not revoke an order of probation or suspended judgment

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

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

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

(B) advise the respondent that he or she is entitled to counsel at all stages of a proceeding under this section and appoint 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.

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

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

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

§6. Subdivision 1 of section 243 of the executive law, as amended by chapter 574 of the laws of

1985, is amended to read as follows:

1. The director shall exercise general supervision over the administration of probation services throughout the state, including probation in family courts and shall collect statistical and other information and make recommendations regarding the administration of probation services in the courts. He or she shall endeavor to secure the effective application of the probation system and the enforcement of the probation laws and the laws relating to family courts throughout the state. After consultation with the state probation commission, he or she shall adopt general rules which shall regulate methods and procedure in the administration of probation services, including investigation of defendants prior to sentence, and children prior to adjudication, supervision, case work, record keeping, and accounting, program planning and research so as to secure the most effective application of the probation system and the most efficient enforcement of the probation laws throughout the state. Such rules shall permit the establishment of a program of intensive probation supervision for juveniles directed to receive such services pursuant to subdivision (e) of section seven hundred fifty-seven of the family court act and shall include, but not be limited to: specification of the maximum caseload levels and training required for intensive supervision probation officers; the frequency and nature of probation contacts with juveniles in the program, schools and other agencies; and supervision, treatment and other services to be provided to such juveniles. Such rules shall provide that the probation investigations ordered by the court in designated felony act cases under subdivision one of section 351.1 of the family court act shall have priority over other cases arising under articles three and seven of such act. Such rules shall be binding upon all probation officers and when duly adopted shall have the force and effect of law, but shall not supersede rules that may be adopted pursuant to the family court act. He or she shall keep [himself] informed as to the work of all probation officers and shall from time to time inquire into and report upon their conduct and efficiency. He or she may investigate the work of any probation bureau or probation officer and shall have access to all records and probation offices. He or she may issue subpoenas to compel the attendance of witnesses or the production of books and papers. He or she may administer oaths and examine persons under oath. He or she may recommend to the appropriate authorities the removal of any probation officer. He or she shall transmit to the governor not later than February first of each year an annual report of the work of the division of probation and correctional alternatives for the preceding calendar year, which shall include such information relative to the administration of probation and correctional alternatives throughout the state as may be appropriate. He or she may from

time to time publish reports regarding probation including probation in family courts, and the operation of the probation system including probation in family courts and any other information regarding probation as he or she may determine provided expenditures for such purpose are within amounts appropriated therefor.

§7. This act shall take effect on the ninetieth day after it shall have become a law; provided, however, that (i) sections 2,3,4 and 5 of this act shall apply to juveniles found to have committed acts that are the bases for adjudicating them to be persons in need of supervision, respectively, that occurred on or after the effective date of such sections, and (ii) section 6 of this act shall take effect immediately.

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

Four significant gaps exist in the procedural framework governing juvenile delinquency cases, each in the area of violations of court orders. The Family Court Advisory and Rules Committee is proposing legislation to eliminate these gaps by clarifying applicable procedures in cases of alleged violations of adjournments in contemplation of dismissal (ACD's), orders of probation, orders of placement and orders of conditional discharge in juvenile delinquency proceedings.

First, 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.[25] 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.

Second, the proposal remedies the failure of the provisions regarding violations of orders of probation to specify the type of support for the violation petition allegations. Because the violations often concern a juvenile's compliance or lack of compliance with orders to cooperate with particular programs, it should be possible for probation violation petitions to be based upon allegations supported by letters, reports and other documents from the programs in question.[26] The proposal thus specifies that petition allegations may include hearsay, although the current requirement for the evidence of proof of the petition to be relevant, material and competent would be retained.

Third, the Committee's proposal effectuates the apparent intention of the Legislature to provide identical provisions to toll orders of probation and conditional discharge while violation proceedings are pending. While sections 360.2 and 360.3 articulate a procedure governing violations of both probation and conditional discharge, references to conditional discharge appear to have been inadvertently omitted from two subdivisions of those sections. In Matter of Donald MM, 231 A.D.2d 810, 647 N.Y.S. 2d 312 (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 of the same section, which requires credit for the period of pendency of a violation petition to be given in cases in which the violation has not been sustained.

Finally, the proposal remedies an anomaly in the placement statute. While a placement with the New York State Office of Children and Family Services is tolled when a child is absent without leave and a warrant is outstanding [Exec. Law §510-b(7)], no similar provision applies to a placement of a child with a county Department of Social Services. Placements with DSS are often for the very same facilities as those with NYS OCFS – residential treatment facilities operated by authorized agencies

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[25] In light of the Governor's veto of this measure in 1999, the measure was revised to delete reference to a specific burden of proof.

[26] Legislation is needed in light of appellate decisions applying juvenile delinquency pleading requirements for non-hearsay allegations to probation violation petitions. *See* Matter of Markim Q 22 A.D.3d 498 (2d Dept., 2005); Matter of Whitney Z., 12 A.D.3d 971 (3d Dept., 2004); Matter of Todd D., 288 A.D.2d 740 (3d Dept., 2001).

under contract. Disparate treatment of placed delinquent youth should not arise out of the happenstance of who the agency contracts with for payment of the child's placement. The Committee's proposal, therefore, incorporates Executive Law §510-b(7) into Article 3 of the Family Court Act and makes it applicable both to placements with County Departments of Social Services and with the NYS Office of Children and Family Services.

