Report of the **Family Court Advisory** and **Rules Committee**

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

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I. Introduction and Executive Summary

The Family Court Advisory and Rules Committee is one of the standing advisory committees established by the Chief Administrative Judge of the Courts pursuant to section 212(1)(q) of the Judiciary Law and section 212(b) of the Family Court Act. The Committee annually recommends to the Chief Administrative Judge proposals in the areas of Family Court procedure and family law that may be incorporated into the Chief Administrative Judge's legislative program. These recommendations are based on the Committee's own studies, examination of decisional law, and suggestions received from bench and bar. In addition to recommending its own annual legislative program, the Committee reviews and comments on other pending legislative measures concerning Family Court and family law.

A. Legislative Agenda: New and Modified Legislative Proposals

The Committee is proposing a comprehensive legislative agenda, including 11 new and revised proposals and 19 proposals previously recommended, including the proposals submitted in 2022 but not introduced. These proposals address all areas of Family Court practice, thereby providing needed clarification and enhancing the Unified Court System's ability to handle these cases effectively.

The new and revised proposals include the following:

1. Requirements for independent "Qualified Individuals" to evaluate proposed "Qualified Residential Treatment Program" placements of children under the *Family First Prevention Services Act*: The two-step process for approval of placements of children in group settings that is embedded in the Federal *Family First Prevention Services Act of* 2018 (FFPSA) [Public Law 115-123], as implemented by chapter 56, Part L, of the Laws of 2021 – that is, an evaluation within 30 days by a "Qualified Individual" (QI) to be followed by approval or denial within 60 days by a Family Court judge - is intended to reduce such placements and instead facilitate retention of children in their own homes through provision of preventive services or, where necessary, placements in family settings, in particular, with relatives where possible. With the aim of interrupting "business as usual," – that is, the frequent placement of children in group settings – Federal law, and now State law, endeavored to ensure that this two-step process would result in clinical recommendations and judicial determinations that would be independent and not tethered to prior practices. However, utilizing a waiver procedure contained in the Federal law, New York has been permitted to utilize employees of local social services districts and placement agencies as QI's, thereby jettisoning the independence and objectivity so necessary to fulfillment of the legislative goal. The Family Court Advisory and Rules Committee is proposing a measure to amend Social Services Law §409-h to provide that, apart from the exercise of its QI functions, QI's would not be permitted to be employees of local departments of social services or placement agencies and they would need to "maintain complete independence and objectivity" with respect to their placement recommendations.

2. Dispositional options for destitute minors where one or both parents are deceased: While Article 10-C of the Family Court Act provides a valuable vehicle for addressing the

immediate needs of destitute children, it fails to address the long-term needs of those children whose parents or caretakers have died—an increasing problem as a result of the Covid-19 pandemic. Only two dispositional alternatives are included in Family Court Act §1095(d), that is, placement of children temporarily in foster care with a local commissioner of social services (or in New York City, the Administration for Children's Services), or custody or guardianship with a relative or other suitable person. For those orphaned children who lack any relatives or suitable individuals with whom guardianship or custody may be ordered and for whom adoption is their permanency goal, the process to achieve that goal is unnecessarily cumbersome. Current law requires that in such cases, after the destitute child placement is ordered under Family Court Act §1095(d), a termination of parental rights proceeding must be filed and prosecuted under Social Services Law §384-b(4)(a). While uncontested, this type of termination of parental rights proceeding is time-consuming and burdensome for everyone involved. The Family Court Advisory and Rules Committee, therefore, is proposing a measure to obviate the need for the second proceeding by adding a third dispositional option, that is, to allow the Family Court to free the child for adoption by granting guardianship and custody to the local commissioner of social services so that the commissioner would be able to consent to the child's adoption under Domestic Relations Law §111(1)(f).

3. Eligibility for children surrendered from foster care for the Kinship Guardianship Assistance Program (KinGAP): The enactment of the subsidized kinship guardianship assistance program ("KinGAP") in 2010 marked a milestone in adding a valuable permanency alternative to the menu of options available to expedite the exodus of children from foster care into permanent families. *See* L.2010, c. 58, part F §4. In applying the KinGAP statute, however, the Family Court Advisory and Rules Committee has identified a gap in the definition of "child" – probably an inadvertent omission -- that has proven to be an impediment to utilization of the program for one narrow category of children. The Family Court Advisory and Rules Committee, therefore, is proposing a measure to amend subdivision one of section 458-a of the Social Services Law to add a child surrendered from foster care under Social Services Law §383-c to the definition of a child who would be eligible for inclusion in the KinGAP program if all of the other eligibility criteria are met. Significantly, the KinGAP definition already includes children whose parental rights were surrendered when they were not in foster care under Social Services Law §384, as well as children voluntarily placed in foster care under Social Services Law §§358-a and 384-a and children for whom parental rights were terminated under Social Services Law §384-b. Since children surrendered directly from foster care under Social Services Law §383-c may also be able to meet all of the KinGAP eligibility criteria, there is no reason that they should be excluded from, and not enjoy the benefits of, the KinGAP permanency option.

4. Eligibility for assigned counsel in paternity and parentage proceedings: While most of the provisions of section 262 of the Family Court Act delineate case categories in which both parties have a right to counsel, including appointed counsel in cases where they cannot afford to pay, the reference to Article 5 is an outlier in affording the right to assigned counsel only to the respondent in a paternity proceeding, regardless of whether the respondent is an alleged father or a birth parent defending an affirmative action by an alleged father. It is anomalous not to provide a right to counsel for both parties in this type of litigation, as both parties have fundamental interests

and rights regarding determinations of parentage with respect to children. Moreover, Family Court Act §262 has not been amended to incorporate parentage enactments, which involve litigants who present equally compelling grounds for inclusion in the right to counsel. The Family Court Advisory and Rules Committee, therefore, is proposing an amendment to Family Court Act §262 to include three important omitted categories, namely, any person, not simply a respondent, in a paternity proceeding under Article 5, as well as any person involved in a proceeding determining parentage under the *Uniform Interstate Family Support Act* (UIFSA, Article 5-B) and under the recently enacted *Child-Parent Security Act* (CPSA, Article 5-C).

5. Questioning of parties regarding existence and location of firearms in orders of protection cases in Family Court: Recognizing the grave risk of lethality in domestic violence cases where parties have access to firearms, Criminal Procedure Law §530.14 and Family Court Act §842-a were amended by chapter 577 of the laws of 2022 in order to provide judges with valuable information on "the existence and location of any firearm, rifle or shotgun owned or possessed" by the defendant or respondent. However, the amendments to Family Court Act §842-a that require Family Court judges to directly question family offense petitioners "outside of the presence of the respondent" would force the judges to violate the respondents' constitutional rights to due process, as well as the dictates of judicial ethics. The Family Court Advisory and Rules Committee, therefore, is submitting a chapter amendment to chapter 577 that would simply delete the phrase from the opening paragraphs of subdivisions one, two and three of section 842-a of the Family Court Act. While the initial request for a temporary order of protection may be made on an ex parte basis, once the respondent has been served and appears in court, the Family Court may not question the petitioner outside the respondent's presence without both violating his or her fundamental due process rights and the Court's obligations under subdivision six of Canon 3 of the *Code of Judicial Conduct*.

6. Deletion of the notice to the putative father registry as a criterion for standing by a putative parent to consent to an adoption: Enactment of chapter 828 of the laws of 2022 reflected the laudable goal of enhancing birth parents' rights to consent to adoptions, but contains one provision in which furtherance of this goal comes at the expense of the child's right to timely permanency. The Committee is thus recommending an amendment to section 111 of the Domestic Relations Law to require that, in order to confer standing to consent to an adoption, alleged parents must do more than simply file "an unrevoked notice of intent to claim parentage," *i.e.,* a notice with the putative father registry, established under section 372-c of the Social Services Law, of an intention sometime to pursue a parentage determination. Chapter 828 allows such a notice to be filed at any point, even on the eve of the filing of a termination of parental rights or adoption proceeding, and contains no requirement of any follow-up to the notice within any set time-frame. The provision permits efforts to achieve permanency and stability for a child in State care to come to a complete halt based simply upon an expression of intent by a putative parent that may never be realized and that may even be contradicted by the putative parent's own actions, even while not revoking the putative father registry notice. The Committee's amendment would delete the

provision allowing permanency efforts to be derailed based upon such a speculative expression of intent.

7. Requirements for forensic evaluators in custody and visitation proceedings to receive training in domestic violence and child maltreatment: While requiring forensic evaluators to receive initial and ongoing training in domestic violence and child abuse will undoubtedly improve the ability of the Supreme and Family Courts to render effective decisions regarding the best interests, including safety, of the children before them, chapter 740 of the laws of 2022, as well as the chapter amendment (S 860) that has passed both Houses, will overly restrict the judges' essential discretion in custody and visitation cases to appoint the most appropriate expert in individual cases. The Family Court Advisory and Rules Committee is submitting a measure that would permit appointment of an expert licensed outside New York State, where good cause is stated on the record and where the expert received comparable training in another jurisdiction. Many cases involve parties living in different states, often brought under the *Uniform Child Custody Jurisdiction and Enforcement Act* [D.R.L. §75 *et seq.*], or children with special needs that require evaluation by a specific expert outside New York State, where it may be necessary to appoint an evaluator from another state. Additionally, the measure would lodge responsibility for providing certifications of training in family violence in the agency that licenses forensic evaluators, that is, the New York State Education Department, in consultation with the New York State Office for the Prevention of Domestic Violence. Sections 6524, 7603, 7607, 7704 and 7710 of the Education Law would, therefore, be amended to prescribe both initial and ongoing training requirements for licensed psychiatrists, psychologists and social workers.

8. Time-limit for the filing notices of appeal in Family Court proceedings and objections to Support Magistrate determinations in Family Court child support, paternity and parentage proceedings: In order to provide continued access to justice during the recent Covid-19 public health emergency, the Unified Court System, including the Family Courts, rapidly escalated its use of technology for all aspects of proceedings. Pleadings, exhibits and other documents have been transmitted to the Family Courts electronically, in many cases for the first time, and the courts, in turn, have transmitted their orders electronically to litigants and attorneys. The New York City Family Court, in fact, has initiated a pilot program for the use of the Court System's Electronic Filing System. Electronic transmission of orders by the courts, however, has led to a serious gap in the law as to the applicable deadlines for filing notices of appeal in all categories of Family Court proceedings under Family Court Act §1113 and for filing objections to Support Magistrate determinations in support, parentage and paternity proceedings under Family Court Act §439(e). Recognizing the importance of giving clear guidance regarding applicable deadlines in Family Court proceedings, especially in light of the large percentage of litigants without attorneys, the Committee is proposing a measure providing that where orders are transmitted to litigants electronically, they would have up to thirty-five days from the date of transmission in which to file notices of appeal or objections to orders, as applicable.

9. Expiration dates in orders of protection and duration of temporary orders of protection issued prior to the filing of petitions in juvenile delinquency proceedings in Family Court:

Although it is well established that all orders of protection – civil and criminal, temporary and final – must contain expiration dates in order to be enforceable through contempt, Family Court Act §154-c only articulates the mandate regarding orders of protection in support, paternity, custody and family offense cases. The Committee's measure would thus add orders in juvenile delinquency, Persons in Need of Supervision, child abuse and neglect and permanency planning hearing cases to the requirement of "plainly" stating an expiration date. Additionally, the measure would amend Family Court Act §304.2 to ensure that temporary orders of protection issued prior to the filing of juvenile delinquency petitions would be strictly time-limited and subject to court review. A temporary order in such a case may last for an initial period of up to 30 days and may be extended by the Court for good cause, upon notice to the juvenile, for a period of up to 30 days or for a period coincident with the period during which local probation departments are attempting to adjust or divert the juvenile's case. One additional extension of up to 30 days would be permitted upon a judicial finding of a compelling reason, which must include a determination whether the presentment agency had made diligent efforts to file a petition promptly and the reasons for any delay. Both the good cause and compelling basis extensions would have to be on notice to the juvenile, who would have a right to counsel under Family Court Act §249 and a right to be heard.

10. Issuance of warrants for seizures of firearms in domestic violence cases in Family Court: The amendment to Family Court Act §842, enacted in 2020, gave Family Courts authority, for the first time, to issue search warrants for law enforcement officers to seize weapons from accused offenders in family offense and other proceedings involving orders of protection. [L. 2020, c. 55, Part M]. In 2022, the legislation was expanded to make seizure orders mandatory in cases where a previous voluntary surrender order was willfully violated, retaining the court's discretion to issue such orders "for other good cause shown." [L. 2022, c. 576]. In developing protocols for implementation of these amendments, however, Family Courts have encountered three issues that require clarification. The Family Court Advisory and Rules Committee, therefore, is submitting a measure to clarify three points:

- Who can apply for a search warrant: The general incorporation by reference into Family Court Act §842-a of Article 690 of the Criminal Procedure Law has raised the question of whether the limitation of standing contained in Criminal Procedure Law §§690.05(1) and 690.35(1) to district attorneys, law enforcement and "other public servants acting in the course of his or her duties" applies to applications in Family Court. Since most domestic violence proceedings in Family Court do not involve any of these individuals, the Committee's proposal would thus clarify that a petitioner may make the application for the search warrant directly, without involvement by law enforcement, prosecutors or other public servants.

- Who can hear an application for a search warrant: Family Court Act §842-a clearly expands the authorization in Criminal Procedure Law §690.35 for local criminal courts to entertain search warrant applications in order to allow Family Courts to entertain the applications. However, Judiciary Law §§212(2)(n) and (o), the authorizations for court attorney referees and judicial hearing officers to hear applications for temporary orders of protection and orders of protection issued on default, were not amended. Since temporary orders of protection are often granted by court attorney referees and judicial hearing officers, the measure clarifies that the authorization in the Judiciary Law §§212(2)(n) and (o) for court attorney referees and judicial hearing officers to

hear and determine issues regarding orders of protection also extends to issues regarding firearms seizure orders.

- Jurisdiction of local criminal court to act when family courts are not in session: A "substantial risk" of use of a firearm to injure, maim or murder a victim of domestic violence may arise at any hour and often comes to light during hours when Family Courts are not in session, including when temporary orders of protection are first requested. Both Family Court Act §154-d and Criminal Procedure Law §530.12 provide specific authority for local criminal courts to issue and modify temporary orders of protection when Family Courts are closed, but do not address whether that authority extends to the issuance of firearms seizure orders. The Committee's measure, therefore, would amend both Family Court Act §154-d and Criminal Procedure Law §530.12 to clarify that local criminal courts may issue firearms seizure orders when acting for Family Courts during hours when those courts are not in session.

11. Procedural requirements for parentage proceedings regarding children conceived through assisted reproduction or surrogacy agreements: Like many comprehensive legislative changes, the landmark *Child-Parent Security* Act on gestational surrogacy and parentage, enacted in conjunction with the New York State budget in 2020, contains a few minor drafting errors, internal inconsistencies and gaps. [L. 2020, c. 56, Part L]. Together with attorneys who had been involved in drafting the CPSA, the Family Court Advisory and Rules Committee is submitting a proposal to address these issues. Highlights of the measure include the following:

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

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

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

- Where the parentage judgment predated the birth, Family Court Act §581-202(g) would require petitioners to provide notification to the court of the birth of child so that an amended parentage order can be issued. Additionally, a typographical error would be corrected to change a reference to §581-202(e) to §581-202(f).

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

- In order to forestall any future challenges to parentage determinations in surrogacy contract cases, Family Court Act § 581-203(b) would be amended to include as necessary parties the person acting as surrogate; her spouse, if any; donors for whom evidence of donative intent is lacking, if any; and all intended parents.

- To reconcile the inconsistency in residency requirements between sections 581-203(c)(1) and 581-402, the measure would amend section 581-402 to provide that, in cases in which a person acting as surrogate has not been a New York resident at least one intended parent or the person acting as a surrogate in a surrogacy arrangement must have been a New York resident for at least six months prior to the execution of the surrogacy agreement..

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

- To ensure that the confidentiality protections of Family Court Act §581-205 would not be defeated by public disclosure of the names of the parties and child in documents in the public domain, the section would be amended, notwithstanding any other provision of law, to prohibit the County Clerk, as well as the Clerks of Supreme, Family and Surrogate's Courts, from displaying full names in the captions of documents available to the public.

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

- To address the ambiguity of the language in §581-403(a) and to add needed formality, the measure would amend the section to require that signatures to a surrogacy contract be either notarized or witnessed by two non-parties.

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

B. <u>Legislative Agenda: Previously Endorsed Measures</u>

The Committee is recommending re-submission of the following 19 proposals:

1. <u>Expungement of records in Persons in Need of Supervision proceedings</u>: Passage of the juvenile delinquency statute over three decades ago ironically left youth charged as Persons in Need of Supervision (PINS) with fewer protections than either their juvenile delinquent or adult counterparts. This measure would remedy one of the most glaring disparities by providing sealing and expunction provisions for PINS cases that are comparable to Family Court Act §§375.1 - 375.3 and Criminal Procedure Law §160.50. The measure would amend Family Court Act §783 to provide that court records in actions terminated favorably to the accused -- that is, cases that had been diverted (addressed without the filing of a petition), withdrawn or dismissed -- would automatically be expunged and, in cases involving a PINS adjudication, the juvenile would be permitted to make a motion for expungement of the record in the interests of justice. In light of the amendment to Criminal Procedure Law §160.50(3) in chapter 131 of the Laws of 2019, providing that convictions for violation-level marijuana possession under Penal Law §221.05 are deemed to be terminations of actions in favor of the accused, PINS cases based upon that ground would be subject to mandatory expungement following the conclusion of any disposition or period of

extension. Likewise, since the Federal *Trafficking Victims Protection Act* defines "severe forms of trafficking in persons," *inter alia*, as "sex trafficking in which ...the person induced to perform such act has not attained 18 years of age,"[1] the measure would require expungement at the conclusion of any disposition or extension based upon a finding for a prostitution offense under Penal Law §230.00. Motions to expunge records in the interests of justice would be able to be made at any time following the conclusion of a disposition period and, if not expunged sooner, all PINS records would be expunged once the youth reaches the age of 21. As in Family Court Act §375.3, the Family Court would retain its inherent authority to expunge its records. Finally, recognizing that PINS behavior consists of conduct that would not be criminal if committed by adults, sections 783 and 784 of the Family Court Act would be amended to preclude use of PINS records in other courts.

2. Discovery in juvenile delinquency proceedings in Family Court: As recognized by the Appellate Division, First Department, in Matter of Jayson C., 200 A.D.3d 447 (1st Dept., 2021), the legislation expanding and expediting discovery in criminal cases, enacted as part of the 2019 budget [L. 2019, c. 59, part JJJ] and revised in 2020 [L. 2020, c. 56, part HHH], failed to address a significant segment of the justice system, namely, young people prosecuted as juvenile delinquents in Family Court, including the 16- and 17-year old juveniles accused of misdemeanors and non-violent felonies whose cases are either initiated in or removed to Family Court under the recent raise-the-age law [L. 2017, c. 59, part www]. Subdivision one of section 303.1 of the Family Court Act specifically provides that "[t]he provisions of the criminal procedure law shall not apply to proceedings under this [juvenile delinquency] article unless the applicability of such provisions are specifically prescribed by this [Family Court] act." Thus, without either an incorporation of the new law by reference or specific enactment in the Family Court Act, the new Article 245 of the Criminal Procedure Law, with its attendant disclosure obligations for both the defense and prosecution, has no applicability in juvenile delinquency proceedings. Those proceedings remain governed by the Family Court Act version of the now-obsolete Article 240 of the Criminal Procedure Law. The Family Court Advisory and Rules Committee has developed a proposal to address this gap by adapting the new Article 245 of the CPL into Article 3 of the Family Court Act. In addition to substituting Family Court terminology, because juvenile delinquency cases proceed far quicker than criminal cases, the adaptation chiefly requires shortening several of the time-frames.

3. Equalization of the criteria for Family Court transfers and sentencing of adolescent and juvenile offenders in the youth parts of superior courts: The Legislature's enactment of the ground-breaking "raise the age" law in 2017 left the juvenile offender law, enacted in 1978, requiring the adult prosecution of 13-, 14- and 15-year old youth for enumerated felonies, virtually intact, except for the incorporation of such cases into the jurisdiction of the Youth Parts in Supreme and County

[1] 22 U.S.C. §7102(11)(A).

Courts. Ironically, however, in not amending the juvenile offender law, the current statute affords greater protections to adolescent offenders (16- and 17-year old youth) than for the younger children who fall into the juvenile offender category, even when they are charged with the very same felony crimes. The Family Court Advisory and Rules Committee is submitting a measure to remedy these disparities with respect to the criteria for removal of juvenile offender cases from the Youth Part to Family Court at all stages of the proceedings, including on the recommendation of a grand jury, at the felony complaint stage or following a plea or verdict. With respect to sentencing of adolescent and juvenile offender cases that remain in the Youth Part, the measure would equalize the sentencing provisions for both categories of offenders so that their ages are afforded appropriate consideration – allowing for both categories to have determinate, indeterminate, probation, conditional and unconditional discharge, Youthful Offender or incarceration sentences of equal duration imposed.

4. Notice to parents of the consequences of findings of child abuse and neglect in Family Court: Effective January 1, 2022, a comprehensive reform of the State Central Registry of Child Abuse and Maltreatment ("SCR") [L. 2020, c.56, Part R], that, *inter alia*, amends Social Services Law §424-a(1)(e)(iv) to provide that a report of child neglect deemed to be "indicated" (supported by a preponderance of evidence) is automatically sealed from disclosure to potential employers and other licensing and provider agencies performing registry checks if it is more than eight years old, as it is deemed to be neither "relevant" nor "reasonably related" to an inquiry regarding whether the subject of the report should be permitted to have contact with children. Left untouched by the new statute, however, is a provision of the Family Court Act requiring that, when a finding of child abuse or neglect is made, whether by verdict after a fact-finding hearing or by admission, the respondent parent must be given notice of the consequences of the finding and, specifically, the consequences of retention of the report on the SCR that gave rise to the finding. The Family Court Advisory and Rules Committee, therefore, is proposing a measure to correct the wording of Family Court Act §1051(f)(iii) to conform to the new statute, that is, to indicate that a report of child neglect will be legally sealed as against prospective employers and licensing and authorized agencies once eight years has elapsed since it was made.

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

6. Determining parentage in Family Court proceedings after an acknowledgment of parentage has been executed: Section 516-a of the Family Court Act provides for the recognition of signatories to acknowledgments of parentage (AOPs) executed pursuant to section 111-k of the Social Services Law as legal parents and delineates procedures for vacating AOP's. Its limitation

that only the signatories to an AOP have standing to petition for vacatur has led to confusion about whether a non-signatory to the AOP could ever seek a determination of legal parentage. Since AOP's are generally executed in hospitals within days of a child's birth, even a non-signatory petitioner filing right away in Family Court may find that a legal parent in addition to the birth mother already exists. This measure would amend the Family Court Act to clarify that a non-signatory to an AOP who comes forward alleging parentage has standing to file a petition notwithstanding the existence of an AOP signed by another individual. In such a case, the signatory to the AOP is a necessary party and would have to be named as a respondent. If appropriate, the Family Court would be permitted to order the signatory to submit to DNA testing in addition to the petitioner, birth mother and child. Finally, the court would be required to issue an order vacating the AOP where a non-signatory has been adjudged to be a legal parent, even in the absence of a petition filed by a signatory.

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

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

8. Adjournments in contemplation of dismissal and suspended judgments in child protective proceedings: Long-standing uncertainty regarding the consequences of adjournments in contemplation of dismissal and suspended judgments in child protective proceedings has hindered the ability of the Family Courts to utilize these important mechanisms for resolving child protective cases without the need for more drastic alternatives, such as out-of-home foster care placements. The Family Court Advisory and Rules Committee is, therefore, submitting a proposal to clarify and fill gaps in the statutory framework with respect to both of these options. The measure would make clear that an adjournment in contemplation of dismissal may be ordered either before the entry of a fact-finding order or after fact-finding but before the entry of a final disposition. While the former requires the consent of the petitioner-child protective agency and child's attorney, the latter does not, except that the agency and child's attorney would have a right to be heard. Restoration of the proceeding to the Family Court calendar following a finding of a violation of a pre-fact-finding adjournment would restore the matter to the pre-fact-finding stage, while violation of an adjournment ordered after fact-finding but before disposition would restore the case to the dispositional stage. During the period both of an adjournment in contemplation of dismissal and of a suspended judgment, the child would not be permitted to be placed, except on a temporary basis under Family Court Act §1024 or 1027.

Additionally, the measure would amend Family Court Act §1053 to require that orders suspending judgment delineate the duration, terms and conditions and provide a warning in conspicuous print that failure to comply may lead to its revocation and to issuance of any other dispositional order that might have been made at the time the judgment was suspended. A copy of the order must be furnished to the respondent. Significantly, in contrast to an adjournment in contemplation of dismissal, once a parent has successfully completed the period of a suspended judgment, the underlying order of fact-finding would not automatically be vacated; nor would the report on the Statewide Central Register of Child Abuse and Maltreatment automatically be sealed or expunged. Rather, the parent could apply to the Family Court, pursuant to Family Court Act §1061, for an order vacating the order of fact-finding and dismissing the proceeding in accordance with subdivision (c) of section 1051 of the Family Court Act on the ground that the aid of the Court is no longer required and that the dismissal would be in the children's best interests. A suspended judgment may thus be an appropriate disposition in cases in which the Court determines that a full dismissal of the proceedings, including vacatur of the fact-finding, should not be automatic.

9. Adjournments in contemplation of dismissal in family offense proceedings in Family Court: In order to respond appropriately to civil cases of domestic violence, the Family Court requires a comprehensive menu of pre-dispositional and dispositional options. The Family Court Advisory and Rules Committee is thus submitting a proposal to fill a significant gap in the statutory framework governing those options and to remedy a disparity between the treatment of family offense cases in family and criminal courts. The Committee's measure would add a new section 829 to the Family Court Act to authorize adjournments in contemplation of dismissal ("ACD's") in Article 8 (family offense) proceedings, both before or upon a finding that a family offense has occurred, and would amend section 841 to add a new subdivision (f) authorizing an ACD as a dispositional option. The ACD would require the consent of both the respondent and

petitioner, as well as the approval of the Family Court, both as to the ordering of the ACD and as to any conditions. If an attorney for the child has been appointed, the position of the attorney must be considered. A temporary order of protection may be issued under Family Court Act §828 in conjunction with the ACD and compliance with the order would be required as one of the conditions of the ACD. Similar to ACD's in criminal family offense cases under Criminal Procedure Law §170.55(2), an ACD ordered under Family Court Act §828 may last for up to one year. One extension of up to one year may be ordered, again requiring consent of the parties, approval of the Court and, if an attorney for the child has been appointed, consideration of the position of the attorney. Upon successful completion of the ACD period or the extension, the petition would automatically be dismissed in furtherance of justice. Finally, the measure delineates procedures for restoring matters to the Family Court calendar following determinations of violations of ACD's.

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

11. Stipulations and agreements in child support proceedings: The Committee is submitting a measure to redress the failure of Family Court Act §413(h) and Domestic Relations Law §240(1b)(h) to address the consequences of violations of the *Child Support Standards Act* (*CSSA*) in support agreements and stipulations. The proposal would provide that if an agreement or stipulation fails to comply with any of the *CSSA* requirements, the non-compliant portion must be deemed void as of the earlier of the date one of the parties alleged the noncompliance in a pleading or motion or the date the Court made a finding of noncompliance. Further, the proposal requires that upon a finding of noncompliance, the Court must hold a hearing to determine an appropriate amount of child support as of the earlier of the date the noncompliance had been asserted in a

pleading or a motion or the date of the Court's finding of noncompliance. The proposal would preclude noncompliance with the *CSSA* from being raised as a defense to non-payment of child support in violation of an agreement or stipulation for a period prior to the assertion of noncompliance in a motion or pleading. Recognizing that there are instances when child support provisions that do not comply with the *CSSA* are so intertwined with a non-child support provision that voiding the child support provisions would also result in the inappropriate invalidation of non-child support provisions, the proposal provides that if the Family Court determines that there are intertwined provisions over which it has no jurisdiction, *e.g.*, equitable distribution, it must dismiss the petition in order to allow the parties to return to Supreme Court. Finally, curing the problems noted, *inter alia*, by the Supreme Court, Appellate Divisions, First and Second Departments in Georgette D.W. *v.* Gary N.R., 134 A.D.3d 406, (1st Dept., 2015) and Matter of Savini *v.* Burgaleta, 34 A.D.3d 686 (2d Dept., 2006), respectively, the measure provides that, unless precluded by the Supreme Court, the Family Court would be deemed a court of competent jurisdiction with subject matter jurisdiction to review, determine and, where necessary, vacate or modify, not simply enforce, child support in cases in which a divorce judgment did not conform to the *CSSA*.

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

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

facilities may be co-located with a prison, jail or local lockup for adult offenders provided that appropriate sight and sound separation is maintained and the facility is not "jail-like" in appearance.

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

15. Notification and engagement of parents in proceedings before the Youth Parts of superior criminal courts: The new statute raising the age of criminal responsibility requires law enforcement, upon the arrests of 16- and 17-year old youth, to notify parents or other persons legally responsible for the adolescents' care both as to where the youth are being held and, if interrogating the youth, as to the youth's *Miranda* rights. *See* Criminal Procedure Law §§1.20(7), 140.20(6), 140.27(5), 140.40(5) [L. 2017, c. 59, Pt. WWW]. The Family Court Advisory and Rules Committee is proposing a measure to build upon the recognition of the importance of parental involvement by requiring notification of probation case plan efforts and of details, to the extent available, of when and where the youth will be arraigned in court. Similar to Family Court Act §341.2(3), the proposal also amends section 722.00(1) of the Criminal Procedure Law to require presence of parents or other persons legally responsible at all proceedings in the Youth Part, with the caveat that the court would "not be prevented from proceeding by the absence of such parent or person if reasonable efforts have been made to provide such notice unless the court found good cause to dispense with such notice."

16. Determinations of willful violations of Family Court orders of protection: Section 846-a of the Family Court Act provides that a willful violation of an order of protection must be proven by "competent evidence," but the statute is silent regarding the quantum of proof required, resulting in disparate standards being applied in different parts of the State. The Family Court Advisory and Rules Committee is proposing a measure to codify Matter of Cori XX, 155 A.D.3d 113(3rd Dept., 2017); Matter of Stuart LL *v.* Amy KK, 123 A.D.3d 218, 995 N.Y.S.2d 317 (3rdDept., 2014), Matter of Nicola V., 134 A.D.3d 1131, 21 N.Y.S.3d 633 (2nd Dept., 2015) and Matter of Rubackin *v*. Rubackin, 62 A.D.3d 11, 20–21, 875 N.Y.S.2d 90 (2nd Dept., 2009), by requiring that a charge of a willful violation of an order of protection must be proven beyond a reasonable doubt if it is in the nature of a criminal contempt and if it results in a definite sentence

including incarceration. This requirement would apply to sentences actually imposed, as well as to sentences that are suspended or that may be served on particular days, rather than continuously. The proposal would also clarify the provision authorizing the Family Court to suspend sentences or direct the days on which sentences must be served.

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

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

19. Permanency planning in juvenile delinquency and persons in need of supervision (PINS) proceedings in Family Court: New York State statutes, as well as both the Federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273, as amended in 2002] and Federal regulations, implementing the Federal *Adoption and Safe Families Act* [Public Law 105-89; L. 1999, c. 7], make clear that the *ASFA* permanency planning mandates apply to all children in foster care, including those in care as a result of juvenile delinquency and PINS petitions. The enactment of the *Family First Prevention Services* Act [Public Law 115-123], which took effect in New York State on September 29, 2021, underscored the critical importance of reentry planning for youth in congregate care settings (Qualified Residential Treatment Programs, or "QRTP's"), including in PINS and juvenile delinquency cases. Consistent with that statute and extending

beyond youth in QRTP's, the Committee is proposing a comprehensive measure to implement permanency planning mandates for the juvenile justice population as follows**:**

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

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

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

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

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

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

* * *

In addition to its legislative efforts, the Committee developed or revised numerous forms for use in Family Court in order to enhance the use of plain English, make needed corrections and facilitate implementation of recent statutes. Further, members of the Committee provided training

to jurists and non-judicial staff regarding the newly enacted *Family First Prevention Services Act* and related Family Court Rule 205.18, as well as the recent statute authorizing support for dependent adults. The forms and court rule are posted on the Internet for easy access by attorneys, litigants and the public. *See* http://www.nycourts.gov.

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

Hon. Michele Pirro Bailey and Hon. Peter Passidomo, Co-Chairs
Janet R. Fink, Counsel [E-mail: jfink@nycourts.gov]
Family Court Advisory and Rules Committee
New York State Office of Court Administration
25 Beaver Street, 10th Floor, New York, New York 10004

II. New or Modified Measures

1. Independent evaluations of children for congregate care settings under the *Family First Prevention Services Act* [Soc. Ser. L. §409-h

The Federal *Family First Prevention Services Act of* 2018 (FFPSA) [Public Law 115-123], as implemented by chapter 56, Part L, of the laws of 2021, is intended to further the goal of reducing placements of children in congregate care settings and instead facilitate retention of children in their own homes through provision of preventive services or, where necessary, placing children in family settings, in particular, with relatives where possible. As the Family Court, Bronx County, held, in rejecting a recommendation for a congregate placement in Matter of Felipe R.:

> The statute, in relevant part, is intended to ensure that children removed from their homes do not languish in restrictive, congregate settings unnecessarily.

76 Misc.3d 373 (Fam. Ct., Bx Co., 2022). *See* also Matter of Trevon G., 77 Misc.3d 1211(A), 2022 NY Slip Op. 51188(2022)(Unrep.). To accomplish this goal, the statutes impose a two-step process that must be followed whenever placement is recommended in a "Qualified Residential Treatment Program" (QRTP) in juvenile delinquency, Persons in Need of Supervision, destitute minor, former foster youth, child protective and for initial QRTP placements occurring at the permanency hearing stage, that is, an evaluation within 30 days by a "Qualified Individual" (QI) to be followed by approval or denial within 60 days by a Family Court judge. *See* P.L. 115-123, §50742; 42 U.S.C.A.§675(a)(c); F.C.A. §§353.7, 756-b, 1055-c, 1091-a, 1097; Soc. Serv. Law §§393, 409-h. [2]

With the aim of interrupting "business as usual," – that is, the frequent placement of children in group settings – Federal law, and now State law, endeavored to ensure that this two-step process would result in clinical recommendations and judicial determinations that would be independent and not tethered to prior practices and the prevailing placement culture. As the United States Children's Bureau indicated, in its Program Instruction on *FFPSA* in 2018:

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[2] *See also,* U.S. Dept. of Health & Human Services Admin. On Children, Youth & Families Children's Bureau, Program Instruction ACYF-CB-PI-18-07 (July 9, 2018) at 10-11; *Family First Prevention Services Act of 2018: A Guide for the Legal Community* (American Bar Association, 2020) at 23; Children's Defense Fund, Amer. Acad. Of Pediatrics, ChildFocus, FosterClub, Generations United, Juvenile Law Center & National Indian Child Welfare Assoc., *Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers and Other Stakeholders* (Jan., 2020), at 100-104.

> The term "qualified individual" means a trained professional or licensed clinician who is not an employee of the title agency and who is not connected to, or affiliated with, any placement setting in which children are placed by the title IV-E agency. For example, a qualified individual may be a licensed social worker or a trained child welfare worker.

The instruction goes on to provide that the State title IV-E agency (in New York, the Office of Children and Family Services) may request a waiver of this requirement, "thereby allowing the individual to be an employee of the agency and/or connected to or affiliated with a placement setting in which children are placed by the agency. " However, in such a case, " the title IV-E agency must certify that the trained professionals or licensed clinicians will maintain objectivity in determining the most effective and appropriate placement for a child (section 475A(c)(1)(C) of the Act)." *See* U.S. Dept. of Health & Human Services, Administration for Children, Youth and Families Children's Bureau, ACYF-CB-PI-18-07 (July 9, 2018), at pages 10-11.

In its efforts to plan for implementation of *FFPSA* in New York, the Office of Children and Family Services requested and received a blanket waiver allowing social services districts to utilize placement agency employees as "Qualified Individuals." With such a broad authorization, it is hard to fathom how the requisite assurance of objectivity could be given; nor is it clear how, if at all, OCFS has taken steps to monitor and ensure this objectivity. However, review of the data gathered by OCFS regarding implementation of the QI and judicial review process, as displayed on its *FFPSA* "Data Dashboard" indicates that little, if anything, has changed in terms of New York's level of congregate care placements, thus implying that the process has not been freed from adherence to the earlier pro-placement culture. Posted data from December, 2022, updated on January 6, 2023, indicates virtually no change in the level of each placement category. Of the 30-day assessments conducted by QI's since the statute was implemented on September 29, 2021, 5% did not recommend the QRTP placement, 63% recommended the QRTP and 32% of the assessments were still pending. Concomitantly, only 3% of the corresponding judicial determinations, based in large measure upon these assessments, were for disapproval of the placements, 47% approved them and half were still pending.[3]

The Family Court Advisory and Rules Committee is proposing a measure to amend Social Services Law §409-h to ensure needed independence of the QI's statewide, notwithstanding the waiver obtained by OCFS. Apart from the exercise of its QI functions, QI's would not be permitted to be employees of local departments of social services or placement agencies and they would need to "maintain complete independence and objectivity" with respect to their placement recommendations. No justification existed for such a broad, statewide blanket waiver, which has, not surprisingly, resulted in recommendations by placement agency QI's consistent with the

[3] Source: NYS Office of Children and Family Services Bureau of Research. Evaluation and Performance Analytics (Dec., 2022, refreshed Jan. 6, 2023)[posted at : https://ocfs.ny.gov/main/sppd/family-first-dashboard/, visited Jan. 17, 2023].

placement orientation to which they are accustomed, a reflection perhaps of implicit, rather than explicit, bias. While the predispositions of the QI's may not be the sole cause of the persistent continuation of New York's placement culture -- lack of sufficient family-based alternatives, particularly for teenagers enmeshed in the juvenile justice system, may also contribute to this –a statutory requirement of independence is critically needed in order to fulfill *FFPSA*'s goals.