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 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. Section 353.3 of the family court act is amended by adding a new subdivision 11 to read as follows:

11. Where the respondent is placed pursuant to subdivision two or three of this section and is absent from the facility or authorized agency without the consent of the director of the facility or agency, the absence shall interrupt the calculation of time of such placement and such interruption shall continue until the child's return to the facility or agency; provided, however, that a timely permanency hearing shall be held for the respondent, notwithstanding such interruption. Any time spent in detention between the date of such absence without leave and the return of the child to the facility or agency shall be credited against the time of placement if the detention was due to a surrender or arrest due to the absence or if the detention was due to an arrest that did not culminate in a petition, adjudication or adjustment.

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

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

* * *

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

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

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

18. Termination of parental rights on the ground of homicide of a parent or child in the home (SSL §§384-b(4), (8))

Few cases can be said to pose a greater challenge to the strong constitutional and statutory primacy of birth parents' rights than that of a child whose parent has been convicted of homicide, either of another child in the home or of another parent. Enactment of the *Lee Ann Cruz Act* in 1998, its amendment in 1999 and its inclusion in the New York State version of the *Uniform Child Custody Jurisdiction and Enforcement Act* in 2001, reflected the Legislature's clear determination that, notwithstanding ties of blood, parents convicted of such crimes should be presumptively denied custody of, or visitation with, their surviving children. *See* Laws of 1998, ch. 150; Laws of 1999, ch. 378; Laws of 2001, ch. 386. This strong statement of public policy was evident as well in the Legislature's enactment in 1999 of the statute implementing the federal *Adoption and Safe Families Act* [P.L. 105-89] and its 2000 amendment. A conviction for homicide of a child was included as a presumptive ground for the Family Court to order child care agencies to dispense with reasonable efforts to reunify families and as a form of severe abuse constituting a ground for termination of parental rights; a conviction for homicide or other violent felony was also included as presumptive evidence of disqualification to be a foster or adoptive parent. *See* Laws of 1999, ch.7; Laws of 2000, ch.145. However, the termination of parental rights statute in New York continues to be an incomplete reflection of this policy determination and its flaws have impeded the achievement of permanency for children whose tragic cases make them among those most in need.

The Family Court Advisory and Rules Committee is proposing legislation to fill this gap in the severe abuse statute, Social Services Law §384-b(8), to better fulfill the State's strong public policy underlying the *Adoption and Safe Families Act* precept that the "safety of the child is paramount." First, the measure would add a conviction for homicide of the child's other parent as a ground for termination of parental rights. As in the law presumptively rendering individuals with such convictions ineligible to be foster or adoptive parents, an exception would be provided where the convicted parent "was a victim of physical, sexual or psychological abuse by the decedent parent and such abuse was a factor in causing the homicide." *See* Social Services Law §378-a(2)(j).

Second, the enumerated grounds for termination of parental rights would be expanded to include a conviction for homicide of another child in the household for whose care the convicted parent "is or has been legally responsible," as the latter phrase is defined in the child protection statute, Family Court Act §1012(g), even if the murdered child was not a sibling of the child whose parent's rights are facing termination. Addition of the cross-reference to the definition of individuals who can be charged with child neglect or abuse would foster consistency in the statutory framework by making clear that homicide of a child by a person who is the child's custodian. or guardian or who "continually or at regular intervals [is] found in the same household as the child..." would be grounds for terminating the convicted parent's rights over his or her surviving child. No longer would an agency have the burden of proving permanent neglect (failure of the parent to plan for or contact the child), because of the inapplicability of the severe abuse statute as written. For example, in Matter of Kyle M., 5 A.D.3d 489 (2d Dept., 2004), the Appellate Division, Second Department upheld a permanent neglect finding against a mother who had been convicted of fatally strangling her three-year-old nephew, who was entrusted to her care – a case that could have been addressed more simply and expeditiously had the Committee's proposal been the law at the time. In support of the finding that reasonable efforts to reunite the family would have been pointless in such an egregious case, the Court quoted the Court of Appeals' decision in Matter of Marino S., 100 N.Y.2d 361, 372 (2003), *cert. denied,* 124 S.Ct. 834

(2003):

> [W]hen a child's best interests are endangered...the State's strong interest in avoiding extended foster care and expediting permanency planning may properly excuse the futile exercise of making efforts toward reuniting a family that, in the end, should not and will not be reunited.

Proposal

AN ACT to amend the social services law, in relation to termination of parental rights on the grounds of homicide of a parent or a sibling of the child

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

Section 1. Paragraph (e) of subdivision 4 of section 384-b of the social services law, as amended by chapter 3 of the laws of 2005 is amended to read as follows:

(e) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, severely or repeatedly abused such child or was convicted of murder or manslaughter, or an attempt thereof, of the child's other parent or of a sibling or another child in the home, as provided in subsection (A) of subparagraph (iii) of paragraph (a) of subdivision eight of this section. Where a court has determined that reasonable efforts to reunite the child with his or her parent are not required, pursuant to the family court act or this chapter, a petition to terminate parental rights on the ground of severe abuse or homicide as set forth in subparagraph (iii) of paragraph (a) of subdivision eight of this section may be filed immediately upon such determination.

§2. Subsection (A) of subparagraph (iii) of paragraph (a) of subdivision 8 of section 384-b of the social services law, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

(A) the parent of such child has been convicted of murder in the first degree as defined in section 125.27, murder in the second degree as defined in section 125.25, manslaughter in the first degree as defined in section 125.20, or manslaughter in the second degree as defined in section 125.15, and the victim of any such crime was another child of the parent or another child for whose care such parent is or has been legally responsible as defined in subdivision (g) of section one thousand twelve of the family court act, or another parent of the child, unless the convicted parent was a victim of physical, sexual or psychological abuse by the decedent parent and such abuse was a factor in causing the homicide; or has been convicted of an attempt to commit any of the foregoing crimes, and the victim or intended victim was the child or another child of the parent or another child for whose care such parent

is or has been legally responsible as defined in subdivision (g) of section one thousand twelve of the family court act, or another parent of the child, unless the convicted parent was a victim of physical, sexual or psychological abuse by the decedent parent and such abuse was a factor in causing the homicide.