Proposal

AN ACT to amend the social services law, in relation to the definition of the qualified individual who must evaluate placements of children in qualified residential treatment programs

The People of the State of New York, represented in Senate and Assembly,

do enact as follows:

Section 1. Subdivision 5 of section 409-h of the social services law, as added by subdivision 3 of Part L of chapter 56 of the laws of 2021, is amended to read as follows:

5. "Qualified individual" shall mean a trained professional or licensed clinician acting within their scope of practice who shall have current or previous relevant experience in the child welfare field. Provided however, such individual shall not be an employee of the office of children and family services, any local department of social services, the New York City Administration for Children's Services or any authorized agency providing placement services to children, apart from employment or contractual services to perform the functions of an independent qualified individual under this chapter and the family court act; nor shall such person have a direct role in case management or case planning decision making authority for the child for whom such assessment is being conducted, in accordance with 42 United States Code sections 672 and 675a and the state's approved title IV-E state plan. The individual must maintain complete independence and objectivity with respect to determining the most effective and appropriate placement for the child.

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

2. Dispositional alternatives regarding destitute minors before the Family Court [F.C.A. §1095; Soc. Ser. L. §398]

Enactment of Article 10-C of the Family Court Act in 2011 provided a valuable vehicle for addressing the needs of destitute children in New York State, including children, *inter alia*, whose parents or caretakers have died. However, once a child has been found by the Family Court to be destitute, only two dispositional alternatives are included in Family Court Act §1095(d). First, a child may be placed in foster care with a local commissioner of social services (or in New York City, the Administration for Children's Services), which would be reviewed periodically at permanency hearings under Article 10-A of the Family Court Act after the child's first eight months in care and every six months thereafter. In 2021, the statute was amended to require an independent evaluation and judicial review of placements of destitute children in congregate care settings under the *Family First Prevention Services Act. See* Family Court Act §1097. Second, the Family Court may order custody or guardianship with a relative or other suitable person. Social Services Law §458-a(1) was clarified to ensure that children for whom guardianship has been ordered may qualify for the Kinship Guardianship Assistance Program (KinGAP).

Notwithstanding these modifications, the dispositional alternatives in Family Court Act §1095(d) fail to fulfill the need for prompt achievement of permanency for those destitute children whose parents are deceased, especially in light of the serious loss or losses that they have suffered. For those orphaned children who lack any relatives or suitable individuals with whom guardianship or custody may be ordered and for whom adoption is their permanency goal, the process to achieve that goal is unnecessarily cumbersome. Current law requires that in such cases, after the destitute child placement is ordered under Family Court Act §1095(d), a termination of parental rights proceeding must be filed and prosecuted under Social Services Law §384-b(4)(a). While uncontested, this type of termination of parental rights proceeding is time-consuming and burdensome for everyone involved, especially in light of proof already adduced at the destitute child proceeding that the parents are deceased and that no other guardian has been appointed. The Family Court Advisory and Rules Committee, therefore, is proposing a measure to obviate the need for the second proceeding in order that an adoption may proceed more quickly.

The Committee's measure would amend Family Court Act §1095(d) to add a third dispositional option, that is, to allow the Family Court to free the child for adoption and to grant guardianship and custody to the local commissioner of social services in order to authorize the commissioner to consent to the child's adoption under Domestic Relations Law §111(1)(f). The option would apply only to those cases in which both parents are deceased or in which one parent is deceased, there is no other person entitled to consent or notice regarding an adoption and for whom no other guardian or custodian has been appointed. To ensure timely and appropriate agency efforts to achieve permanency and necessary assistance for the child, the measure further provides that: (1) a permanency hearing should be scheduled on a date certain; (2) the rights of the child to placement or, at minimum, contact with siblings should be effectuated; and (3) appropriate services and assistance should be provided to the child, including assistance in learning independent living skills if the child is fourteen years of age or older. A conforming amendment would be added to

Social Services Law §398 to authorize the commissioners of social services to provide consents to adoption in these cases.

This measure would benefit those destitute children already traumatized by the loss of one or both parents. The need for this legislation is especially acute in light of the pandemic. The Centers for Disease Control estimates that, as of May 1, 2022, 10.5 million children globally have experienced the loss of a parent to Covid-19.[4] Researchers have estimated that over 200,000 children in the United States have lost a parent to Covid-19. Noting that "Black and Hispanic children lose caregivers at rates more than double those of white children," Dan Treglia, a researcher at the University of Pennsylvania, has indicated that states, such as New York and California, which have large communities of color and communities experiencing poverty, have been hit especially hard by the impact of the pandemic. [5] Further, it has been estimated that in New York City, one in every 200 children have lost a parent or caregiver to Covid-19, almost double the national average.[6]

The Committee's proposal would streamline the process for affording destitute children, who have suffered the death of a parent, a faster means of becoming free for adoption by eliminating the unnecessary, perfunctory step of a termination of parental rights proceeding. The simple addition of a third dispositional option in destitute child proceedings would provide a valuable benefit for children sorely in need of stable and permanent homes.

Proposal

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[4] U.S. Centers for Disease Control and Prevention, *Global Orphanhood Associated with Covid-19* [https://www.cdc.gov/globalhealth/covid-19/orphanhood/index.html#:~:text=The%20number%20of%20children%20who,co%2Dled%20by%20CDC%20reveals, **visited January 12, 2022].** .

[5] E. Griswold, "The kids who lost parents to covid: On two teens bound by grief, and the estimated two hundred thousand American children like them," *NEW YORKER*, July 13, 2022. *See also*, N. Stewart, "He is 16 and His Mother Died of Covid-19. What Happens to Him Now? Children who lost their parents in the pandemic are fighting to hold on to what is left of their families," *NY TIMES*, Aug. 13, 2020 [https://www.nytimes.com/2020/08/13/nyregion/coronavius-ny-parents-dead.html, visited Jan 12, 2023].

[6] F. Khan, "1 in Every 200 NYC Children Have Lost Parent or Caregiver to COVID. That's Almost Twice the National Average," *THE CITY*, Apr. 20, 2022 [https://www.thecity.nyc/search?q=COVID+LOSS+OF+PARENT+OR+CAREGIVER#nt=navsearc; visited Jan. 12, 2023].

AN ACT to amend the family court act and the social services law, in relation to dispositional alternatives for children placed with local social services agencies as destitute minors

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

Section 1. Subdivision (d) of section 1095 of the family court act, as amended by chapter 3 of the laws of 2012, is amended to read as follows:

(d) If the court sustains the petition pursuant to subdivision (b) of this section, it may immediately convene a dispositional hearing or may adjourn the proceeding for further inquiries to be made prior to disposition provided however, that if a petition pursuant to article six of this act has been filed by a person or persons seeking custody or guardianship of the child, or if a petition pursuant to article seventeen of the surrogate's court procedure act seeking guardianship of the child has been filed, the court shall consolidate the dispositional hearing with a hearing under section one thousand ninety-six of this article, unless consolidation would not be appropriate under the circumstances. If the court does not consolidate such dispositional proceedings it shall hold the dispositional hearing under this section in abeyance pending the disposition of the petition filed pursuant to article six of this act or article seventeen of the surrogate's court procedure act. Based upon material and relevant evidence presented at the dispositional hearing, the court shall enter an order of disposition stating the grounds for its order and directing one of the following alternatives:

(1) placing the child in the care and custody of the commissioner of social services; [or]

(2) granting an order of custody or guardianship to relatives or suitable persons pursuant to a petition under article six of this act or guardianship of the child to a relative or suitable person under article seventeen of the surrogate's court procedure act and in accordance with section one thousand ninety-six of this article; or

(3) freeing the child for adoption and granting guardianship and custody to the commissioner of social services for the purposes of consenting to an adoption where both of the child's parents are deceased, or where one of the child's parents is deceased and the other parent is not entitled to consent or notice pursuant to sections one hundred eleven and one hundred eleven-a

of the domestic relations law or section three hundred eighty-four-c of this act and no other guardian or custodian has been appointed.

§2. Section 1095 of the family court act is amended by adding a new subdivision (h) to read as follows:

(h) If the child has been freed for adoption pursuant to paragraph three of subdivision (d) of this section, the court shall include the following in its order:

(1) a date certain for the permanency hearing in accordance with paragraph two of subdivision (a) of section one thousand eighty-nine of this act;

(2) a direction that the child be placed together with or, at minimum, to visit and have regular communication with, his or her siblings, if any, unless contrary to the best interests of the child and/or the siblings;

(3) if the child is or will be fourteen or older by the date of the permanency hearing, the services and assistance that may be necessary to assist the child in learning independent living skills; and

(4) a direction for the commissioner of social services to provide or arrange for services or assistance, limited to those authorized or required to be made available under the comprehensive annual services program plan then in effect, to facilitate the child's permanency plan.

§3. Paragraphs (b) and (c) of subdivision 1 of section 398 of the social services law, paragraph (b) as added and paragraph (c) s amended by chapter 3 of the laws of 2012, are amended and a new paragraph (d) is added to read as follows: is amended by adding a new paragraph (d) to read as follows:

(b) report to the local criminal justice agency and to the statewide central register for missing children as described in section eight hundred thirty-seven-e of the executive law such relevant information as required on a form prescribed by the commissioner of the division of criminal justice services, in appropriate instances; [and]

(c) assume charge of and provide care and support for any child who is a destitute child pursuant to paragraph (a) of subdivision three of section three hundred seventy-one of this article who cannot be properly cared for in his or her home, and if required, petition the family court to obtain custody of the child in accordance with article ten-C of the family court act[.]; and

(d) consent to the adoption of a child whose custody and guardianship has been transferred to a social services district in accordance with section one thousand ninety-five of the family court act or paragraph (a) of subdivision four of section three hundred eighty-four-b of this chapter, where the child's parents are both deceased, or where one parent is deceased and the other parent is not entitled to consent or notice pursuant to sections one hundred eleven and one hundred eleven-a of the domestic relations law or section three hundred eighty-four-c of this article and no other guardian or custodian has been appointed.

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

3. Eligibility of children surrendered from foster care for the New York State Kinship Guardianship Assistance Program (KinGAP) [Soc. Ser. L. §458-a(1)]

New York State, as well as Federal, law has long favored placements with relatives as a means of achieving permanency for children in cases in which they cannot remain or be reunited safely with their parents. Most recently, enactment of the State legislation implementing the Federal *Family First Prevention Services Act of 2018* (FFPSA) underscores the importance of considering foster family settings, especially in kinship homes, as a means of preventing inappropriate placements of children in congregate care settings. *See* Public Law 115-123]; Laws of 2021, chapter 56, Part L

The enactment of the subsidized kinship guardianship assistance program ("KinGAP") in 2010 marked a milestone in adding a valuable permanency alternative to the menu of options available to expedite the exodus of children from foster care into permanent families. *See* L.2010, c. 58, part F §4. Experience with the program, especially in New York City where it is frequently utilized, has demonstrated its enormous value, not only for the children and families who are its beneficiaries, but also for New York State in its constant quest to improve its record in achieving timely permanency for the children in its care. Successive enactments expanding eligibility for KinGAP -- encompassing destitute children in 2011 [L. 2011, c. 607] and allowing "virtual" kin, not simply blood relatives, to apply to be KinGAP guardians in 2017 [L. 2017, c. 384] – underscored the importance of KinGAP as a permanency alternative for children before the Family Court.

In applying the KinGAP statute, however, the Family Court Advisory and Rules Committee has identified a gap in the definition of "child" – probably an inadvertent omission -- that has proven to be an impediment to utilization of the program for one narrow category of children. The Family Court Advisory and Rules Committee, therefore, is proposing a measure to amend subdivision one of section 458-a of the Social Services Law to add a child surrendered from foster care under Social Services Law §383-c to the definition of a child who would be eligible for inclusion in the KinGAP program. Like all children receiving KinGAP assistance, such a child:

(i) would have had to have been in foster care for at least six consecutive months in foster care with and have a demonstrated "strong attachment" to the prospective guardian;

(ii) would need to have had "guardianship and custody" or "custody, care and custody" transferred to a social services official prior to the child's 18th birthday;

(iii) would have had consultation with the court and, if over the age of 14, to have consented to KinGAP; and

(iv) would not be a candidate for adoption.

See Soc. Ser. L. §§458-a(1), 458-b(1).

Significantly, the KinGAP definition already includes children whose parental rights were surrendered when they were <u>not</u> in foster care under Social Services Law §384, as well as children

voluntarily placed in foster care under Social Services Law §§358-a and 384-a and children whose parental rights were terminated under Social Services Law §384-b. Since children surrendered directly from foster care under Social Services Law §383-c may also be able to meet all of the KinGAP eligibility criteria, there is no reason that they should be excluded from, and not enjoy the benefits of, the KinGAP permanency option.

The omission of Social Services Law §383-c from the enumerate eligibility categories for KinGAP has a very real impact upon real children. Consider an example of a child in foster care, who has a strong relationship with a kinship foster parent and whose parent is supportive of the agency's permanency goal of referral for legal guardianship with the relative under KinGAP. If the parent is a respondent in either a child protective proceeding under Article 10 of the Family Court Act or a termination of parental rights under Social Services Law §384-b, the parent would have no means of expediting fulfillment of this goal by voluntarily surrendering the child under Social Services Law §383-c. Instead, the parent would need to either proceed to trial, thus possibly subjecting the child to the trauma of testifying, or to admit to the charges presented with the collateral consequences such admissions entail.[7] Ironically, if the parent in such a situation surrenders the child under Social Services Law §383-c, the child would be eligible for adoption, not KinGAP. It seems odd that a program designed to make it easier to achieve permanency for children by preserving family ties can, in some instances, make it harder. This proposal, which would simply add Social Services Law §383-c to the eligibility categories, would rectify this disparity.

Proposal

AN ACT to amend the social services law, in relation to kinship guardianship of children whose parental rights were surrendered or terminated

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

Section 1. Subdivision 1 of section § 458-a of the social services law, as added by chapter 607 of the laws of 2011, is amended to read as follows:

[7] For example, a fact-finding order in a child protective proceeding results in an irrebuttable presumption that a report to the Statewide Central Register of Child Abuse and Maltreatment is indicated, which may have implications for respondent's future employment prospects, custody and visitation proceedings. *See* Soc. Ser. Law §422(8)(b)(ii); D.R.L. §240(1)(a).

1. “Child” shall mean a person under the age of twenty-one years whose custody, care and custody, or custody and guardianship have been committed to a social services official prior to such person's eighteenth birthday pursuant to section three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, three hundred eighty-four-a or three hundred eighty-four-b of this chapter or article three, seven, ten or 10-C of the family court act.

§2. This act shall take effect immediately.

4. Eligibility for assigned counsel for individuals involved in paternity and parentage proceedings in Family Court [F.C.A. §262]

Establishment of the right to counsel under Family Court Act §262 in 1975 for adults in Family Court, including the right to appointed counsel for those who cannot afford an attorney, was accompanied by legislative findings underscoring the importance of this fundamental right:

> Persons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal charges, and therefore have a constitutional right to counsel in such proceedings. Counsel is often indispensable to a practical realization of due process of law and may be helpful to the court in making reasoned determinations of fact and proper orders of disposition. The purpose of this part is to provide a means for implementing the right to assigned counsel for indigent persons in proceedings under this act.

Family Court Act §261.

Through a patchwork of enhancements since 1975, section 262 of the Family Court Act has been amended to delineate numerous categories of litigants whose rights are so important that the Legislature has determined they are entitled to have counsel assigned if they cannot afford attorneys. Several of these categories encompass all parties to the litigation, including, among others, all parties to family offense proceedings under Article 8 of the Family Court Act, a parent seeking child custody or contesting "substantial infringement" of custodial rights and, in destitute minor cases under Article 10-C of the Family Court Act, any parents, caretakers and "interested adults." However, Article 5 of the Family Court Act is an outlier in requiring counsel to be appointed only for the respondent in a paternity proceeding, regardless of whether the respondent is an alleged father or a birth parent defending an affirmative action by an alleged father. It is anomalous not to provide a right to counsel for both parties in this type of litigation, as both parties have fundamental interests and rights regarding determinations of parentage with respect to children. Moreover, several recent enactments involve litigants who present equally compelling grounds for inclusion in the right to counsel but have not been included in Family Court Act §262.

The Family Court Advisory and Rules Committee, therefore, is proposing an amendment to Family Court Act §262 to include three important omitted categories, namely, any person, not simply a respondent, in a paternity proceeding under Article 5, as well as any person involved in a proceeding determining parentage under the *Uniform Interstate Family Support Act* (UIFSA, Article 5-B) and under the recently enacted *Child-Parent Security Act* (CPSA, Article 5-C).

The rights that are being protected in a proceeding under Article 5 – either establishing or defending against the establishment of paternity (and increasingly, maternity) – are fundamentally the same. There is no reason to provide counsel to a respondent in a paternity case, who may be an alleged father or a birth parent, but deny counsel to the same person when he or she is a petitioner.

In addition, many paternity and parentage proceedings involve third persons, such as spouses of birth parents and earlier signatories of acknowledgments of parentage, whose status as parents are at risk in these proceedings and who are equally in need of counsel. Likewise, in UIFSA cases under Article 5-B of the Family Court Act, there are no procedural differences in parentage determinations that would justify the denial of counsel to litigants, especially in light of the extra challenges often posed by litigation involving parties in different jurisdictions. Finally, Article 5-C parentage proceedings present special challenges to litigants. While persons acting as surrogates have a right to have counsel paid for by intended parents, this is not the case for the other individuals involved in the often complex *CPSA* cases, including spouses of birth parents, earlier signatories of acknowledgments of parentage and alleged non-anonymous donors. Instead of the relative certainty of DNA testing that guides determinations in Article 5 proceedings, for example, litigants in cases involving surrogacy agreements or assisted reproduction under Article 5-C must marshal evidence, *inter alia*, regarding whether the parties agreed to parentage at the time of conception and whether the person who provided genetic material intended to be a donor, rather than a parent. All are potentially in need of experienced counsel to protect their rights and interests.

Proposal

AN ACT to amend the family court act, in relation to the right to counsel in proceedings to establish paternity or parentage in the family court

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

Section 1. Paragraph (viii) of subdivision (a) of section 262 of the family court act, as added by chapter 456 of the laws of 1978, is amended to read as follows:

(viii) [the respondent~~]~~ any person in any proceeding to establish paternity or parentage under article five, five-b, or five-c of this act [in relation to the establishment of paternity].

§2. This act shall take effect immediately.

5. Questioning of parties by judges regarding ownership or possession of firearms in Family Court cases when orders of protection are issued [F.C.A. §842-a]

Recognizing the grave risk of lethality in domestic violence cases where parties have access to firearms, Criminal Procedure Law §530.14 and Family Court Act §842-a were amended by chapter 577 of the laws of 2022 in order to provide judges with information on "the existence and location of any firearm, rifle or shotgun owned or possessed" by the defendant or respondent. There is no doubt that this information is critically important and, indeed, there are questions on the uniform Family Court family offense petition form regarding the respondent's ownership or access to guns, as well as licensure. *See* Family Court Family Offense Form 8-2.[8] However, the amendments to all three opening paragraphs of Family Court Act §842-a that require Family Court judges to directly question family offense petitioners "outside of the presence of the respondent" would force the judges to violate the respondents' constitutional rights to due process, as well as the dictates of judicial ethics. The Family Court Advisory and Rules Committee, therefore, is submitting a chapter amendment to chapter 577 that would simply delete the phrase from the opening paragraphs of subdivisions one, two and three of section 842-a of the Family Court Act.

The requirement of a direct colloquy with Family Court petitioners requesting orders of protection or temporary orders of protection applies to child support, paternity, child custody and visitation and child abuse and neglect proceedings, not simply family offense cases brought under Article 8 of the Family Court Act. *See* Family Court Act §§446-a, 552, 656-a and 1056-a. It applies to all phases of the proceedings, that is, whenever an order of protection or temporary order of protection is issued. While the initial request for a temporary order of protection may be made on an ex parte basis, not implicating a respondent's due process rights, the issuance or extensions of such an order, as well as the issuance of a final order, at any later stage, once the respondent has been served and appears in court, poses the difficulty.

Underscoring the applicability of fundamental due process protections, the parties have a right to counsel under Family Court Act §262 and 821-(a), once they appear in court in a family offense case, including the right to appointed counsel if they cannot afford to retain counsel. Litigants in child custody and visitation and child protective proceedings, as well as respondents in paternity and child support violation proceedings, likewise have a right to counsel. *See* Family Court Act §262. Inextricably linked to the right to counsel are the rights to be heard and to

[8] *See* Domestic Violence Forms for All Courts Issuing Orders of Protection (Criminal, Supreme Court Matrimonial, IDV & Family Court Jurisdiction) | NYCOURTS.GOV

confront evidence and witnesses, rights that would be violated by chapter 577. Section 6 of Article 1 of the New York State Constitution provides:

> In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her.

Significantly, the Court of Appeals, in Matter of Jung, 11 N.Y.3d 365 (2008), removed a Family Court judge for "seriously compromise[ing] the due process rights of litigants" by failing to notify them of their right to counsel and, in cases involving incarcerated litigants, failing to produce them in court absent their specific requests. The Court in Jung also held that the judge's violation of litigants' due process rights simultaneously violated the *Code of Judicial Conduct* and was, therefore, appropriately subject to the ultimate remedy of removal from the bench. Canon 3 of the *Code*, which requires judges "to Perform the Duties of Judicial Office Impartially and Diligently," provides in subdivision 6 that:

> A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except: (a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond.

The requirement in the *Code of Judicial Conduct* that the substance of any ex parte communication be disclosed so that parties not present would have an opportunity to respond is consistent with the only other context in which Family Court judges are permitted to have communications outside the presence of parties appearing in court, that is, the interviews by judges of children in chambers. The Court of Appeals in the seminal case of Lincoln *v.* Lincoln, 24 N.Y.2d 270 (1969), required disclosure in open court of any new information disclosed by a child in an *in camera* interview:

> Without a full background on the family and the child, these interviews can lead the most conscientious Judge astray. The dangers, however, can be minimized. We are confident that the Trial Judges recognize the difficulties and will not use any information, which has not been previously mentioned and is adverse to either parent, without in some way checking on its accuracy during the course of the open hearing.

In summary, both the dictates of due process and of the *Code of Judicial Conduct* compel the deletion of the requirements in Family Court Act §842-a for judges to question petitioners "outside of the presence of the respondent." These simple deletions from chapter 577 will further the new statute's vital goal of stemming gun violence in domestic violence cases by requiring

courts to obtain necessary information so that appropriate firearms provisions can included in orders of protection.

Proposal

AN ACT to amend the family court act, in relation to firearms inquiries in cases where orders of protection are issued

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 842-a of the family court act, as amended by chapter 577 of the laws of 2022, is amended to read as follows:

Suspension of firearms license and ineligibility for such a license upon the issuance of a temporary order of protection. Whenever a temporary order of protection is issued pursuant to section eight hundred twenty-eight of this article, or pursuant to article four, five, six, seven or ten of this act the court shall inquire of the respondent and[, outside of the presence of the respondent,] the petitioner or, if the petitioner is not the protected party, any party protected by such order, if the court has reason to believe that such petitioner or protected party would have actual knowledge or reason to know such information, as to the existence and location of any firearm, rifle or shotgun owned or possessed by the respondent and:

§ 2. The opening paragraph of subdivision 2 of section 842-a of the family court act, as amended by chapter 577 of the laws of 2022, is amended to read as follows:

Revocation or suspension of firearms license and ineligibility for such a license upon the issuance of an order of protection. Whenever an order of protection is issued pursuant to section eight hundred forty-one of this part, or pursuant to article four, five, six, seven or ten of this act the court shall inquire of the respondent and[, outside of the presence of the respondent,] the petitioner or, if the petitioner is not the protected party, any party protected by such order, if the court has reason to believe that such petitioner or protected party would have actual knowledge or reason to know such information, as to the existence and location of any firearm, rifle or shotgun owned or possessed by the respondent and:

§3. The opening paragraph of subdivision 3 of section 842-a of the family court act, as amended by chapter 577 of the laws of 2022, is amended to read as follows:

Revocation or suspension of firearms license and ineligibility for such a license upon a finding of a willful failure to obey an order of protection or temporary order of protection. Whenever a respondent has been found, pursuant to section eight hundred forty-six-a of this part to have willfully failed to obey an order of protection or temporary order of protection issued pursuant to this act or the domestic relations law, or by this court or by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, in addition to any other remedies available pursuant to section eight hundred forty-six-a of this part the court shall inquire of the respondent and[, outside the presence of the respondent,] the petitioner or, if the petitioner is not the protected party, any party protected by such order, if the court has reason to believe that such petitioner or protected party would have actual knowledge or reason to know such information, as to the existence and location of any firearm, rifle or shotgun owned or possessed by the respondent and:

§ 4. This act shall take effect immediately.

6. Persons entitled to consent to adoptions of children before Family and Surrogate's Courts [D.R.L. §111]

Enactment of chapter 828 of the Laws of 2022 reflected a recognition by the Legislature not only of the rights of both non-marital parents of children in the care of the State to equal rights to consent or veto adoptions, but the equally important rights of the children to family integrity and to custody or, at minimum, relationships with both of their birth parents. At the same time, a long history of both Federal and State enactments has established the fundamental rights of these children to family stability and well-being through timely achievement of permanent homes, whether through reunification with their parents or, where that is not possible, though guardianship with kin or through adoption.

The Family Court Advisory and Rules Committee has identified one provision in chapter 828 in which the laudable goal of enhancing birth parents' rights to consent to adoptions comes at the expense of the child's right to timely permanency. The committee is thus recommending a chapter amendment to require that, in order to warrant entitlement to consent to an adoption, alleged parents do more than simply file "an unrevoked notice of intent to claim parentage" – in other words, a notice with the putative father registry, established under Section 372-c of the Social Services Law, of an intention sometime to pursue a parentage determination. Chapter 828 allows such a notice to be filed at any point, even on the eve of the filing of a termination of parental rights or adoption proceeding. It provides no requirement that, once the notice has been filed, the putative parent must *actively* prosecute any paternity or parentage petition within <u>any</u> set time-frame, let alone an expedited one. Indeed, such a notice does not even preclude the putative parent from defending <u>against</u> a paternity or parentage action filed subsequently by an agency or individual against him or her. Chapter 828 thus permits efforts to achieve permanency and stability for a child in State care to come to a complete halt based simply upon an expression of intent by a putative parent that may never be realized and that may even be contradicted by the putative parent's own actions, even while not revoking the putative father registry notice. The Committee's amendment would delete the provision allowing permanency efforts to be derailed based upon such a speculative expression of intent.

The rationale for the Committee's measure is identical to that of Family Court Act §1017, that is, that all birth parents of children subject to State intervention in child protective proceedings should be identified at the front-end of proceedings involving their care. They should be actively sought after and located, notified of court proceedings and encouraged to be engaged in their children's lives. They—and, where appropriate, their families—may be resources for the care of the children to obviate the need for placement in stranger foster care. As the National Council of Juvenile and Family Court Judges indicated, in its *Enhanced Resource Guidelines: Improving Court Practice for Child Abuse and Neglect Cases* (2016), at p. 84:

> It is highly encouraged that putative fathers be located and brought into the court process as quickly as possible. Timely resolution of paternity issues is both in the best interests of the child and essential to avoiding delays at subsequent points in the court process.

Apart from the putative father registry notice of intent, the remaining criteria in Chapter 828 protect the rights of putative parents though application of objective criteria evincing concrete steps demonstrating an actual assumption of a parental role in their children's lives sufficient to warrant their standing to consent or veto an adoption. Inclusion of an "unrevoked notice of intent to claim parentage" does not provide that indicia of evidence and, as such, should be deleted.

Proposal

AN ACT to amend the domestic relations law, in relation to persons entitled to consent to adoptions of children before family and surrogate's courts

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

Section 1. Subparagraph (iv) of paragraph (e) of subdivision 1 of section 111 of the domestic relations law, as amended by chapter 828 of the laws of 2022, is amended to read as follows:

(iv) Of any person who filed an [unrevoked notice of intent to claim parentage of the child pursuant to section three hundred seventy-two-c of the social services law prior to the filing of a petition to terminate parental rights to the child pursuant to section three hundred eighty-four-b of the social services law, an] application to execute a judicial surrender of rights to the child pursuant to subdivision three of section three hundred eighty-three-c of the social services law, or an application for approval of an extra-judicial surrender pursuant to subdivision four of section three hundred eighty-three-c of the social services law;

§2. This act shall take effect immediately.

7. Required training of court-appointed forensic evaluators in custody and visitation proceedings in Supreme and Family Courts

[D.R.L. 240; Exec. L. §575; Ed. L. §§6524, 7603, 7607, 7704, 7710; F.C.A. §654]

Almost three decades ago, the Unified Court System's Matrimonial Commission, appointed by former Chief Judge Judith Kaye and chaired by former Appellate Division, Second Department Associate Justice Sondra Miller, highlighted the importance of court ordered forensic evaluations in assisting Supreme and Family Courts in their determinations regarding custody and parental access and recommended, *inter alia*, training requirements for clinicians appointed to evaluate cases in which allegations regarding domestic violence and/or child abuse have been made:

> Proposed reforms from many different sources have ranged from eliminating the use of forensics altogether to instituting changes that will insure the quality and proper use of the reports; namely, that they be given appropriate weight and consideration by the judiciary.

Report of the Matrimonial Commission (Feb., 2006) at page 46. Justice Miller, in fact, several years earlier, had authored the landmark decision in Wissink *v.* Wissink, 301 A.D.2d 36 (2d Dept., 2002), which reversed a child custody determination in a case involving allegations of domestic violence on the ground that a comprehensive psychological evaluation of the parties and child should have been ordered.

More recently, as noted by Governor Hochul in signing chapter 740 of the laws of 2022, the *Report of the Blue-Ribbon Commission on Forensic Custody Evaluations* (December, 2021), at page 9, unanimously recommended legislation requiring that "mandatory and ongoing trainings for qualified mental health evaluators" with respect to domestic and intimate partner violence, child abuse, substance abuse, coercive control and trauma.

There is no question that requiring forensic evaluators to receive initial and ongoing training in domestic violence and child abuse will improve the ability of the Supreme and Family Courts to render effective decisions regarding the best interests of the children before them, including their paramount interest in safety. However, as the Matrimonial Commission noted in emphasizing the importance of forensic evaluation, "It is a serious issue requiring significant attention, while taking care not to eliminate or overly constrict what is often a very valuable, and at times indispensable resource for the litigants and courts in custody matters." *Report of the Matrimonial Commission* (Feb., 2006), *id.* at 46. Both the Family Court Advisory and Rules Committee and the Matrimonial Practice Advisory and Rules Committee are concerned that the specific mandates of both chapter 740 of the laws of 2022 and chapter 23 of the laws of 2023, the recently enacted chapter amendment, do "overly constrict" this valuable resource. The Committees have thus prepared a measure to remedy these problems.

First, the measure would permit appointment of an expert licensed outside New York State, where good cause is stated on the record and where the expert received comparable training in another jurisdiction. In restricting the discretion of Supreme and Family Courts to appointments of forensic evaluators who received training in New York State by an organization designated by the

United States Department of Health and Human Services, the statute fails to recognize the numerous circumstances in which appointment of an expert not meeting that requirement would be necessary and appropriate. The authorization in the chapter amendment for a New York State clinician to perform a virtual evaluation of a child who lives out of state does not afford the courts sufficient discretion, particularly since virtual evaluations of children may not be clinically appropriate. Many cases involve parties living in different states, often brought under the *Uniform Child Custody Jurisdiction and Enforcement* Act [D.R.L. §75 *et seq.*], where it may be necessary to appoint an evaluator from another state. Others may involve unique issues for which a recognized expert from another state or even country with specific expertise may be needed, *e.g.*, cases involving children or parents with special needs or disabilities. Likewise, cases may arise in parts of New York that have few or no forensic evaluators available. In all of these situations, restricting appointments to those who have completed the specific training program required by the new statute is not practical and is likely to impede timely and effective justice to the detriment of the best interests of the children involved.

Second, the Committee's measure would lodge responsibility for providing certifications of training in family violence in the agency that licenses forensic evaluators, that is, the New York State Education Department. Sections 6524, 7603, 7607, 7704 and 7710 of the Education Law would, therefore, be amended to prescribe both initial and ongoing training requirements for licensed psychiatrists, psychologists and social workers. Continuing education requirements would be on a three-year cycle to conform to other continuing education requirements that clinicians must meet.

Under proposed Executive Law §575, the training would be designed, the requisite number of hours required would be determined and the curricula would be reviewed periodically by the State licensing entity, the New York State Education Department, in consultation with the New York State Office for the Prevention of Domestic Violence, the State entity posing a substantial reservoir of expertise in issues regarding domestic and intimate partner violence. While they may, of course, elicit participation by local as well as non-New York State experts to present the training programs, licensure is and should remain a governmental function. Analogously, the New York State Office of Children and Family Services has the statutory responsibility under Social Services Law §421(1) to conduct a "continuing publicity and education program," in conjunction with local departments of social services, for mandated reporters of child abuse and maltreatment.

The governmental entities that would be tasked with designing the curricula for forensic evaluator training should be able to draw upon the broadest range of local, national and international experts who would be able to provide state-of-the-art presentations on a broad and ever-changing range of issues in the dynamic field of family violence. By comparison, the court system uses experts from many sources to assist in its training programs for judges and court staff on domestic violence and child abuse issues. These sources include a wide array of national experts provided by the National Council of Juvenile and Family Court Judges, by a variety of advocacy groups in New York, and by distinguished colleges and universities, both within and outside of the State. The body responsible for providing training for clinical professionals who will act as forensic evaluators must be able to choose the best experts from a broad spectrum of sources. Likewise, the curriculum, both for pre- and in-service training, needs to be flexible and should

draw upon the latest developments in the state of knowledge of family violence issues specifically geared toward the practices of the clinical professions. For example, judicial seminars in recent years have been greatly enhanced by presentations on new and developing issues, none of which are included in the list in the new statute, such as digital and cyber forms of domestic violence, electronic and other means of stalking, implicit and explicit gender and other biases in domestic violence cases, the frequency of strangulation and traumatic brain injuries, the impact of adolescent brain research on teen dating violence, and neurologic effects upon child and adult victims of abuse. In the forensic evaluation context, professional clinical organizations have developed new interviewing techniques and protocols that would be vital to include in the required training programs. Rigid repetition of the issues to be covered by imposition of statutorily imposed curriculum prescribed in section 575 of the Executive Law does not allow for new issues to be addressed as the state of professional knowledge develops.

In summary, while all would agree that training of forensic evaluators is critically important, neither chapter 740 nor the new chapter amendment sufficiently preserve the judicial discretion that is essential for the courts to fulfill children's best interests in the unique circumstances presented by their individual cases. The Committees' proposed measure would enhance these statutes by: (i) allowing courts the discretion, in appropriate cases, to appoint forensic evaluators who are located out of state and/or have not received the training program prescribed in the new statute; and (ii) lodging responsibility for the design and administration of dynamic, wide-ranging curricula for forensic evaluator training programs in the New York State governmental entity that licenses clinicians, acting in consultation with the State Office for the Prevention of Domestic Violence.

Proposal

AN ACT to amend the domestic relations law, the executive law, the education law and the family court act, in relation to court ordered forensic evaluations involving child custody and visitation

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

Section 1. Paragraph (a-3) of subdivision 1 of section 240 of the domestic relations law subdivisions 1,2,3 and 4 as added by chapter 740 of the laws of 2022 and subdivision 5 as added by chapter 23 of the laws of 2023, is amended to read as follows:

(a-3) Court ordered forensic evaluations involving child custody and visitation.

(1) The court may appoint a forensic evaluator on behalf of the court to evaluate and investigate the parties and a child or children in a proceeding involving child custody and visitation provided that the child custody forensic evaluator is a licensed psychologist, social worker or psychiatrist [who]. Unless the order of appointment provides otherwise for good cause that shall be

stated on the record, if the evaluator is licensed in the state of New York [and has], the evaluator shall have received training within the last [two] three years[, a certification of completion for completing the training program] pursuant to paragraph (o) of subdivision three of section five hundred seventy-five of the executive law or, if the evaluator is licensed outside of the state of New York, comparable training.

(2) [Notwithstanding any provision of law to the contrary, no individual shall be appointed by a court to conduct a forensic evaluation in a proceeding involving child custody and visitation pursuant to this paragraph unless such individual has received within the last two years, a certification of completion for completing the] training program pursuant to paragraph (o) of subdivision three of section five hundred seventy five of the executive law.

(3)] A psychologist, social worker or psychiatrist authorized to conduct court ordered child custody forensic evaluations pursuant to this section shall notify the court in which such individual requests to be considered for such court ordered evaluations. Any psychologist, social worker or psychiatrist who no longer meets the requirements of this section [in regards to completing] regarding completion within the last [two] three years of the training program pursuant to paragraph (o) of subdivision three of section five hundred seventy-five of the executive law shall be obligated to inform such courts [within seventy-two hours of noncompliance so as to be removed from consideration] prior to accepting any appointments for court ordered evaluations.

[(4)](3) [Upon] Except as provided in subdivision one of the section, upon appointment, the court shall require such child custody forensic evaluator to show proof of [certification for completing] completion within the last [two] three years of the training program pursuant to paragraph (o) of subdivision three of section five hundred seventy-five of the executive law.

[(5) A court shall appoint a forensic evaluator who has completed the training program pursuant to paragraph (o) of subdivision three of section five hundred seventy-five of the executive law when the child is living out-of-state and is farther than one hundred miles from the New York state border; provided, however, that such] (4) Where a forensic custody evaluation [may be] of a child is conducted remotely utilizing videoconferencing technology[. The], the evaluator must take all steps reasonably available to protect the confidentiality of the child's

disclosures for any evaluation conducted remotely utilizing videoconferencing technology, as needed.

§2. Paragraph (o) of subdivision 3 of section 575 of the executive law, as amended by chapter 23 of the laws of 2023, is amended to read as follows:

(o) (i) Within amounts appropriated for such purpose, the office shall [contract with an organization designated by the federal department communities, social services systems, and programming regarding the prevention and intervention of domestic violence in New York state to mutually develop] consult with the state education department to assist it in developing a training program as described in this paragraph. The office [and such organization shall be responsible for providing] shall assist the state education department in arranging for the provision of such training to psychiatrists, psychologists and social workers who are licensed in the state of New York, so that such individuals may conduct court ordered forensic evaluations, involving child custody and visitation pursuant to paragraph (a-3) of subdivision one of section two hundred forty of the domestic relations law[; for consulting]. The office shall consult with experts, domestic violence service providers and representative organizations in the field of domestic violence [when such training is provided in their communities;] and [for] shall assist the state education department in reviewing and updating training topics and content at least once every [two] three years. [Such] Drawing upon experts, such training shall include, but not be limited to, a review of: [relevant statutes; case law and psychological definitions of domestic violence; coercive control and child abuse; the dynamics and effects of domestic violence and child abuse, including but not limited to, emotional, financial, physical, technological and sexual abuse; the barriers and fears associated with reporting domestic violence and child abuse and why victims may not have documented evidence of abuse; tactics commonly used by one party to induce fear in another party or child, including verbal, emotional, psychological, and/or economic abuse, isolating techniques, coercive control, and monitoring of a partner's location and activities; litigation abuse and demands for custody or joint custody in order to pressure the partner to return or punish the partner for leaving; trauma, particularly as it relates to sexual abuse and the risks posed to children and the long-term dangers and impacts imposed by the presence of adverse childhood experiences; the increased risk of escalating violence that occurs during child custody

proceedings; and the danger of basing child custody decisions on claims that a child's deficient or negative relationship with a parent is caused by the other parent] the applicable legal standards and clinical knowledge regarding family violence and its effects upon children.