§3. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to termination of parental rights petitions filed on or after such effective date.

III Previously Endorsed Measures

1. 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 willful violation has been found;[27] 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,[28] 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 delineate the powers of the Family Court to impose sanctions upon a finding of a willful violation of an order of protection or temporary order of protection and to modify or issue a new order of protection or temporary order of protection. The Court's authority to place a violator on probation and to require, as a condition of probation, *inter alia*, that the violator participate and pay the costs of a batterer's education program would be articulated – a recommendation consistent with the statutorily-required evaluation of

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

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

the 1994 legislation by the New York State Office for the Prevention of Domestic Violence and Division of Criminal Justice Services.[29] 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. None of these are new powers; all are powers currently exercised by the Courts. *See, e.g.,* Matter of C.B. *v.* J.U., 5 Misc.3d 1004 (Sup. Ct., N.Y. Co., 2004)(supervised visitation ordered). 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,[30] 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 a 1999 amendment regarding matrimonial orders of protection 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 willful violation: probation, imposition of legal and medical fees and costs, suspension of visitation or direction that visitation be supervised and commitment to jail. *See* Laws of 1999, ch. 606.

With increased issuance of temporary and permanent orders of protection in matrimonial proceedings 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

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

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[29] *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.

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

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 willfully 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 willfully 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 willful 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 willfully 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 willfully 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

willful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, stalking, assault or attempted assault. 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 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 willful 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 willfully 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 willfully 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 willful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment,

stalking, assault or attempted assault. 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 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.

2. 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 remains at a high level, 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, localities must be encouraged to develop cost-effective alternatives both to pre-dispositional detention and placement.

The Family Court Advisory and Rules Committee has developed a proposal that would enhance the capacity of the Family Court 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 establish a regulatory framework to establish meaningful alternatives to detention and to 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, if such program is available under the auspices of the local probation department and 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.[31]

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 to the extent available in the county. In light of the requirement in section 303.1(a) of the Family Court Act that Criminal Procedure Law provisions be

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[31] *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).

"specifically prescribed" in the Family Court Act in order to be applicable, this provision would provide the necessary analogue to section 65.10(4) of the Criminal Procedure Law, the statutory response to the decision of the Court of Appeals in People *v.* McNair, 87 N.Y.2d 772 (1996). See Laws of 1996, ch. 653. A program of electronic monitoring, to the extent available, 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[32] and the Supreme Court, Appellate Division, Third Department recently endorsed its use as a reasonable condition of probation in a Person in Need of Supervision (PINS) proceeding. *See* Matter of Kristian CC., -A.D.3d-, 2005 Slip Op. 09380 (3d Dept., 2005).

Finally, the New York State Division of Probation and Correctional Alternatives would be directed to promulgate regulations permitting and guiding 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 formerly 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, which is scheduled to start anew as the "Enhanced Supervision Program (ESP)," was 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.[33]

Significantly, not only does intensive probation supervision save money, but it may also facilitate access to federal dollars . Funds from the federal child welfare programs can be made available to localities for these programs if the Division of Probation and Correctional Alternatives and local probation departments work in partnership with the New York State Office of Children and Family

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[32] *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).

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

Services and local social services districts. If intensive supervision services that are provided to youth in order to prevent placement are explicitly included in the statewide plan for child welfare services, federal reimbursement at a rate of 75% would be available as a preventive service under Title IV-B of the Social Security Act. 42 U.S.C.A. §§622, 623 [Social Security Act, Title IV-B; Public Law 96-272].[34] 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 New York State Office of Children and Family Services 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 and Safe Families Act* [Public Law 105-89], by incorporating into State law the requirements that Family Court judges make findings, prior to ordering both detention and placements of juveniles into facilities eligible for federal reimbursement, that "reasonable efforts" have been made to prevent the placements. *See* Family Court Act §§352.2(2)(b); Laws of 1999, ch. 7; Laws of 2000, ch. 145. Eliminating unnecessary placements of juvenile delinquents will facilitate State compliance with, and concomitant eligibility of funding from, the federal *Adoption and Safe Families Act* and the *Juvenile Justice and Delinquency Prevention Act*, in light of the applicability of the strict permanency planning mandates to all juveniles in placement facilities that are in receipt of federal foster care funding. *See* Public Law 107-273; V. Hemrich, "Applying *ASFA* to Delinquency and Status Offender Cases," 18 *ABA Child Law Practice #9*: 129, 133 (November, 1999).

Even apart from federal or state funding eligibility, investing intensive probation supervision resources in youth who would otherwise be likely to be placed would result in substantial savings of placement dollars, since probation supervision, even with enhanced officer-to-juvenile ratios and electronic monitoring programs, represents but a fraction of the cost of residential placement.[35] Importantly, however, the proposal does not require such expenditures, as both the electronic monitoring and the intensive probation provisions authroize their utilization only "to the extent available" in a particular locality.

Proposal

AN ACT to amend the family court act and the executive law, in relation to alternatives to detention and

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[34] 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.

[35] 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. See *Family Ties: A Financial Analysis* N.Y.C. Dept. of Juvenile Justice (June, 1993), p.7.

conditions of probation in juvenile delinquency cases

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

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

The court shall not direct detention unless available alternatives to detention would not 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, to the extent available, as a condition of release would address the basis for the finding, that is, 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 and if such a program is available in the county, 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 is amended by re-lettering paragraphs (e) and (f) as (f) and (g) and adding a new paragraph (e) to such subdivision to read as follows:

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

§3. Subdivision 6 of section 353.2 of the family court act, as amended by chapter 124 of the laws of 1993, is amended to read as follows:

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

probation for an additional year.

§4. Subdivision 1 of section 243 of the executive law, as amended by chapter 574 of the laws of 1985, is amended to read as follows:

1. The director shall exercise general supervision over the administration of probation services throughout the state, including probation in family courts and shall collect statistical and other information and make recommendations regarding the administration of probation services in the courts. He or she shall endeavor to secure the effective application of the probation system and the enforcement of the probation laws and the laws relating to family courts throughout the state. After consultation with the state probation commission, he or she shall adopt general rules which shall regulate methods and procedure in the administration of probation services, including investigation of defendants prior to sentence, and children prior to adjudication, supervision, case work, record keeping, and accounting, program planning and research so as to secure the most effective application of the probation system and the most efficient enforcement of the probation laws throughout the state. Such rules shall permit the establishment of a program of intensive probation supervision for juveniles directed to receive such services pursuant to paragraph (e) of subdivision three of section 353.2 of the family court act and shall include, but not be limited to: specification of the maximum caseload levels and training required for intensive supervision probation officers; the frequency and nature of probation contacts with juveniles in the program, schools and other agencies; and supervision, treatment and other services to be provided to such juveniles. Such rules shall further provide for the establishment of a program of electronic monitoring for accused juvenile delinquents who would otherwise be detained prior to disposition pursuant to subdivision three of section 320.5 of the family court act and for adjudicated juvenile delinquents placed on probation on condition of cooperation with a program of electronic monitoring pursuant to paragraph (e) of subdivision three of section 353.2 of the family court act. Such rules shall provide that the probation investigations ordered by the court in designated felony act cases under subdivision one of section 351.1 of the family court act shall have priority over other cases arising under articles three and seven of such act. Such rules shall be binding upon all probation officers and when duly adopted shall have the force and effect of law, but shall not supersede rules that may be adopted pursuant to the family court act. He or she shall keep [himself] informed as to the work of all probation officers and shall from time to time inquire into and report upon their conduct and efficiency. He or she may investigate the work of any probation bureau or probation officer and shall have access to all records and probation offices. He or she may issue subpoenas to compel the attendance of witnesses or the production of books and papers. He or she may administer oaths and examine persons under oath. He or she may recommend to the appropriate authorities the removal of

any probation officer. He or she shall transmit to the governor not later than February first of each year an annual report of the work of the division of probation and correctional alternatives for the preceding calendar year, which shall include such information relative to the administration of probation and correctional alternatives throughout the state as may be appropriate. He or she may from time to time publish reports regarding probation including probation in family courts, and the operation of the probation system including probation in family courts and any other information regarding probation as he or she may determine provided expenditures for such purpose are within amounts appropriated therefor.

§5. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to juveniles found to have committed acts of juvenile delinquency that occurred on or after such effective date, provided, however, that section 4 of this act shall take effect immediately.

3. Duration of probation in Family Court family offense proceedings (FCA §841(c))

In 2003, legislation was enacted to lengthen the permissible duration of orders of protection in family offense cases brought in the Family Court pursuant to Article 8 of the Family Court Act from one to two years and, where aggravating circumstances have been found, from three to five years. Laws of 2003, chapter 579. However, no concomitant changes were made to Family Court Act §841(c), which authorizes respondents in such cases to be placed on probation as a disposition of an Article 8 proceeding. The Family Court Advisory and Rules Committee is proposing a measure to remedy that disparity.

The proposal would amend Family Court Act §841(c) to authorize the Family Court to place a respondent on probation for a period of up to two years or, where an order of protection pursuant to Family Court Act §842 has been issued for five years, a period of up to five years. Since Family Court Act §841 explicitly authorizes concurrent issuance of both an order of probation and an order of protection as a disposition of an Article 8 family offense proceeding, logic dictates that the duration of both orders should be equal. Clearly, the duration of probation supervision over a respondent in a family offense matter should be coextensive with the duration of the order of protection, that is, coextensive with the period of time determined by the Family Court as the period necessary to protect a victim of family violence from suffering further violence.

Enactment of the 2003 legislation reflected the legislative findings underpinning the *Family Protection and Domestic Violence Intervention Act of 1994* [Laws of 1994, chapter 222], that is:

> The legislature hereby finds and declares that there are few more prevalent or more serious problems confronting the families and households of New York than domestic violence... The victims of family offenses must be entitled to the fullest protections of our civil and criminal laws.

Laws of 1994, ch. 222, §1. This measure, ensuring that respondents will be under supervision during the same time periods to which they are subject to orders of protection, will further augment those protections in fulfillment of these statutory goals.

Proposal

AN ACT to amend the family court act, in relation to periods of probation in family offense proceedings

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

Section 1. 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 respondent on probation for a period not exceeding [one year, and requiring] two years

or, if an order of protection has been issued for five years pursuant to section eight hundred forty-two of this article, five years. The order may require respondent to participate in a batterer's education program designed to help end violent behavior, which may include referral to drug and alcohol counseling, and to pay the costs thereof if respondent has the means to do so, provided, however, that nothing contained herein shall be deemed to require payment of the costs of any such program by the petitioner, the state or any political subdivision thereof; or

§2. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to family offenses committed on or after such date.