(ii) The state education department, in consultation with the office, [in consultation with the organization designated by the federal department of health and human services to coordinate statewide improvements within local communities, social services systems, and programming regarding the prevention and intervention of domestic violence in New York state ,] shall determine a reasonable number of training-hours that shall be required for the first instance such program is provided to psychiatrists, psychologists and social workers and a reasonable number of training-hours that shall be required for subsequent refresher courses provided to such individuals.

(iii) The [organization designated by the federal department of health and human services to coordinate statewide improvements within local communities, social services systems, and programming regarding the prevention and intervention of domestic violence in New York] state education department shall be responsible for providing a certification of completion to each psychiatrist, psychologist [or] and social worker who satisfies the requirements of such training program, so that such individuals may conduct court ordered forensic evaluations involving child custody and visitation pursuant to paragraph (a-3) of subdivision one of section two hundred forty of the domestic relations law; and

§3. The education law is amended by adding a new subdivision 12 to section 6524 to read as follows:

(12) Psychiatrists appointed by courts to perform forensic evaluations in child custody and visitation cases; additional requirements. In order to be eligible for appointment by a court to perform forensic evaluations in child custody and visitation cases, a psychiatrist shall receive training regarding domestic violence and child maltreatment in accordance with paragraph (o) of subdivision three of section five hundred seventy-five of the executive law: (i) for those licensed as of the effective date of this subdivision or within one year thereafter, within one year following such effective date or within one year of licensure, whichever is later, and every three years thereafter; and (ii) for those not yet licensed as of the effective date of this subdivision, prior to licensure and every three years thereafter.

§4. The education law is amended by adding a new subdivision 9 to section 7603 to read as follows:

(9) Psychologists appointed by courts to perform forensic evaluations in child custody and visitation; additional requirements. In order to be eligible for appointment by a court to perform forensic evaluations in child custody and visitation cases, a psychologist shall receive training regarding domestic violence and child maltreatment in accordance with paragraph (o) of subdivision three of section five hundred seventy-five of the executive law: (i) for those licensed as of the effective date of this subdivision or within one year thereafter, within one year following such effective date or within one year of licensure, whichever is later, and every three years thereafter; and (ii) for those not yet licensed as of the effective date of this subdivision, prior to licensure and every three years thereafter.

§5. The education law is amended by adding a new subdivision 4 of section 7607 to read as follows:

(4) Psychologists appointed by courts to perform forensic evaluations in child custody and visitation; additional requirements. During each triennial registration period, an applicant for registration as a psychologist shall complete training in domestic violence and child maltreatment in accordance with paragraph (o) of subdivision three of section five hundred seventy-five of the executive law.

§6. The education law is amended by adding a new subdivision 3 to section 7704 to read as follows:

(3) Licensed master social workers and licensed clinical social workers appointed by courts to perform forensic evaluations in child custody and visitation; additional requirements. In order to be eligible for appointment by a court to perform forensic evaluations in child custody and visitation cases, a licensed master social worker and licensed clinical social worker shall receive training regarding domestic violence and child maltreatment in accordance with paragraph (o) of subdivision three of section five hundred seventy-five of the executive law: (i) for those licensed as of the effective date of this subdivision or within one year thereafter, within one year following such effective date or within one year of licensure, whichever is later, and every three years

thereafter; and (ii) for those not yet licensed as of the effective date of this subdivision, prior to licensure and every three years thereafter.

§7. The education law is amended by adding a new subdivision 4 to section 7710 to read as follows:

(4) Licensed master social workers and licensed clinical social workers appointed by courts to perform forensic evaluations in child custody and visitation; additional requirements. During each triennial registration period, an applicant for registration as a licensed master social worker or licensed clinical social worker shall complete training in domestic violence and child maltreatment in accordance with paragraph (o) of subdivision three of section five hundred seventy-five of the executive law.

§8. Article 6 of the family court act is amended by adding a new section 654 to read as follows:

§654. Court- ordered forensic evaluations involving child custody and visitation.

(1) The court may appoint a forensic evaluator on behalf of the court to evaluate and investigate the parties and a child or children in a proceeding involving child custody and visitation provided that the child custody forensic evaluator is a licensed psychologist, social worker or psychiatrist. Unless the order of appointment provides otherwise for good cause that shall be stated on the record, if the evaluator is licensed in the state of New York, the evaluator shall have received within the last three years training pursuant to paragraph (o) of subdivision three of section five hundred seventy-five of the executive law or, if the evaluator is licensed outside of the State of New York, training comparable to such program.

(2) A psychologist, social worker or psychiatrist authorized to conduct court- ordered child custody forensic evaluations pursuant to this section shall notify the court in which such individual requests to be considered for such court ordered evaluations. Any psychologist, social worker or psychiatrist who no longer meets the requirements of this section regarding completion within the last three years of the training program pursuant to paragraph (o) of subdivision three of section five hundred seventy-five of the executive law shall be obligated to inform such courts prior to accepting any appointments for court ordered evaluations.

(3) Except as provided in subdivision one of the section, upon appointment, the court shall require such child custody forensic evaluator to show proof of completion within the last

three years of the training program pursuant to paragraph (o) of subdivision three of section five hundred seventy-five of the executive law.

§9. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2023 amending the domestic relations law and the executive law, relating to court ordered forensic evaluations involving child custody and visitation, as proposed in legislative bills numbers S. 860 and A 632, takes effect.

8. Time-limit for filing notices of appeals in all categories of Family Court proceedings and objections to Support Magistrate determinations in Family Court child support, paternity and parentage proceedings [F.C.A.§§439(e), 1113]

In order to provide continued access to justice during the recent Covid-19 public health emergency, the Unified Court System, including the Family Court, rapidly escalated its use of technology for all aspects of proceedings. Pleadings, exhibits and other documents have been transmitted to the Family Courts electronically, in many cases for the first time, and the Courts, in turn, have transmitted its orders electronically to litigants and attorneys. The New York City Family Court, in fact, has initiated a pilot program for the use of the Court System's Electronic Filing System.

Electronic transmission of orders by the courts, however, has led to a serious gap in the statutory delineation of applicable deadlines for filing notices of appeal in all categories of Family Court proceedings under Family Court Act §1113 and for filing objections to support magistrate determinations in support, parentage and paternity proceedings under Family Court Act §439. The Appellate Division, Fourth Department, in two recent cases, has rejected arguments that appeals were untimely, noting that the orders were neither provided in court nor transmitted by mail and were thus not subject to any statutory deadlines. *See* Matter of Bukowski *v.* Florentino, 176 A.D.3d 812 (4th Dept., 2022); Matter of Grayson S. (Thomas S.), 209 A.D.3d 1309 (4th Dept., 2022). The Appellate Division in Grayson S. held that, contrary to Family Court Act §1113:

> Here, "[t]here is no evidence in the record that the father was served with the order of fact-finding and disposition by a party or the child's attorney, that he received the order in court, or that the Family Court mailed the order to the father" (*Matter of Batts v Muhammad*, 198 AD3d 750, 751 [2d Dept 2021]). Instead, despite using a form order that provided typewritten check boxes for the two methods of service by the court mentioned in the statute (i.e., in court or by mail) (*see* Family Ct Act § 1113), the court here crossed out the word "mailed" and edited the form to indicate that the order was emailed to, among others, the father's attorney. The statute, however, does not provide for service by the court through email or any other electronic means (*see id*.) and, contrary to the assertions of petitioner and the AFC [Attorney for the Child], traditional mail and email are not indistinguishable (*see* CPLR 2103 [f] [1]; *see generally* Family Ct Act §§ 165 [a]; 1118). It is well settled that "[c]ourts should construe clear and unambiguous statutes so as to give effect to the plain meaning of the words used" (*Matter of Alonzo M. v New York City Dept. of Probation*, 72 NY2d 662, 665 [1988]) and, here, the statute permits court service by mail but does not provide for such service by electronic means (*see* § 1113), despite the fact that the legislature has had the opportunity to include those means in the years since email has become more prevalent (*see e.g.* L 2010, ch 41, § 83). Inasmuch as the father was served the order by the court via email, which is not a method provided for in Family Court Act § 1113, and there is no indication that he was served by any of the methods authorized by the statute, we conclude that the time to take an appeal did not begin to run and that it cannot be said that the father's appeal is untimely (*see Batts*, 198 AD3d at 751; *Matter of Tynell S.*, 43 AD3d 1171, 1172 [2d Dept 2007]).

Recognizing the importance of giving clear guidance regarding applicable deadlines in Family Court proceedings, especially in light of the large percentage of litigants without attorneys, the committee is proposing a measure providing that where orders are transmitted to litigants electronically, they would have up to thirty-five days from the date of transmission in which to file notices of appeal or objections to orders, as applicable. As the United States Supreme Court held in Turner *v.* Rogers, 564 U.S. 431 (2011), procedures in civil child support proceedings must satisfy the precept of "fundamental fairness" a precept clearly applicable to all categories of Family Court proceedings.

Among the most important remedies under New York law, litigants need to be given accurate notice of the deadline for filing objections to determinations by Support Magistrates so that they can be reviewed by a Family Court judge, a prerequisite to the litigants' equally important right to appeal.7 *See* Family Court Act §439(e); Reynolds *v.* Reynolds,. 92 A.D.3d 1109 (3rd Dept., 2012); Kasun *v.* Kasun, 82 A.D.3d 769 (2nd Dept., 2011). Currently, Family Court Act §439(e) requires litigants to file their objections within "thirty days after receipt of the order in court or by personal service, or, if the objecting party or parties did not receive the order in court or by personal service, thirty-five days after mailing." Likewise, Family Court Act §1113 requires that an appeal "must be taken no later than thirty days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, thirty days from receipt of the order by the appellant in court or thirty-five days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest" and requires that all orders contain a notice to that effect. No mention is made in either statute of the electronic transmission by the Court of its orders, leaving a glaring gap in the law as to the applicable time-limits in such cases.

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

Proposal

AN ACT to amend the family court act, in relation to the time-limit for appeals in all categories of Family Court cases and for the filing of objections to support magistrate determinations in child support, paternity and parentage proceedings in family court

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

Section 1. Subdivision (e) of section 439 of the family court act, as amended by chapter 336 of the laws of 2004, is amended to read as follows:

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

§2. Section 1113 of the family court act, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

§ 1113. Time of appeal. An appeal under this article must be taken no later than thirty days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, thirty days from receipt of the order by the appellant in court or thirty-five days from the mailing or electronic transmission of the order to the appellant by the clerk of the court, whichever is earliest.

All such orders shall contain the following statement in conspicuous print: “Pursuant to section 1113 of the family court act, an appeal must be taken within thirty days of receipt of the

order by appellant in court, thirty-five days from the mailing or electronic transmission of the order to the appellant by the clerk of the court, or thirty days after service by a party or attorney for the child upon the appellant, whichever is earliest." When service of the order is made by the court, the time to take an appeal shall not commence unless the order contains such statement and there is an official notation in the court record as to the date and the manner of service of the order.

§3. This act shall take effect one hundred twenty days after it shall have become a law.

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

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

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

Second, the proposal would amend subdivision four of section 304.2 to include the requirement for an expiration date in temporary and final orders in juvenile delinquency cases, as well as to specifically address the duration of temporary orders of protection that are issued prior to the filing of an accusatory instrument (petition). A temporary order in such a case may last for an initial period of up to thirty days and may be extended by the court for good cause for an additional period of up to thirty days or for a period coincident with the period during which local probation departments are attempting to adjust or divert the juvenile's case.[9] If the juvenile successfully completes adjustment prior to the expiration of the order, the probation service, presentment agency or attorney for the child would be authorized to move to vacate the temporary order of protection. One additional extension of up to 30 days would be permitted upon a judicial finding of a compelling reason, which must include a determination whether the presentment agency had made diligent efforts to file a petition promptly and the reasons for any delay.

[9] Family Court Act §308.1(9) provides that the adjustment period may last for an initial period of up to three months, which may be extended by the Family Court for an additional period of up to two months.

Finally, while the initial request for a pre-petition temporary order of protection may be made *ex parte*, any application for an extension of such a temporary order of protection must be on notice to the juvenile. The juvenile must be afforded an opportunity to be heard and a right to counsel, including a right to appointment of an attorney for the child pursuant to section 249 of the Family Court Act.

Often needed in cases of alleged teen dating abuse, including in cases involving 16- and 17-year old youth that are removed from Youth Parts with referrals to local probation departments for adjustment, orders issued prior to the filing of a petition implicate significant constitutional rights of juveniles not yet formally accused of any act of juvenile delinquency. This is especially true in light of the serious consequences for violations of orders of protection. As Professor Merril Sobie indicated, in the McKinney's Practice Commentaries to Family Court Act §304.2, "considerations of fairness and due process mandate that *ex parte* orders be subject to adversarial review." It is critically important that such orders be strictly time-limited, that an initial extension be for good cause and that a further extension must be justified by a compelling reason, along with a showing by the presentment agency of why an extension is needed notwithstanding diligent efforts to file a juvenile delinquency petition on a timely basis. Due process considerations compel all such extensions to be on notice to the juvenile, who must be afforded an opportunity to be heard with counsel. Moreover, such orders must be properly terminated, *e.g.*, in cases in which the adjustment process has ended successfully or where it has failed, but where the presentment agency has declined to prosecute the case. With the salutary trend toward increased utilization of the adjustment process – and, at the same time, with the recent pandemic inevitably causing some delays for the presentment agencies to quickly file juvenile delinquency petitions involving non-detained youth – the need to carefully delineate the permissible duration of pre-petition temporary orders of protection has become ever-more vital.

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

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

Proposal

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

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

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

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

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

4. A temporary order of protection issued or extended after the filing of a petition under this article shall contain an expiration date and may remain in effect until an order of disposition is entered.

a. A temporary order of protection issued prior to the filing of a petition under this article may remain in effect for an initial period of up to thirty days and may be extended by the court for an additional period of up to thirty days upon good cause or, where the juvenile's case is being adjusted pursuant to section 308.1 of this article, for a period coinciding with such adjustment. If the juvenile successfully completes adjustment prior to the expiration of the order, the probation service, presentment agency or attorney for the child may move to vacate such temporary order of protection upon such successful completion.

b. A temporary order of protection issued under this section may be extended for one additional period of up to thirty days upon a finding by the court of a compelling reason. Where the case is not being adjusted or where efforts to adjust the case have been terminated unsuccessfully,

the court must also determine whether the presentment agency has made diligent efforts to file the petition and the reasons for any delay.

c. Any application for an extension of a temporary order of protection under this section shall be on notice to the juvenile, who shall have an opportunity to be heard and shall have a right to counsel pursuant to section two hundred forty-nine of this act.

§3. This act shall take effect immediately.

10. Issuance of warrants for seizures of firearms in domestic violence cases in Family Court [F.C.A. §§154-d, 842-a; C.P.L. §530.12; Jud. L. §212(2)]

Legislative enactments in 2020 and 2022 significantly enhanced the firearms provisions of the Family Court Act in family violence cases. For the first time, effective in 2020, Family Courts were given the authority to issue search warrants for law enforcement officers to seize weapons from accused offenders in family offense and other proceedings involving orders of protection. L. 2020, c. 55, Part M; Family Court Act §842-a. In 2022, the statute was expanded to make such seizure orders mandatory when a respondent in Family Court willfully fails to obey a court order for the voluntary surrender of firearms. L. 2022, c. 576. Additionally, the Family Court retains discretion to issue seizure orders "for other good cause shown," including at the initial proceeding in which an application for a temporary order of protection is made. The latter authority is especially significant in light of legislation enacted in 2022 amending Family Court Act §842-a requiring jurists to inquire of litigants directly, including at initial *ex parte* proceedings, "as to the existence and location of any firearm, rifle or shotgun owned or possessed by the respondent." L. 2022, c. 577.

In developing protocols for effectuating Family Court Act §842-a, both for discretionary and mandatory seizure orders, Family Courts have encountered three serious obstacles to implementation that require clarification. The Family Court Advisory and Rules Committee, therefore, is submitting a measure to clarify three points:

- Who can apply for a search warrant: The general incorporation by reference into Family Court Act §842-a of Article 690 of the Criminal Procedure Law has raised the question of whether the limitation contained in Criminal Procedure Law §§690.05(1) and 690.35(1) applies to applications in Family Court. Those statutes require that search warrant applications be made by a police officer, district attorney or "other public servant" acting in the course of his or her official duties. However, applications in Family Court for orders of protection, as well as later proceedings regarding compliance with court orders, such as surrender orders, are conducted in the absence of any presentment agencies, law enforcement officers or other public servants. Other than child protective proceedings under Article 10 of the Family Court Act, these are cases between private litigants. Particularly at the preliminary stage when a temporary order of protection is requested – and when the provision of the new statute authorizing seizure orders for "good cause" is invoked – petitioners in Family Court are often self-represented, as an attorney is often not assigned until the return date when both parties appear under Family Court Act §821-a(3)(a). Although any search warrant issued would be directed to law enforcement agencies to implement, the Committee's proposal would thus clarify that a petitioner may make the application for the search warrant directly, without involvement by law enforcement, prosecutors or other public servants.

- Who can hear an application for a search warrant: Family Court Act §842-a clearly expands the authorization in Criminal Procedure Law §690.35 for local criminal courts to entertain search warrant applications in order to allow Family Courts to entertain the applications. However,

Judiciary Law §§212(2)(n) and (o), the authorizations for court attorney referees and judicial hearing officers to hear applications for temporary orders of protection and orders of protection issued on default, were not amended in the 2020 legislation. In the absence of a specific authorization, it might be argued that consent of all parties would be required under section 4301 of the Civil Practice Law and Rules for reference of a proceeding to "hear and determine" the search warrant issue. This is a critical issue most especially in cases in which the ground for the search warrant application is "good cause," *e.g.*, information presented by a petitioner about "a substantial risk" of use of a firearm that is presented at the outset of a case when a temporary order of protection is first requested. It is critically important, therefore, to clarify that the authorization in the Judiciary Law §§212(2)(n) and (o) for court attorney referees and judicial hearing officers to hear and determine issues regarding orders of protection also extends to issues regarding firearms seizure orders.

• Jurisdiction of local criminal court to act when family courts are not in session: A "substantial risk" of use of a firearm to injure, maim or murder a victim of domestic violence may arise at any hour and often comes to light during hours when Family Courts are not in session, including, as noted above, when temporary orders of protection are first requested. Both Family Court Act §154-d and Criminal Procedure Law §530.12 provide specific authority for local criminal courts to issue and modify temporary orders of protection when Family Courts are closed. However, neither provision clearly affords these courts with specific authority to issue firearms seizure orders off-hours in Family Court cases, although they have the authority under Criminal Procedure Law §530.14 to issue such orders in criminal cases. The Committee's measure, therefore, would amend both Family Court Act §154-d and Criminal Procedure Law §530.12 to clarify that local criminal courts may issue firearms seizure orders when acting for Family Courts during hours when those courts are not in session.

The critical importance of effective implementation of the recently enacted authority for the issuance of search warrants for law enforcement to seize firearms in domestic violence cases in Family Courts cannot be overemphasized. As members of the New York State Legislature have indicated:

> The connection between domestic violence and lethal gun violence is far greater than many realize. According to a recent report by Everyone for Gun Safety, a nonprofit which advocates for gun control and against gun violence, more than half of America's mass shootings between 2009 and 2016 involved intimate partners or other family members.
>
> … In 2013, nearly one-quarter of all homicide victims in New York were in a domestic relationship with their killers. Each month, 50 American women are shot to death by an intimate partner, and nearly a million women alive today have been shot, or shot at, by their partners.

A. Paulin and D. Savino, "Close New York's Deadly Loophole," *NY Daily News*, Nov. 26, 2017, p. 38, col. 3. And as Hon. Susan Carbon, former Director of the United States Department of

Justice Office of Violence Against Women and New Hampshire judge, has written, along with nationally recognized expert, Darren Mitchell:

> Research has shown that family and intimate partner assaults involving firearms are 12 times more likely to result in death than those that do not involve firearms. Approximately two-thirds of the intimate partner homicides in the country are committed using guns.
>
> … Abusers who kill their intimate partners also may injure or kill third parties. One study found that in 38% of homicides involving intimate partners the perpetrator kills more than one person; other victims include children, intervenors, and bystanders.

D. Mitchell and S. Carbon, "Firearms and Domestic Violence: A Primer for Judges," *Court Review* 32 (Summer, 2002) [footnotes omitted].

In summary, in order to ensure effective implementation of New York State's vital firearms protections in domestic violence cases, enactment of the Committee's proposal is essential.

Proposal

AN ACT to amend the family court act, the criminal procedure law and the judiciary law, in relation to issuance of warrants for seizures of firearms in family court proceedings

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

Section 1. Section 154-d of the family court is amended by adding a new subdivision 3 to read as follows:

3. Applications for orders to seize firearms. When the family court is not in session, upon request of the petitioner, police officer or other public servant acting in the course of his or her official duties, a local criminal court may issue an order pursuant to paragraph (c) of subdivision one, paragraph (c) of subdivision two or paragraph (c) of subdivision three of section eight hundred forty-two-a of the family court act.

§2. Paragraph (c) of subdivisions 1, 2 and 3 of section 842-a of the family court act, as amended by chapter 576 of the laws of 2022, are amended to read as follows:

(c) the court shall where the [defendant] respondent willfully refuses to surrender such firearm, rifle or shotgun pursuant to paragraphs (a) and (b) of this subdivision, or for other good cause shown, order the immediate seizure of such firearm, rifle or shotgun, and search therefor, pursuant to an order issued in accordance with article six hundred ninety of the criminal procedure

law, consistent with such rights as the [defendant] respondent may derive from this article or the constitution of this state or the United States; provided that, notwithstanding subdivision one of section 690.05 and subdivision one of section 690.35 of the criminal procedure law, the petitioner may make an application for an order under this paragraph.

(c) the court shall where the [defendant] respondent willfully refuses to surrender such firearm, rifle or shotgun pursuant to paragraphs (a) and (b) of this subdivision, or for other good cause shown, order the immediate seizure of such firearm, rifle or shotgun, and search therefor, pursuant to an order issued in accordance with article six hundred ninety of the criminal procedure law, consistent with such rights as the [defendant] respondent may derive from this article or the constitution of this state or the United States; provided that, notwithstanding subdivision one of section 690.05 and subdivision one of section 690.35 of the criminal procedure law, the petitioner may make an application for an order under this paragraph.

(c) the court shall where the [defendant] respondent willfully refuses to surrender such firearm, rifle or shotgun pursuant to paragraphs (a) and (b) of this subdivision, or for other good cause shown, order the immediate seizure of such firearm, rifle or shotgun, and search therefor, pursuant to an order issued in accordance with article six hundred ninety of the criminal procedure law, consistent with such rights as the [defendant] respondent may derive from this article or the constitution of this state or the United States; provided that, notwithstanding subdivision one of section 690.05 and subdivision one of section 690.35 of the criminal procedure law, the petitioner may make an application for an order under this paragraph.

§3. Subdivision 6 of section 842-a of the family court act, as amended by section 11 of part M of chapter 55 of the laws of 2020, is amended to read as follows:

6. Notice. (a) Where an order requiring surrender, revocation, suspension, seizure or ineligibility has been issued pursuant to this section, any temporary order of protection or order of protection issued shall state that such firearm license has been suspended or revoked or that the respondent is ineligible for such license, as the case may be, and that the [defendant] respondent is prohibited from possessing any firearms, rifles or shotguns.

(b) The court revoking or suspending the license, ordering the respondent ineligible for such license, or ordering the surrender or seizure of any firearm, rifles or shotguns shall

immediately notify the statewide registry of orders of protection and the duly constituted police authorities of the locality of such action.

(c) The court revoking or suspending the license or ordering the [defendant] respondent ineligible for such license shall give written notice thereof without unnecessary delay to the division of state police at its office in the city of Albany.

(d) Where an order of revocation, suspension, ineligibility, surrender, or seizure is modified or vacated, the court shall immediately notify the statewide registry of orders of protection and the duly constituted police authorities of the locality concerning such action and shall give written notice thereof without unnecessary delay to the division of state police at its office in the city of Albany.

§4. Section 530.12 of the criminal procedure law is amended by adding a new subdivision 3-c to read as follows:

3-c. Applications for orders to seize firearms. When the family court is not in session, upon request of the petitioner, police officer or other public servant acting in the course of his or her official duties, a local criminal court may issue an order pursuant to paragraph (c) of subdivision one, paragraph (c) of subdivision two or paragraph (c) of subdivision three of section eight hundred forty-two-a of the family court act.

§5. Paragraph (n) and the opening paragraph of paragraph (o) of subdivision 2 of section 212 of the judiciary law, paragraph (n) as added by chapter 343 of the laws of 2010 and the opening paragraph of paragraph (o) as added by chapter 219 of the laws of 2002, are amended to read as follows:

(n) Have the power to authorize a court under subdivision (b) of section forty-three hundred seventeen of the civil practice law and rules to order a reference to determine [an application] applications for (i) an order of protection (including a temporary order of protection) that, in accordance with law, is made ex parte or where all parties besides the applicant default in appearance; and (ii) an order for law enforcement to search for and seize firearms pursuant to section eight hundred forty-two-a of the family court act; provided, however, this paragraph shall only apply to applications brought in family court during the hours that the court is in session, and after five o'clock p.m. Training about domestic violence shall be required for all persons who are designated to serve as references as provided in this paragraph.

(o) Notwithstanding the provisions of paragraph (n) of this subdivision, have the power to authorize family courts in the seventh and eighth judicial districts to establish a judicial hearing officer pilot program (hereinafter referred to as "pilot program") and, under subdivision (b) of section forty-three hundred seventeen of the civil practice law and rules, order a reference to determine [an application] applications for (i) an order of protection or temporary order of protection, that, in accordance with law, is made ex parte or where all parties beside the applicant default in appearance; and (ii) an order for law enforcement to search for and seize firearms pursuant to section eight hundred forty-two-a of the family court act; provided, however, that the chief administrator shall not exercise this power without prior consultation with the presiding justice of the fourth judicial department. Training about domestic violence shall be required for all judicial hearing officers in the pilot program.

§6. This act shall take effect immediately; provided, however, the amendments to paragraph (n) of subdivision 2 of section 212 of the judiciary law made by section five of this act shall not affect the repeal of such paragraph and shall be deemed repealed therewith.

11. Procedural requirements for parentage proceedings regarding children conceived through assisted reproduction or surrogacy agreements

[F.C.A. §§581-202, 581-203, 581-205, 581-206, 581-207, 581-303, 581-402, 581-403, 581-404, 581-405, 581-406, 581-409, 581-502, 581-603, 581-604, 581-605, 581-606, 581-705; D.R.L. §123; Gen'l. Bus. L. §§1400, 1401, 1404]

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

In brief, the measure would make the following changes to Article 5-C of the Family Court Act, section 123 of the Domestic Relations Law and section 1400 *et seq*. of the General Business Law:

A. <u>Parentage determinations in assisted reproduction parentage proceedings</u>:

• Parentage petitions: A new option is added to the venue provisions in Family Court Act §581-202(a), that is, to allow parentage petitions to be filed in the county where the child's birth is "intended to occur" in cases in which one or both intended parents reside in New York State. With respect to the adjudication of the petitions, Family Court Act § 581-202(c) requires the court to enter an order of parentage based on the petition allegations alone if it finds that the allegations are truthful. However, like the comparable provision applicable to surrogacy parentage petitions [Family Court Act § 581-203(d)], the statute should require the court to actually make a determination of the truthfulness of the allegations, whether by hearing or otherwise. Significantly, while the petition itself must be verified, the statements attached to the petition are not required to be sworn. While in many cases, the court is able to determine written statements to be truthful without at least some accompanying testimony, this is not always the case. Courts, therefore, must have discretion to insist on testimony by the participants in order to judge the truthfulness of those statements, while retaining discretion to dispense with testimony, if appropriate. Using language similar to that in section 581-203(d), the proposal thus requires the court to actually "find" the statements to be truthful.

• Record of gamete donation: Family Court Act § 581-202(d)(2)(a) delineates the requirements for a record acknowledging the donation of a gamete or embryo, providing that it may be but is not required to be, signed before a notary public, two witnesses who are not the intended parents or a healthcare practitioner. The proposal would require that the record be signed

before a notary public or two witnesses, as the record is too significant for the witnessing or notarization of the signature to be optional. An agreement by a donor to give up any parental claim to a child born as a result of a donation of genetic material should be subject to at least some formal requirements. It should be noted that the statute already accommodates the possibility of cases lacking a formal record of the gamete donation. In such cases, Family Court Act § 581-202(d)(2)(b) provides that in the absence of a suitable record, the court may make a finding that "clear and convincing evidence" exists to support the donation. The provision would not apply in cases in which the gamete donation was by a spouse of an intended parent.

• Notice to necessary parties: Family Court Act §581-202(e) specifies that gamete donors for whom evidence of donative intent is lacking must be notified but is otherwise silent as to other interested individuals who should be deemed necessary parties and should be notified of parentage proceedings in assisted reproduction cases. In order to afford conclusiveness and finality to the proceedings, it is critical that a parentage proceeding not only determine who the parents of a child are, but also resolve any possible claims of parentage that other individuals may have. The proposal thus requires that, in addition to a donor for whom intent evidence is lacking, where an intended parent, if any, and the intended parent's spouse, if any, are not the petitioners, notice must also be provided to them and they must be deemed necessary parties.

• Parentage finding: In order for the court to report to the Department of Health in cases in which a parentage judgment had been issued prior to the child's birth, the measure would require the petitioner to notify the court of the child's name and date of birth within seven days of the birth on a form prescribed by the Chief Administrator of the Courts, after which the court would be required to incorporate the information into an amended order of parentage. Additionally, the measure would correct a drafting error in Family Court Act § 581-202(g) to include a cross-reference to Family Court Act §581-202(f), rather than §581-202(e),

C. <u>Parentage determinations in proceedings involving surrogacy agreements</u>:

• Venue: An additional venue option would be added to Family Court Act §581-203(a) to permit a parentage petition to be filed in "the county where the birth is intended to occur."

• Timing of filing of parentage petition: Family Court Act §581-203(b) allows a surrogate parentage proceeding to be "commenced at any time after the surrogacy agreement has been executed." Potentially, a proceeding can then be filed prior to the "transfer" of the embryo i.e. prior to pregnancy – a time-frame that may be months or even years prior to a pregnancy being achieved, if it is ever achieved. The measure would amend the statute to allow the proceeding to be commenced only after pregnancy is achieved. Further, with respect to pre-birth parentage orders, as in assisted reproduction cases, Family Court Act §581-203(d)(7) would be added to require the petitioner to provide notification to the court within seven days of the child's birth so that the child's name and birth date can be incorporated into an amended parentage order.

• Necessary parties: Family Court Act § 581-203(b) states that "the person acting as surrogate and all intended parents are necessary parties." As is the case with assisted reproduction proceedings under section 581-202(e), a critical component of parentage determinations is the

achievement of finality through elimination of future, potential parentage claims by other individuals. The measure thus amends the section to include as necessary parties the surrogate, her spouse, if any; donors for whom evidence of donative intent is lacking, if any; and all intended parents. Where a case regarding a surrogacy agreement also involves assisted reproduction, the notification requirement of Family Court Act §581-202(e) applies by reference.

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

• Confidentiality of records: Family Court Act §581-205 provides that records in parentage proceedings must be sealed, but lacks a specific provision ensuring that the anonymous captions would be used on documents that may reside in the public domain, such as papers filed with the County Clerk and court calendars. The provision would, therefore, be amended to require that, notwithstanding any other law, the County Clerk, as well as the Clerks of Supreme, Family and Surrogate's Courts, would be prohibited from displaying the full names of the parties or child on any documents available to the public. This measure would obviate the need for the case-by-case application for anonymous captions, which have become burdensome, especially for litigants in Supreme Court parentage cases, and it would ensure that the confidentiality protections of the *Child-Parent Security Act* are not vitiated by public access to full names by virtue of the filing of documents with the County, Supreme or Family Court Clerks.

• Certified copies of judgments of parentage: Applicable to both assisted reproduction and surrogacy agreement cases, a new section 581-207 would be added to the Family Court Act to require the court issuing a judgment of parentage to provide a certified copy to the intended parent or parents.

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

• Residency requirements: The measure rectifies the inconsistency between the residency requirements of sections 581-203(c) (1) and 581-402. Providing a more flexible residency requirement, Family Court Act §§581-402(a)(2) and 581-402(b)(1) would be amended to be consistent with Family Court Act § 581-203(c), which requires that the petition state "that the person acting as surrogate or at least one of the intended parents" was a New York State resident for at least six months at the time the surrogacy agreement was executed.

• Medical expenses and insurance coverage of the person acting as surrogate: Family Court Act §581-402 would further be amended to retain the intended parents' obligation to cover the medical expenses of the person acting as surrogate, while eliminating the rigid requirement for them to purchase a medical insurance policy on behalf of the person acting as surrogate that would cover her preconception care through 12 months after the end of her pregnancy. This current requirement is problematic because insurance policies are issued on an annual basis and therefore no insurance policy exists that would cover that exact, extended time period. While the amendment clearly requires the intended parents to take care of the medical expenses, it provides flexibility as to the specific means by which those expenses may be covered. Further, the amendment to the provision addressing legal counsel clarifies that the right to legal counsel commences after the surrogate has completed medical screening and once the contract phase has been initiated. This section, as well as Family Court Act §581-606, would also be amended to provide intended parents with the option of purchasing contractual or accidental death insurance policies which often provide greater insurance coverage for persons acting as surrogates than that which is provided by traditional life insurance policies. Finally with respect to insurance, Family Court Act §581-605 would be amended to use the broader term "mental health counseling," rather than "behavioral health," as insurance policies for the latter are often not available.

• Surrogacy contract signatures: Section 581-403(a) of the Family Court Act requires that a surrogacy contract be "a signed record verified or executed before two non-party witnesses." Two problems are evident in the language of this section. First, it is ambiguous, as it is not clear whether a verified signature must always be witnessed by two non-parties or whether the two non-party witness requirement only applies to unverified signatures. More problematic, however, is the minimal requirement for authentication of the contract, even though Part 4 of the new statute recognizes the need for surrogacy agreements to contain very specific and detailed requirements protective of all parties. These contracts are not entered into lightly, or without a great deal of time, attorney involvement, negotiation and expense. Given the importance of the contract, it is thus not unreasonable to require at least notarization of the signatures or witnessing by two non-party witnesses.

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

provide for specific performance as a remedy for breach of contract under the very limited circumstances where either: 1) the person acting as surrogate refuses to transfer custody of the child to the intended parents or 2) the intended parents refuse to accept custody of the child.

• Compensation to person acting as surrogate: The measure would amend Family Court Act §581-502 to clarify that the person acting as surrogate would be compensated for a period including the pregnancy term and eight-week post-birth recuperation. If there are complications from the pregnancy or delivery, as confirmed by a health care practitioner, supplemental compensation for lost wages may be provided for a period after the recuperative period and up to twelve months after the birth, stillbirth or miscarriage resulting in termination of the pregnancy or pregnancy termination.

• Independent legal counsel: The measure would amend Family Court Act §581-603 to add the right of the spouse of the person acting as surrogate to be represented by counsel. It further makes clear that the intended parents are not required to cover legal fees of either the person acting as surrogate or her spouse for a litigated dispute unless ordered to do so by an "arbiter or court of competent jurisdiction."

• Bill of rights for person acting as surrogate: Family Court Act §581-601 would be amended to clarify that the enumerated rights in the article apply to any person acting as surrogate under New York State law, "notwithstanding ay surrogacy agreement, judgment of parentage, memorandum of understanding, verbal agreement or contract to the contrary."

C. Retroactivity: Family Court Act §581-705 provides that the provisions relating to children conceived through assisted reproduction may be applied retroactively. Similarly, the surrogacy provisions may also be applied retroactively to uncompensated surrogacy agreements. Compensated surrogacy agreements, which pre-dated passage of the legislation, must be adjudicated pursuant to section 581-407 which provides that the parentage of the child will be determined based on the intent of the parties, taking into account the best interests of the child.

D. Domestic Relations Law: D.R.L. §123 would be amended to correct a typographical error, that is, to substitute "party" for "part."

E. Surrogacy Programs and Assisted Reproduction Providers: The definition of "surrogacy program" in General Business Law §1400 would be amended to clarify that a licensed attorney would only be deemed a surrogacy program if he or she provides services to match intended parents with potential persons to act as surrogates. Pursuant to General Business Law §1401, a surrogacy program arranging a surrogacy agreement would be subject to the requirements of the General Business Law "regardless of whether such agreement ultimately comports with the requirements" for surrogacy agreements under Part 4 of the CPSA. General Business Law §1403 would be clarified to exclude from the escrow requirement those fees paid to a surrogacy program for its services. Finally, General Business Law §1404 would be amended to require the regulations of the Department of Health to mandate surrogacy programs to "monitor compliance with eligibility criteria for the intended parents and persons acting as surrogates." The prior statutory language, which required surrogacy programs to monitor compliance with the surrogacy

agreements, was unrealistic because those programs are clearly not in a position to ensure that the parties are complying with each of the many commitments the parties are required to make to one another in the contract. This modification appropriately requires the surrogacy programs to oversee compliance with the aspect of the process that is within their purview, that is, application of the eligibility criteria for intended parents and persons acting as surrogates.

Proposal

AN ACT to amend the family court act, the domestic relations law and the general business law, in relation to surrogacy programs and surrogacy agreements.

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

Section 1. Section 581-102 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§ 581-102. Definitions. (a) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse and includes but is not limited to:

1. intrauterine or vaginal insemination;

2. donation of gametes;

3. donation of embryos;

4. in vitro fertilization and transfer of embryos; and

5. intracytoplasmic sperm injection.

(b) "Child" means a born individual of any age whose parentage may be determined under this act or other law.

(c) "Compensation" means payment of ny valuable consideration in excess of reasonable medical and ancillary costs.

(d) "Donor" means an individual who does not intend to be a parent who produces gametes and provides them to another person, other than the individual's spouse, for use in assisted reproduction. The term does not include a person who is a parent under part three of this article. Donor also includes an individual who had dispositional control of an embryo or gametes who then

transfers dispositional control and releases all resent and future parental and inheritance rights and obligations to a resulting child.