4. Duration of term of probation and procedures for violations of probation in child support proceedings (FCA §§454, 456)

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

Along the continuum of child support sanctions, there must be a means of providing regular, in-person monitoring by someone in authority who can compel a change of behavior under threat of a more serious sanction and who may be able, at the same time, to provide services and rehabilitative assistance to the support obligor that will facilitate compliance with child support obligations. That vital in-person monitoring and provision of individualized assistance may best be provided by placing a support obligor on probation. However, while explicitly authorized in the Family Court Act, probation has proven to be an unworkable and rarely-utilized tool in Family Court child support cases. The Family Court Advisory and Rules Committee has identified statutory impediments to the effective use of probation in child support cases and is proposing a measure to address these problems.

First, in order to make probation less costly for local probation departments and fairer to the probationers, the proposal would impose a limit on the duration of probation more commensurate with probation in other contexts. Alone among probation provisions in both the Family Court Act and Criminal Procedure Law, Family Court Act §456 permits a child support obligor to be placed on probation for an extended period of time, that is, the entire duration of a child support or visitation order or order of protection. Since a child support order may last until the youngest child reaches the age of 21, this may mean more than two decades of probation – four times greater than the duration of probation for all but the most serious felonies. Cf. Penal Law §65(3). This disproportionate degree of supervision is beyond the capacity of most local probation departments to provide, particularly in times of fiscal constraint, and may explain the reluctance of probation departments to become involved in child support matters. The Committee's proposal, therefore, would impose the same time limit that exists for person in need of supervision (PINS) cases in Family Court – that is, not more than one year, a period that may be extended, after notice to the support obligor and an opportunity to be heard, for an additional year upon a finding of exceptional circumstances.

Second, Family Court Act §456 is entirely silent regarding procedures to be followed in the event of a violation of probation. All too often, the burden falls upon custodial parents to take time off from work to prepare, file and arrange service of violation petitions. Again comparable to other probation

violation provisions, the Committee's proposal would instead require the local probation department to file a verified probation violation petition and would provide an opportunity for the probationer and parties to be to be heard as prerequisites to revocation of probation in the event of a willful violation. The measure would further provide that the period of probation would be tolled as of the date of filing of the violation petition and that in the event the violation petition is not sustained, the tolling period would be credited to the period of probation. Providing a mechanism consistent with due process to bring alleged child support violators to the attention of the Family Court would benefit the families as well – taking the onus off of custodial parents to initiate and prosecute violation proceedings that should instead be handled by local probation departments.

Enactment of this measure would make probation a viable alternative for probation departments, would improve the collection of child support for the children in the State, would make the probation provisions fairer for support obligors and would greatly enhance the Family Court's capacity to respond effectively to the wide variety of child support cases before it.

Proposal

AN ACT to amend the family court act, in relation to probation in child support cases

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 454 of the family court act is amended to read as follows:

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

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

§456. Probation. (a) No person may be placed on probation under this article unless the court makes an order to that effect, either at the time of the making of an order of support or under section four hundred fifty-four. The order of probation may contain such conditions as the court may determine. The maximum period of probation may [continue so long as an order of support, order of protection or order of visitation applies to such person] not exceed one year. If the court finds, at the conclusion of the original period, upon notice and an opportunity to be heard, that exceptional circumstances require an additional year of probation, the court may continue probation for an additional year.

(b) [The] If the court [may at any time, where circumstances warrant it, revoke an order of] finds,

after a hearing, that a party who has been placed on probation [. Upon such revocation, the probationer shall be brought to court, which may, without further hearing,] in accordance with this section, has willfully violated any term or condition 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 may make any order [that might have been made at the time the order of probation was made] authorized by section four hundred fifty-four of this article. No such finding may be made unless a verified petition containing specific allegations constituting the violation is filed with the court and duly served upon the parties. The period of probation shall be deemed tolled as of the date of filing of the probation violation petition, but, in the event that the court does not find that the order of probation was willfully violated, the period of such interruption shall be credited to the period of probation.

§3. This act shall take effect immediately.

5. Modification of orders of child support in family court and matrimonial proceedings (FCA §§451, 461; DRL §236B(9)(b))

Examination of the New York State statutory framework for child support reveals layers of enactments, a patchwork of provisions that do not cohere into an integrated, internally-consistent whole. The standards applicable to modifications of child support orders are examples of contradictory statutory layers that lead to disparate and sometimes unfair results for both parents and, importantly, their children. The Family Court Advisory and Rules Committee is proposing a measure to lessen the disparity and make more uniform the provisions regarding modification in the Family Court Act and Domestic Relations Law.

The *Child Support Standards Act (CSSA)*, enacted in 1989, was designed to ensure that the children of New York are adequately supported and share fairly in the earnings and resources of their parents. The *CSSA* contains a formula-driven mechanism to accomplishes this purpose, at least at the time of the initial child support determination. In the early 1990's, pursuant to federal mandate, a "review and adjustment" procedure was added that required periodic adjustment of child support orders in cases involving families on public assistance or upon the request of custodial parents who had applied for child support collection and enforcement and/or paternity establishment services pursuant to section 111-g of the Social Services Law. Before the "review and adjustment" provisions were fully implemented, the federal *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* was enacted, which, *inter alia*, gave States the option of replacing the "review and adjustment" provisions with an automatic "cost of living adjustment" ("COLA"). *See* 42 U.S.C. §666(a)(10)(A) [Public Law 104-193] . With the passage of its welfare reform legislation in 1997, New York State availed itself of this option, again making it applicable to custodial parents on public assistance and others who have requested child support and/or paternity services. *See* Social Services Law §111-n [Laws of 1997, ch. 398]. Orders issued prior to 1989 were made subject to a one-time "review and adjustment," after which all child support orders in public assistance and, upon request, in child support and paternity services cases were made subject to the "cost of living adjustment" every two years. The statute contained a procedure for challenging a COLA, which, when invoked by either party, would result in either issuance of a whole new order of support under the *CSSA* standards or an order declining the adjustment. *See* Family Court Act §413-a(3)(b); Domestic Relations Law §240-c(3)(b); Social Services Law §111-n(5).

These "review and adjustment" and "COLA" provisions, enacted to comply with the requirements of Title IV-D of the federal *Social Security Act* [42 U.S.C..] for New York State's receipt of federal IV-D funding, were super-imposed upon a long-standing methodology for the modification of child support obligations, articulated in the Family Court Act and Domestic Relations Law and shaped by case law. A litigant not covered by these provisions is required to demonstrate an "unforeseen change in circumstances" as a prerequisite to a modification of a child support order – in essence, as a prerequisite to gaining access to the *CSSA* provisions if the original order had not been issued within those standards. *See* Matter of Boden *v.* Boden, 42 N.Y.2d 210, 213 (1977). In Matter of Brescia *v.* Fitts, 56 N.Y.2d 132, 139-40 (1982), the Court of Appeals further permitted modification based upon the child's right to adequate support. The recent COLA provisions contain the caveat that "[n]othing herein shall be deemed in any way to limit, restrict, expand or impair the rights of any party to file for a modification of a child support order as is otherwise provided by law." Family Court Act §413-a(4); Domestic Relations Law §240-c(4).

However, in reality, the provisions do just that – that is, litigants in public assistance and child support and paternity enforcement services cases may obtain a full review and a new *Child Support*

Standards Act order without the showing of a change in circumstances required for all other litigants. As the Court of Appeals held, in Tompkins County Support Collection Unit on behalf of Linda S. Chamberlin *v.* Boyd M. Chamberlin, 99 N.Y.2d 328 (2003), a challenge to a COLA brings up the whole child support order for review, not simply the COLA itself: "Family Court did not err in entering an order in accordance with the *CSSA* guidelines rather than merely determining whether or not the COLA amount should be applied." *Id.* at 337.

The Committee proposes to remedy this disparity by giving all litigants in child support matters the opportunity for periodic review of child support orders without requiring a showing of a change in circumstances. While the provisions authorizing modifications at any time that the requisite showing can be made would continue, all litigants would also have standing to apply for a modification every three years without making the showing required by the Boden and Brescia cases. Recognizing the need to honor the sanctity of agreements, however, the measure would exempt cases in which the parties have specifically opted out of the three-year modification provision in a written agreement or stipulation to a court order of child support.

This proposal would thus resolve the disparity between public and private child support cases in a clear and fair fashion. It would continue to allow either party to seek a modification at any time during the duration of the child support order, should a traditional change of circumstances occur. It would continue the COLA provisions for public assistance and child support enforcement cases, but would also allow children and their families in other cases to access the benefits of the *Child Support Standards Act* at least every three years. This change would further the goals of broadening the reach of the *CSSA* to provide adequate support for more children and would, at the same time, be entirely consistent with the federal child support mandates applicable to New York State.

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to modification of child support orders

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

Section 1. Section 451 of the family court act, as amended by chapter 533 of the laws of 1999, is amended by adding a new last paragraph to read as follows:

§451. Continuing jurisdiction.

Except as provided in article five-B of this act, the court has continuing jurisdiction over any support proceeding brought under this article until its judgment is completely satisfied and may modify, set aside or vacate any order issued in the course of the proceeding, provided, however, that the modification, set aside or vacatur shall not reduce or annul child support arrears accrued prior to the making of an application pursuant to this section. The court shall not reduce or annul any other arrears unless the defaulting party shows good cause for failure to make application for relief from the judgment or order

directing payment prior to the accrual of the arrears, in which case the facts and circumstances constituting such good cause shall be set forth in a written memorandum of decision. A modification may increase support payments [nunc pro tunc as of] retroactively to the date of the initial application for support based on newly discovered evidence. Any retroactive amount of support due shall be paid in one lump sum or periodic sums, as the court directs, taking into account any amount of support which has been paid. Upon an application to modify, set aside or vacate an order of support, no hearing shall be required unless such application shall be supported by affidavit and other evidentiary material sufficient to establish a prima facie case for the relief requested.

An application to modify an order of support and to establish a new order of support in accordance with the child support standards as set forth in section four hundred thirteen of this article may be made on the grounds of (i) newly discovered evidence, (ii) a change in circumstances as defined in paragraph b of subdivision nine of part B of section two hundred thirty-six of the domestic relations law, or (iii) the fact that more than three years have elapsed since the issuance of the order. Nothing contained in this section shall prevent the parties from entering into a written agreement or stipulation to a court order for child support that precludes any subsequent modification in the absence of newly discovered evidence or a change in circumstances and/or that provides that the supreme court shall retain exclusive jurisdiction to modify, set aside, vacate or enforce the order.