(e) "Embryo" means a cell or group of cells containing a diploid complement of chromosomes or group of such cells, not a gamete or gametes, that has the potential to develop into a live born human being if transferred into the body of a person under conditions in which gestation may be reasonably expected to occur.

(f) "Embryo transfer" means all medical and laboratory procedures that are necessary to effectuate the transfer of an embryo into the uterine cavity.

(g) "Gamete" means a cell containing a haploid complement of DNA that has the potential to form an embryo when combined with another gamete. Sperm and eggs shall be considered gametes. A human gamete used or intended for reproduction may not contain nuclear DNA that has been deliberately altered, or nuclear DNA from one human combined with the cytoplasm or cytoplasmic DNA of another human being.

(h) "Health care practitioner" means an individual licensed or certified under title eight of the education law, or a similar law of another state or country, acting within his or her scope of practice.

(i) "Independent escrow agent" means someone other than the parties to a surrogacy agreement and their attorneys. An independent escrow agent can, but need not, be a surrogacy program, provided such surrogacy program is owned [or managed] by an attorney licensed to practice law in the state of New York. If such independent escrow agent is not an attorney owned surrogacy program, it shall be [licensed,] bonded and insured.

[(i) "Surrogacy agreement" is an agreement between at least one ntended parent and a person acting as surrogate intended to result in a live birth where the child will be the legal child of the intended parents.]

(j) "In vitro fertilization" means the formation of a human embryo outside the human body.

(k) "Intended parent" is an individual who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction or a surrogacy agreement, provided he or she meets the requirements of this article.

(l) "Parent" as used in this article means an individual with a parent-child relationship created or recognized under this act or other law.

(m) "Participant" is an individual who either provides a gamete that is used in assisted reproduction, is an intended parent, is a person acting as surrogate, or is the spouse of an intended parent or person acting as surrogate.

(n) "Person acting as surrogate" means an adult person, not an intended parent, who enters into a surrogacy agreement to bear a child who will be the legal child of the intended parent or parents so long as the person acting as surrogate has not provided the egg used to conceive the resulting child.

[(h)) "Health care practitioner" means an individual licensed or certified under title eight of the education law, or a similar law of another state or country, acting within his or her scope of practice.

(l) "Intended parent" is an individual who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction or a surrogacy agreement provided he or she meets the requirements of this article.

(m) "In vitro fertilization" means the formation of a human embryo outside the human body.

(n) "Parent" as used in this article means an individual with a parent-child relationship created or recognized under this act or other law.

(o) "Participant" is an individual who either: provides a gamete that is used in assisted reproduction, is an intended parent, is a person acting as surrogate, or is the spouse of an intended parent or person acting as surrogate.

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

[(q)] (p) "Retrieval" means the procurement of eggs or sperm from a gamete provider.

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

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

(s) "Surrogacy agreement" means an agreement between at least one intended parent and a person acting as surrogate intended to result in a live birth where the child will be the legal child of the intended parents.

(t) "Transfer" means the placement of an embryo or gametes into the body of a person with the intent to achieve pregnancy and live birth.

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

§ 581-202. Proceeding for judgment of parentage of a child conceived through assisted reproduction. (a) A proceeding for a judgment of parentage with respect to a child conceived through assisted reproduction may be commenced:

(1) if [the] an intended parent or child resides in New York state, in the county where the intended parent resides any time after pregnancy is achieved or in the county where the child was born or resides or in the county where the birth is intended to occur; or

(2) if [the] neither an intended parent [and] nor the child [do not] reside in New York state, up to ninety days after the birth of the child in the county where the child was born.

(b) The petition for a judgment of parentage must be verified.

(c) Where [a petition includes the following truthful] the court finds the following statements in the petition to be true, the court shall adjudicate the intended parent or parents to be the parent or parents of the child without the need for additional proceedings or documentation.

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

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

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

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

The court may, in its discretion, dispense with testimony to establish the truthfulness of the statements.

(d) The following shall be deemed sufficient proof of a donor's donative intent for purposes of this section:

(1) [in the case of an anonymous donor or] where gametes or embryos have [previously] been [released] relinquished to a gamete or embryo storage facility or were donated in the presence of a health care practitioner, either:

(i) a statement or documentation from the gamete or embryo storage facility or health care practitioner stating or demonstrating that the donor or donors of such gametes or embryos [were anonymously donated or had previously been released] relinquished all parental or proprietary interest to them; or

(ii) a record from the gamete or embryo donor or donors evidencing intent to relinquish all parental or proprietary interest in the gametes or embryos; or

(iii) clear and convincing evidence that the gamete or embryo donor [intended to donate gametes or embryos anonymously or intended to release such gametes or embryos to a gamete or embryo storage facility or health care practitioner; or] or donors confirmed, prior to donation, that the donor or donors would have no parental or proprietary interest in the gametes or embryos;

(2) [in the case of a donation from a known donor, either: a.] where the gametes or embryos were not relinquished to a gamete or embryo storage facility or donated in the presence of a health care practitioner, either:

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

[(i)] (A) before a notary public, or

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

[(iii)] (C) before a health care practitioner; or

[b.] (ii) clear and convincing evidence that the gamete or embryo donor or donors agreed, prior to conception, [with the gestating parent] that the on or [has] or donors would have no parental or proprietary interest in the gametes or embryos.

(3) Except for those agreements executed in compliance with section 581-306 of this article, this subdivision shall not apply where the person providing the gametes or embryos is the spouse of the intended parent.

(e)[(1)] In the absence of evidence pursuant to subparagraphs (i) and (ii) of paragraph one and subparagraph (i) of paragraph two of [this] subdivision (d) of this section, notice shall be given to any donor whose identity is known to intended parents at least twenty days prior to the date set for the proceeding to determine the existence of donative intent by delivery of a copy of the petition and notice pursuant to section three hundred eight of the civil practice law and rules. If an intended parent or an intended parent's spouse is not a petitioner, such notice shall also be given to such person who shall be a necessary party unless the intended parent proceeded without the participation of their spouse in compliance with section 581-305(b) or section 581-306 of this article. Upon a showing to the court, by affidavit or otherwise, on or before the date of the proceeding or with in such further time as the court may allow, that personal service cannot be effected at the [donor's] last known address or addresses of the donor or donors, and/or the non-petitioning intended parent, if any, with reasonable effort, notice may be given, without prior court order therefore, at least twenty days prior to the proceeding by registered or certified mail directed to [the donor's] such last known address or addresses. Notice by publication shall not be required to be given to [a donor] anyone entitled to notice pursuant to the provisions of this section.

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

(f) In cases not covered by subdivision (c) of this section, the court shall adjudicate the parentage of the child consistent with part three of this article.

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

(1) declaring[, that] the intended parent or parents to be the legal parent or parents of the child immediately upon the birth of the child[, the intended parent or parents is or are the legal parent or parents of the child]; and

(2) ordering the intended parent or parents to assume responsibility for the maintenance and support of the child immediately upon the birth of the child; and

(3) if there is a donor or donors, ordering that [the] any donor is not a parent of the child; and

(4) ordering that:

(i) [Pursuant] The hospital birth registrar shall report the parentage of the child on the record of live birth in conformity with the judgment of parentage, if the judgment of parentage is issued before the birth of the child; and

(ii) If a change to the child's birth certificate is necessitated by the judgment of parentage, then pursuant to section two hundred fifty-four of the judiciary law, the clerk of the court shall transmit to the state commissioner of health, or for a person born in New York city, to the commissioner of health of the city of New York, on a form prescribed by the commissioner, a written notification of such entry together with such other facts as may assist in identifying the birth record of the person whose parentage was in issue and, if such person whose parentage has been determined is under eighteen years of age, the clerk shall also transmit forthwith to the registry operated by the department of social services pursuant to section three hundred seventy-two-c of the social services law a notification of such determination; and

[(ii)] (iii) Pursuant to section forty-one hundred thirty-eight of the public health law and NYC Public Health Code section 207.05 that upon receipt of a judgment of parentage the local registrar where a child is born will report the parentage of the child to the appropriate department of health in conformity with the court order. If an original birth certificate has already been issued, the appropriate department of health will amend the birth certificate in an expedited manner and

seal the previously issued birth certificate except that it may be rendered accessible to the child at eighteen years of age or the legal parent or parents; and

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

The court shall thereafter issue an amended judgment of parentage that includes the child's name as it appears on the child's birth certificate and the child's date of birth.

§3. Section 581-203 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§581-203. Proceeding for judgment of parentage of a child conceived pursuant to a surrogacy agreement.(a) The proceeding may be commenced:

(1) in any county where an intended parent resided any time after the surrogacy agreement was executed; or

(2) in the county where the child was born or resides or in the county where the birth is intended to occur; or

(3) in the county where the surrogate resided any time after the surrogacy agreement was executed.

(b) The proceeding may be commenced at any time after [the surrogacy agreement has been executed] pregnancy is achieved and the person acting as surrogate, the spouse of the person acting as surrogate, if any, donors for whom there is not proof of donative intent as set forth in subdivision (d) of section 581-202 of this part, and all intended parents are necessary parties. The service provisions of subdivision (e) of section 581-202 of this title shall be applicable to donors entitled to notice pursuant to this provision.

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

(1) a statement that the person acting as surrogate or at least one [of the] intended [parents] parent has been a resident of the state for at least six months at the time the surrogacy agreement was executed; and

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

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

(4) a copy of the executed surrogacy agreement.

(d) Where the court finds the statements required by subdivision (c) of this section to be true, the court shall issue a judgment of parentage, without additional proceedings or documentation:

(1) declaring, that upon the birth of the child born during the term of the surrogacy agreement, the intended parent or parents are the only legal parent or parents of the child;

(2) declaring, that upon the birth of the child born during the term of the surrogacy agreement, the person acting as surrogate, and the spouse of the person acting as surrogate, if [any] applicable, is not [the] a legal parent of the child;

(3) declaring that upon the birth of the child born during the term of the surrogacy agreement, [the donors] any donor, if [any] applicable, [are] is not [the parents] a parent of the child;

(4) ordering the person acting as surrogate and the spouse of the person acting as surrogate, if any, to transfer the child to the intended parent or parents if this has not already occurred;

(5) ordering the intended parent or parents to assume responsibility for the maintenance and support of the child immediately upon the birth of the child; and

(6) ordering that:

(i) [Pursuant] The hospital birth registrar shall report the parentage of the child on the record of live birth in conformity with the judgment of parentage, if the judgment of parentage is issued before the birth of the child; and

(ii) If a change to the child's birth certificate is necessitated by the judgment of parentage, then pursuant to section two hundred fifty-four of the judiciary law, the clerk of the court shall transmit to the state commissioner of health, or for a person born in New York city, to the commissioner of health of the city of New York, on a form prescribed by the commissioner, a written notification of such entry together with such other facts as may assist in identifying the birth record of the person whose parentage was in issue and, if the person whose parentage has been determined is under eighteen years of age, the clerk shall also transmit to the registry operated by the department of social services pursuant to section three hundred seventy-two-c of the social services law a notification of the determination; and

[(ii)] (iii) Pursuant to section forty-one hundred thirty-eight of the public health law and NYC Public Health Code section 207.05 that upon receipt of a judgement of parentage the local registrar where a child is born will report the parentage of the child to the appropriate department of health in conformity with the court order. If an original birth certificate has already been issued, the appropriate department of health will amend the birth certificate in an expedited manner and seal the previously issued birth certificate except that it may be rendered accessible to the child at eighteen years of age or the legal parent or parents; and

(7) if the judgment of parentage is issued prior to the birth of the child, ordering the petitioner or petitioners, within seven days of such birth, to provide the court with notification thereof, together with such other facts as may assist in identifying the birth record of the child whose parentage was in issue. Such notification shall be in writing on a form to be prescribed by the chief administrator of the courts. The court shall thereafter issue an amended judgment of parentage that includes the child's name as it appears on the child's birth certificate and the child's date of birth.

(e) In the event the certification required by paragraph two of subdivision (c) of this section cannot be made because of a technical or non-material deviation from the requirements of this article; the court may nevertheless enforce the agreement and issue a judgment of parentage if the

court determines the agreement is in substantial compliance with the requirements of this article. In the event that any other requirements of subdivision (c) of this section are not met, the court shall determine parentage according to part four of this article.

§4. Section 581-205 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§581-205. Inspection of records. Court records relating to proceedings under this article shall be sealed, provided, however, that the office of temporary and disability assistance, a child support unit of a social services district or a child support agency of another state providing child support services pursuant to title IV-d of the federal social security act, when a party to a related support proceeding and to the extent necessary to provide child support services or for the administration of the program pursuant to title IV-d of the federal social security act, may obtain a copy of a judgment of parentage. The parties to the proceeding and the child shall have the right to inspect and make copies of the entire court record, including, but not limited to, the name of the person acting as surrogate and any known [donors] donor. Notwithstanding any other provision of law, the county clerk or the clerk of the supreme, surrogate's or family court shall not display the surname of the child or parties in any document, index, minutes or other record available to the public.

§5. Subdivision (a) of section 581-206 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

(a) Proceedings pursuant to this article may be instituted in [the] New York state supreme [or] court, family court or surrogates court.

§6. The family court act is amended by adding a new section 581-207 to read as follows:

§ 581-207. Certified copy of judgment of parentage. Upon issuing a judgment of parentage pursuant to section 581-202 or 581-203 of this article, the issuing court shall provide a certified copy of such judgment to the intended parent or parents.

§7. Subdivision (b) of section 581-303 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

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

§8. Paragraph 3 of subdivision (a) and subdivision (d) of section 581-306 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, are amended to read as follows:

(3) where the intended parents are married, transfer of legal rights and dispositional control [occurs only] becomes effective upon: (i) living separate and apart pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded; or (ii) living separate and apart at least three years; or (iii) divorce; or (iv) death.

(d) An embryo disposition agreement [or advance directive] that is not in compliance with subdivision (a) of this section may still be found to be enforceable by the court after balancing the respective interests of the parties except that the intended parent who divested him or herself of legal rights and dispositional control may not be declared to be a parent for any purpose without his or her consent. The intended parent awarded legal rights and dispositional control of the embryos shall, in this instance, be declared to be the only parent of the child.

§9. Section 581-402 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§581-402. Eligibility to enter surrogacy agreement. (a) A person acting as surrogate shall be eligible to enter into an enforceable surrogacy agreement under this article if the person acting as surrogate has met the following requirements at the time the surrogacy agreement is executed:

(1) the person acting as surrogate is at least twenty-one years of age;

(2) the person acting as surrogate: (i) is a United States citizen or a lawful permanent resident, and[, where at least one intended parent is not] (ii) has been a resident of New York state for at least six months[, was] if neither intended parent has been a resident of New York state for at least six months;

(3) the person acting as surrogate has not provided the egg used to conceive the resulting child;

(4) the person acting as surrogate has completed a medical evaluation with a health care practitioner relating to the anticipated pregnancy. Such medical evaluation shall include a screening of the medical history of the potential surrogate including known health conditions that may pose risks to the potential surrogate or embryo during pregnancy;

(5) the person acting as surrogate has given informed consent [for the surrogacy after] to undergo the medical procedures after the licensed health care practitioner [inform] has informed them of the medical risks of surrogacy including the possibility of multiple births, risk of medications taken for the surrogacy, risk of pregnancy complications, psychological and psychosocial risks, and impacts on their personal lives;

(6) the person acting as surrogate, and the spouse of the person acting as surrogate, if applicable, have been represented from the initiation of [throughout] the contractual process and throughout the duration of the [contract and its execution] surrogacy agreement by independent legal counsel of their own choosing who is licensed to practice law in the state of New York which shall be paid for by the intended parent or parents, except that a person acting as surrogate who is receiving no compensation may waive the right to have the intended parent or parents pay the fee for such legal counsel. Where the [intended parent or parents are paying for the] independent legal counsel of the person acting as surrogate, and the spouse of the person acting as surrogate, if applicable, is paid by the intended parent or parents, a separate retainer agreement shall be prepared clearly stating that such legal counsel will only represent the person acting as surrogate and the spouse of the person acting as surrogate, if applicable, in all matters pertaining to the surrogacy agreement, that such legal counsel will not offer legal advice to any other parties to the surrogacy agreement, and that the attorney-client relationship lies with the person acting as surrogate and the spouse of the person acting as surrogate, if applicable. The intended parent or parents shall not be required to pay the legal fees for the person acting as surrogate, and the spouse of the person acting as surrogate, if applicable, in connection with a litigated dispute between the parties unless otherwise ordered by an arbiter or court of competent jurisdiction;

(7) the person acting as surrogate has or the surrogacy agreement stipulates that the person acting as surrogate will obtain [a comprehensive] health insurance [policy] coverage that takes effect after the person acting as surrogate has been deemed medically eligible but prior to taking any medication or commencing treatment to further embryo transfer that covers [preconception care, prenatal care, major medical treatments, hospitalization, and behavioral health care, and the comprehensive policy has a term that extends throughout the duration of the expected pregnancy and for twelve months after the birth of the child, a stillbirth, a miscarriage resulting in termination of pregnancy, or termination of the pregnancy; the policy shall be paid for, whether directly or through reimbursement or other means, by the intended parent or parents on behalf of the person acting as surrogate pursuant to the surrogacy agreement, except that a person acting as surrogate who is receiving no compensation may waive the right to have the intended parent or parents pay for the health insurance policy. The intended parent or parents shall also pay for or reimburse the person acting as surrogate for all co-payments, deductibles and any other out-of-pocket medical costs associated with preconception, pregnancy, childbirth, or postnatal care, that accrue through twelve months after the birth of the child, a stillbirth, a miscarriage, or termination of the pregnancy. A person acting as surrogate who is receiving no compensation may waive the right to have the intended parent or parents make such payments or reimbursements]:

(i) preconception medical expenses. The surrogacy agreement shall state that the intended parent or parents will be responsible for all medical costs of the person acting as surrogate associated with their pre-conception care including but not limited to medical and psychological screenings, medications, embryo transfer procedure, monitoring prior and subsequent to the embryo transfer procedure and any complications associated with the foregoing. The intended parent or parents shall be responsible for the costs of any such complications either through insurance or by placing and maintaining sufficient funds in escrow to cover such expenses. If the surrogacy agreement is terminated after the person acting as surrogate has taken any medication or commenced treatment to further embryo transfer but before pregnancy is achieved, such funds shall remain in escrow for a minimum period of six months from the date the surrogacy agreement is terminated;

(ii) medical expenses associated with pregnancy. The person acting as surrogate has, or the surrogacy agreement shall stipulate that the person acting as surrogate will obtain, comprehensive

health insurance coverage, via one or more insurance policies, prior to or immediately upon confirmation of pregnancy that covers prenatal care, childbirth and postnatal care, and that such comprehensive coverage must be in place throughout the duration of the pregnancy and for twelve months after the birth of the child, a stillbirth, a miscarriage resulting in termination of the pregnancy, or termination of the pregnancy. The policy shall be paid for, whether directly or through reimbursement or other means, by the intended parent or parents on behalf of the person acting as surrogate to the extent that there is an additional cost to the person acting as surrogate for such health insurance coverage. The intended parent or parents shall also pay for or reimburse the person acting as surrogate for all co-payments, deductibles and any other out-of-pocket medical costs associated with pregnancy, childbirth, or postnatal care, that accrue through twelve months after the birth of the child, a stillbirth, a miscarriage resulting in termination of the pregnancy, or termination of the pregnancy; and

(iii) uncompensated surrogacy agreements. A person acting as surrogate who is receiving no compensation may waive the right to have the intended parent or parents make the payments set forth in this section;

(8) the surrogacy agreement must provide that the intended parent or parents shall [procure and] pay for a life insurance, contractual liability or accidental death insurance policy for the person acting as surrogate that takes effect prior to taking any medication or the commencement of medical procedures to further embryo transfer, provides a minimum benefit of seven hundred fifty thousand dollars or the maximum amount the person acting as surrogate qualifies for if it is less than seven hundred fifty thousand dollars, and [has a term that extends] such coverage shall extend throughout the duration of the expected pregnancy and for twelve months after the birth of the child, a stillbirth, a miscarriage resulting in termination of pregnancy, or termination of the pregnancy, with a beneficiary or beneficiaries of [their] the person acting as surrogate's choosing. The policy shall be paid for, whether directly or through reimbursement or other means, by the intended parent or parents on behalf of the person acting as surrogate pursuant to the surrogacy agreement, except that a person acting as surrogate who is receiving no compensation may waive the right to have the intended parent or parents pay for the life insurance, contractual liability or accidental death insurance policy; and

(9) the person acting as surrogate meets all other requirements deemed appropriate by the commissioner of health regarding the health of the prospective surrogate.

(b) The intended parent or parents shall be eligible to enter into an enforceable surrogacy agreement under this article if he, she or they have met the following requirements at the time the surrogacy agreement was executed:

(1) at least one intended parent is:

(i) a United States citizen or a lawful permanent resident; and [was] (ii) has been a resident of New York state for at least six months if the person acting as surrogate has not been a resident of the state of New York for at least six months;

(2) [the intended parent or parents has] they have been represented [throughout] from the initiation of the contractual process and throughout the duration of the [contract and its execution] surrogacy agreement by independent legal counsel of his, her or their own choosing who is licensed to practice law in the state of New York; and

(3) [he or she is] they are an adult person who is not in a spousal relationship, or [adult] any adults who are spouses together, or any [two] adults who are intimate partners together, except an adult in a spousal relationship is eligible to enter into an enforceable surrogacy agreement without [his or her] their spouse if:

(i) they are living separate and apart pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded; or

(ii) they have been living separate and apart for at least three years prior to execution of the surrogacy agreement.

(c) where the spouse of an intended parent is not a required party to the agreement, the spouse is not an intended parent and shall not have rights or obligations to the child.

§10. Section 581-403 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§ 581-403. Requirements of surrogacy agreement. A surrogacy agreement shall be deemed to have satisfied the requirements of this article and be enforceable if it meets the following requirements:

(a) it shall be in a [signed] record [verified or executed before] with each signature either notarized or witnessed by two [non-party witnesses] non-parties and signed by:

(1) each intended parent, and

(2) the person acting as surrogate, and the spouse of the person acting as surrogate, if [any] applicable, unless:

(i) [the person acting as surrogate and the spouse of the person acting as surrogate] they are living separate and apart pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or approved in the form required to entitle a deed to be recorded; or

(ii) they have been living separate and apart for at least three years prior to execution of the surrogacy agreement;

(b) it shall be executed prior to the person acting as surrogate taking any medication or the commencement of medical procedures in the furtherance of embryo transfer, provided the person acting as surrogate shall have provided informed consent to undergo such medical treatment or medical procedures prior to executing the agreement;

(c) it shall be executed by a person acting as surrogate meeting the eligibility requirements of subdivision (a) of section 581-402 of this part and by the spouse of the person acting as surrogate, if applicable, unless the signature of the spouse of the person acting as surrogate is not required as set forth in this section;

(d) it shall be executed by intended parent or parents who met the eligibility requirements of subdivision (b) of section 581-402 of this part;

(e) the person acting as surrogate and the spouse of the person acting as surrogate, if applicable, and the intended parent or parents shall have been represented [throughout] from the initiation of the contractual process and the surrogacy agreement states that they shall be represented throughout the duration of the [contract and its execution] surrogacy agreement by

separate, independent legal counsel of their own choosing who is licensed to practice law in the state of New York;

(f) if the surrogacy agreement provides for the payment of compensation to the person acting as surrogate, the funds for base compensation and reasonable anticipated additional expenses shall have been placed in escrow with an independent escrow agent, who consents to the jurisdiction of New York courts for all proceedings related to the enforcement of the escrow agreement, prior to the person acting as surrogate commencing [with] any medical procedure other than medical evaluations necessary to determine the person acting as surrogate's eligibility;

(g) the surrogacy agreement must include information disclosing how the intended parent or parents will cover the medical expenses of the person acting as surrogate and the child. The surrogacy agreement shall specify the amount that the intended parent or parents shall place in escrow to cover such reasonable anticipated costs including preconception medical care and extending throughout the duration of the surrogacy agreement. If it is anticipated that comprehensive health care coverage [is] will be used to cover the medical expenses for the person acting as surrogate, the [disclosure shall include a review and summary of the] health care policy provisions related to coverage and exclusions for the person acting as [surrogate's] surrogate shall be reviewed and summarized in relation to the anticipated pregnancy prior to such policy being used to cover any of the person acting as surrogate's medical expenses incurred pursuant to the surrogacy agreement; and

(h) [it] the surrogacy agreement shall include the following information:

(1) the date, city and state where the surrogacy agreement was executed;

(2) the first and last names of and contact information for the intended parent or parents and of the person acting as surrogate;

(3) the first and last names of and contact information for the persons from which the gametes originated, if known. The agreement shall specify whether the gametes provided were eggs, sperm, or embryos;

(4) the name of and contact information for the licensed and registered surrogacy program [handling] arranging or facilitating the transactions contemplated by the surrogacy agreement, if any; and

(5) the name of and contact information for the attorney representing the person acting as surrogate, and the spouse of the person acting as surrogate, if applicable, and the attorney representing the intended parent or parents; and

(i) the surrogacy agreement must comply with all of the following terms:

(1) As to the person acting as surrogate and the spouse of the person acting as surrogate, if applicable:

(i) the person acting as surrogate agrees to undergo embryo transfer and attempt to carry and give birth to the child;

(ii) the person acting as surrogate and the spouse of the person acting as surrogate, if applicable, agree to surrender custody of all resulting children to the intended parent or parents immediately upon birth;

(iii) the surrogacy agreement shall include the name of the attorney representing the person acting as surrogate and, if applicable, the spouse of the person acting as surrogate;

(iv) the surrogacy agreement must include an acknowledgement by the person acting as surrogate and the spouse of the person acting as surrogate, if applicable, that they have received a copy of the Surrogate's Bill of Rights from their legal counsel;

(v) the surrogacy agreement must permit the person acting as surrogate to make all health and welfare decisions regarding themselves and their pregnancy including but not limited to, whether to consent to a cesarean section or multiple embryo transfer, and notwithstanding any other provisions in this chapter, provisions in the agreement to the contrary are void and unenforceable. This article does not diminish the right of the person acting as surrogate to terminate or continue a pregnancy;

(vi) the surrogacy agreement shall permit the person acting as a surrogate to utilize the services of a health care practitioner of the person's choosing;

(vii) the surrogacy agreement shall not limit the right of the person acting as surrogate to terminate or continue the pregnancy or reduce or retain the number of fetuses or embryos the person is carrying;

(viii) the surrogacy agreement shall provide for the right of the person acting as surrogate, upon request, to obtain counseling to address issues resulting from the person's participation in the surrogacy agreement, including, but not limited to, counseling following delivery. The cost of that counseling shall be paid by the intended parent or parents;

(ix) the surrogacy agreement must include a notice that any compensation received pursuant to the agreement may affect the eligibility of the person acting as [surrogate's ability] surrogate and the person acting as surrogate's spouse, if applicable, for public benefits or the amount of such benefits; and

(x) the surrogacy agreement shall provide that, upon the person acting as surrogate's request, the intended parent or parents [have or will procure and] shall pay for a disability insurance policy [for] or other insurance policy to cover any lost wages incurred by the person acting as surrogate [; the person acting as surrogate may designate the beneficiary of the person's choosing] in connection with their participation in the surrogacy agreement after taking any medication or commencing treatment to further embryo transfer excluding medical procedures required to determine the medical eligibility to become a person acting as surrogate. In the event that such insurance coverage is not available, the intended parent or parents shall reimburse the person acting as surrogate for any lost wages the person acting as surrogate incurs in connection with their participation in the surrogacy agreement.

(2) As to the intended parent or parents:

(i) the intended parent or parents [agree to] shall accept custody of all resulting children immediately upon birth regardless of number, gender, or mental or physical condition and regardless of whether the [intended] embryo or embryos was or were transferred due to a laboratory error without diminishing the rights, if any, of anyone claiming to have a superior parental interest in the child; and

(ii) the intended parent or parents [agree to] shall assume responsibility for the support of all resulting children immediately upon birth; and

(iii) the surrogacy agreement shall include the name of the attorney representing the intended parent or parents; and

(iv) the surrogacy agreement shall provide that the rights and obligations of the intended parent or parents under the surrogacy agreement are not assignable; and

(v) the intended parent or parents [agree to] shall execute a will, prior to the embryo transfer, designating a guardian for all resulting children and authorizing their executor to perform the [intended parent's or parents'] obligations of the intended parent or parents pursuant to the surrogacy agreement, including filing a proceeding for a judgment of parentage for a child conceived pursuant to a surrogacy agreement pursuant to section 581-203 of this article if there is no intended parent living.

§11. Subdivision (b) of section 581-404 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

(b) The subsequent separation or divorce of the intended parents does not affect the rights, duties and responsibilities of the intended parents as outlined in the surrogacy agreement. After the execution of a surrogacy agreement under this article, the subsequent spousal relationship of the intended parent does not affect the validity of a surrogacy agreement, and the consent of the new spouse of [the] an intended parent to the agreement shall not be required.

§12. Section 581-405 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§ 581-405. Termination of surrogacy agreement. After the execution of a surrogacy agreement but before the [person acting as surrogate becomes pregnant by means of assisted reproduction,] embryo transfer occurs or after an unsuccessful embryo transfer, the person acting as surrogate, the spouse of the person acting as surrogate, if applicable, or any intended parent may terminate the surrogacy agreement by giving notice of termination in a record to all other parties. Upon proper termination of the surrogacy agreement the parties are released from all obligations recited in the surrogacy agreement except that the intended parent or parents [remains] shall remain responsible for all [expenses that are reimbursable] lost wages and other financial obligations which have accrued under the agreement [which have been incurred by the person acting as surrogate] through the date of termination. If the intended parent or parents terminate the surrogacy agreement pursuant to this section after the person acting as surrogate has taken any medication or commenced treatment to further embryo transfer, such intended parent or parents

shall be responsible for paying [for or reimbursing the person acting as surrogate for all co-payments, deductibles,] any other out-of-pocket medical costs[, and any other economic losses] incurred within twelve months [of] after the termination of the agreement [and] which, as documented by a health care practitioner, are associated with taking such medication or undertaking such treatment. Unless the agreement provides otherwise, the person acting as surrogate is entitled to keep all payments received and obtain all payments to which the person is entitled up until the date of termination of the agreement. Neither a person acting as surrogate nor the spouse of the person acting as surrogate, if [any] applicable, is liable to the intended parent or parents for terminating a surrogacy agreement as provided in this section.

§13. Section 581-406 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§581-406. Parentage under compliant surrogacy agreement. Upon the birth of a child conceived by assisted reproduction under a surrogacy agreement that complies with this part, each intended parent is, by operation of law, a parent of the child and neither the person acting as

[a] surrogate nor the person's spouse, if [any] applicable, is a parent of the child.

§14. Section 581-409 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§ 581-409. Dispute as to surrogacy agreement. (a) Any dispute which is related to a surrogacy agreement other than disputes as to parentage, which are not resolved through alternative dispute resolution methods, shall be resolved by the supreme court, which shall determine the respective rights and obligations of the parties[, in]. In any proceeding initiated pursuant to this section, the court may, at its discretion, authorize the use of conferencing or mediation at any point in the proceedings.

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

(c) There shall be no specific performance remedy available for a breach] or subdivision (c) or (d) of this section, if the agreement is breached by the person acting as surrogate, the spouse of the person acting as surrogate, if applicable, or one or more intended parent, the non-breaching

party shall be entitled to all remedies available at law or in equity in any dispute related to the surrogacy agreement.

(c) Specific performance shall not be a remedy available for a breach by a person acting as surrogate of a provision in the surrogacy agreement that the person acting as surrogate be impregnated, agree to a multiple embryo transfer, terminate or not terminate a pregnancy, or submit to medical procedures including a cesarean section.

(d) If any intended parent is adjudicated to be the parent of the child, specific performance is a remedy available for: (1) breach of the surrogacy agreement by a person acting as surrogate which prevents the intended parent or parents from exercising the full rights of parentage immediately upon the birth of the child; or (2) breach by the intended parent or parents by failure to accept the duties of parentage immediately upon the birth of the child.

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

§15. Section 581-502 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§581-502.Compensation. (a) Compensation may be paid to a donor or person acting as surrogate based on medical risks, physical discomfort, inconvenience and the responsibilities they are undertaking in connection with their participation in the assisted reproduction. Under no circumstances may compensation be paid to purchase gametes or embryos or for the release of a parental interest in a child.

(b) The compensation, if any, paid to a donor or person acting as surrogate must be reasonable and negotiated in good faith between the parties[, and said payments]. Base compensation paid to a person acting as surrogate shall not exceed the duration of the pregnancy and recuperative period of [up to] eight weeks after the birth of any resulting [children] child. Supplemental compensation for any medical procedure associated with complications from the pregnancy or delivery as confirmed by a health care practitioner, and any associated lost wages, may be, but are not required to be, paid after the recuperative period and until twelve months after

the birth of the child, a stillbirth, a miscarriage resulting in termination of the pregnancy, or termination of the pregnancy.

(c) Compensation may not be conditioned upon the purported quality or genome-related traits of the gametes or embryos.

(d) Compensation may not be conditioned on actual genotypic or phenotypic characteristics of the donor or donors or of any resulting children.

(e) Compensation to [an] any embryo donor shall be limited to storage fees, transportation costs and attorneys' fees.

§16. Section 581-601 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§581-601. Applicability. The rights enumerated in this part shall apply to any person acting as surrogate [in] under the laws of this state, notwithstanding any surrogacy agreement, judgment of parentage, memorandum of understanding, verbal agreement or contract to the contrary. Except as otherwise provided by law, any written or verbal agreement purporting to waive or limit any of the rights in this part is void as against public policy. The rights enumerated in this part are not exclusive, and are in addition to any other rights provided by law, regulation, or a surrogacy agreement that meets the requirements of this article.

§17. Section 581-603 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§581-603. Independent legal counsel. A person acting as surrogate, and the spouse of the person acting as surrogate, if applicable, has the right to be represented [throughout] from the initiation of the contractual process and throughout the duration of the surrogacy agreement [and its execution] by independent legal counsel of their own choosing who is licensed to practice law in the state of New York, to be paid for by the intended parent or parents. The intended parent or parents shall not be required to pay the legal fees for the person acting as surrogate, and the spouse of the person acting as surrogate, if applicable, in connection with a litigated dispute between the parties unless otherwise ordered by an arbiter or court of competent jurisdiction.

§18. Section 581-604 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§581-604. Health insurance and medical costs. A person acting as surrogate has the right to have [a] comprehensive health insurance coverage [policy] that covers preconception [care, prenatal care, major medical treatments, hospitalization and behavioral health care] medical expenses and medical expenses associated with the pregnancy for a [term] period that extends throughout the duration of the expected pregnancy and for twelve months after the birth of the child, a stillbirth, a miscarriage resulting in termination of pregnancy, or termination of the pregnancy, to be paid for by the intended parent or parents. [The intended parent or parents shall also pay for or reimburse the person acting as surrogate for all co-payments, deductibles and any other out-of-pocket medical costs associated with pregnancy, childbirth, or postnatal care that accrue through] In addition, a person acting as a surrogate shall have the right to have the intended parent or parents pay for all of their medical expenses incurred in connection with the surrogacy agreement, continuing through the duration of the expected pregnancy and for twelve months after the birth of the child, a stillbirth, a miscarriage resulting in the termination of pregnancy, or the termination of the pregnancy. A person acting as a surrogate who is receiving no compensation may waive the right to have the intended parent or parents make such payments or reimbursements.

§19. Section 581-605 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§581-605. Counseling. A person acting as surrogate has the right to [obtain a comprehensive health insurance policy that covers behavioral health care and will cover the cost of psychological] mental health counseling to address issues resulting from their participation in [a] the surrogacy [and such policy] agreement, which shall be paid for by an insurance policy or by the intended parent or parents.

§20. Section 581-606 of the family court act, as added by section 1 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§581-606. Life insurance, contractual liability, or accidental death insurance policy. A person acting as surrogate has the right to be provided a life insurance, contractual liability or

accidental death insurance policy that takes effect prior to taking any medication or commencement of treatment to further embryo transfer, provides a minimum benefit of seven hundred fifty thousand dollars, or the maximum amount the person acting as surrogate [qualifying] qualifies for [it] if less than seven hundred fifty thousand dollars, and [has a term that extends] such coverage shall extend throughout the duration of the expected pregnancy and for twelve months after the birth of the child, a stillbirth, a miscarriage resulting in termination of pregnancy, or termination of the pregnancy, with a beneficiary or beneficiaries of [their] the person acting as surrogate's choosing, to be paid for by the intended parent or parents.

§21. The family court act is amended by adding a new section 581-705 to read as follows:

§581-705. Adjudication. (a) A court adjudicating the parentage of a child conceived through assisted reproduction or adjudicating the enforceability of an embryo disposition agreement may apply section 581-202 and part three of this article retroactively.

(b) The participants in a surrogacy agreement that involved the payment of compensation prior to February fifteenth, two thousand twenty-one shall not be eligible to receive a judgment of parentage pursuant to section 581-203 or section 581-406 of this article, but shall be entitled to seek a judgment of parentage pursuant to section 581-407 of this article.

(c) This article shall apply retroactively to uncompensated surrogacy agreements entered into prior to February fifteenth, two thousand twenty-one.

(d) Surrogacy agreements that were executed on or after February fifteenth, two thousand twenty-one, but before the effective date of this subdivision that were in compliance with this article before it was amended by the chapter that added this subdivision shall be deemed a compliant surrogacy agreement pursuant to section 581-406 of this article regardless of any deviations from the current provisions of this article.

§22. Paragraph (a) of subdivision 2 of section 123 of the domestic relations law, as amended by section 5 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

(a) Any party to a genetic surrogate parenting agreement or the spouse of any [part] party to a genetic surrogate parenting agreement who [violate] violates this section shall be subject to a civil penalty not to exceed five hundred dollars.

§23. Subdivision (c) of section 1400 of the general business law, as added by section 11 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

(c) "Surrogacy program" does not include any party to a surrogacy agreement or any person licensed to practice law and representing a party to the surrogacy agreement, but does include and is not limited to any agency, agent, business, or individual engaged in, arranging, or facilitating transactions contemplated by a surrogacy agreement, regardless of whether such agreement ultimately comports with the requirements of part four of article five-C of the family court act. Any person licensed to practice law shall be deemed a surrogacy program only in those cases where such person is providing matching services to the intended parent or parents and the person acting as a surrogate.