§2. Paragraph (ii) of subdivision (b) of section 461 of the family court act, as amended by chapter 28 of the laws of 1970, is amended to read as follows:

(ii) entertain an application to modify such order on the ground that changed circumstances or newly discovered evidence requires such modification or upon the ground that more than three years have elapsed since the date of the order in accordance with section four hundred fifty-one of this article, unless the order of the supreme court provides that the supreme court retains exclusive jurisdiction to enforce or modify the order.

§3. Paragraph b of subdivision 9 of part B of section 236 of the domestic relations law, as amended by chapter 354 of the laws of 1993, is amended to read as follows:

b. Upon application by either party, the court may annul or modify any prior order or judgment as to maintenance or child support, upon a showing of the recipient's inability to be self-supporting or a substantial change in circumstance or termination of child support awarded pursuant to section two hundred forty of this article, including financial hardship. Where, after the effective date of this part, a separation agreement remains in force no modification of a prior order or judgment incorporating the terms of said

agreement shall be made as to maintenance without a showing of extreme hardship on either party in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines. [Provided] The court may, however, [that no] annul or modify a prior order or judgment of child support in the absence of such a showing in any case in which more than three years have elapsed since the issuance of the order. Nothing contained in this section shall prevent the parties from entering into a written agreement or stipulation to a court order for child support that precludes any subsequent modification in the absence of a substantial change in circumstances. No modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of application to annul or modify any prior order or judgment as to child support. The court shall not reduce or annul any arrears of maintenance which have been reduced to final judgment pursuant to section two hundred forty-four of this chapter. No other arrears of maintenance which have accrued prior to the making of such application shall be subject to modification or annulment unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears and the facts and circumstances constituting good cause are set forth in a written memorandum of decision. [Such] A modification may increase maintenance or child support [nunc pro tunc as of] retroactively to the date of application based on newly discovered evidence. Any retroactive amount of maintenance, or child support due shall, except as provided for herein, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. Any retroactive amount of child support due shall be support arrears/past due support. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the court shall not direct the schedule of repayment of retroactive support. The provisions of this subdivision shall not apply to a separation agreement made prior to the effective date of this part.

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

6. 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 future streams 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 and in no way superseding the issuance of orders for periodic payments 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 would require the Court to 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 Assembly, do 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.

7. 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,* Title IV-D §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 $12, 569 in child support, since the difference between $0 and the self-support reserve ($12, 569 annually, the level in 2004) is $12, 569, 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* Callen *v.* Callen, 287 A.D.2d 818 (3rd Dept., 2001); In Re Rhianna R., 256 A.D.2d 1184 (4th Dept., 1998)[citing Matter of Cary (Mahady) *v.* Megrell, 219 A.D.2d 334 (3rd Dept., 1996), *lve. app. dismissed,* 88 N.Y.2d 1065 (1996)]; Dunbar *v.* Dunbar, 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.[36]

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 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 noncustodial 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 noncustodial 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 noncustodial 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 noncustodial

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[36] 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].

parent's income and the self- support reserve, whichever is greater, in addition to any amounts 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 noncustodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the noncustodial 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 noncustodial 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 noncustodial 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 any amounts 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 noncustodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the noncustodial 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.

8. 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 are 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 support magistrate. 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 support magistrate 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 support magistrate 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 support magistrate 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, in addition to awarding damages, 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.

9. 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. 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 –that is, if out-of-wedlock children are not foreclosed from seeking remedies available to children born of marriages, including actions to modify child support. Most recently, the Family Court, Orange County, in Matter of Ilene P.V. *v.* Felix V., 3 Misc.3d 759 (Fam. Ct., Orange Co., 2004), declined to apply section 516 to foreclose a subsequent action to modify. Invoking the holding in Clara C., the Court held that, since no inquiry had been made at the time of entry of the 516 agreement regarding the adequacy of support for the child, the preclusive effect of section 516 in barring other remedies would not be imposed.

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 in 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.

10. 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* Besharov, Practice Commentaries, McKinney's Cons. Laws of NY, Book 29A, Family Court Act §1034, p. 76. 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.[37]

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

[37] One Family Court 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).

the petition."[38]

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.[39] 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

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[38] 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." Besharov, Practice Commentaries, McKinney's Cons. Laws of NY, Book 29A, Family Court Act §254, p. 283. *See also, Lawyer's Code of Professional Responsibility*, Ethical Consideration 7-14; *Standards of Practice for lawyers Representing Child Welfare Agencies* (American Bar Assoc.; Aug., 2004). 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).

[39] 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.

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.

§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.

11. 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.

12. 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 an enormous and rapidly growing database of sensitive information; according to the Office of Court Administration, as of December 16, 2005, there were 1, 115, 905 orders of protection 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].[40] Under the revised proposal, knowing and willful disclosure of information to individuals not authorized to receive it would subject violators to prosecution for a class A misdemeanor, the same criminal penalty that applies to the unauthorized willful disclosure of information from the statewide child abuse registry, pursuant to subdivision 12 of section 422 of the Social Services Law, and similar to that which applies to the willful 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 would 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 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:

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[40] Notwithstanding the revision, the Committee's original 1995 version was again passed by the Legislature and vetoed by the Governor in 1996 [A 9809, Veto Message #11]. No action has been taken on this matter by the Legislature since 1996.

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

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

13. Compensation of guardians *ad litem* appointed for children and adults in civil proceedings out of public funds (CPLR §1204)

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

There are a variety of situations in which children and adults may be deemed by judges to require the protection afforded by a guardian *ad litem*. For example, in Family Court the respondent in a child protective proceeding (the parent of the child who is allegedly mistreated) may be under 18 years of age. 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. Additionally, guardians *ad litem* are sometimes appointed in matrimonial proceedings in Supreme Court in lieu of a law guardian.

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). *See also* Matter of Baby Boy O., 298 A.D.2d 677 (3rd Dept., 2002)(County Commissioner of Social Services could not be ordered to pay for guardian *ad litem* as he was not a party). In Family Court proceedings, the parties are often indigent and thus unable to remunerate the guardian *ad litem*.

This measure authorizes payment for the services of the guardian *ad litem* out of public funds, as a state charge, where the guardian served on behalf of a child, and as a county charge, if the guardian served on behalf of an adult, consistent with the present statutory sources of funding for assignment of law guardians and counsel for indigent adults. By virtue of section 165 of the Family Court Act, section 1204 of the CPLR, as amended, would apply to Family Court proceedings. In addition, if the proceeding is one in which there is a subsequent monetary recovery, the funds 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 appropriated to the judiciary in the same amounts established by subdivision three of section thirty-five of the judiciary law, if the guardian ad litem has been appointed for an infant, and out of county funds in the same amounts established by section seven hundred twenty-two-b of the county law, if appointed for an adult. No order allowing compensation shall be made except on an affidavit of the guardian or [his] the guardian's attorney showing the services rendered.

§2. This act shall take effect immediately.

14. 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[41] 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 willful. 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 willful 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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[41] According to New York State Office of Court Administration figures, 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 willful.

(b) If the court determines that such violation was willful, 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 for 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 willful, 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 willful.

2. If the court determines that such violation was willful, 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 for 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 willful, the court may:

a. require any visitation to be supervised by a person or agency designated by the court;

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.

IV. Future Matters:

Under the leadership of the Committee's Co-chairs, Hon. Sara Schechter, Judge of the Family Court, New York County, and Peter Passidomo, Chief Family Court Magistrate, the Family Court Advisory and Rules Committee had a year of unusual accomplishment in 2005, first in its contributions to fostering the collaboration essential to the enactment of comprehensive permanency legislation and then to a further, intensive collaboration in order to implement the new law. As noted, following its successful "Child Welfare Roundtable" at the New York State Judicial Institute in April, 2004, the Committee convened a second roundtable in March, 2005, at the New York State Bar Association in Albany, New York, with Chief Judge Kaye presiding and with a broad spectrum of judges, child welfare professionals, legislative and executive representatives and advocates participating. Both roundtables were enthusiastically received and the Committee is, therefore, planning to follow it with similar roundtables on other topics of concern, such as the educational needs of children in out-of-home care and the unmet need for supervised visitation programs statewide.

In addition to reviewing legislative and other proposals, the Committee's five subcommittees are expected to be actively engaged in the following projects, among others, during the coming year:

• **Child Welfare**: assisting in the implementation of the permanency legislation [Laws of 2005, ch. 3]; planning for a roundtable on the educational needs of children in out-of-home care; addressing prevalent problems in obtaining timely birth certificates and social security cards for adopted children; continued advocacy of legislation prohibiting dual representation of adoptive parents and child protective agencies, establishing subsidized guardianship and clarifying questions that have arisen in the permanency legislation; and further development of proposals to incorporate elements of "Model Court" initiatives into Family Court practice and to promote "one family, one judge" system of processing.

• **Juvenile Justice:** planning for the education roundtable and development of related proposals, with particular attention to adolescents in the juvenile justice system; continued review of the implementation of the *Adoption and Safe Families Act* with respect to juvenile delinquency and status offense cases, including issues regarding parental involvement and parental representation; exploration of alternative approaches to address problems of status offenders, with particular focus upon chronic runaways and upon the impact of the recent PINS reforms; and examination of the utilization and availability of probation, diversion and placement resources, and, in particular, alternatives to placement and detention, such as the use of electronic monitoring in juvenile delinquency cases.

• **Child Support and Paternity:** finalization of a uniform form for motions to vacate default orders; consideration of an intra-state analogue to the *Uniform Interstate Family Support Act* [Family Court Act Article 5-B]; development of a court rule 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 further development of proposals regarding remedies to enforce orders against self-employed obligors.

• **Custody, Visitation and Domestic Violence:** addressing the recommendations of the Matrimonial Commission, which are expected in early 2006; development of possible roundtable or other initiatives regarding recommended practices and unmet needs in the area of supervised visitation and

visitation exchanges; review of model parenting plans, including the one recently-issued by the American Academy of Matrimonial Lawyers; development of a uniform form for appointment of forensic examiners; continued review of implementation of the *Uniform Child Custody Jurisdiction and Enforcement Act* [Domestic Relations Law Article 5-A; Laws of 2001, ch. 386] in order to identify further needs for court rules, forms and training; consideration of an intra-state analogue to the *UCCJEA*; and continued development of proposals to enhance the courts' effectiveness in responding to domestic violence.

• **Forms and Technology:** continuation of efforts to simplify current uniform forms to enhance access to justice for self-represented litigants and to streamline the comprehensive forms to implement the *Adoption and Safe Families Act* and permanency legislation; 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 the joint resolution of the national Conference of Chief Justices and Conference of State Court Administrators.[42] 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 creative means to ensure that Family Courts receive necessary information on a timely basis, convene hearings promptly that comport with due process and 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 the rapidly-expanding reform initiatives statewide.[43]

The Committee, which includes experienced judges, support magistrates, Family Court clerks and

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[42] 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).

[43] *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).

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 2005, including landmark legislation, comprehensive rules revisions and the promulgation of 125 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.nycourts.gov). In 2006, 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 2006 to improving the functioning of the Family Court and the quality of justice it delivers.

Respectfully submitted,

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