§24. Section 1401 of the general business law, as added by section 11 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

§1401. Surrogacy programs regulated under this article. The provisions of this article apply to surrogacy programs arranging or facilitating transactions contemplated by a surrogacy agreement, regardless of whether such agreement ultimately comports with the requirements under part four of article five-C of the family court act if:

(a) The surrogacy program does business in New York state; or

(b) A person acting as surrogate who is party to a surrogacy agreement resides in New York state [during the term of] at the time the surrogacy agreement[; or

(c) Any medical procedures under the surrogacy agreement are performed in New York state] is executed.

§ 25. Subdivisions (a) and (f) of section 1403 of the general business law, as added by section 11 of part L of chapter 56 of the laws of 2020, are amended to read as follows:

(a) Shall keep all funds paid by or on behalf of the intended parent or parents other than funds paid to the surrogacy program for its fees, in an escrow account separate from its operating accounts; and

(f) Shall be licensed to operate in New York state pursuant to regulations promulgated by the department of health in consultation with the department of financial services[, once such regulations are promulgated and become effective]; and

§26. Subdivision 1 of section 1404 of the general business law, as added by section 11 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

1. The department of health, in consultation with the department of financial services, shall promulgate rules and regulations to implement the requirements of this article regarding surrogacy programs and assisted reproduction service providers in a manner that ensures the safety and health of gamete providers and persons serving as surrogates.

Such regulations shall:

(a) Require surrogacy programs to monitor compliance with [surrogacy agreements] eligibility [and requirements in state law] <u>criteria for the intended parents and persons acting as surrogates under this article</u>; and

(b) Require the [surrogacy programs and] assisted reproduction service providers to administer informed consent procedures that comply with regulations promulgated by the department of health under section twenty-five hundred ninety-nine-cc of the public health law.

§27. This act shall take effect immediately.

III. Previously submitted proposals

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

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

Professor Merril Sobie noted this disparity in his Practice Commentaries to Family Court Act §751:

> [Family Court Act] Article 7, unlike Article 3 [the juvenile delinquency statute], does not provide for the automatic sealing of records when a petition is dismissed or withdrawn (see Section 375.1). Hence, the records remain relatively open, subject only to the generalized, imprecise [Family Court Act] Section 166 stipulation that "[t]he records of any proceeding in the family court shall not be open to indiscriminate public inspection". Ironically, children who are falsely accused of non-criminal "status offense" conduct are afforded less protection than youths who are accused of engaging in criminal activities.

Most recently, he has noted the even more serious, anomalous disparity between the confidentiality protections afforded criminal records and the far more limited protections afforded to both juvenile delinquency and PINS records:

> In recent years the New York Legislature has enacted criminal procedure law measures to strengthen confidentiality and to seal and expunge many records, thereby barring or limiting accessibility to less egregious criminal findings. Astonishingly, the measures have excluded the young. Today, Family Court juvenile delinquency records (crimes committed by children) and status offense records (non-criminal youthful behavior, such as truancy) are far more open and available than similar adult criminal files.
>
> …A few examples illustrate the dichotomy. The records of adults who have formerly been convicted of cannabis possession have been expunged (part of the legalization of marijuana). However, children below the age of 16 are excluded. See F.C.A. §712. Even cases where the child had been found to be innocent are never sealed, remaining open together with cases where the child

> has been found to be guilty. Similarly, the records of a child who has been accused of illegal non-criminal behavior, such as truancy, remains unsealed indefinitely and hence widely available indefinitely.

M. Sobie, "A Life Sentence for Children: NY's Antiquated Prejudicial Juvenile Justice Records Provisions," *N.Y.L.J.*, Dec. 16, 2021.

The Family Court Advisory and Rules Committee is submitting a measure to correct that anomaly. First, as the Committee is also recommending with respect to section 375.1 of the Family Court Act, the measure would amend Family Court Act §783 to provide that court records in actions terminated favorably to the accused – that is, cases that had been diverted (diverted without petition), withdrawn or dismissed – would automatically be expunged. In light of the amendment to Criminal Procedure Law §160.50(3) in chapter 131 of the Laws of 2019, providing that convictions for petty offense-level marijuana possession under Penal Law §221.05 are deemed to be terminations of actions in favor of the accused requiring mandatory expungement, PINS findings for violations of Penal Law §221.05 would be subject to automatic expungement following the conclusion of any disposition or period of extension. Likewise, since the Federal *Trafficking Victims Protection Act* defines "severe forms of trafficking in persons," *inter alia*, as "sex trafficking in which ...the person induced to perform such act has not attained 18 years of age,"[10] the measure would require expungement at the conclusion of any disposition or extension based upon a finding for a prostitution offense under Penal Law §230.00.

Notices would be required to be sent to presentment or law enforcement agencies, if either have been involved, directing them to expunge their records as well. At the same time, recognizing that designated lead agencies for PINS diversion, that is, local departments of social services or probation departments, have certain statutory requirements for internal access to their records for limited purposes, the notices to those agencies would be for them to seal their records, thus permitting access simply for enumerated statutory purposes but barring public access. The proposal authorizes designated lead diversion agencies to check their records if a juvenile returns on a subsequent PINS, and, where the diversion agency is the local Department of Social Services, the local Department may have access to its own records where necessary for service determinations and where the Commissioner determines the information is necessary to comply with Social Services Law §422-a regarding disclosure of fatality-related information.

Second, in cases in which a juvenile has been adjudicated as a PINS, the juvenile would be permitted to make a motion for expungement of the record in the interests of justice at any time subsequent to the conclusion of the period of a disposition. If granted, notices would likewise be sent to the agencies involved in the case to seal their records. Further, youth whose cases had been

[10] 22 U.S.C. §7102(11)(A).

favorably terminated prior to the effective date of the statute would be permitted to move for expungement upon twenty days' notice. Significantly, consistent with Professor Sobie's suggestion, in "A Life Sentence for Children: NY's Antiquated Prejudicial Juvenile Justice Record Provisions," *supra*, PINS records would be required to be automatically expunged once the juvenile reaches the age of 21, if not expunged sooner, assuming the period of any disposition has concluded.

Beyond the above provisions, as in Family Court Act §375.3, the Family Court would retain its inherent authority to expunge, rather than simply seal, its records. *See* Matter of Dorothy D. *v.* New York City Probation Department, 49 N.Y.2d 212 (1980)(juvenile delinquency); Matter of Richard S. *v*. City of New York, 32 N.Y.2d 592 (1973)(PINS); Matter of Daniel PP., 224 A.D.2d 906 (3d Dept., 1996)(PINS). As the Court of Appeals held in Matter of Dorothy D. *supra*, at 215: :

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

Many states, in fact, include expungement, not simply sealing, as their mechanism for ensuring the confidentiality of juvenile records. *See, e.g.,*West's Colorado Revised Statutes §19-1306*;* Illinois Compiled Statutes §405/5-915 (juvenile delinquency) and §405/1-9 (juvenile court records other than juvenile delinquency); Ohio Revised Code §§2151.355, 2151.356, 2151.358 (juvenile delinquency and "unruly children" records); Revised Code of Washington §13.50.050; Delaware Code §§1014-1018; North Carolina General Statutes §§7B-3200, 3201 (juvenile delinquency and "undisciplined" children); Arizona Revised Statutes §13-921; Arkansas Code §§927-309[b][1][A], [b][2]; West's California Code, Div. 2, C. 2, Art. 22, §826[a]; Connecticut General Statutes §§46b-133a,46b-146; West's Florida Statutes §943.0582; Minnesota Statutes §260B.235[9]; Pennsylvania Consolidated Statutes §9123; West's Code of Virginia §16-1-306. *See also*, M. Sobie, "A Life Sentence for Children: NY's Antiquated Prejudicial Juvenile Justice Record Provisions," *supra*.

Finally, recognizing that PINS behavior consists of conduct that would not be criminal if committed by adults, sections 783 and 784 of the Family Court Act would be amended to preclude use of PINS records in other courts. The language in section 783, permitting such records to be utilized in criminal sentencing proceedings, as well as the reference in section 784 to criminal courts taking action regarding police records, are vestiges of the days when juvenile delinquency and PINS proceedings were both covered by Article 7 of the Family Court Act and are more appropriately applied solely to juvenile delinquency records. Indeed, these provisions have been

incorporated into Article 3. *See* Family Court Act §§381.2, 381.3(2). The Committee's proposed measure appropriately deletes these provisions from Family Court Act Article 7.

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

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

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

Proposal

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

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

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

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

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

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

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

(i) Upon termination of a proceeding under this article in favor of the respondent, the clerk of the court shall immediately notify and direct the directors of the appropriate probation department, designated lead agency pursuant to section seven hundred thirty-five of this article and, if a presentment agency represented the petitioner in the proceeding, such agency, that the proceeding has terminated in favor of the respondent and that the records, if any, of such action or proceeding on file with such offices shall be expunged. If the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement had been the referring agency or petitioner pursuant to section seven hundred thirty-three of this article, the notice shall also be sent to the appropriate police department or law enforcement agency. Upon receipt of such notification, the records shall be expunged in accordance with subdivision (b) of this section. The attorney for the respondent shall be notified by the clerk of the court in writing of the date and agencies and departments to which such notifications were sent.

(ii) For the purposes of this section, a proceeding under this article shall be considered terminated in favor of a respondent where the proceeding has been:

(A) diverted prior to the filing of a petition pursuant to subdivision (g) of section seven hundred thirty-five of this article or subsequent to the filing of a petition pursuant to subdivision (b) of section seven hundred forty-two of this article; or

(B) withdrawn or dismissed for failure to prosecute, or for any other reason at any stage; or

(C) dismissed following an adjournment in contemplation of dismissal pursuant to subdivision (a) of section seven hundred forty-nine of this article.

(D) resulted in an adjudication where the only finding was for a violation of section 221.05 or 230.00 of the penal law; provided, however, that with respect to findings under this paragraph, the expungement required by this section shall not take place until the conclusion of the period of any disposition or extension under this article.

(iii) If, with respect to a respondent who had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency, the designated lead agency diverts a case either prior to or subsequent to the filing of a petition under this article, the designated lead agency shall notify the appropriate probation service and police department or law enforcement agency in writing of such diversion. Such notification may be on a form prescribed by the chief administrator of the courts and may be transmitted by electronic means. Upon receipt of such notification, the probation service and police department or law enforcement agency shall expunge any records in accordance with subdivision (b) of this section in the same manner as is required thereunder with respect to an order of a court.

(iv) If, following the referral of a proceeding under this article for the filing of a petition, the petitioner or, if represented by a presentment agency, such agency, elects not to file a petition under this article, the petitioner or, if applicable, the presentment agency, shall notify the appropriate probation service and designated lead agency of such determination. Such notification may be on a form prescribed by the chief administrator of the courts and may be transmitted by electronic means. If the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency, the notification shall also be sent to the appropriate police department or law enforcement agency. Upon receipt of such notification, the records shall be expunged in accordance with subdivision (b) of this section in the same manner as is required thereunder with respect to an order of a court, provided, however, that the designated lead agency may have access to its own records in accordance with paragraph (v) of this subdivision.

(v) Where a proceeding has been diverted pursuant to subparagraph (A) of paragraph (ii) of this subdivision or where a proceeding has been referred for the filing of a petition but the potential

petitioner or, if represented by a presentment agency, such agency, elects not to file a petition in accordance with paragraph (iv) of this subdivision, the designated lead agency shall seal its records under this section, but shall have access to its own records solely for the following purposes:

(A) where there is continuing or subsequent contact with the child under this article; or

(B) where the information is necessary for such department to determine what services had been arranged or provided to the family or where the commissioner determines that the information is necessary in order for the commissioner of such department to comply with section four hundred twenty-two-a of the social services law.

(vi) Records expunged or sealed under this section shall be made available to the juvenile or his or her agent and, where the petitioner or potential petitioner is a parent or other person legally responsible for the juvenile's care, such parent or other person. No statement made to a designated lead agency by the juvenile or his or her parent or other person legally responsible that is contained in a record expunged or sealed under this section shall be admissible in any court proceeding, except upon the consent or at the request, respectively, of the juvenile or his or her parent or other person legally responsible for the juvenile's care.

(vii) A respondent in whose favor a proceeding was terminated prior to the effective date of this paragraph may, upon motion, apply to the court, upon not less than twenty days notice to the petitioner or (where the petitioner is represented by a presentment agency) such agency, for an order granting the relief set forth in paragraph (i) of this subdivision. Where a proceeding under this article was terminated in favor of the respondent in accordance with paragraph (iii) or (iv) of this subdivision prior to the effective date of this paragraph, the respondent may apply to the designated lead agency, petitioner or presentment agency, as applicable, for a notification as described in such paragraphs granting the relief set forth therein and such notification shall be granted.

(d) Motion to expunge after an adjudication and disposition.

(i) If an action has resulted in an adjudication and disposition under this article, the court may, in the interest of justice and upon motion of the respondent, order the expungement of the records and proceedings.

(ii) Such motion must be in writing and may be filed at any time subsequent to the conclusion of the disposition, including, but not limited to, the expiration of the period of placement, suspended judgment, order of protection or probation or any extension thereof. Notice of such motion shall be served not less than eight days prior to the return date of the motion upon the petitioner or, if the petitioner was represented by a presentment agency, such agency. Answering affidavits shall be served at least two days before the return date.

(iii) The court shall set forth in a written order its reasons for granting or denying the motion. If the court grants the motion, all court records, as well as all records in the possession of the designated lead agency, the probation service, the presentment agency, if any, and, if the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or if the police or law enforcement agency was the referring agency or petitioner pursuant to section seven hundred thirty-three of this article, the appropriate police or law enforcement agency, shall be expunged in accordance with subdivision (b) of this section.

(e) Automatic expungement of court records. All records under this article shall be automatically expunged upon the respondent's twenty-first birthday unless earlier expunged under this section, provided that expungement under this paragraph shall not take place until the conclusion of the period of any disposition or extension under this article.

(f) Expungement of court records; inherent power. Nothing contained in this article shall preclude the court's use of its inherent power to order the expungement of court records.

§ 2. Section 784 of the family court act is amended to read as follows:

§ 784. Use of police records. All police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection, but such records shall be open to inspection upon good cause shown by the parent, guardian, next friend or attorney of that person upon the written order of a judge of the family court in the county in which the order was made [or, if the person is subsequently convicted of a crime, of a judge of the court in which he was convicted].

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

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

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

However, as recognized by the Supreme Court, Appellate Division, First Department, in Matter of Jayson C., 200 A.D.3d 447. (1st Dept., 2021), the new legislation failed to address a significant segment of the justice system, namely, young people prosecuted as juvenile delinquents in Family Court, including the 16- and 17-year old juveniles accused of misdemeanors and non-violent felonies whose cases are either initiated in or removed to Family Court under the recent raise-the-age law [L. 2017, c. 59, part www]. The Appellate Division held that this failure is of constitutional dimension:

> While not all provisions of the Criminal Procedure Law are applicable to proceedings under the Family Court Act (Family Ct Act § 303.1[1]) under the circumstances presented here, the denial of records available under CPL 245.10(1)(k)(iv), which broadly requires disclosure of all impeachment evidence deprived appellant of equal protection of the laws (US Const, 14th Amend; NY Const, art. I, § 11; *see e.g. Matter of James H.*, 34 NY2d 814, 816 [1974]; *Matter of Arthur M.*, 34 AD2d 761 [1st Dept 1970]; *Matter of Edward S.*, 80 AD2d 585, 585-86 [2d Dept 1981]).
>
> A respondent in a juvenile delinquency proceeding has the same right to cross-examine witnesses as a criminal defendant (*see generally Matter of Walker*, 144 AD2d 306 [1st Dept 1988]), and there is no reason to allow more limited access to impeachment materials in a juvenile suppression or fact-finding hearing than in a criminal suppression hearing or trial. The need for impeachment evidence is equally crucial in both delinquency and criminal proceedings. A similarly situated defendant in a criminal proceeding would be entitled to access to the impeachment materials requested by appellant.

Subdivision one of section 303.1 of the Family Court Act specifically provides that "[t]he provisions of the criminal procedure law shall not apply to proceedings under this [juvenile delinquency] article unless the applicability of such provisions are specifically prescribed by this [Family Court] act." Thus, without either an incorporation of the new law by reference or specific enactment in the Family Court Act, the new Article 245 of the Criminal Procedure Law, with its attendant disclosure obligations for both the defense and prosecution,

has no applicability in juvenile delinquency proceedings. Those proceedings remain governed by the Family Court Act version of the now-obsolete Article 240 of the Criminal Procedure Law as set forth in Family Court Act §§331.1 - 331.7.

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

To address this anomaly, the Family Court Advisory and Rules Committee has developed a proposal to adapt the new Article 245 of the CPL into new sections 331.1 through 331.13 of the Family Court Act. With no grand jury indictments or jury trials and with flat trial and detention time-frames far shorter than in criminal proceedings, juvenile delinquency proceedings proceed significantly more quickly than adult proceedings – requiring fact-finding hearings (trials) within three days of the initial appearance for juveniles in detention on less than Class C felony charges, within 14 days for juveniles detained on Class A, B or C felony charges and within 60 days for non-detained juveniles, with limited adjournments possible. *See* Family Court Act §340.1. Thus, the adaptation of Article 245 into the Family Court Act requires modifications of the CPL timeframes. Similar to the original adaptation of CPL Article 240 into the current Family Court Act, the time-frames, therefore, as well as terminology,[11] are the key differences between the Committee's proposal and CPL Article 245 upon which it is based.

The key provisions of the proposed measure include the following:

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

- Family Court Act §331.2 would require presentment agencies to fulfill their automatic discovery obligations – a list of items set forth in Family Court Act §331.3 that is similar to CPL Article 245 – within the earlier of 15 calendar days after the initial appearance or not later than three days prior to the first scheduled trial date. If the discovery is voluminous – in actuality a rarity in juvenile delinquency cases – the presentment agency may obtain an extension of ten calendar days or three days if the accused juvenile is in detention. The juvenile respondent's counsel would need to comply with the reciprocal discovery requirements not more than 25 days

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

after the presentment agency has provided a certificate of compliance or not later than three days prior to the fact-finding hearing, whichever is earlier. These time-frames can be modified by the Family Court for good cause based upon the needs of the case, whether or not the juvenile is in detention and the "need for a fair and expeditious resolution" of the case.

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

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

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

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

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

Criminal Justice Standards of the American Bar Association,[12] by a fully informed assessment of the evidence in the case.

Proposal

AN ACT to amend the family court act and the judiciary law, in relation to discovery provisions applicable to juvenile delinquency proceedings in family court

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

Section 1. Sections 331.1, 331.2, 331.3, 331.4, 331.5, 331.6 and 331.7 of the family court act are REPEALED.

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

§ 331.1. Initial appearance. 1. Disclosure. At the respondent's initial appearance, as defined in section 320.1 of this article, the presentment agency shall disclose to the respondent: (a) any police or other law enforcement agency reports and written witness statements relating to the juvenile delinquency proceeding against the respondent that are within the presentment agency's possession at that time;

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

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

2. Copy of records. If in the exercise of reasonable diligence and due to the limited availability of resources for downloading or copying recordings, a copy of an electronic

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

recording discoverable under this section is unavailable at the initial appearance, a copy shall be made and disclosed to the respondent as soon as practicable but not later than five calendar days after the initial appearance, provided, however, that if the respondent is in detention, a copy shall be made not later than three days after the initial appearance. Portions of materials under this section claimed to be non-discoverable may be withheld pending a prompt request by the presentment agency for a determination and ruling of the court under section 331.11 of this part; but the discoverable portions of such materials shall be disclosed to the extent practicable.

§ 331.2. Timing of discovery after the initial appearance.

1. Presentment agency's performance of obligations.

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

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

2. Respondent's performance of obligations. The respondent shall perform his or her discovery obligations under subdivision four of section 331.3 of this part not later than twenty-five calendar days after being served with the presentment agency's certificate of compliance pursuant to subdivision two of section 331.6 of this part or not later than three days prior to the first

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

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

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

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

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

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

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

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

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

summarized in any writing or recording, by persons to be called as witnesses at pre-fact-finding hearings.

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

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

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

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

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

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

(k) All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: (i) negate the

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

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

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

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

(o) All tangible property that relates to the subject matter of the case, along with a designation of which items the presentment agency intends to introduce in its case-in-chief at a

fact-finding hearing or at a pre-trial motion hearing. If in the exercise of reasonable diligence the presentment agency has not formed an intention within the time period specified in subdivision one of section 331.2 of this part that an item under this paragraph will be introduced at fact-finding hearing or at a pre-trial motion hearing, the presentment agency shall notify the respondent in writing, and the time period in which to designate items as exhibits shall be stayed without need for a motion pursuant to subdivision two of section 331.11 of this part; but the disclosure shall be made as soon as practicable, provided, however, that if the respondent is in detention, such disclosure shall be made no later than three days prior to the first scheduled fact-finding hearing date. All property under this paragraph is subject to the continuing duty to disclose pursuant to section 331.9 of this part.

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

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

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

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

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

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

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

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

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

2. Duties of the presentment agency. The presentment agency shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under subdivision one of this section and to cause such material or information to be made available for discovery where it exists but is not within the presentment agency's possession, custody or control; provided that the presentment agency shall not be required to obtain by subpoena duces tecum material or information which the respondent may thereby obtain. For purposes of subdivision one of this section, all items and information related to the presentment agency of a charge in the possession of any New York state or local police or law enforcement agency, and any information in the possession of a laboratory having contact with evidence related to the presentment agency of a charge, shall be deemed to be in the possession of the presentment agency. This subdivision shall not require the presentment agency to ascertain the existence of witnesses not known to the police or another law enforcement agency, or the written or recorded statements thereof, under paragraph (c) or (e) of subdivision one of this section.

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

4. Reciprocal discovery for the presentment agency.

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

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

(c) If in the exercise of reasonable diligence the reciprocally discoverable information under paragraph (f) or (o) of subdivision one of this section is unavailable for disclosure within the time period specified in subdivision two of section 331.2 of this part, such time period shall be stayed without need for a motion pursuant to subdivision two of section 331.11 of this part; but the disclosure shall be made as soon as practicable, provided, however, that if the respondent is in detention, such disclosure shall be made no later than three days prior to the first scheduled fact-finding hearing date. All reciprocally discoverable information under this subdivision is subject to the continuing duty to disclose pursuant to section 331.9 of this part.

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

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

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

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

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

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

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

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

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

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

3. Discretionary discovery by order of the court. The court in its discretion may, upon a showing by the respondent that the request is reasonable and that the respondent is unable without undue hardship to obtain the substantial equivalent by other means, order the presentment agency,

or any individual, agency or other entity subject to the jurisdiction of the court, to make available for disclosure to the respondent any material or information which potentially relates to the subject matter of the case and is reasonably likely to be material.

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

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

1. Discretion of courts. To facilitate compliance with this part, and to reduce or streamline litigation of any disputes about discovery, the court in its discretion may issue an order:

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

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

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

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

2. Certificates of compliance.

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

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

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

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

(a) appear in a lineup;

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

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

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

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

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

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

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

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

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

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

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

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

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

body camera recordings and other police recordings.

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

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

§ 331.9. Continuing duty to disclose. If either the presentment agency or the respondent subsequently learns of additional material or information which it would have been under a duty to disclose pursuant to any provisions of this part had it known of it at the time of a previous discovery obligation or discovery order, it shall expeditiously notify the other party and disclose the additional material and information as required for initial discovery under this part. This section also requires expeditious disclosure by the presentment agency of material or information that became relevant to the case or discoverable based on reciprocal discovery received from the respondent pursuant to subdivision four of section 331.3 of this part.

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

summarized in any writing or recording, made to the attorney for the respondent or the attorney's agents.

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

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

3. Prompt hearing. Upon request for a protective order, the court shall conduct an appropriate hearing within three business days to determine whether good cause has been shown and when practicable shall render decision expeditiously. Any materials submitted and a transcript of the proceeding may be sealed and shall constitute a part of the record on appeal.

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

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

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

§ 331.12. Remedies or sanctions for non-compliance.

1. Need for remedy or sanction. (a) When material or information is discoverable under this part but is disclosed belatedly, the court shall impose an appropriate remedy or sanction if the party entitled to disclosure shows that it was prejudiced. Regardless of a showing of

prejudice the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material.

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

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

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

§ 331.13. Admissibility of discovery. The fact that a party has indicated during the discovery process an intention to offer specified evidence or to call a specified witness is not admissible in evidence or grounds for adverse comment at a pre-trial or fact-finding hearing.

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

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

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

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

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

3. Equalization of sentencing and Family Court transfer provisions applicable to juvenile and adolescent offender proceedings in the Youth Part of Supreme and County Courts

[C.P.L. §§190.71, 220.10, 330.25, 722.20, 722.21, 722.22, 722.23, 725.05; Penal L. §§60.10, 60.10-a, 70.05, 70.20]

As New York State was one of the last two states in the nation prosecuting all youth over 16 as adults, its enactment in 2017 of the "Raise the Age" law, providing for the prosecution of misdemeanors and the vast majority of felonies committed by 16- and 17-year old youth in the Family Court, was a watershed moment for the juvenile justice system in the State – a reflection of the fact that, as recognized by the United States Supreme Court in Miller *v.* Alabama, 567 U.S. 460 (2012), brain development in adolescents is not complete and that age must be considered in determining culpability. *See* L.2017, c.59, part www. The statute left the juvenile offender law, enacted in 1978, requiring the adult prosecution of 13-, 14- and 15-year old youth for enumerated felonies, virtually intact, except for the incorporation of such cases into the jurisdiction of the Youth Parts in Supreme and County Courts. Ironically, however, in not amending the juvenile offender law, the current statute affords greater protections to adolescent offenders (16- and 17-year old youth) than for the younger children who fall into the juvenile offender category, even when they are charged with the very same felony crimes. This is particularly anomalous in light of the recent enactment of chapter 810 of the laws of 2021, which raises the minimum age for juvenile delinquency jurisdiction in all but homicide cases to 12.

The Family Court Advisory and Rules Committee is submitting a measure to remedy these disparities with respect to the criteria for removal of juvenile offender cases from the Youth Part to Family Court and, with respect to sentencing of adolescent and juvenile offender cases that remain in the Youth Part, to equalize the sentencing provisions for both categories of offenders so that their ages are afforded appropriate consideration. Briefly, the proposal includes the following:

- Criminal Procedure Law §190.71 is amended to authorize a grand jury to vote to file requests for both adolescent and juvenile offender cases to be removed to the Family Court;

- Criminal Procedure Law §220.10 would be amended to equalize the plea restrictions applicable to adolescent and juvenile offenders and the removals of cases in both categories after a plea;

- Criminal Procedure Law §330.25 would be amended to equalize the provisions for both categories of offenders with respect to removals of cases to Family Court after a verdict is rendered in the Youth Part;

- Criminal Procedure Law §§722.20 and 722.22 would be repealed and §§722.21 and 722.23 would be amended to incorporate provisions regarding juvenile offenders into the sections

regarding adolescent offender felony complaint procedures and provisions regarding removals of cases to Family Court. Conforming amendments would also be added to the removal provisions of Criminal Procedure Law §725.05;

- Penal Law §60.10 would be amended to expand sentencing options for juvenile offenders to include probation (including cases in which youthful offender status has not been afforded), conditional or unconditional discharges and split sentences of incarceration and probation;

- Penal Law §60.10-a would be amended to provide that the periods of incarceration applicable to juvenile offenders under Penal Law §70.05 would also be applicable to adolescent offenders, one aspect of current law in which an adolescent offender would be subject to a longer sentence for an identical crime committed by a juvenile offender;

- Penal Law §70,05 would be amended to authorize Youth Part judges to impose determinate, indeterminate and split sentences to both categories of youth; and

- Penal Law §70.20 would be amended to provide that a juvenile offender who receives a definite sentence of one year or less may be directed to serve the sentence in a local secure juvenile detention facility, rather than a State facility – a provision analogous to the provision for adolescent offenders to serve such sentences in the specialized secure detention facilities certified for that age group.

Proposal

AN ACT to amend the criminal procedure law and the penal law, in relation to treatment of juvenile and adolescent offenders in the youth parts of superior courts

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

Section 1. Subdivisions (b) and (c) of section 190.71 of the criminal procedure law, subdivision (b) as amended by section 28 of part www of chapter 59 of the laws of 2017 and subdivision (c) as added by chapter 481 of the laws of 1978, are amended to read as follows:

(b) A grand jury may vote to file a request to remove a charge to the family court if it finds that a person [sixteen, or commencing October first, two thousand nineteen, seventeen years of age or younger] charged as a juvenile offender or adolescent offender did an act which, if done by a person over the age of [sixteen, or commencing October first, two thousand nineteen,] seventeen,

would constitute a crime provided (1) such act is one for which it may not indict; (2) it does not indict such person for a crime; and (3) the evidence before it is legally sufficient to establish that such person did such act and competent and admissible evidence before it provides reasonable cause to believe that such person did such act.

(c) Upon voting to remove a charge to the family court pursuant to subdivision (b) of this section, the grand jury must, through its [foreman] foreperson or acting [foreman] foreperson, file a request to transfer such charge to the family court. Such request shall be filed with the court by which it was impaneled. It must (1) allege that a person named therein did any act which, if done by a person over the age of [sixteen] seventeen, would constitute a crime; (2) specify the act and the time and place of its commission; and (3) be signed by the [foreman] foreperson or the acting [foreman] foreperson.

§2. Paragraphs (g) and (g-1) of subdivision 5 of section 220.10 of the criminal procedure law, paragraph (g) as amended by chapter 410 of the laws of 1979, the closing paragraph of paragraph (g) as amended by chapter 11 of the laws of 1979, subparagraph (iii) of paragraph (g) as amended by chapter 264 of the laws of 2003, the second undesignted paragraph of paragraph (g) as amended by chapter 920 of the laws of 1982, and paragraph (g-1) as added by chapter 809 of the laws of 2021, are amended to read as follows:

(g) Where the defendant is a juvenile offender or adolescent offender, the provisions of paragraphs (a), (b), (c) and (d) of this subdivision shall not apply **[**and any plea entered pursuant to subdivision three or four of this section, must be as follows:

(i) If the indictment charges a person fourteen or fifteen years old with the crime of murder in the second degree any plea of guilty entered pursuant to subdivision three or four must be a plea of guilty of a crime for which the defendant is criminally responsible;

(ii) If the indictment does not charge a crime specified in subparagraph (i) of this paragraph, then any plea of guilty entered pursuant to subdivision three or four of this section must be a plea of guilty of a crime for which the defendant is criminally responsible unless a plea of guilty is accepted pursuant to subparagraph (iii) of this paragraph;

(iii) Where the indictment does not charge a crime specified in subparagraph (i) of this paragraph, the district attorney may recommend removal of the action to the family court. Upon making such recommendation the district attorney shall submit a subscribed memorandum setting forth: (1) a recommendation that the interests of justice would best be served by removal of the action to the family court; and (2) if the indictment charges a thirteen year old with the crime of murder in the second degree, or a fourteen or fifteen year old with the crimes of rape in the first degree as defined in subdivision one of section 130.35 of the penal law, or criminal sexual act in the first degree as defined in subdivision one of section 130.50 of the penal law, or an armed felony as defined in paragraph (a) of subdivision forty-one of section 1.20 of this chapter specific factors, one or more of which reasonably supports the recommendation, showing, (i) mitigating circumstances that bear directly upon the manner in which the crime was committed, or (ii) where the defendant was not the sole participant in the crime, that the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution, or (iii) possible deficiencies in proof of the crime, or (iv) where the juvenile offender has no previous adjudications of having committed a designated felony act, as defined in subdivision eight of section 301.2 of the family court act, regardless of the age of the offender at the time of commission of the act, that the criminal act was not part of a pattern of criminal behavior and, in view of the history of the offender, is not likely to be repeated.

If the court is of the opinion based on specific factors set forth in the district attorney's memorandum that the interests of justice would best be served by removal of the action to the family court, a plea of guilty of a crime or act for which the defendant is not criminally responsible may be entered pursuant to subdivision three or four of this section, except that a thirteen year old charged with the crime of murder in the second degree may only plead to a designated felony act, as defined in subdivision eight of section 301.2 of the family court act.

Upon accepting any such plea, the court must specify upon the record the portion or portions of the district attorney's statement the court is relying upon as the basis of its opinion and that it believes the interests of justice would best be served by removal of the proceeding to the family court. Such plea shall then be deemed to be a juvenile delinquency fact determination and

the court upon entry thereof must direct that the action be removed to the family court in accordance with the provisions of article seven hundred twenty-five of this chapter.

(g-1) Where a defendant is an adolescent offender, the provisions of paragraphs (a), (b), (c) and (d) of this subdivision shall not apply**]**. Where the plea is to an offense constituting a misdemeanor or other offense for which the defendant is not criminally responsible, the plea shall be deemed replaced by an order of fact-finding in a juvenile delinquency proceeding, pursuant to section 346.1 of the family court act, and the action shall be removed to the family court in accordance with article seven hundred twenty-five of this chapter. Where the plea is to an offense constituting a felony for which the defendant is criminally responsible, the court may remove the action to the family court in accordance with section 722.23 and article seven hundred twenty-five of this chapter.

§3. Subdivision 2 of section 330.25 of the criminal procedure law, as amended by chapter 920 of the laws of 1982, is amended to read as follows:

2. If the district attorney consents to the motion for removal pursuant to this section, he or she shall file a subscribed memorandum with the court setting forth (1) a recommendation that the interests of justice would best be served by removal of the action to the family court; and (2) if the conviction is [of an offense set forth in paragraph (b) of subdivision one of section 722.22] for murder in the second degree as defined in section 125.25 of the penal law; rape in the first degree, as defined in subdivision one of section 130.35 of the penal law; criminal sexual act in the first degree, as defined in subdivision one of section 130.50 of the penal law; or an armed felony as defined in paragraph (a) of subdivision forty-one of section 1.20 of this chapter, specific factors, one or more of which reasonably support the recommendation, showing, (i) mitigating circumstances that bear directly upon the manner in which the crime was committed, or (ii) where the defendant was not the sole participant in the crime, that the defendant's participation was relatively minor although not so minor as to constitute a defense to prosecution, or (iii) where the [juvenile offender has no previous adjudications of having committed a designated felony act, as defined in subdivision eight of section 301.2 of the family court act, regardless of the age of the offender at the time of commission of the act, that the] criminal act was not part of a pattern of criminal behavior and, in view of the history of the offender, it is not likely to be repeated.

§4. Section 722.20 of the criminal procedure law is REPEALED.

§ 5. The title and subdivisions 1, 4, 5 and paragraph (e) of subdivision 6 of section 722.21 of the criminal procedure law, as added by section (1-a) of part www of chapter 59 of the laws of 2017, are amended to read as follows:

§ 722.21 Proceedings upon felony complaint; juvenile or adolescent offender.

1. When a juvenile or an adolescent offender is arraigned before a youth part, the provisions of this section shall apply. If the youth part is not in session, the defendant shall be brought before the most accessible magistrate designated by the appellate division of the supreme court to act as a youth part for the purpose of making a determination whether such juvenile or adolescent offender shall be detained or, with the consent of the district attorney, immediately removed to family court. If the defendant is ordered to be detained, he or she shall be brought before the next session of the youth part. If the defendant is not detained, he or she shall be ordered to appear at the next session of the youth part, family court or the local probation department.

4. Notwithstanding the provisions of subdivisions two and three of this section, where the defendant is charged with a felony, other than a class A felony defined outside article two hundred twenty of the penal law, a violent felony defined in section 70.02 of the penal law or a felony listed in paragraph one or two of subdivision forty-two of section 1.20 of this chapter, except as provided in paragraph (c) of subdivision two of section 722.23 of this article, the court shall, upon notice from the district attorney that he or she will not file a motion to prevent removal pursuant to section 722.23 of this article, order transfer of an action against a juvenile or an adolescent offender to the family court pursuant to the provisions of article seven hundred twenty-five of this title, provided, however, notwithstanding any other provision of law, section 308.1 of the family court act shall apply to actions transferred pursuant to this subdivision and such actions shall not be considered removals subject to subdivision thirteen of such section 308.1.

5. Notwithstanding subdivisions two and three of this section, at the request of the district attorney, the court shall order removal of an action against a juvenile or an adolescent offender charged with an offense listed in paragraph (a) of subdivision two of section 722.23 of this article, to the family court pursuant to the provisions of article seven hundred twenty-five of this title and upon consideration of [the criteria specified in subdivision two of section 722.22 of this article] (i) the seriousness and circumstances of the offense; (ii) the extent of harm caused by the offense; (iii)

the evidence of guilt, whether admissible or inadmissible at trial; (iv) the history, character and condition of the defendant; (v) the purpose and effect of imposing upon the defendant a sentence authorized for the offense; (vi) the impact of a removal of the case to the family court on the safety or welfare of the community; (vii) the impact of a removal of the case to the family court upon the confidence of the public in the criminal justice system; (viii) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and (ix) any other relevant fact indicating that a judgment of conviction in the criminal court would serve no useful purpose, when it is determined that to do so would be in the interests of justice. Where, however, the felony complaint charges the juvenile or adolescent offender with murder in the second degree as defined in section 125.25 of the penal law, rape in the first degree as defined in subdivision one of section 130.35 of the penal law, criminal sexual act in the first degree as defined in subdivision one of section 130.50 of the penal law, or an armed felony as defined in paragraph (a) of subdivision forty-one of section 1.20 of this chapter, a determination that such action be removed to the family court shall, in addition, be based upon a finding of one or more of the following factors: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the crime.

(e) Where an action against a defendant has been removed to the family court pursuant to this section, there shall be no further proceedings against the juvenile or adolescent offender in any local or superior criminal court including the youth part of the superior court for the offense or offenses which were the subject of the removal order.

§6. Section 722.20 of the criminal procedure law is REPEALED.

§7. The section heading and subdivisions 1, 4, 5 and 6 of section 722.21 of the criminal procedure law, the section heading and subdivisions 4, 5 and 6 as added by section 1-a of part WWW of chapter 59 of the laws of 2017 and subdivision 1 as amended by chapter 240 of the laws of 2019, are amended to read as follows:

Proceedings upon felony complaint; juvenile or adolescent offender.

1. When [an] juvenile offender or adolescent offender is arraigned before a youth part, the provisions of this section shall apply. If the youth part is not in session, the defendant shall be

brought before the most accessible magistrate designated by the appellate division of the supreme court to act as a youth part for the purpose of making a determination whether such juvenile or adolescent offender shall be detained or, with the consent of the district attorney, immediately removed to family court. If the defendant is ordered to be detained, he or she shall be brought before the next session of the youth part. If the defendant is not detained, he or she shall be ordered to appear at the next session of the youth part, family court or the local probation department.

4. Notwithstanding the provisions of subdivisions two and three of this section, where the defendant is charged with a felony, other than a class A felony defined outside article two hundred twenty of the penal law, a violent felony defined in section 70.02 of the penal law or a felony listed in paragraph one or two of subdivision forty-two of section 1.20 of this chapter, except as provided in paragraph (c) of subdivision two of section 722.23 of this article, the court shall, upon notice from the district attorney that he or she will not file a motion to prevent removal pursuant to section 722.23 of this article, order transfer of an action against [an] a juvenile or adolescent offender to the family court pursuant to the provisions of article seven hundred twenty-five of this title, provided, however, notwithstanding any other provision of law, section 308.1 of the family court act shall apply to actions transferred pursuant to this subdivision and such actions shall not be considered removals subject to subdivision thirteen of such section 308.1.

5. Notwithstanding subdivisions two and three of this section, at the request of the district attorney, the court shall order removal of an action against [an] a juvenile or adolescent offender charged with an offense listed in paragraph (a) of subdivision two of section 722.23 of this article, to the family court pursuant to the provisions of article seven hundred twenty-five of this title and upon consideration of [the criteria specified in subdivision two of section 722.22 of this article,] (i) the seriousness and circumstances of the offense, (ii the extent of harm caused by the offense, (iii the evidence of guilt, whether admissible or inadmissible at trial, (iv) the history, character and condition of the defendant, (v) the purpose and effect of imposing upon the defendant a sentence authorized for the offense, (vi) the impact of a removal of the case to the family court on the safety or welfare of the community, (vii) the impact of a removal of the case to the family court upon the confidence of the public in the criminal justice system, (viii) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion, and (ix) any other relevant fact indicating that a judgment of conviction in the criminal court would serve no useful purpose, when

it is determined that to do so would be in the interests of justice. Where, however, the felony complaint charges the juvenile offender or adolescent offender with murder in the second degree as defined in section 125.25 of the penal law, rape in the first degree as defined in subdivision one of section 130.35 of the penal law, criminal sexual act in the first degree as defined in subdivision one of section 130.50 of the penal law, or an armed felony as defined in paragraph (a) of subdivision forty-one of section 1.20 of this chapter, a determination that such action be removed to the family court shall, in addition, be based upon a finding of one or more of the following factors: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the crime.

6. (a) If the court orders removal of the action to family court pursuant to subdivision five of this section, it shall state on the record the factor or factors upon which its determination is based, and the court shall give its reasons for removal in detail and not in conclusory terms.

(b) The district attorney shall state upon the record the reasons for his or her consent to removal of the action to the family court where such consent is required. The reasons shall be stated in detail and not in conclusory terms.

(c) For the purpose of making a determination pursuant to subdivision five of this section the court may make such inquiry as it deems necessary. Any evidence which is not legally privileged may be introduced. If the defendant testifies, his or her testimony may not be introduced against him or her in any future proceeding, except to impeach his or her testimony at such future proceeding as inconsistent prior testimony.

(d) Except as provided by paragraph (e) of this subdivision, this section shall not be construed to limit the powers of the grand jury.

(e) Where an action against a defendant has been removed to the family court pursuant to this section, there shall be no further proceedings against the juvenile offender or adolescent offender in any local or superior criminal court including the youth part of the superior court for the offense or offenses which were the subject of the removal order.

§8. Section 722.22 of the criminal procedure law is REPEALED.

§9. The section heading and paragraph (a) of subdivision 2 of section 722.23 of the criminal procedure law, as added by section (1-a) of part www of chapter 59 of the laws of 2017, are amended to read as follows:

§ 722.23 Removal of juvenile and adolescent offenders to family court.

2 (a) Upon the arraignment of a defendant charged as a juvenile offender or an adolescent offender with a crime committed when he or she was sixteen or, commencing October first, two thousand nineteen, seventeen years of age [on] that is a class A felony, other than those defined in article [220] two hundred twenty of the penal law, or a violent felony defined in section 70.02 of the penal law, the court shall schedule an appearance no later than six calendar days from such arraignment for the purpose of reviewing the accusatory instrument pursuant to this subdivision. The court shall notify the district attorney and defendant regarding the purpose of such appearance.

§10. Subdivisions 2 and 3 of section 725.05 of the criminal procedure law, as amended by section 2 of part www of chapter 59 of the laws of 2017, are amended to read as follows:

2. Where the direction is authorized pursuant to paragraph (b) of subdivision three of section [722.20 or] 722.21 of this title, it must specify the act or acts it found reasonable cause to believe the defendant did.

3. Where the direction is authorized pursuant to subdivision four of section [722.20 or section] 722.21 of this title, it must specify the act or acts it found reasonable cause to allege.

§11. Section 60.10 of the penal law, as amended by chapter 411 of the laws of 1979, is amended to read as follows:

§60.10. Authorized disposition; juvenile offender. 1. When a juvenile offender is convicted of a crime, the court shall sentence the defendant to imprisonment in accordance with section 70.05 of this title, probation or conditional or unconditional discharge in accordance with article sixty-five of this title, a split sentence in accordance with paragraph (d) of subdivision two of section 60.01 of this article, or sentence him or her upon a youthful offender finding in accordance with section 60.02 of this [chapter] title.

2. Subdivision one of this section shall apply when sentencing a juvenile offender notwithstanding the provisions of any other law that deals with the authorized sentence for persons who are not juvenile offenders. [Provided, however, that the limitation prescribed by this section shall not be deemed or construed to bar use of a conviction of a juvenile offender, other than a juvenile offender who has been adjudicated a youthful offender pursuant to section 720.20 of the criminal procedure law, as a previous or predicate felony offender under section 70.04, 70.06, 70.08 or 70.10, when sentencing a person who commits a felony after he has reached the age of sixteen.]

§12. Section 60.10-a of the penal law, as added by section 41 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

§60.10-a. Authorized disposition; adolescent offender. When an adolescent offender is convicted of an offense. the court shall sentence the defendant to any sentence authorized to be imposed on a person who committed such offense at age eighteen or older, provided, however, that if an indeterminate sentence is imposed for a class A, B, C or D felony, the term of such sentence shall be in accordance with section 70.05 of this title. When a sentence is imposed, the court shall consider the age of the defendant in exercising its discretion at sentencing.

§13. Subdivision 1 of section 70.05 of the penal law, as amended by chapter 174 of the laws of 2003, is amended to read as follows:

1. Indeterminate, determinate or split sentence. A sentence of imprisonment for a felony committed by a juvenile offender shall be an indeterminate sentence, unless the court orders a determinate sentence not in excess of one year or a split sentence in accordance with paragraph (d) of subdivision two of section 60.01of this title. When [such a] an indeterminate sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section. The court shall further provide that where a juvenile offender is under placement pursuant to article three of the family court act, any sentence imposed pursuant to this section which is to be served consecutively with such placement shall be served in a facility designated pursuant to subdivision four of section 70.20 of this article prior to service of the placement in any previously designated facility.

§14. Paragraph (a) of subdivision 4 of section 70.20 of the penal law, as amended by section 44 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

(a) Notwithstanding any other provision of law to the contrary, a juvenile offender, adolescent offender, or a juvenile offender or adolescent offender who is adjudicated a youthful offender, who is given an indeterminate, determinate or a definite sentence, and who is under the age of twenty-one at the time of sentencing, shall be committed to the custody of the commissioner of the office of children and family services who shall arrange for the confinement of such offender in secure facilities of the office; provided, however, if a juvenile offender or an adolescent offender[who committed a crime on or after the youth's sixteenth birthday] receives a definite sentence not exceeding one year, the judge, as applicable, may order that the juvenile offender serve such sentence in a secure juvenile detention facility certified by the office of children and family services or that the adolescent offender serve such sentence in a specialized secure juvenile detention facility for older youth certified by the office of children and family services in conjunction with the state commission of correction and operated pursuant to section two hundred eighteen-a of the county law. The release or transfer of such juvenile offenders or adolescent offenders from the office of children and family services shall be governed by section five hundred eight of the executive law.

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

4. Notice to parents of consequences of findings in child abuse and neglect proceedings [F.C.A. §1051(f)]

As part of the New York State budget for Fiscal Year 2020, the Legislature enacted a comprehensive reform of the State Central Registry of Child Abuse and Maltreatment ("SCR") that became effective on January 1, 2022. [L. 2020, c.56, Part R]. Among its most significant changes is the amendment to Social Services Law §424-a(1)(e)(iv) that adds a subparagraph (b) providing that a report of child neglect deemed to be "indicated" (supported by a preponderance of evidence) is automatically sealed from disclosure to potential employers and other licensing and provider agencies performing registry checks if it is more than eight years old. Such a report is shielded from disclosure because it is deemed to be neither "relevant" nor "reasonably related" to an inquiry regarding whether the subject of the report should be permitted to have contact with children:

> Where the subject of the report is not the subject of any indicated report of child abuse and is the subject of a report of child maltreatment where the indication for child maltreatment occurred more than eight years prior to the date of the inquiry, any such indication of child maltreatment shall be deemed to be not relevant and reasonably related to employment.

Although indicated, State Central Registry reports in both child abuse and neglect cases remain on the registry until the youngest child reaches the age of 18, the protection against use of child neglect reports in excess of eight years old protects subjects of such reports from serious collateral consequences in terms of eligibility for day care and other types of employment involving contact with children. *See* C. Gottlieb, "Major Reform of New York's Child Abuse and Maltreatment Register," *N.Y.L.J.*, May 26, 2020.

Left untouched by the new statute, however, is a provision of the Family Court Act requiring that, when a finding of child abuse or neglect is made, whether by verdict after a fact-finding hearing or by admission, the respondent parent must be given notice of the consequences of the finding and, specifically, the consequences of retention of the report on the SCR that gave rise to the finding. Social Services Law §422(8)(b)(ii)(A) provides that where a finding of child abuse or neglect is made, there is an "irrebuttable presumption" that the SCR report is indicated, thus underscoring the importance of providing parents with accurate information as to the implications of all such findings. The Family Court Advisory and Rules Committee, therefore, is proposing a measure to correct the wording of Family Court Act §1051(f)(iii) to conform to the new statute, that is, to indicate that a report of child neglect will be legally sealed as against prospective employers and licensing and authorized agencies once eight years has elapsed since it was made.

When making child protective findings, especially when determining whether to accept admissions made by respondent parents, Family Court judges must ensure that the parents fully understand the consequences and that any admission is made knowingly, intelligently and voluntarily, in light of the constitutional dimension of the interests involved. The provisions of Family Court Act §1051(f) form the core of the information that the judges provide to parents in

such cases. It is vitally important that such information be accurate and reflect the changes made to the SCR statute.

Proposal

AN ACT to amend the family court act, in relation to notices given to respondents in child abuse and neglect proceedings in family court

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

Section 1. Paragraph (iii) of subdivision (f) of section 1051 of the family court act, as added by chapter 430 of the laws of 1994, is amended to read as follows:

(iii) that [the] any report made to the state central register of child abuse and maltreatment [upon which the petition is based] of allegations on which the court makes a finding of abuse or neglect will remain [on file] indicated in the register until ten years after the eighteenth birthday of the youngest child named in such report, unless such finding is vacated or dismissed, and that:

(A) the respondent will be unable to [obtain expungement of] amend such report[,] in the state central register;

(B) if the court finding is for neglect, it shall be legally sealed eight years after the report was made unless it is sealed earlier in an administrative proceeding; and [that]

(C) the existence of such report, which is not legally sealed, may be made known to employers seeking to screen employee or volunteer applicants [in the field of child care] where the individual has the potential for regular and substantial contact with children, and to child care agencies if the respondent applies to become a foster parent or adoptive parent.

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

5. Substitution of determinations of parentage for paternity and filiation in proceedings in Family Court

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

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

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

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

to DNA testing, in addition to the petitioner, mother and child. Unless equitable estoppel has foreclosed DNA testing, the court would be required to issue an order vacating the AOP where a non-signatory has been found to be a genetic parent, even in the absence of a vacatur petition filed by the original AOP signatory.

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

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

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

Proposal

AN ACT to amend the family court act, the domestic relations law, the social services law, the civil practice law and rules, the judiciary law, the executive law, the general obligations

law, the social services law, the vehicle and traffic law, the alcoholic beverage control law, and the education law, in relation to substituting parentage for paternity and filiation; and to repeal certain provisions of the family court act relating thereto

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

Section 1. Paragraph (iii) of subdivision (a) of section 115 of the family court act, as added by chapter 222 of the laws of 1994, is amended to read as follows:

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

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

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

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

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

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

(a) The court, on its own motion or motion of any party, when [paternity] parentage is contested under this article, shall order the [mother,] parties and the child [and the alleged father] to submit to one or more genetic marker or DNA marker tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether the alleged [father] parent is or is not the [father] parent of the child. No such test shall be ordered,

however, where the acknowledgment was signed by the intended parent of a child born through assisted reproduction pursuant to subparagraph (ii) of paragraph (b) of subdivision one of section four thousand one hundred thirty-five-b of the public health law, or upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married [woman] couple. The record or report of the results of any such genetic marker or DNA test shall be received in evidence, pursuant to subdivision (e) of rule forty-five hundred eighteen of the civil practice law and rules where no timely objection in writing has been made thereto. Any order pursuant to this section shall state in plain language that the results of such test shall be admitted into evidence, pursuant to rule forty-five hundred eighteen of the civil practice law and rules absent timely objections thereto and that if such timely objections are not made, they shall be deemed waived and shall not be heard by the court. If the record or report of results of any such genetic marker or DNA test or tests indicate at least a ninety-five percent probability of [paternity] parentage, the admission of such record or report shall create a rebuttable presumption of [paternity] parentage, and, if unrebutted, shall establish the [paternity] parentage of and liability for the support of a child pursuant to this article and article five of this act.

§5. Subdivisions (a), (b) and (c) of section 439 of the family court act, subdivision (a) as amended by section 21 of part L of chapter 56 of the laws of 2020 and subdivisions (b) and (c) as amended by chapter 526 of the laws of 2020, are amended to read as follows:

(a) The chief administrator of the courts shall provide, in accordance with subdivision (f) of this section, for the appointment of a sufficient number of support magistrates to hear and determine support proceedings. Except as hereinafter provided, support magistrates shall be empowered to hear, determine and grant any relief within the powers of the court in any proceeding under this article, articles five, five-A, five-B and five-C and sections two hundred thirty-four and two hundred thirty-five of this act, and objections raised pursuant to section five thousand two hundred forty-one of the civil practice law and rules. Support magistrates shall not be empowered to hear, determine and grant any relief with respect to issues specified in section four hundred fifty five of this article, issues of contested parentage involving claims of equitable estoppel, custody, visitation including visitation as a defense, determinations of parentage made pursuant to section 581–407 of this act and orders of protection or exclusive possession of the

home, which shall be referred to a judge as provided in subdivision (b) or (c) of this section. Where an order of [filiation] parentage is issued by a judge in a [paternity] parentage proceeding and child support is in issue, the judge, or support magistrate upon referral from the judge, shall be authorized to immediately make a temporary or final order of support, as applicable. A support magistrate shall have the authority to hear and decide motions and issue summonses and subpoenas to produce persons pursuant to section one hundred fifty-three of this act, hear and decide proceedings and issue any order authorized by subdivision (g) of section five thousand two hundred forty-one of the civil practice law and rules, issue subpoenas to produce prisoners pursuant to section two thousand three hundred two of the civil practice law and rules and make a determination that any person before the support magistrate is in violation of an order of the court as authorized by section one hundred fifty-six of this act subject to confirmation by a judge of the court who shall impose any punishment for such violation as provided by law. A determination by a support magistrate that a person is in willful violation of an order under subdivision three of section four hundred fifty-four of this article and that recommends commitment shall be transmitted to the parties, accompanied by findings of fact, but the determination shall have no force and effect until confirmed by a judge of the court.

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

support, as applicable. Whenever an order of [filiation] parentage is made by a support magistrate, the support magistrate also shall make a final or temporary order of support.

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

§ 5-a. Subdivision (a) of section 439 of the family court act, as amended by section 2 of chapter 468 of the laws of 2012, is amended to read as follows:

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

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

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

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

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

(b) If the respondent after receiving appropriate notice, fails to comply with a summons, subpoena or warrant relating to a [paternity] parentage proceeding under article five of this act or child support proceeding, and the court has determined that the respondent is licensed, permitted or registered by or with a board, department, authority or office of this state or one of its political subdivisions or instrumentalities to conduct a trade, business, profession or occupation, the court may order such board, department, authority or office to commence proceedings as required by law

regarding the suspension of such license, permit, registration or authority to practice and to inform the court of the actions it has taken pursuant to such proceeding. The court may subsequently order such board, department, authority or office to terminate the suspension of the respondent's license, permit, registration or authority to practice; however, the court shall order the termination of such suspension when the court is satisfied that the respondent has fully complied with the requirements of all summonses, subpoenas and warrants relating to a [paternity] parentage proceeding under or child support proceeding.

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

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

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

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

[PATERNITY] PARENTAGE PROCEEDINGS

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

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

§512. Definitions. When used in this article,

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

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

(c) [the word “mother” refers to the mother of a child born out of wedlock.

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

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

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

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

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

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

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

§ 514. Liability [of father to mother] for expenses of pregnancy, confinement and recovery. The [father] court may determine which parent is liable for the reasonable expenses of the [mother's] gestating parent's confinement and recovery and such reasonable expenses in connection with [her] the pregnancy as determined by the court; provided, however, where the [mother's] gestating parent's confinement, recovery and expenses in connection with ~~her~~ the pregnancy were paid under the medical assistance program on the [mother's] gestating parent's behalf, the [father] non-gestating parent may be liable to the social services district furnishing such medical assistance and to the state department of health for medical assistance so expended. Such expenses, including such expenses paid by the medical assistance program on the [mother's] gestating parent's behalf, shall be deemed cash medical support and the court shall determine the obligation of the parties to contribute to the cost thereof pursuant to subparagraph five of paragraph (c) of subdivision one of section four hundred thirteen of this act.

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

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

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

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

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

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

(a) the [putative father] alleged parent was the petitioner in the [paternity]parentage proceeding; or,

(b) the [putative father] alleged parent acknowledged [paternity] parentage of the child in open court; or, a genetic marker or DNA test had been administered to the [putative father] alleged parent prior to his or her death; or, the [putative father] alleged parent has openly and notoriously acknowledged the child s his or her own.

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

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

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

§ 522. Persons who may originate proceedings.

(a) Proceedings to establish the [paternity] parentage of [the] a child and to compel support

under this article may be commenced by [the mother.]:

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

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

(3) an authorized representative of a support enforcement agency or other governmental agency authorized to maintain a parentage proceeding, a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or

(4) a minor, in order to legally establish the child-parent relationship, or [by]

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

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

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

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

§ 523. Petition to establish parentage.

(a) Proceedings are commenced by the filing of a verified petition, alleging that the person named as respondent, or the petitioner if the petitioner is a person alleging to be the child's [father] parent of a child born out-of-wedlock, of the child and petitioning the court to issue a summons or a warrant, requiring the respondent to show cause why the court should not enter a declaration of [paternity] parentage, an order of support, and such other and further relief as may be appropriate

under the circumstances. Petitions involving assisted reproduction and surrogacy shall be filed in accordance with article 5-C of this act.

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

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

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

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

§524. Issuance of summons.

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

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

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

(c) In any case, whether or not service is attempted under subdivision (a) or (b) of this section, service of a summons and petition under this section may be effected by mail alone to the

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

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

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

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

(a) The court shall advise the parties of their right to one or more genetic marker tests or DNA tests and, on the court's own motion or the motion of any party, shall order the [mother] gestating parent, [her] the child, [and] the alleged [father] parent, and, if appropriate, the non-gestating signatory to an acknowledgment of parentage to submit to one or more genetic marker or

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

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

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

§ 534. Adjournment on motion of court. On its own motion, the court may adjourn the hearing after it has made a finding of [paternity] parentage to enable it to make inquiry into the surroundings, conditions and capacities of the child, into the financial abilities and responsibilities

of both parents or for other proper cause. If the court so adjourns the hearing, it may require the respondent to give an undertaking to appear.

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

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

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

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

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

§ 542. Order of [filiation] parentage.

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

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

been entered against the respondent. The respondent shall be prospectively relieved from liability for support under such order of temporary support upon the respondent's appearance before the court.

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

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

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

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

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

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

of health of New York city, notice of abrogation shall be transmitted to [him] the commissioner of health of the city of New York.

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

§ 545. Order of support by parents.

1. In a proceeding in which the court has made an order of [filiation] parentage, the court shall direct the parent or parents possessed of sufficient means or able to earn such means to pay weekly or at other fixed periods a fair and reasonable sum according to their respective means as the court may determine and apportion for such child's support and education, until the child is twenty-one. The order shall be effective as of the earlier of the date of the application for an order of [filiation] parentage, or, if the children for whom support is sought are in receipt of public assistance, the date for which their eligibility for public assistance was effective. Any retroactive amount of child support shall be support arrears/past-due support and shall be paid in one sum or periodic sums as the court shall direct, taking into account any amount of temporary support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. The court shall direct such parent to make his or her residence known at all times should he or she move from the address last known to the court by reporting such change to the support collection unit designated by the appropriate social services district. The order shall contain the social security numbers of the named parents as required by section four hundred forty of this act. The order may also direct each parent to pay an amount as the court may determine and apportion for the support of the child prior to the making of the order of [filiation] parentage, and may direct each parent to pay an amount as the court may determine and apportion for the funeral expenses if the child has died. The necessary expenses incurred by or for the mother in connection with her confinement and recovery and such expenses in connection with the pregnancy of the mother shall be deemed cash medical support, and the court shall determine the obligation of either or both parents to contribute to the cost thereof pursuant to subparagraph five of paragraph (c) of subdivision one of

section four hundred thirteen of this act. In addition, the court shall make provisions for health insurance benefits in accordance with the requirements of section four hundred sixteen of this act.

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

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

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

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

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

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

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

(a) If the respondent, after receiving appropriate notice, fails to comply with a summons, subpoena or warrant relating to a [paternity] parentage or child support proceeding, and the court has determined that the respondent is licensed, permitted or registered by or with a board, department, authority or office of this state or one of its political subdivisions or instrumentalities to conduct a trade, business, profession or occupation, the court may order such board, department,

authority or office to commence proceedings as required by law regarding the suspension of such license, permit, registration or authority to practice and to inform the court of the actions it has taken pursuant to such proceeding.

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

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

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

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

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

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

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

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

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

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

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

§ 563. [Paternity] Parentage and support proceedings combined; apportionment. When a proceeding to establish [paternity] parentage is initiated under this article, the court on its own motion or on motion of any person qualified under article four of this act to file a support petition may direct the filing of a petition under article four to compel the [mother] parent to support his or her child. If the court enters an order of [filiation] parentage, it may apportion the costs of the support and education of the child between the parents according to their respective means and responsibilities.

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

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

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

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

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

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

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

§38. The article heading of article 5-A, the section heading and subdivisions 1 and 8 of section 571 of the family court act, the article heading of article 5-A and the section heading of section 571 as added by chapter 685 of the laws of 1975 and subdivisions 1 and 8 of section 571 as amended by section 111 of part B of chapter 436 of the laws of 1997, are amended to read as follows:

ARTICLE 5-A

SPECIAL PROVISIONS RELATING TO ENFORCEMENT OF SUPPORT AND ESTABLISHMENT OF [PATERNITY] PARENTAGE

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

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

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

[paternity] parentage proceedings until sixty days after the birth of the child.

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

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

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

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

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

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

parentage of and liability for the support of a child pursuant to articles four and five of the family court act.

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

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

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

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

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

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

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

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

(j) The order shall be effective as of the date of the application therefor, and any retroactive amount of child support due shall be support arrears/past due support and shall, except as provided

for herein, be paid in one lump sum or periodic sums, as the court shall direct, taking into account any amount of temporary support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the courts shall not direct the schedule of repayment of retroactive support. Where such direction is for child support and [paternity] parentage has been established by a voluntary acknowledgement of [paternity] parentage as defined in section forty-one hundred thirty-five-b of the public health law, the court shall inquire of the parties whether the acknowledgement has been duly filed, and unless satisfied that it has been so filed shall require the clerk of the court to file such acknowledgement with the appropriate registrar within five business days. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding. Any order or judgment made as in this section provided may combine in one lump sum any amount payable to the custodial parent under this section with any amount payable to such parent under section two hundred thirty-six of this article. Upon the application of either parent, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party, parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty, or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such

direction. Subject to the provisions of section two hundred forty-four of this article, no such modification or annulment shall reduce or annul arrears accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. Such modification may increase such child support nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of child support due shall be support arrears/past due support and shall be paid in one lump sum or periodic sums, as the court shall direct, taking into account any amount of temporary child support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§52. Paragraph g of subdivision 2 of section 111-c of the social services law, as amended by section 18 of part L of chapter 56 of the laws of 2020, is amended to read as follows:

g. obtain from respondent, when appropriate and in accordance with the procedures established by section one hundred eleven-k of this [chapter] title, an acknowledgment of parentage or an agreement to make support payments, or both;

§53. Subdivision 1 of section 111-d of the social services law, as amended by chapter 502 of the laws of 1990, is amended to read as follows:

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

receiving services pursuant to section one hundred eleven-g of this title.

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

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

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

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

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

respond to such information subpoenas pursuant to section twenty-three hundred eight of the civil practice law and rules.

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

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

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

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

§58. Subparagraph (1) of paragraph (a) of subdivision 2 of section 111-v of the social

services law, as added by chapter 398 of the laws of 1997, is amended to read as follows:

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

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

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

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

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

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

§61. Paragraph (b) of subdivision 1 and subdivision 2 of section 349-b of the social services law, paragraph (b) of subdivision 1 as amended by chapter 398 of the laws of 1997 and subdivision 2 as amended by chapter 685 of the laws of 1975 are amended to read as follows:

(b) to cooperate with the state and the social services official, in accordance with standards established by regulations of the department consistent with federal law, in establishing the [paternity] parentage of a child born out-of-wedlock for whom assistance under this title is

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

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

§62. Paragraphs (a), (d), (e) and (f) of subdivision 1 of section 352-a of the social services law, paragraphs (a), (d) and (e) as added by chapter 187 of the laws of 1969 and paragraph (f) as amended by chapter 685 of the laws of 1975, are amended to read as follows:

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

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

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

(f) to reimburse, to the extent that state and federal requirements authorize or require, appropriate courts and law enforcement officials for activities related to the requirements of this chapter and the family court act with respect to establishment of [paternity] parentage and for services they have undertaken on behalf of such official.

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

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

§ 63-a. Subparagraph 3 of paragraph (d) of subdivision 1 of section 366 of the social services law, as amended by section 2 of part CCC of chapter 56 of the laws of 2022, is amended to read as follows:

(3) cooperates with the appropriate social services official or the department in establishing [paternity] parentage or in establishing, modifying, or enforcing a support order with respect to his or her child; provided, however, that nothing herein contained shall be construed to require a

payment under this title for care or services, the cost of which may be met in whole or in part by a third party; notwithstanding the foregoing, a social services official shall not require such cooperation if the social services official or the department determines that such actions would be detrimental to the best interest of the child, applicant, or recipient, or with respect to pregnant women during pregnancy and during the one year period beginning on the last day of pregnancy, in accordance with procedures and criteria established by regulations of the department consistent with federal law; and

§64. Subdivisions 1, 2, 3 and 4 of section 372-c of the social services law, subdivisions 1 and 2 as amended by section 20 of part L of chapter 56 of the laws of 2020 and subdivisions 3 and 4 as added

by chapter 665 of the laws of1976, are amended to read as follows:

1. The department shall establish a putative father registry which shall record the names and addresses of: (a) any person adjudicated by a court of this state to be the parent of a child born out of wedlock; (b) any person who has filed with the registry before or after the birth of a child out of wedlock, a notice of intent to claim parentage of the child; (c) any person adjudicated by a court of another state or territory of the United States to be the father of an out of wedlock child, where a certified copy of the court order has been filed with the registry by such person or any other person; (d) any person who has filed with the registry an instrument acknowledging [paternity] <u>parentage</u> pursuant to section 4-1.2 of the estates, powers and trusts law <u>or section four thousand thirty-five-b of the public health law</u>.

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

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

4. An unrevoked notice of intent to claim [paternity] <u>parentage</u> of a child may be

introduced in evidence by any party, other than the person who filed such notice, in any proceeding in which such fact may be relevant.

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

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

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

4-e. Suspension and disqualification for failure to make child support payments or failure to comply with a summons, subpoena or warrant relating to a [paternity] parentage proceeding under article five of the family court act or child support proceeding.

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

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

(d) Upon receipt of an order from the court based on failure to comply with a summons, subpoena, or warrant relating to a [paternity] parentage proceeding under article five of the family court act or child support proceeding, the authority, if it finds such person has been issued a license or permit, shall within thirty days of receipt of such order from the court, provide notice to the

licensee or permittee that his or her license shall be suspended in sixty days unless the conditions in paragraph (e) of this subdivision are met.

§68. The section heading and subdivisions 1 and 5 of section 6509-c of the education law, as added by section 122 of chapter 398 of the laws of 1997, are amended to read as follows:

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

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

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

§69. This act shall take effect on the first day of November after it shall have become a law; and provided, further, that section sixty-three-a of this act shall take effect on the same date and in the same manner as section 2 of part CCC of chapter 56 of the laws of 2022 takes effect; and provided further, that the amendments made to subdivision 4-e of section 510 of the vehicle and traffic law made by section sixty-six of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith.

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

6. Determining parentage in Family Court proceedings after an acknowledgment of parentage has been executed

[F.C.A. §§ 522, 523, 524, 532(a), 542(d)]

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

The Family Court Advisory and Rules Committee is proposing a measure to amend the Family Court Act to clarify that a non-signatory to an AOP who comes forward alleging parentage has standing to file a parentage [13] petition notwithstanding the existence of an AOP signed by another individual. In such a case, the signatory to the AOP is a necessary party and would have to be named as a respondent. If appropriate, the Family Court would have discretion to order the original signatory to submit to DNA testing, in addition to the petitioner, gestating parent and child. Finally, the court would be required to issue an order vacating the AOP where a non-signatory has been adjudged to be the legal parent, even in the absence of a petition filed by a signatory. It should be noted that this proposal does not change the law on equitable estoppel, so that an alleged parent seeking a parentage order may still be barred by equitable estoppel. *See,* Stephen N. *v.* Amanda O., 140 A.D.3d 1223 (3rd Dept., 2016).

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

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

vacate the AOP. This measure would provide needed clarification by amending Family Court Act §542 to provide that where the AOP signatory is determined not to be a legal parent, the AOP must be vacated at the same time that a new order of parentage is issued.

The recent decision of the Family Court, Bronx County, in Matter of Emily R. *v.* Emilio R. and Juan Alexis C., 53 Misc.3d 325 (Fam. Ct., Bx. Co., 2017), illustrates and, in fact, suggests the need for enactment of the Committee's proposal. The mother, a teenager at the time of the birth of the child, was involved with two men, one of whom joined the mother in signing an AOP right after the child's birth but soon became uninvolved both with the child and her mother. The other man, who was married and in his thirties when the child was born, developed a parental relationship with the child. The AOP signatory filed a petition to vacate the AOP but it was dismissed for failure to prosecute. The child's attorney filed a vacatur petition, but the Support Magistrate denied it since neither the mother nor the AOP signatory had a vacatur petition pending. Upon referral to a Family Court judge to adjudicate equitable estoppel issues, the judge noted that the limitation that only an AOP signatory may challenge an AOP is an "impediment to a non-signatory seeking to establish paternity." *Id.,* at 333. Noting that children's best interests are the paramount concern in paternity proceedings, the judge stated that adjudication of "the correct man" to be the child's father would be in her best interests:

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

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

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

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

Proposal

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

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

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

§ 522. Persons who may originate proceedings.

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

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

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

(3) an authorized representative of a support enforcement agency or other governmental agency authorized to maintain a parentage proceeding, a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or

(4) a minor, in order to legally establish the child-parent relationship, or [by]

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

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

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

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

§ 523. Petition to establish parentage.

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

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

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

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

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

§524. Issuance of summons

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

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

permits.

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

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

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

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

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

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

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

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

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

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

First, the measure will make it easier, particularly for self-represented litigants, to ensure that the financial documents submitted will become part of the Family Court record and will thus be available for review, both in terms of the review by judges of objections to Support Magistrate determinations under Family Court Act §439(e) and on appeal to the Appellate Division pursuant to Article 11 of the Act. The affidavits of net worth submitted by each party would automatically be entered into evidence and would become part of the record. [14] Official documents, such as W-2 wage and tax statements, current and representative pay stubs and health insurance documents, which are filled out by employers, insurance companies and other businesses, if appearing regular on their face, would be admissible as business records under section 4518 of the Civil Practice Law and Rules, without the need for witnesses to lay the evidentiary foundation. State and federal tax returns may also be automatically deemed part of the record "if accompanied by sworn written statements or sworn statements on the record by the taxpayer that the documents are true copies of returns actually submitted, as applicable, to the United States Internal Revenue Service or state taxation authority." Consistent with due process requirements, all documents admitted into evidence would require that the party submitting the document be subject to cross-examination by the opposing party.

This measure would facilitate needed uniformity in practice throughout the State, since jurists vary as to whether they formally enter the financial disclosure documents into evidence. Section 439(d) of the Family Court Act requires Support Magistrates to follow evidentiary rules.

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

Many of the documents may justifiably be characterized as business records under section 4518 of the CPLR, as employers, for example, are required by Labor Law §195(3) to provide pay stubs to their employees. However, some of the documents –particularly, the financial disclosure affidavit and tax returns– do not clearly conform to established hearsay exceptions, although they are explicitly required to be submitted to the Family Court by statute. Clarification of Family Court Act §424-a, therefore, to ensure that all documents submitted will become part of the record, assuming that the parties offering the documents are subject to cross-examination, will go a long way toward making proceedings more uniform, ensuring reviewability and making it easier for self-represented litigants to navigate, while, at the same time, preserving their essential due process rights.

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

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

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

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

Concomitantly, subdivision (c) of section 424-a at present provides only one remedy for cases in which the petitioner, without good cause, does not comply with the requirements of the statute, that is, the Family Court may adjourn the proceedings until such time as the petitioner provides the required documents. This rigid limitation may result in adverse consequences for both

parties and may result in unwarranted delays in completing the case. Prof. Merril Sobie indicated in his 2016 update to his McKinney's Practice Commentaries:

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

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

Proposal

AN ACT to amend the family court act, in relation to financial disclosure in child and spousal support proceedings in the family court

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

Section 1. Section 424-a of the family court act, subdivision (a) as amended by section 59 of chapter 214 of the laws of 1998 and subdivision (b) as amended by chapter 398 of the laws of 1997, , is amended to read as follows:

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

(a) there shall be compulsory disclosure by both parties of their respective financial states, provided, however, that this requirement shall not apply to a social services official who is a party in any support proceeding under this act. No showing of special circumstances shall be required before such disclosure is ordered and such disclosure may not be waived by either party or by the court. A sworn statement of net worth shall be filed with the clerk of the court on a date to be fixed by the court, no later than ten days after the return date of the petition. As used in this part, the

term “net worth” shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations. It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter, provided, however, that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth. All such sworn statements of net worth shall be accompanied by a current and representative paycheck stub and the most recently filed state and federal income tax returns including a copy of the W-2(s) wage and tax statement(s) submitted with the returns. In addition, both parties shall provide information relating to any and all group health plans available to them for the provision of care or other medical benefits by insurance or otherwise for the benefit of the child or children for whom support is sought, including all such information as may be required to be included in a qualified medical child support order as defined in section six hundred nine of the employee retirement income security act of 1974 (29 USC 1169) including, but not limited to: (i) the name and last known mailing address of each party and of each dependent to be covered by the order; (ii) the identification and a description of each group health plan available for the benefit or coverage of the disclosing party and the child or children for whom support is sought; (iii) a detailed description of the type of coverage available from each group health plan for the potential benefit of each such dependent; (iv) the identification of the plan administrator for each such group health plan and the address of such administrator; (v) the identification numbers for each such group health plan; and (vi) such other information as may be required by the court [;]. The sworn statements of net worth of each party shall automatically be deemed part of the record of the proceeding and the financial documents submitted, including, but not limited to, representative pay stubs, copies of W-2 wage and tax statements and proof of group health plans or other medical benefits by insurance or otherwise for the benefit of the children for whom support is sought, and shall, if appearing regular on their face, be received into evidence as a business record pursuant to subdivision (f) of section forty-five hundred eighteen of the civil practice law and rules, provided that the party, who is offering that evidence, is subject to cross-examination by the opposing party. State and federal tax returns may be automatically deemed part of the record if accompanied by sworn written statements or sworn statements on the

record by the taxpayer that the documents are true copies of returns actually submitted, as applicable, to the United States Internal Revenue Service or state taxation authority, provided that the party, who is offering that evidence, is subject to cross-examination by the opposing party;

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

(c) when a petitioner other than a social services official fails, without good cause to file a sworn statement of net worth, a current and representative paycheck stub and the most recently filed state and federal income tax returns, as provided in subdivision (a) of this section, the court may on its own motion or upon application of any party adjourn [such] the proceeding until such time as the petitioner files with the court such statements and tax returns or may preclude the petitioner from entering any evidence regarding his or her financial ability or, in a proceeding to modify an order of support, may grant a motion to dismiss in whole or in part. The provisions of this subdivision shall not apply to proceedings establishing temporary support or proceedings for the enforcement of a support order or support provision of a separation agreement or stipulation.

§2. This act shall take effect immediately.

8. Adjournments in contemplation of dismissal and suspended judgments in child protective proceedings [F.C.A. §§1039, 1053, 1071]

Long-standing uncertainty regarding the consequences of adjournments in contemplation of dismissal and suspended judgments in child protective proceedings has hindered the ability of the Family Courts to utilize these important mechanisms for resolving child protective cases without the need for more drastic alternatives, such as out-of-home foster care placements. The Family Court Advisory and Rules Committee is, therefore, submitting a proposal to clarify and fill gaps in the statutory framework with respect to both of these options.

The proposal would make clear that an adjournment in contemplation of dismissal may be ordered either before the entry of a fact-finding order or before the entry of a final disposition. It would maintain the current law permitting an adjournment in contemplation of dismissal to be ordered upon the consent of the parties and child's attorney prior to the entry of a fact-finding order. Preserving the 1990 amendment to Family Court Act §1039(e) that followed from the Court of Appeals decision in Matter of Marie B., 62 N.Y.2d 352 (1984), if the Family Court finds a violation of the conditions of a pre-fact-finding adjournment and restores the matter to the Family Court calendar, the parent would be entitled to a fact-finding hearing on the original child abuse or neglect petition prior to the case advancing to the dispositional stage. Eliminating the confusing and overly limiting phrase "upon a fact-finding hearing," the proposal makes clear that an adjournment in contemplation of dismissal may alternatively be ordered '[a]fter the entry of a fact-finding order but prior to the entry of a dispositional order," by the Family Court or also upon motion by any party or the child's attorney. In such a case, the consent of the petitioner child protective agency and child's attorney would not be required but both would have a right to be heard regarding their positions. In the event the matter is restored to the Family Court calendar as a result of a violation of the conditions of the adjournment, the matter would proceed to disposition no later than thirty days after the application to restore the matter to the calendar, unless an extension for "good cause" is granted by the Court. In all cases, the Family Court would have to state reasons on the record for adjourning a case in contemplation of dismissal.

The proposal also clarifies that an adjournment in contemplation of dismissal may be extended for up to one year, either upon consent of the parties and child's attorney (if prior to fact-finding) or for good cause upon the respondent's consent (if after fact-finding and prior to disposition). If a violation of the conditions of the adjournment is alleged, the adjournment period is tolled pending a determination regarding the alleged violation. Additionally, sixty days prior to the expiration of the adjournment, the child protective agency must submit a report to the Family Court, parties and child's attorney regarding compliance with the conditions. If there has been no violation of the adjournment in contemplation of dismissal and the adjournment in contemplation of dismissal has not been extended, the petition would be deemed dismissed and, in the case of a post-fact-finding ACD, the fact-finding itself would be deemed vacated. If the court finds a violation, the Family Court may extend the ACD, possibly

with new or different conditions, or may restore the matter to the calendar for fact-finding (for pre-fact-finding ACD's) or for disposition (for post-fact-finding ACD's).

During the period of an ACD, Family Court would not be authorized to place the child pursuant to Family Court Act §§1017(2)(a)(iii), 1052(a)(iii), 1055 or order custody to a parent or non-respondent parent pursuant to Family Court Act §§1017(2)(a)(i), 1052(a)(vi), (vii), 1055-b and Article Six of the Family Court Act. A release of the child to a non-respondent parent would, however, be permissible, if, for example, the condition of the ACD included a mandate for a respondent parent to complete a particular program. The ACD may not be conditioned upon the child's voluntary placement pursuant to Social Services Law §358-a. Except as necessary under sections 1024 or 1027 of the Family Court Act, the child could not be removed from home during the adjournment period. These amendments are necessary in light of the fact that children remanded or placed in foster care, notwithstanding the adjournment in contemplation of dismissal of the underlying proceeding, are not eligible for Federal foster care reimbursement under Title IV-E of the *Social Security Act*. It goes without saying that if the case warrants dismissal following a period of adjournment, the Court would not be able to find that retention in the home would be contrary to the child's best interests, as is required by the New York State and Federal *Adoption and Safe Families Act*s for Federal foster care eligibility. *See* Family Court Act §1027(b); Social Services Law §358-a(3); Public Law 105-89.

Like the provisions regarding adjournments in contemplation of dismissal, the dispositional alternative of suspended judgment in child protective cases has long generated confusion, because the Family Court Act is largely silent regarding procedures for its issuance, as well as its ultimate consequences. Similar to the amendments made in 2005 and 2006 to Family Court Act §633,[15] the suspended judgment provisions applicable to permanent neglect cases, the proposal would amend Family Court Act §1053 to require that the order suspending judgment contain the duration, terms and conditions of the order. The order would also require a warning in conspicuous print that failure to comply may lead to its revocation and to issuance of any other order of disposition that might have been made under Family Court Act §1052 at the time the judgment was suspended. A copy of the order must be furnished to the respondent.

The proposal would add clarity regarding procedures applicable when a parent has successfully complied with the conditions of a suspended judgment. The order suspending judgment must include a date for a review by the Court and parties of the parent's compliance no later than 30 days prior to the expiration of the suspended judgment period. In addition to the existing requirements for progress reports 90 days after issuance of the order and as ordered by the Court, the proposal would require a report no later than 60 days prior to the suspended judgment's expiration.

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

Consistent with the observation of the Supreme Court, Appellate Division, Third Department, in Matter of Baby Girl W., 245 A.D.2d 830 (3d Dept., 1997), the Committee's proposal provides that at the end of a successful period of a suspended judgment, the underlying order of fact-finding would not automatically be vacated; nor would the report on the Statewide Central Register of Child Abuse and Maltreatment automatically be sealed or expunged. Rather, as in Matter of Makynli N., 17 Misc.3d 1127(A), 2007 N.Y.Slip Op. 52162 (Fam. Ct., Monroe Co., 2007) (Unreported), the parent could apply to the Family Court, pursuant to Family Court Act §1061, for an order vacating the order of fact-finding and dismissing the proceeding in accordance with subdivision (c) of section 1051 of the Family Court Act on the ground that the aid of the Court is no longer required and that the dismissal would be in the children's best interests. *See also* Matter of Crystal S., 74 A.D.3d 823 (2nd Dept., 2010); Matter of Araynah B., 34 Misc.3d 566, 939 N.Y.S.2d 239 (Fam. Ct., Kings Co., 2011). Such a dismissal would then provide the parent with grounds to seek administrative relief in terms of sealing or expungement of the State Central Register report. As the Family Court, Monroe County, noted in its earlier opinion in the case,

> [A] suspended judgment neither condones Respondent's neglectful action, nor does it necessarily eradicate the finding. [Citation omitted].

Matter of MN, 16 Misc.3d 499, 506 (Fam. Ct., Monroe Co., 2007).

Significantly, it is the requirement of this procedural step, *i.e.*, the motion under Family Court Act §1061, that distinguishes the outcome of a successful suspended judgment from that of an adjournment in contemplation of dismissal. A suspended judgment may thus be an appropriate disposition in cases in which the Court determines that a full dismissal of the proceedings, including vacatur of the fact-finding, should not be automatic.

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

The Committee's proposal provides needed clarity to both the provisions regarding adjournments in contemplation of dismissal and the disposition of suspended judgment, thus enhancing the usefulness of these options for the resolution of child abuse and neglect

proceedings in Family Court. Both of these options are critically important to promote and preserve the well-being of children and their families by providing opportunities for families to access services in order to repair the problems that precipitated court action without the disruption and, all too often, the trauma of out-of-home placement.

Proposal

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

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

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

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

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

(iii) The court may make [such] an order under this section only after it has apprised the respondent of the provisions of this section and it is satisfied that the respondent understands the effect of such provisions. Under no circumstances shall the court order any party to consent to an order under this section. The court shall state its reasons on the record for ordering an adjournment in contemplation of dismissal under this section.

(b) An adjournment in contemplation of dismissal is an adjournment of the proceeding for a period not to exceed one year with a view to ultimate dismissal of the petition in furtherance of justice. In the case of an adjournment in contemplation of dismissal after the entry of a fact-finding order, such dismissal includes vacatur of the fact-finding order.

(i) Upon the consent of the petitioner, the respondent and the child's attorney, the court may issue an order extending [such] the period of an adjournment in contemplation of dismissal issued pursuant to paragraph (i) of subdivision (a) of this section prior to the entry of a fact-finding order for such time and upon such conditions as may be agreeable to the parties.

(ii) For good cause shown and with the consent of the respondent, the court may, on its own motion or on motion of any party or the attorney for the child and after providing notice and an opportunity to be heard to all parties and the attorney for the child, issue an order extending an adjournment in contemplation of dismissal issued pursuant to paragraph (ii) of subdivision (a) of this section after entry of a fact-finding order for such time and upon such conditions as may be in the best interests of the child or children who are the subjects of the proceeding.

(iii) The court shall state its reasons on the record for extending an adjournment in contemplation of dismissal under this subdivision, including its reasons for changes in the terms and conditions, if any.

(c) [Such] The order [may] shall include terms and conditions [agreeable to the parties and to the court, provided that such terms and conditions] in furtherance of the best interests of the child or children who are the subjects of the proceeding and shall include, but not be limited to, a requirement that the child and the respondent be under the supervision of a child protective agency during the adjournment period. Except as provided in subdivision (g) of this section, an order pursuant to subparagraphs (i) and (iii) of paragraph (a) of subdivision two of section one thousand seventeen, paragraphs (iii), (vi), and (vii) of subdivision (a) of section one thousand fifty-two, section one thousand fifty-five or section one thousand fifty-five-b of this article shall not be made in any case adjourned under this section; nor shall an order under this section contain a condition requiring the child or children to be placed voluntarily pursuant to sections three hundred fifty-eight and three hundred eighty-four-a of the social services law. In any order issued pursuant to this section, [such agency] the petitioner shall be directed to make a progress report to the court,

the parties and the child's attorney on the implementation of such order, no later than ninety days after the issuance of such order[, unless the court determines that the facts and circumstances of the case do not require such reports to be made] and shall submit a report pursuant to section one thousand fifty-eight of this article no later than sixty days prior to the expiration of the order. The [child protective agency] petitioner shall make further reports to the court, the parties and the child's attorney in such manner and at such times as the court may direct.

(d) Upon application of the respondent, the petitioner[,] or the child's attorney or upon the court's own motion, made at any time during the duration of the order, if the child protective agency has failed substantially to provide the respondent with adequate supervision or to observe the terms and conditions of the order, the court may direct the child protective agency to observe such terms and conditions and provide adequate supervision or may make any order authorized pursuant to section two hundred fifty-five or one thousand fifteen-a of this act.

(e) [Upon application of] If, prior to the expiration of the period of an adjournment in contemplation of dismissal, a motion or order to show cause is filed by the petitioner or the child's attorney or upon the court's own motion, made at any time during the duration of the order, [the] that alleges a violation of the terms and conditions of the adjournment, the period of the adjournment in contemplation of dismissal is tolled as of the date of such filing until the entry of an order disposing of the motion or order to show cause. The court may revoke the adjournment in contemplation of dismissal and restore the matter to the calendar or the court may extend the period of the adjournment in contemplation of dismissal pursuant to subdivision (b) of this section, if the court finds after a hearing on the alleged violation that the respondent has failed substantially to observe the terms and conditions of the order or to cooperate with the supervising child protective agency. [In such event] Where the court has revoked the adjournment in contemplation of dismissal and restored the matter to the calendar:

(i) in the case of an adjournment in contemplation of dismissal issued prior to the entry of a fact-finding order, unless the parties consent to an order pursuant to section one thousand fifty one of this [act] article or unless the petition is dismissed upon the consent of the petitioner, the court shall thereupon proceed to a fact-finding hearing under this article no later than sixty days after

[such] the application to restore the matter to the calendar has been granted, unless such period is extended by the court for good cause shown; or

(ii) in the case of an adjournment in contemplation of dismissal issued after the entry of a fact-finding order, the court shall thereupon proceed to a dispositional hearing under this article no later than thirty days after the application to restore the matter to the calendar has been granted, unless such period is extended by the court for good cause shown.

(iii) The court shall state its reasons on the record for revoking an adjournment in contemplation of dismissal and restoring the matter to the calendar under this subdivision.

(f) If the proceeding is not [so] restored to the calendar as a result of a finding of an alleged violation pursuant to subdivision (e) of this section and if the adjournment in contemplation of dismissal is not extended pursuant to subdivision (b) of this section, the petition is, at the expiration of the adjournment in contemplation of dismissal period, deemed to have been dismissed by the court in furtherance of justice [unless an application is pending pursuant to subdivision (e) of this section]. If [such application is granted] the court finds a violation pursuant to subdivision (e) of this section, the petition shall not be dismissed and shall proceed in accordance with the provisions of such subdivision (e).

(g) Notwithstanding the provisions of this section, if a motion or order to show cause is filed alleging a violation pursuant to subdivision (e) of this section and the court finds that removal of the child from the home is necessary pursuant to section one thousand twenty-seven of this article during the pendency of the violation motion or order to show cause, the court[,] may, at any time prior to dismissal of the petition pursuant to subdivision (f), issue an order authorized pursuant to section one thousand twenty-seven of this article. Nothing in this section shall preclude the child protective agency from taking emergency action pursuant to section one thousand twenty-four of this article where compelled by the terms of that section. If the violation is found and the matter is restored to the calendar, the court may make further orders in accordance with subdivision (e) of this section.

§2. Section 1053 of the family court act, as added by chapter 962 of the laws of 1970 and subdivision (c) as amended by chapter 41 of the laws of 2010, is amended to read as follows:
§1053. Suspended judgment. (a) Rules of court shall define permissible terms and conditions of a

suspended judgment. These terms and conditions shall relate to the acts or omissions of the parent or other person legally responsible for the care of the child.

(b) The maximum duration of any term or condition of a suspended judgment is one year, unless the court finds at the conclusion of that period, upon a hearing, that exceptional circumstances require an extension thereof for a period of up to an additional year. The court shall state its reasons on the record for extending a period of suspended judgment under this subdivision, including its reasons for changes in the terms and conditions, if any.

(c) Except as provided for herein, in any order issued pursuant to this section, the court may require the child protective agency to make progress reports to the court, the parties, and the child's attorney on the implementation of such order. Where the order of disposition is issued upon the consent of the parties and the child's attorney, such agency shall report to the court, the parties and the child's attorney no later than ninety days after the issuance of the order, unless the court determines that the facts and circumstances of the case do not require such report to be made.

(d) The order of suspended judgment must set forth the duration, terms and conditions of the suspended judgment, and must contain a date certain for a court review not later than thirty days prior to the expiration of the period of suspended judgment. The order of suspended judgment also must state in conspicuous print that a failure to obey the order may lead to its revocation and to the issuance of any order that might have been made at the time judgment was suspended. A copy of the order of suspended judgment must be furnished to the respondent.

(e) Not later than sixty days before the expiration of the period of suspended judgment, the petitioner shall file a report, pursuant to section one thousand fifty-eight of this article, with the family court and all parties, including the respondent and his or her attorney, the attorney for the child and intervenors, if any, regarding the respondent's compliance with the terms of the suspended judgment. The report shall be reviewed by the court on the scheduled court date. Unless a motion or order to show cause has been filed prior to the expiration of the period of suspended judgment alleging a violation or seeking an extension of the period of the suspended judgment, the terms of the disposition of suspended judgment shall be deemed satisfied. In such event, the court’s jurisdiction over the proceeding shall be terminated. However, the order of factfinding and the presumptive effect of such finding upon retention of the report of suspected abuse and neglect on

the state central register in accordance with paragraph (b) of subdivision eight of section four hundred twenty-two of the social services law shall remain in effect unless the court grants a motion by the respondent to vacate the fact-finding pursuant to section one thousand sixty-one of this article.

§3. Section 1071 of the family court act, as amended by chapter 437 of the laws of 2006, is amended to read as follows:

§1071. Failure to comply with terms and conditions of suspended judgment. If, prior to the expiration of the period of the suspended judgment, a motion or order to show cause is filed that alleges that a parent or other person legally responsible for a child's care violated the terms and conditions of a suspended judgment issued under section one thousand fifty-three of this article, the period of the suspended judgment shall be tolled as of the date of such filing pending disposition of the motion or order to show cause. If a motion or order to show cause alleging a violation has been filed and the court finds that removal of the child from the home pending disposition of the motion or order to show cause is necessary pursuant to section one thousand twenty-seven of this article, the court may issue an order pursuant to such section one thousand twenty-seven. Nothing in this section shall preclude the child protective agency from taking emergency action pursuant to section one thousand twenty-four of this article where compelled by the terms of that section. If, after a hearing on the alleged violation, the court is satisfied by competent proof that the parent or other person violated the order of suspended judgment, the court may revoke the suspension of judgment and enter any order that might have been made at the time judgment was suspended or may extend the period of suspended judgment pursuant to subdivision (b) of section one thousand fifty-three of this article. The court shall state its reasons for revoking or extending a period of suspended judgment under this section.

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

9. Adjournments in contemplation of dismissal in family offense proceedings in Family Court [F.C.A. §§829, 841]

Enactment of the Family Court Act in 1962 was accompanied by a finding that, in order to fulfill the Court's responsibilities "for dealing with the complexities of family life so that its action may fit the particular needs of those before it," the judges "are thus given a wide discretion and grave responsibilities." Family Court Act §141. The seriousness of the responsibility to provide individualized justice that provides fairness in process and outcome to both victim and offender, including meaningful accountability for the offender and safety for the victim, cannot be overemphasized in family offense cases. In order to respond appropriately to civil cases of domestic violence, the Family Court requires a comprehensive menu of pre-dispositional and dispositional options. The Family Court Advisory and Rules Committee is submitting a proposal to fill a significant gap in the statutory framework governing those options and to remedy any disparity between the treatment of family offense cases in family and criminal courts.

The Committee's measure would add a new section 829 to the Family Court Act to authorize adjournments in contemplation of dismissal ("ACDs") in Article 8 (family offense) proceedings, both before or upon a finding that a family offense has occurred, and would amend section 841 to add a new subdivision (f) authorizing an ACD as a dispositional option. Importantly, the ACD would require the consent of both the respondent and petitioner, as well as the approval of the Family Court, both as to the ordering of the ACD and as to any conditions. If an attorney for the child has been appointed, the position of the attorney must be considered, a particularly significant provision if any of the ACD conditions involve contact with a child. A temporary order of protection may be issued under Family Court Act §828 in conjunction with the ACD and compliance with the order would be required as one of the conditions of the ACD. Payment of restitution under subdivision (e) of section 829 of the Family Court Act would also be authorized in conjunction with the ACD. Similar to ACD's in criminal family offense cases under Criminal Procedure Law §170.55(2), an ACD ordered under Family Court Act §828 may last for up to one year. One extension of up to one year may be ordered, again requiring consent of the parties, approval of the Court and, if an attorney for the child has been appointed, consideration of the position of the attorney. Upon successful completion of the ACD period or the extension, the petition would automatically be dismissed in furtherance of justice.

The measure would also delineate procedures for violations of ACD's in Family Court family offense cases. The Family Court would be able to restore the matter to the calendar, either on its own motion or upon application of the petitioner, if it finds a violation "after a hearing based upon competent, material and relevant evidence." If a violation is found, the original family offense petition would be reinstated and the Court would proceed to either a fact-finding hearing or a dispositional hearing, depending upon whether the ACD had been ordered before or after a finding had been made.

It is truly anomalous that ACD's are explicitly authorized in criminal family offense proceedings under section 170.55 of the Criminal Procedure Law but not when identical cases are brought under Article 8 of the Family Court Act. Nor is there any justification for the fact that

ACD's are explicitly permitted under other Articles of the Family Court Act, namely, in juvenile delinquency, Persons in Need of Supervision and child abuse and neglect proceedings under sections 315.3, 749 and 1039, respectively, of the Family Court Act. Indeed, ACD's have been ordered without challenge, notwithstanding the lack of specific statutory authorization, in several family offense cases in the Family Court. The Appellate Division, Second Department, in Matter of Cote *v.* Berger, 112 A.D.3d 821 (2d Dept., 2013), reversed an ACD violation petition for insufficiency of the violation allegations, but did not challenge issuance of the ACD itself. In the custody case of Matter of M.M.H. *v.* William D.H., 26 Misc. 3d 1240 (Unrep., Fam. Ct., Dutchess Co., 2010), the Family Court noted that an ACD had been ordered in an earlier family offense proceeding between the parties. Significantly, the nowretired Family Court judge in Matter of Sirley M.M. *v.* Jorge L.C., 58 Misc.3d 796 (Fam. Ct., Qns. Co., 2018), after ordering that the proceeding be adjourned in contemplation of dismissal, wrote an article encouraging the use of the ACD procedure. *See* J. Hunt, "Why ACD's Should Be a Dispositional Alternative in Family Offense Cases," *N.Y. Law J.,* Jan. 18, 2019, p.4, col. 4.

Allowing ACDs in Article 8 cases provides benefits for both petitioners and respondents and, at the same time, expands the tools available to the Family Court to resolve family offense cases to the satisfaction of all parties. ACDs will allow petitioners to continue temporary orders of protection for up to a year without the need for continued litigation and thus will not compromise victim safety. From a victim's perspective, an ACD granted prior to a fact-finding will limit the need for court appearances and will not require the victim to undergo the trauma involved in recounting the violence on the witness stand and under cross examination. Further, as judges who have ordered ACD's have indicated, the option of an ACD may provide a valuable alternative to the frequent withdrawals of, or failures to follow through with, family offense petitions in Family Court. Given an option of an ACD, with the continued safety provided by a temporary order of protection, a domestic violence victim may choose it over the option of outright dismissal or withdrawal of a petition. An ACD may inure to the benefit of the parties' children as well, since the ACD conditions may regulate and, if appropriate, require supervision over visits with the children. Finally, an ACD as a means of resolving a family offense petition has obvious benefits for respondents as well, as it provides an automatic dismissal upon successful completion and it is not an admission of guilt and thus does not trigger the potential collateral consequences of an adjudication.

Proposal

AN ACT to amend the family court act, in relation to providing authorization for adjournments in contemplation of dismissal in family offense cases in family court

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

Section 1. Article 8 of the family court act is amended by adding a new section 829 to read as follows:

§829. Adjournment in contemplation of dismissal.

1. Prior to or upon a fact-finding hearing, with the consent of the petitioner and the respondent and with the approval of the court, the proceeding may be "adjourned in contemplation of dismissal". The court shall consider the position of the attorney for the child, if one has been appointed. Under no circumstances shall the court order any party to consent to an order under this section.

2. An adjournment in contemplation of dismissal is an adjournment of the proceeding for a period not to exceed one year with a view to ultimate dismissal of the petition in furtherance of justice.

3. Such order of adjournment in contemplation of dismissal may include terms and conditions agreeable to the parties and to the court. The court may, as a condition of such order, issue a temporary order of protection in accordance with section 828 of this part. The duration of the temporary order of protection may not exceed the length of the adjournment in contemplation of dismissal. Compliance with the temporary order of protection shall be a condition of the order of adjournment in contemplation of dismissal.

4. Upon consent of the petitioner and respondent, upon consideration of the position of the attorney for the child, if one has been appointed, and with the approval of the court, the court may issue an order extending the adjournment in contemplation of dismissal for an additional period of up to one year upon terms and conditions agreeable to the parties and to the court.

5. Upon application of the petitioner alleging a violation of such order, or upon the court's own motion, made at any time during the duration of the adjournment in contemplation of dismissal, the court may restore the matter to the calendar if the court finds after a hearing based upon competent, relevant and material evidence that the respondent has failed to comply with the terms and conditions of the order. Pending a determination after a hearing, the court may toll the expiration of any of the provisions of the order of adjournment in contemplation of dismissal, modify and/or extend the temporary order of protection or issue a new temporary order of protection.

6. If the proceeding is not restored to the calendar at the expiration of the adjournment period, the petition is deemed to have been dismissed by the court in furtherance of justice, unless an application is pending pursuant to subdivision four of this section. If the application to restore

the petition is granted, the petition shall not be dismissed and unless the parties agree to extend the order or to dismissal of the petition, the court shall proceed either to a fact-finding hearing or to a dispositional hearing, if such order was issued after fact-finding.

§2. Subdivision (e) of section 841 of the family court act, as amended by chapter 222 of the laws of 1994, is amended and a new subdivision (f) is added to read as follows:

(e) directing payment of restitution in an amount not to exceed ten thousand dollars. An order of restitution may be made in conjunction with any order of disposition authorized under [subdivisions] subdivision (b), (c) [or], (d) or (f) of this section. In no case shall an order of restitution be issued where the court determines that the respondent has already paid such restitution as part of the disposition or settlement of another proceeding arising from the same act or acts alleged in the petition before the court; or

(f) adjourning the petition in contemplation of dismissal in accordance with section eight hundred twenty-nine of this article.

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

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

To insure that Supreme and Family Courts are fully informed prior to issuing custody and visitation orders, chapter 595 of the Laws of 2008 amended Family Court Act §651 and Domestic Relations Law §240(1)(a) to require the courts to check the sex offender registry, the statewide registry of orders of protection and the New York State Unified Court System's own records of child protective proceedings and warrants in all custody and visitation proceedings. As the legislation's supporting memorandum indicated, the law was prompted by a tragic case in which a Family Court Judge awarded unsupervised visitation to a parent who, unbeknownst to the Court or the attorney for the child, had been convicted of raping his 14-year old niece and was a Level 2 registered sex offender. The father was subsequently arrested for raping the 12-year old daughter to whom he had been granted visitation by the Court. [16]

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

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

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

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

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

The Family Court Advisory and Rules Committee is, therefore, proposing a measure requiring a review of records in accordance with Family Court Act §651 prior to the issuance of temporary and final orders of protection in which custody is awarded to either parent or a relative in the second degree. The incorporation by reference of Family Court Act §651 ensures that in the rare cases in which the review is not feasible but in which an emergency custody order is critical, subdivisions five and six of section 651 would apply, thus permitting a temporary order of custody with a prompt review of records afterwards. Additionally, the measure would repeal the paragraph of Family Court Act §842 regarding orders to terminate leases or rental agreements that has been rendered obsolete in light of the substitution of an administrative procedure in chapter 694 of the Laws of 2019.

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

Proposal

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

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

Section 1. The first and eighth undesignated paragraphs of section 842 of the family court act, as amended by chapter 335 of the laws of 2019, are amended to read as follows:

The court may also award custody of the child, during the term of the order of protection to either parent, or to an appropriate relative within the second degree. Prior to ordering custody pursuant to this paragraph, the court shall direct a review, in accordance with section six hundred fifty-one of this act, of the reports of the sex offender registry established and maintained pursuant to section one hundred sixty-eight-b of the correction law, reports of the statewide computerized registry of orders of protection established and maintained pursuant to section two hundred twenty-one-a of the executive law, related decisions in court proceedings under article ten of this act and all warrants issued under this act. Nothing in this section gives the court power to place or board

out any child or to commit a child to an institution or agency.

[In addition to the foregoing provisions, the court may issue an order, pursuant to section two hundred twenty-seven-c of the real property law, authorizing the party for whose benefit any order of protection has been issued to terminate a lease or rental agreement pursuant to section two hundred twenty-seven-c of the real property law.]

§2. This act shall take effect immediately.

11. Stipulations and agreements for child support in Family Court and matrimonial proceedings [S 4829-a version] [F.C.A. §413(1)(h); DRL §240(1-b)(h)]

Section 413(1)(h) of the Family Court Act and section 240(1-b)(h) of the Domestic Relations Law provide three important protections for children when their parents enter into agreements and stipulations for the payment of child support. Validly executed agreements and stipulations entered into by the parties and presented to the Supreme or Family Court for incorporation into orders or judgments must include a statement that the parties were advised of the provisions of the Child Support Standards Act (*CSSA*), as well as a statement that the "basic child support obligation" (application of the *CSSA* percentages to the parties' combined parental income) would "presumptively result in the correct amount of child support to be awarded." Where the agreement or stipulation is at variance with the basic child support obligation, a statement must also be included of what the presumptive amount would have been and why the deviation from that amount is appropriate. These protections are not waivable by the parties or their attorneys. All four Judicial Departments have held that agreements not in compliance with these requirements are invalid and unenforceable. *See* David *v.* Cruz, 103 A.D.3d 494 (1st Dept., 2013); Jefferson *v.* Jefferson, 21 A.D.3d 879 (2nd Dept., 2005); Spooner *v.* Spooner, 154 A.D.3d 1158 (3rd Dept., 2017); Panzarella *v.* Panzarella, 106 A.D.3d 1527 (4th Dept., 2013). However, they have not agreed on the procedures to be followed and the remedies for noncompliance with these mandates. The Family Court Advisory and Rules Committee is proposing legislation to supply necessary clarity to this area.

The Committee's proposal would amend both Family Court Act §413(1)(h) and Domestic Relations Law §240(1-b)(h) to provide that if an agreement or stipulation fails to comply with any of the three provisions of the *CSSA*, the non-*CSSA*-compliant provisions must be deemed void as of the earlier of the date that one of the parties alleged the noncompliance in a pleading or motion or the date the Court made a finding of noncompliance. This approach is consistent with that of the Appellate Division, Third Department, which, in Clark *v.* Liska, 263 A.D.2d 640, 692 N.Y.S.2d 825 (3d Dept., 1999), treated a motion to vacate a stipulation on the ground of noncompliance with these requirements as a prospective modification of the parties' obligations. Noting that retroactive vacatur of the agreement would negatively affect the accumulated child support arrears owed by defendant, the cancellation of which is generally prohibited, the Court affirmed the modification date as the date of the application. *See also* Luisi *v.* Luisi, 6 A.D.3d 398 (2d Dept., 2004); Matter of B.J.G. *v.* M.D.G., 29 Misc.3d 670 Sup.Ct., Nassau Co., 2010). *Cf.*, Jefferson *v.* Jefferson, 21 A.D.3d 879, 800 N.Y.S.2d 612 (2d Dept., 2005) (noncompliance with *CSSA* rendered agreement invalid and unenforceable; matter remitted for new determination of child support retroactive to the original date of the agreement).

Further, the Committee's proposal requires that upon a finding of noncompliance, the Court must schedule a hearing to determine an appropriate amount of child support as of the earlier of the date the noncompliance had been asserted in a pleading or a motion or the date of the Court's finding of noncompliance. Concomitantly, the proposal provides that the noncompliance with the *CSSA* may not be asserted as a defense to non-payment of child support in violation of an

agreement or stipulation for a period prior to the assertion of noncompliance in a motion or pleading or judicial determination of noncompliance, whichever was earlier.

At the same time, the measure recognizes that there are instances when child support provisions that do not comply with the *CSSA* are so intertwined with a non-child support provision that voiding the child support provisions would also result in the inappropriate invalidation of non-child support provisions. *See*, Cimons *v.* Cimons, 53 A.D.3d 125 (2nd Dept., 2008). Therefore the proposed legislation provides that if the Family Court determines that there are intertwined provisions over which it has no jurisdiction, e.g., equitable distribution, it must dismiss the petition in order to allow the parties to return to Supreme Court.

Finally, the proposal provides that unless the Supreme Court has retained exclusive jurisdiction to enforce or modify the agreement, the Family Court would have subject matter jurisdiction to review, and, where necessary, set a new child support obligation in cases in which a divorce judgment did not conform to the *CSSA*. *See* J. Gallet and M. Fine, *Spouse and Child Support in New York* §13:2 (Feb., 2018 Update). While the Third Department has held that the Family Court has the authority to make such an order, [Hardman *v.* Coleman, 154 A.D.3d 1146 (3rd Dept., 2017), Du Bois *v.* Swisher, 306 A.D.2d 610 (3rd Dept., 2003)], the First and Second Departments have decided that in the absence of statutory authority, the Family Court has no jurisdiction to make a new order of support where it finds that the underlying order did not comply with the *CSSA*. *See* Byrne *v.* Javino, 145 A.D.3d 718 (2nd Dept., 2016); Georgette D.W. *v.* Gary N.R., 134 A.D.3d 406 (1st Dept., 2015); Castaneda *v*. Castaneda, 132 A.D.3d 667 (2nd Dept., 2015); Savini *v*. Burgaleta, 34 A.D.3d 686 (2d Dept., 2006). If a Family Court in one of these jurisdictions finds that the support order is unenforceable, it has no choice but to dismiss the petition and direct the parties to return to Supreme Court, an often time-consuming and expensive option. And since the order is invalid, the Family Court cannot even direct a support obligor to pay arrears that may have accrued under the order to the custodial parent.

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

Proposal

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

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

Section 1. Paragraph (h) of subdivision 1 of section 413 of the family court act, as amended

by chapter 41 of the laws of 1992, is amended to read as follows:

(h)(1) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include the following:

(i) a provision stating that the parties have been advised of the provisions of this subdivision; and

(ii) a provision stating that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded.

(2) In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount.

(3) Such provision may not be waived by either party or counsel.

(4) Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section.

(5) Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(6) If a court of competent jurisdiction finds that sections relating to child support in any agreement, stipulation or court order fail to comply with any of the provisions of this paragraph, such sections shall be deemed void as of the date that any of the parties raises this failure to comply in a pleading or motion or as of the date that a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier. Any sections of an agreement, stipulation or court order that are so directly connected or intertwined with a section deemed void that they

necessarily must be recalculated therewith shall also be deemed void as of the same earlier date. Provided, however, that the provisions of this subparagraph shall be subject to the terms of subparagraph (8) of this paragraph.

(7) If a court of competent jurisdiction finds that an agreement, stipulation or court order fails to comply with any of the provisions of this paragraph, the court shall issue a temporary order of child support and schedule a hearing to determine the final child support order. The final determination of child support shall be made pursuant to this section de novo and shall be effective as of the date that any of the parties raises the failure to comply with any of the provisions of this paragraph in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(8) If the family court finds that sections of an agreement, stipulation or court order other than those relating to child support are directly connected or intertwined with a section that relates to child support that the court has found fails to comply with this paragraph, it shall dismiss the proceeding without prejudice.

(9) The provisions of this paragraph shall not constitute a defense to non-payment of a child support obligation prior to the date that any of the parties raises the failure to comply in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(10) For purposes of this section, a court of competent jurisdiction shall be either the family court or the supreme court, notwithstanding the court in which the agreement, stipulation or order was initiated, unless the supreme court has retained exclusive jurisdiction to enforce or modify the agreement, stipulation or order.

§2. Paragraph (h) of subdivision 1-b of section 240 of the domestic relations law, as amended by chapter 41 of the laws of 1992, is amended to read as follows:

(h)(1) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include the following:

(i) a provision stating that the parties have been advised of the provisions of this

subdivision[,]; and

(ii) a provision stating that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded.

(2) In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount.

(3) Such provision may not be waived by either party or counsel.

(4) Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section.

(5) Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(6) If a court of competent jurisdiction finds that sections relating to child support in any agreement, stipulation or court order fail to comply with any of the provisions of this paragraph, such sections shall be deemed void as of the date that any of the parties raises this failure to comply in a pleading or motion or as of the date that a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier. Any sections of an agreement, stipulation or court order that are so directly connected or intertwined with a section deemed void that they necessarily must be recalculated therewith shall also be deemed void as of the same earlier date. Provided, however, that the provisions of this subparagraph shall be subject to the terms of subparagraph (8) of this paragraph.

(7) If a court of competent jurisdiction finds that an agreement, stipulation or court order fails to comply with any of the provisions of this paragraph, the court shall issue a temporary order of child support and schedule a hearing to determine the final child support order. The final

determination of child support shall be made pursuant to this section de novo and shall be effective as of from the date that any of the parties raises the failure to comply with any of the provisions of this paragraph in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(8) If the family court finds that sections of an agreement, stipulation or court order other than those relating to child support are directly connected or intertwined with a section that relates to child support that the court has found fails to comply with this paragraph, it shall dismiss the proceeding without prejudice.

(9) The provisions of this paragraph shall not constitute a defense to non-payment of a child support obligation prior to the date that any of the parties raises the failure to comply in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(10) For purposes of this section, a court of competent jurisdiction shall be either the family court or the supreme court, notwithstanding the court in which the agreement, stipulation or order was initiated, unless the supreme court has retained exclusive jurisdiction to enforce or modify the agreement, stipulation or order.

§3. This act shall take effect on the ninetieth day after it shall become a law and shall apply to agreements and stipulations entered into on or after such date.

12. Determinations of child support in cases of joint or shared custody in Family and Supreme Court [F.C.A. §413(1)(f); D.R.L. §240(1-b)(f)]

Cases of joint or shared custody, particularly where parents spend equal or near-equal time or where non-custodial parents spend extended time with their children, have long posed a challenge to the courts and litigants in child support matters. Section 413(1)(f) of the Family Court Act and Section 240-1(b)(f) of the Domestic Relations Law provide the bases for courts to deviate from the basic child support obligation, which is arrived at through application of the child support percentages to the parents' incomes. The ninth deviation factor permits a court to vary from the percentage amount in the *Child Support Standards Act* by considering the following:

> Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof...

[FCA § 413-1(f)(9); DRL § 240-1(b)(f)(9)].

While the factor appears at first glance to allow a court to deviate in cases of shared custody, the requirement in subdivision (ii) that a non-custodial parent's expenses offset the custodial parent's expenses in order to qualify for the deviation has meant that it is often impossible for a parent, who is designated as the non-custodial parent, to obtain an order deviating from the basic child support obligation even when that parent has equal or near-equal parenting time with the custodial parent. Moreover, it is often difficult to prove that expenses of visitation are "extraordinary."

The Family Court Advisory and Rules Committee is proposing a measure to amend the Family Court Act and Domestic Relations Law to add a deviation factor that would not require that the non-custodial parent's expenses offset the custodial parent's. Instead, under the proposed additional factor, the Court would be required to take into account whether such an offset exists, while not requiring such an offset to be a prerequisite to a deviation. It should be noted that this proposal does not create a rigid numeric formula to be applied in cases of shared custody; nor does it change the existing statute's requirement that the court find that the non-custodial parent's parenting time is "extended" for the deviation factor to apply.

There have been relatively few substantive changes to the *Child Support Standards Act* (CSSA) since it was enacted in 1989. [Family Court Act §413 *et seq*.] However, during the more than 30 years that have passed, the arrangements in which separated parents rear their children have dramatically changed. Parents now regularly choose various forms of shared and joint custodial arrangements, with the parent designated as non-custodial or non-residential often receiving substantial parenting time. Now, access time often is equal or near-equal.

Unfortunately, the CSSA does not adequately address situations where the designated non-custodial parent has extended or equal parenting time.

In Bast *v.* Rossoff, 239 A.D.2d 106 (1998), the Court of Appeals rejected any approaches other than a strict application of the CSSA. The Court held that the child support percentages must be utilized to determine the non-custodial parent's basic child support obligation in all shared custody cases. Only if one of the parties establishes a basis to deviate from the basic child support obligation can a different amount of support be ordered. The Third Department addressed the equalcustody situation in Baraby *v.* Baraby, 250 A.D.2d 201, 204 (3rd Dept. 1998) and ruled that the percentages must be applied even in cases where custody is shared equally. In these cases, the higher-earning parent is deemed to be the non-custodial parent for the purpose of computing the basic child support obligation.

Where the custodial time is equal, or even where a non-custodial parent has extended parenting time, a deviation from the formula may often be appropriate to ensure that resources exist in both households to adequately care for the child. Unfortunately, while deviations are theoretically permitted in such cases, the current deviation factor is too narrowly drawn to properly address this issue. Careful analysis of this factor demonstrates how difficult it is to use in shared custody situations and how impractical its application can be. First, in the typical equal or near-equal custody situation, the non-custodial or non-residential parent obligated to pay support and seeking deviation does not incur "extraordinary" expenses in visiting, but rather incurs normal expenses in raising the children during his or her access time. Further, the proviso that the custodial parent's expenses must be shown to be "substantially reduced" by what is termed extended visitation is difficult, if not impossible, to prove to a court.

In Matter of Riemersma *v.* Riemersma, 84 A.D.3d 1474, 1477 (3rd Dept. 2011), the Appellate Division, Third Department held that "the costs of maintaining suitable housing and providing food and clothing for the children during custodial period do not constitute extraordinary expenses that would justify a deviation from the statutory formula." In Matter of Mitchell *v.* Mitchell, 134 A.D.3d 1213 (3rd Dept. 2015), the Court found that a non-custodial parent's claims of higher grocery bills, clothes purchases, social activities and summer camp expenses incurred as a result of shared custody did not qualify as extraordinary expenses. In Ball *v.* Ball, 150 A.D.3d 1566, 1570 (3rd Dept., 2017), the Third Department summarized its position as follows: "In short, shared parenting does not automatically justify a deviation from a party's presumptive child support obligation."

In Matter of Jerrett *v.* Jerrett, 162 A.D.3d 1715 (4th Dept. 2018), the Fourth Department echoed the Third Department in holding that "the father's testimony that he incurred household expenses for the benefit of the child in the form of housing, food, clothing, and certain activities does not establish that he incurred any extraordinary expenses that would warrant a deviation from the presumptive support obligation" pursuant to Family Court Act § 413(1)(f)(9). The Appellate Division also rejected a deviation on the basis of "the non-monetary contributions that the parents will make toward the care and well-being of the child pursuant to Family Court Act

§413(1)(f)(5) because "the father's testimony that he incurred ordinary household expenses and paid for some of the child's activities does not constitute evidence of non-monetary contributions to the care and wellbeing of the child."

Thus, after removing food, clothing, housing, and other activities, typical parents, who are enjoying equal or near-equal access time with their children, might reasonably wonder what expenses actually qualify as "extraordinary" justifying a deviation from the presumptive child support amount. The case law highlights the predicament these parents find themselves in as they are forced to pay non-deviation child support obligations despite significant access time. These parents are often left with insufficient resources to adequately care for the children while in their households. In such cases, the benefits to the children that might flow from substantial and meaningful contact with their "non-custodial parent" are often lost.

Many states address the shared-custody issue in their child support statutes.[17] The states that address shared custody in their statutes use either a formula approach or a deviation factor method. While New York uses the latter approach, as described above, the current deviation language is too restrictive.

The Committee is not recommending the adoption of a formula to account for shared custody situations. A strict formula would not take into account the quality of the parenting time. In many cases, while the non-custodial parent has substantial parenting time, the burden of paying for many of the child's needs, such as clothing, education, extracurricular and entertainment expenses, still continues to fall squarely on the custodial parent. A formula approach would then unfairly shift the burden to the custodial parent to show that these expenses justify a deviation from the shared custody formula, rather than leaving the burden with the non-custodial parent.

Additionally, shared custody formulas necessarily contain thresholds before the formulas are triggered. In Wisconsin, for instance, the shared-custody formula is used when the child is with the non-custodial parent at least 92 days.[18] A triggering event would create additional incentives for litigation in custody and visitation cases by monetizing parenting time. When the difference of one day can mean a substantial difference in the amount of support paid, litigation –and, importantly, settlement negotiations – about the amount of parenting time causes financial considerations based upon the formula to trump the paramount consideration of the child's best interests.

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[17] *See* G. Richard & J. Walters, *State Provisions in Child Support Guidelines Concerning Joint Custody Cases* (Alabama Law Institute, April 5, 2016); available at: www.alacourt.gov/docs/Memo-v1.0.pdf .

[18] *See*, Wis. Adm. Code § 150.04.

The Committee's proposal splits the current ninth deviation factor into two separate factors. The ninth factor would retain the language regarding extraordinary expenses in the exercise of visitation, as these may be clear in some cases. This would allow courts to continue to consider whether, for example, the cost of long-distance travel incurred in the exercise of visitation justifies a deviation. The new tenth factor would specifically address equal and near-equal shared custody arrangements. The proposal would still require courts to examine the extent to which the expenditures of the non-custodial parent reduce those of the custodial parent, but it would remove the requirement that such a reduction be present prior to the granting of a deviation. The facts of each extended parenting time case differ, and the addition of the Committee's proposed tenth deviation factor would allow the court to engage in the intensive analysis of each particular case that is necessary before a determination is made to vary, and, if that determination is made, what the amount of the variance should be. Enactment of this measure would, therefore, greatly enhance the courts' ability to appropriately tailor child support orders to the specific needs of the children and families appearing before them.

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to deviations from the child support standards in child support proceedings involving joint or shared custody of children

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

Section 1. Subparagraphs 9 and 10 of paragraph (f) of subdivision 1 of section 413 of the family court act, as amended by chapter 567 of the laws of 1989, are amended to read as follows:

(9) Provided that the child is not [on public assistance (i)] receiving temporary assistance for needy families, extraordinary expenses incurred by the non-custodial parent in exercising visitation[, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and]

(10) Provided that the child is not receiving temporary assistance for needy families, a determination that the child has extended visitation with the non-custodial parent. The court shall not, however, deviate on this basis if the deviation will result in insufficient funds in the household of the custodial parent to meet the basic needs of the child. When determining the amount of deviation, the court shall consider, among other factors, evidence concerning the increased expenses to the non-custodial parent resulting from the extended time spent with that parent and the decreased expenses, if any, to the custodial parent resulting from the extended time spent with the non-custodial parent; and

(11) Any other factors the court determines are relevant in each case, the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation, and may order the non-custodial parent to pay an amount pursuant to paragraph (e) of this subdivision.

§2. Subparagraphs 9 and 10 of paragraph (f) of subdivision (1-b) of section 240 of the domestic relations law, as amended by chapter 567 of the laws of 1989, are amended to read as follows:

(9) Provided that the child is not [on public assistance] receiving temporary assistance for needy families, [(i)] extraordinary expenses incurred by the non-custodial parent in exercising visitation, [or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof]; [and]

(10) Provided that the child is not receiving temporary assistance for needy families, a determination that the child spend extended time with the non-custodial parent. The court shall not, however, deviate on this basis if the deviation will result in insufficient funds in the household of the custodial parent to meet the basic needs of the child. When determining the amount of deviation, the court shall consider, among other things, evidence concerning the increased expenses to the non-custodial parent resulting from the extended time spent with that parent and the decreased expenses, if any, to the custodial parent resulting from the extended time spent with the non-custodial parent; and

(11) Any other factors the court determines are relevant in each case, the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation, and may order the non-custodial parent to pay an amount pursuant to paragraph (e) of this subdivision.

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

13. Clarification of where adolescent offenders may be held pending arraignment when neither a Youth Part nor an accessible magistrate is available

[C.P.L. §§120.90, 140.20(8), 140.27(3-a), 410.40(2); Exec. L. 502(3), 503-b; County Law §218-a]

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

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

Both Federal and State law prohibit the detention of youth in a jail or local lockup alongside adult prisoners. The Federal *Juvenile Justice Reform Act of 2018* [Public Law 115-385; H.R. 6964], which was signed by the President on December 21, 2018, re-authorized the *Juvenile Justice and Delinquency Prevention Act of 1974* [34 U.S.C. §11103] and, *inter alia*, extended the jail removal and "sight and sound separation" mandates formerly applicable only to juvenile delinquents in Family Court to youth prosecuted in the adult criminal justice system, thus including the Youth Parts established pursuant to RTA. "Sight and sound contact" is defined as "any

physical, clear visual, or verbal contact that is not brief and inadvertent." [19] The State Plan requirements in the *Act* [H.R. 6964, §205], which are prerequisites to New York State's receipt of significant Federal juvenile justice funding, provide only limited circumstances for departures from the requirements in the interests of justice, which, under the 2018 Federal amendments, must be judicially determined, rather than simply administratively approved. Those limited circumstances do not resolve the pre-arraignment holding area problem since judges would not be available to make the comprehensive findings detailed in the statute. The U.S. Department of Justice includes court holding facilities in the detention and lock-up facilities that they audit periodically for compliance and in New York State, the State Commission on Corrections, through an agreement with the Division of Criminal Justice Services, has taken on the responsibility of regular audits of court holding facilities in between the Federal audits. Likewise, New York State law and regulations, including provisions in the raise the age statute, prohibit commingling of juvenile and adolescent offenders with adults. *See* Criminal Procedure Law §510.15(1); Corrections Law §500-b(4); 9 N.Y.C.R.R. §§180-1.3(b)(2), 180-3.3(c)(2). The court rule authorizing designation by the judiciary of law enforcement rooms suitable for the questioning of juveniles, which were made applicable to juvenile and adolescent offenders by RTA, requires the rooms to be "office-like," rather than "jail-like," and requires separate entrances for juveniles or procedures to "avoid mingling with adult detainees." *See* 22 N.Y.C.R.R. §§205.20(d)(1), (6).

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

This measure solves this problem by providing that where a youth, who cannot be released, is being held for arraignment and where the Youth Part or an accessible magistrate is unavailable,

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

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

Proposal

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

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

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

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

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

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

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

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

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

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

§5. Subdivision 3 of section 502 of the executive law, as amended by section 19 of part k of chapter 56 of the laws of 2019, is amended to read as follows:

3. "Detention" means the temporary care and maintenance of youth held away from their homes pursuant to article three of the family court act, or held pending issuance of a securing order if the youth is charged as a juvenile offender or adolescent offender or held pending a hearing for alleged violation of the conditions of release from an office of children and family services facility or authorized agency, or held pending a hearing for alleged violation of the condition of parole as a juvenile offender, youthful offender or adolescent offender or held pending return to a jurisdiction other than the one in which the youth is held, or held pursuant to a securing order of a criminal court if the youth named therein as principal is charged as a juvenile offender, youthful offender or adolescent offender or held pending a hearing on an extension of placement or held pending transfer to a facility upon commitment or placement by a court. Only alleged or convicted juvenile offenders, youthful offenders or adolescent offenders who have not attained their eighteenth or,

commencing October first, two thousand eighteen, their twenty-first birthday shall be subject to detention in a detention facility. Commencing October first, two thousand eighteen, a youth who on or after such date [committed] is charged with committing an offense when the youth was sixteen years of age; or commencing October first, two thousand nineteen, a youth who [committed] is charged with committing an offense on or after such date when the youth was seventeen years of age held pursuant to a securing order of a criminal court if the youth is charged as an adolescent offender or held pending a hearing for alleged violation of the condition of parole as an adolescent offender, [must] shall be held in a specialized secure juvenile detention facility for older youth certified by the state office of children and family services in conjunction with the state commission of correction, or pending issuance of a securing order held for no longer than eighteen hours in a specialized secure detention facility for older youth or a temporary pre-appearance secure holding facility for adolescent youth.

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

§503-b. Temporary pre-appearance secure holding facilities for juvenile and adolescent offenders. 1. The office of children and family services shall establish regulations for the operation of temporary pre-appearance secure holding facilities for juvenile and adolescent offenders pursuant to this article and subdivision six of section two hundred eighteen-a of the county law. Notwithstanding any other provision of law, the office, in consultation with the state commission of correction, shall jointly regulate, certify, visit, inspect and supervise temporary pre-appearance secure holding facilities for adolescent offenders. The office shall maintain a list on-line of all facilities certified for the temporary pre-appearance holding of adolescent offenders and shall file a copy of that list periodically with the clerk of the youth part established in each county in accordance with article 722 of the criminal procedure law.

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

offender may be held in a holding facility under this section for more than eighteen hours.

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

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

§7. Section 218-a of the county law, as amended by chapter 880 of the laws of 1976, the opening paragraph of subdivision A as amended by chapter 465 of the laws of 1992, paragraphs 1,2,3 and 4 of subdivision A as amended by chapter 555 of the laws of 1978, paragraph 6 of subdivision A as added by section 82-B of part www of chapter 59 of the laws of 2017, subdivision B as amended by chapter 419 of the laws of 1987 and subdivision C as added by section 12 of part E of chapter 57 of the laws of 2005, is amended to read as follows:

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

A. [To] The office of children and family services shall promulgate regulations to assure that suitable and conveniently accessible accommodations and proper and adequate detention in secure, specialized secure and non-secure detention facilities, as defined in section five hundred two of the executive law and the regulations of [the division for youth] such office, will be available when required for the temporary care, maintenance and security of alleged and convicted juvenile offenders, alleged and adjudicated juvenile delinquents, alleged and convicted adolescent

offenders and alleged and adjudicated persons in need of supervision. Such regulations shall not require any county to provide temporary care in a secure detention facility for residents of any other county except upon a space available basis. The county executive, if there be one, otherwise the board of supervisors shall designate the agency of county government responsible for the administration of the county juvenile detention program and shall so advise the New York state [division for youth] office of children and family services, and may make provisions therefor as follows:

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

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

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

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

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

6. Notwithstanding any other provision of law, commencing October first, two thousand eighteen, a county [must] shall provide for adequate detention of alleged or convicted adolescent offenders in a specialized secure detention facility for older youth who are alleged or convicted of committing an offense when they were sixteen years of age and commencing October first, two thousand nineteen, a county [must] shall provide for adequate detention of alleged or convicted adolescent offenders in a specialized secure detention facility for older youth who are alleged or convicted of committing an offense when they were sixteen or seventeen years of age. Such facility shall be certified and regulated by the office of children and family services in conjunction with the state commission of correction. Such facility shall: (i) have enhanced security features and specially trained staff; and (ii) be jointly administered by the agency of county government designated in accordance with subdivision A of this section and the applicable county sheriff, which both shall have the power to perform all acts necessary to carry out their duties. The county sheriff shall be subject to the same laws that apply to the designated county agency regarding the

protection and confidentiality of the information about the youth in such facility and shall prevent access thereto by, or the distribution thereof to, persons not authorized by law. Where a county is not located in proximity to a secure juvenile detention facility for juvenile offenders or a specialized secure detention facility for older youth for adolescent offenders, it may establish, on an as-needed basis, one or more temporary pre-appearance secure holding facilities for juvenile and adolescent offenders in accordance with section 503-b of the executive law. Such holding facilities shall be certified and regulated by the office of children and family services in conjunction with the state commission of correction and shall be available to hold for no more than twelve hours juvenile and adolescent offenders, who cannot be released or held in a secure juvenile detention facility or specialized secure detention facility for older youth, as applicable, pending an appearance before a youth part or accessible magistrate, whichever is sooner.

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

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

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

14. Eligibility for appearance tickets in adolescent offender cases
[C.P.L. §§140.20, 150.20]

A critical impetus for enactment of the "raise the age" statute was the recognition of the need to extricate youth from adult jails and prisons and to provide more developmentally- and age-appropriate interventions at every stage of proceedings involving adolescents. The statute provides for night, weekend and holiday arraignments before accessible magistrates, increases the likelihood of pretrial diversion through provision of probation case-planning services in the newly created Youth Parts, prohibits youth from detention in county jails and Rikers Island and specifically provides for a "presumption against custody" in removals of adolescent offender cases to Family Court. *See* Criminal Procedure Law §§722.00, 722.23(1)(f), 140.20(8), 140.27(3-a), 180.75(1), 510.15(1); Corrections Law 500-p [L. 2017, c. 59, part www].

However, the statute did not address a significant obstacle to the retention of youth in their communities, that is, the limitations in sections 140.20 and 150.20 of the Criminal Procedure Law on the authority of arresting officers to issue desk appearance tickets; nor has it been modified to be consistent with chapter 59 of the Laws of 2019, the recently enacted bail reform law. Under current law, appearance tickets may only be issued in cases in which the charges do not exceed Class E felonies in seriousness, with six Class E felony charges exempted from eligibility.[20] The Family Court Advisory and Rules Committee is proposing a measure to remedy that gap with respect to youth who are 16- and 17 years of age. It would amend both sections of the Criminal Procedure Law to permit law enforcement to exercise their discretion to issue appearance tickets to adolescent offenders upon arrest, with the exception of those charged with Class A felonies or violent felony offenses as defined in subdivision one of section 70.02 of the Penal Law. Issuance of appearance tickets would not be a mandate but would provide a significant addition to the menu of options available to law enforcement in their efforts to address cases involving older adolescents appropriately.

Peter Preiser, in the Practice Commentary to Criminal Procedure Law §150.20, characterized the authority of law enforcement to issue appearance tickets as "particularly useful, because it contemplates a post arrest evaluation of the necessity for continuing with the costly and liberty restricting physical arrest procedures." Reducing unnecessary detention through issuance of appearance tickets is arguably even more critical in cases involving youth, since research has demonstrated that pretrial detention, even of just a few days, can have long-standing harmful consequences. The Final Report of the Governor's Commission on Youth, Public Safety and Justice in 2015, which provided the underpinning for the "raise the age" statute, indicated that incarceration of youth in jails undermined public safety and exacerbated the risk to the youth of

[20] Charges of Class E felonies involving certain sex offenses, escape, absconding and bail-jumping are not eligible for appearance tickets. *See* Penal Law §§130.25, 130.40, 205.10, 205.17, 205.19, 215.56.

both physical and sexual abuse.[21] Further, as reported by the Justice Policy Institute in a report in 2017, pretrial detention of youth actually heightens the likelihood of re-offending, increases the probability of conviction and out-of-home commitment, exacerbates mental and physical health problems and creates challenges for youth in reconnecting to school and to jobs.[22]

While commencing in a Youth Part of a superior court, an adolescent offender case charging non-violent felonies is presumed to be removable to Family Court unless the Youth Part judge finds that the prosecution has sustained its burden of demonstrating extraordinary circumstances as to why the case should not be transferred and, as noted, a presumption against custody applies. *See* Criminal Procedure Law §722.23. Logic dictates that in such cases, law enforcement should be able to exercise discretion, in appropriate cases, to issue appearance tickets to enable youth to remain with their families in their communities pending their appearances before the Youth Part.

Proposal

AN ACT to amend the criminal procedure law, in relation to issuance of appearance tickets to adolescent offenders pending appearances before youth parts of superior courts of criminal jurisdiction

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

Section 1. The opening paragraph of subdivision 2, the opening paragraph of subdivision 6 and subdivision 8 of section 140.20 of the criminal procedure law, the opening paragraph of subdivision 2 as amended by chapter 550 of the laws of 1987, the opening paragraph of subdivision 6 as amended by section 20 and subdivision 8 as added by section 19 of part www of chapter 59 of the laws of 2017, are amended to read as follows:

2. If the arrest is for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or if, in the case of an

[21] The Commission reported that youth under 18 are five times more likely than adults to be victims of sexual assault in jails, often within the first two days; while comprising only one percent of the jail population, youth comprise twenty-one percent of sexual abuse victims. *See* Final Report of the Governor's Commission on Youth, Public Safety and Justice 78-81 (2015).

[22] Justice Policy Institute, *Raise the Age: Shifting to a Safer and More Effective Juvenile Justice System* (2017) at 29-30. *See also* National Juvenile Defender Center, *The Harms of Juvenile Detention* (2016).

adolescent offender, the arrest is for an offense other than a class A felony or a violent felony offense as defined in subdivision one of section 70.02 of the penal law, the arrested person need not be brought before a local criminal court as provided in subdivision one, and the procedure may instead be as follows:

6. Upon arresting a juvenile offender or a person sixteen [or commencing October first, two thousand nineteen,] seventeen years of age without a warrant, the police officer shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that such offender or person has been arrested, and the location of the facility where he or she is being detained or the place and date an appearance ticket is returnable if the adolescent offender has been given an appearance ticket. If the officer determines that it is necessary to question a juvenile offender or such person, the officer must take him or her to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the juvenile or such person, to his or her residence and there question him or her for a reasonable period of time. A juvenile or such person shall not be questioned pursuant to this section unless he or she and a person required to be notified pursuant to this subdivision, if present, have been advised:

8. [If] Except as provided in subdivision two of this section, if the arrest is for a juvenile offender or adolescent offender other than an arrest for a violation or a traffic infraction, such offender shall be brought before the youth part of the superior court. If the youth part is not in session, such offender shall be brought before the most accessible magistrate designated by the appellate division of the supreme court in the applicable department to act as a youth part.

§2. Paragraph (a) of subdivision 1 and subdivisions 2 and 3 of section 150.20 of the criminal procedure law, paragraph (a) of subdivision 1 as amended by section I-a of part JJJ of chapter 59 of the laws of 2019 and subdivisions 2 and 3 as amended by chapter 550 of the laws of 1987, are amended to read as follows:

(a). Whenever a police officer is authorized pursuant to section 140.10 of this title to arrest a person without a warrant for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or if, in the case of an

adolescent offender, the arrest is for an offense other than a class A felony or a violent felony offense as defined in subdivision one of section 70.02 of the penal law, he or she shall, except as set out in paragraph (b) of this subdivision, subject to the provisions of subdivisions three and four of section 150.40, instead issue to and serve upon such person an appearance ticket.

2. (a) Whenever a police officer has arrested a person without a warrant for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law pursuant to section 140.10 of this title, or if, in the case of an adolescent offender, the arrest is for an offense other than a class A felony or a violent felony offense as defined in subdivision one of section 70.02 of the penal law, or (b) whenever a peace officer, who is not authorized by law to issue an appearance ticket, has arrested a person for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law pursuant to section 140.25 of this title or if, in the case of an adolescent offender, the arrest is for an offense other than a class A felony or a violent felony offense as defined in subdivision one of section 70.02 of the penal law, and has requested a police officer to issue and serve upon such arrested person an appearance ticket pursuant to subdivision four of section 140.27 of this title, or (c) whenever a person has been arrested for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or if, in the case of an adolescent offender, the arrest is for an offense other than a class A felony or a violent felony offense as defined in subdivision one of section 70.02 of the penal law and has been delivered to the custody of an appropriate police officer pursuant to section 140.40 of this title, such police officer may, instead of bringing such person before a local criminal court and promptly filing or causing the arresting peace officer or arresting person to file a local criminal court accusatory instrument therewith or, in the case of an adolescent offender, instead of bringing such offender before a youth part or if the youth part is not in session, an accessible magistrate, may issue to and serve upon such person an appearance ticket. [The issuance and service of an appearance ticket under such circumstances may be conditioned upon a deposit of pre-arraignment bail, as provided in section 150.30.]

3. A public servant other than a police officer, who is specially authorized by state law or local law enacted pursuant to the provisions of the municipal home rule law to issue and serve appearance tickets with respect to designated offenses other than class A, B, C or D felonies or

violations of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law or, in the case of an adolescent offender, with respect to an offense other than a class A felony or a violent felony offense as defined in subdivision one of section 70.02 of the penal law, may in such cases issue and serve upon a person an appearance ticket when he or she has reasonable cause to believe that such person has committed a crime, or has committed a petty offense in his or her presence.

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

15. Notification and engagement of parents in proceedings before the Youth Parts of superior criminal courts

[C.P.L. §§120.90, 140.20, 140.27, 140.40, 722.00, 722.10]

The recent statute raising the age of criminal responsibility requires law enforcement, upon the arrests of 16- and 17-year old youth, to notify parents or other persons legally responsible for the adolescents' care both as to where the youth are being held and, if interrogating the youth, as to the youth's *Miranda* rights. *See* Criminal Procedure Law §§1.20(7), 140.20(6), 140.27(5), 140.40(5) [L. 2017, c. 59, Pt. WWW]. This reflects a salutary recognition of the importance of involving parents and legally responsible individuals involved in adolescents' cases, since these youth are still minors who are dependent upon their families both for sustenance and for guidance.

The Family Court Advisory and Rules Committee is proposing a measure to build upon this recognition by requiring probation to engage parents or other persons legally responsible in their case planning efforts in the Youth Part and to require law enforcement and probation to notify them of details to the extent available of when and where the youth will be arraigned in court. The proposal also amends section 722.10 to require notice to the parents or other persons legally responsible of their right to be present at all proceedings in the Youth Part, "unless good cause exists to dispense with such notice." The court would "not be prevented from proceeding by the absence of such parent or person if reasonable efforts have been made to provide such notice unless the court found good cause to dispense with such notice."

The *Final Report of the Governor's Commission on Youth, Public Safety and Justice* (2015) at 53, 56, noted how critical it is for parents and family members to be engaged in the adjustment process, to assist youth when they are interrogated and to be made aware of their arrests. The Commission noted that current criminal procedures do not include parents or legally responsible adults:

> Because these proceedings follow adult criminal procedures, the youth's parents are not formally involved in proceedings at arraignment, or at any point in the court process. *Id*, at 56.

The *Enhanced Juvenile Justice Guidelines* issued by the National Council of Juvenile and Family Court Judges in January, 2019 included as a "Guiding Principle" that:

> Juvenile justice system staff should engage parents and families at all stages of the juvenile justice court process to encourage family members to participate fully in the development and implementation of the youth's intervention plan.

Id., at p. 3.

The *Guidelines* explained that "[d]ispositions will only be effective if the juvenile delinquency court ensures that the youth and parents, probation, and service providers follow through with court orders." *Id.* The *Guidelines* include notification and inclusion of parents and guardians at every stage of the process from arrest, through probation diversion, detention, disposition and post-disposition proceedings. *Id.*[2324] Likewise, the *Juvenile Justice Standards* promulgated by the American Bar Association and Institute for Judicial Administration in 1979 emphasize the need to notify parents and guardians and include them at every stage. *See* IJA-ABA *Standards Relating to*: *Adjudication* §§1.4, 3.7, 4.5; *Disposition Procedures* §3.1; *Interim Status* §§5.3, 6.5; *Juvenile Probation Function* §2.4(E).[25]

In construing Family Court Act §340.2(3), appellate courts in New York State have repeatedly underscored the importance of involving parents and legally responsible adults in their children's court proceedings, reversing Family Court delinquency plea allocutions and dispositions where insufficient efforts had been made to notify them or, where notified, to give them a reasonable opportunity to appear in court. *See, e.g.*, Matter of Nikim M., 144 A.D.3d 424 (1st Dept., 2016); Matter of Alexander B., 126 A.D.3d 533 (1st Dept., 2015); Matter of John L., 125 A.D.2d 472 (2nd Dept., 1986); Matter of John D., 104 A.D.2d 885 (2nd Dept., 1984); Matter of Tracy B., 80 A.D.2d 792 (1st Dept., 1981); Matter of Smith, 21 A.D.2d 737 (4th Dept., 1964). At the same time, the proposal recognizes that, particularly with the alleged adolescent offenders who are the subjects of proceedings in the Youth Part, there may be cases in which good cause exists to proceed without the involvement of parents or other persons legally responsible.

Incorporation of provisions uniquely adapted from those applicable in Family Court regarding parental notification and engagement, both in the adjustment and in the court process, would significantly enhance the capacity of the newly created Youth Parts to meet their statutory goals of providing specialized treatment tailored to the needs and to the still-nascent capacities of adolescents.

Proposal

AN ACT to amend the criminal procedure law, in relation to notification to, and engagement of, parents in proceedings involving sixteen and seventeen year old defendants in youth parts in superior courts

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[23] *Enhanced Juvenile Justice Guidelines: Improving Court Practice in Juvenile Justice Cases* (National Council of Juvenile and Family Court Judges, Jan., 2019) at ch. 2,p. 7, 33; ch. 3, p. 9,12; ch. 4, p. 3,6,9; ch. 5, p. 12; ch. 6, p.
[24] , 6,7; ch. 7, p. 2,9.16,18,22; ch. 8, p.7; ch. 9, p. 3,6,7; ch. 10, p. 8, 16, 17; ch. 11, p. 7.

[25] American Bar Association, *IJA-ABA Juvenile Justice Standards Annotated: A Balanced Approach* 2, 7, 9, 104, 122, 127, 130, 157 (1996).

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

Section 1. Subdivision 7 of section 120.90 of the criminal procedure law, as amended by section 16 of part WWW of chapter 59 of the laws of 2017, is amended to read as follows:

7. Upon arresting a juvenile offender or adolescent offender, the police officer shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that the juvenile offender or adolescent offender has been arrested, [and] the location of the facility where he or she is being detained or questioned and the location of the court where he or she will be arraigned or appear, as well as the date and approximate time if known.

§2. The opening paragraph of subdivision 6 of section 140.20 of the criminal procedure law, as amended by section 20 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

Upon arresting a juvenile offender or a person sixteen or [commencing October first, two thousand nineteen,] seventeen years of age without a warrant, the police officer shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that such offender or person has been arrested, and the location of the facility where he or she is being detained or questioned and the location of the court where he or she will be arraigned or appear, as well as the date and approximate time if known. If the officer determines that it is necessary to question a juvenile offender or such person, the officer must take him or her to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the juvenile or such person, to his or her residence and there question him or her for a reasonable period of time. A juvenile or such person shall not be questioned pursuant to this section unless he or she and a person required to be notified pursuant to this subdivision, if present, have been advised:

§3. The opening paragraph of subdivision 5 of section 140.27 of the criminal procedure law, as amended by section 23 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

5. Upon arresting a juvenile offender or a person sixteen or [commencing October first, two thousand nineteen,] seventeen years of age without a warrant, the peace officer shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that such offender or person has been arrested, and the location of the facility where he or she is being detained or questioned and the location of the court where he or she will be arraigned or appear, as well as the date and approximate time if known. If the officer determines that it is necessary to question a juvenile offender or such person, the officer must take him or her to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of a juvenile offender or such person, to his or her residence and there question him or her for a reasonable period of time. A juvenile offender or such person shall not be questioned pursuant to this section unless the juvenile offender or such person and a person required to be notified pursuant to this subdivision, if present, have been advised:

§4. The opening paragraph of subdivision 5 of section 140.40 of the criminal procedure law, as amended by section 24 of part www of chapter 59 of the laws of 2017, is amended to read as follows:

If a police officer takes an arrested juvenile offender or a person sixteen or [commencing October first, two thousand nineteen,] seventeen years of age into custody, the police officer shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that such offender or person has been arrested, and the location of the facility where he or she is being detained or questioned and the location of the court where he or she will be arraigned or appear, as well as the date and approximate time if known. If the officer determines that it is necessary to question a juvenile offender or such person the officer must take him or her to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the juvenile offender or such person, to his or her residence and there question him or her for a reasonable period of time. A juvenile offender or such person shall not be questioned pursuant to this section unless he or she and a person required to be notified pursuant to this subdivision, if present, have been advised:

§5. Subdivision 1 of section 722.00 of the criminal procedure law, as added by section 1-a of part www of chapter 59 of the laws of 2017, is amended to read as follows:

1. All juvenile offenders and adolescent offenders shall be notified of the availability of services through the local probation department. Such services shall include the ability of the probation department to conduct a risk and needs assessment, utilizing a validated risk assessment tool, in order to help determine suitable and individualized programming and referrals. Participation in such risk and needs assessment shall be voluntary and the adolescent offender or juvenile offender may be accompanied by counsel during any such assessment. The local probation department shall make reasonable and substantial efforts to secure the participation of the parent or other person responsible for the care of the juvenile offender or adolescent offender in the risk and needs assessment but shall not be prevented from proceeding by the absence of such parent or person. Based upon the assessment findings, the probation department shall refer the adolescent offender or juvenile offender to available and appropriate services.

§6. Section 722.10 of the criminal procedure law is amended by adding a new subdivision 3 is added to read as follows:

3. In all proceedings under this article, the parent or other person responsible for the care of the juvenile offender or adolescent offender shall be notified of the right to be present, unless good cause exists to dispense with such notice. The court shall not be prevented from proceeding by the absence of such parent or person if reasonable efforts have been made to provide notice, unless the court found good cause to dispense with such notice.

§7. This act shall take effect immediately.

16. Determinations of willful violations of Family Court orders of protection [F.C.A. §846-a]

Section 846-a of the Family Court Act provides that a willful violation of an order of protection must be proven by "competent evidence," but the statute is silent regarding the quantum of proof required. This gap in the law has resulted in disparate standards being applied in different parts of the State, that is, in "justice by geography." As the Supreme Court, Appellate Division, Third Department, recognized, in Matter of Stuart LL *v.* Amy KK, 123 A.D.3d 218 (3rd Dept., 2014), "[c]ase law has not been consistent regarding the level of proof when considering an alleged willful violation of a protective order (*see, e.g.*, Matter of Rubackin *v.* Rubackin, 62 A.D.3d 11, 20–21, 875 N.Y.S.2d 90 [2nd Dept., 2009]." *See also* Matter of Cori XX, 155 A.D.3d 113(3rd Dept., 2017); Matter of Nicola V., 134 A.D.3d 1131 (2nd Dept., 2015). The Family Court Advisory and Rules Committee is proposing a measure to clear up the ambiguity by codifying recent decisions issued by the Supreme Court, Appellate Divisions, Second and Third Departments.

Following Matter of Cori XX, Matter of Stuart LL *v.* Amy KK, Matter of Nicola V. and Matter of Rubackin *v.* Rubackin, *supra*, the Committee's proposal requires that if a Respondent is brought before the Family Court for a willful violation that is in the nature of a criminal contempt and that results in a definite sentence including incarceration, the willful violation must be proven beyond a reasonable doubt. This requirement would apply to sentences actually imposed, as well as to sentences that are suspended or that may be served on particular days, rather than continuously. The proposal would also clarify the provision authorizing the Family Court to suspend sentences or direct the days on which sentences must be served.

Some willful violations of orders of protection under Family Court Act §846-a may be characterized as civil in nature, that is, those that may be remediated through use of a non-incarcerative sanction or through an indefinite jail sentence lasting until the contemnor has purged the contempt. However, many willful violations of orders of protection prosecuted in Family Court are more accurately characterized as criminal contempts, aimed at punishing the contemnor for a past act. In holding that such contempts may thus preclude a criminal prosecution for the same act as a violation of the constitutional protection against double jeopardy, the Court of Appeals, in People *v.* Wood, 95 N.Y.2d 509, 719 N.Y.S.2d 639 (2000), stated:

> We have recognized that despite the "civil" legislative label (see, Family Court Act 812[2][b]), section 846-a, which provides for a penalty of incarceration for violation of Family Court orders, is punitive in nature [cites omitted]. An adjudication for contempt under Article 8 is properly characterized as punitive because it does not

> seek to coerce compliance with any pending court mandate, but imposes a definite term of imprisonment and punishes the contemnor for disobeying a prior court order [citations omitted]

95 N.Y.2d, at 513.

Applying this characterization, the Appellate Division, in Matter of Rubackin *v.* Rubackin, *supra*, looked to long-established decisions of the United States Supreme Court for its holding that proof beyond a reasonable doubt is required in criminal contempt cases. Both Gompers *v.* Bucks Stove & Range Co., 221 U.S. 418 (1911) and Michaelson *v.* United States *ex rel* Chicago St.P., M & O. R. Co., 266 U.S. 42 (1924) required proof beyond a reasonable doubt where the purpose of the incarceration was to punish a past violation. Similarly, the New York State Court of Appeals required this quantum of proof in labor cases [County of Rockland *v.* Civil Service Employees Association, 62 N.Y.2d 11 (1984)], and the Appellate Division, Second Department, applied the standard in cases involving violations of judgments, grand jury subpoenas to produce documents and temporary injunctions. *See* Muraca *v.* Meyerowitz, 49 A.D.3d 697, 853 N.Y.S.2d 636 (2nd Dept., 2008); Matter of Kuriansky *v.* Azam, 176 A.D.2d 943, 575 N.Y.S.2d 679 (2nd Dept., 1991); Matter of Jones [McKanic], 160 A.D.2d 870, 554 N.Y.S.2d 303 (2nd Dept., 1990); Matter of Gold *v.* Valentine, 35 A.D.2d 958, 318 N.Y.S.2d 360 (2nd Dept., 1970).

No reason exists to distinguish willful violations of orders of protection in Family Court cases from the contexts in which these settled principles of law evolved. As the Appellate Division held, in Matter of Stuart LL *v.* Amy KK, *supra*:

> Where, as here, a person who has violated an order of protection is incarcerated as a punitive remedy for a definite period—with no avenue to shorten the term by acts that extinguish the contempt—then that aspect of the Family Ct. Act article 8 proceeding "is one involving criminal contempt [and] [t]he standard of proof that must be met to establish that the individual willfully violated the court's order is beyond a reasonable doubt." (*Matter of Rubackin v. Rubackin*, 62 A.D.3d at 21, 875 N.Y.S.2d 90; see Merril Sobie, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act §846–a, at 346).

In codifying Cori XX, Stuart L.L., Nicola V. and Rubackin, the Committee's measure will bring uniformity to the prosecution of violations of orders of protection in Family Court in adherence with well-established constitutional precepts.

Proposal

AN ACT to amend the family court act, in relation to determinations of willful violations of orders of protection

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

Section 1. Section 846-a of the family court act, as amended by chapter 1 of the laws of 2013, is amended to read as follows:

§846-a. Powers on failure to obey order. (a) If a respondent is brought before the court for failure to obey any lawful order issued under this article or an order of protection or temporary order of protection issued pursuant to this act or issued by a court of competent jurisdiction of another state, territorial or tribal jurisdiction and if, after hearing, the court is satisfied by competent proof that the respondent has willfully failed to obey any such order, the court may:

(i) modify an existing order or temporary order of protection to add reasonable conditions of behavior to the existing order,

(ii) make a new order of protection in accordance with section eight hundred forty-two of this part, [may]

(iii) order the forfeiture of bail in a manner consistent with article five hundred forty of the criminal procedure law if bail has been ordered pursuant to this act, [may]

(iv) order the respondent to pay the petitioner's reasonable and necessary counsel fees in connection with the violation petition where the court finds that the violation of its order was willful, and [may]

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

to a definite jail term as a result of a determination of criminal contempt, whether or not such term has been suspended, must be based upon proof beyond a reasonable doubt.

(b) If the court determines that the willful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, assault or attempted assault and if such a respondent is licensed to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law, the court may also immediately revoke such license and may arrange for the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, and disposal of any firearm such respondent owns or possesses.

(c) If the willful failure to obey such order involves the infliction of physical injury as defined in subdivision nine of section 10.00 of the penal law or the use or threatened use of a deadly weapon or dangerous instrument, as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, such revocation and immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law [six] and disposal of any firearm owned or possessed by respondent shall be mandatory, pursuant to subdivision eleven of section 400.00 of the penal law.

§2. This act shall take effect immediately.

17. Duration of orders of protection in child abuse and neglect proceedings in Family Court [F.C.A. §1056]

A serious problem confronting victims of family violence, both adults and children, in child protective cases is the heavy burden created by the extremely short duration of orders of protection against family members, a period far shorter than applicable periods for orders in family offense, custody, visitation, child support and paternity proceedings. Subdivision one of 1056 of the Family Court Act authorizes an order of protection against respondent parents, persons legally responsible for a child's care and such persons' spouses in child neglect and abuse proceedings to last only as long as a child protective dispositional order. *See* Matter of Pedro A. *v.* Gloria A., 168 A.D.3d 3d 1152 (3rd Dept., 2019); Matter of Makayla I. *v.* Harold J., 162 A.D.3d 1139 (3rd Dept., 2018); Matter of Nevaeh T., 151 A.D.3d 1766 (4th Dept., 2017); Matter of Alexis A.(Richard V.), 143 A.D.3d 700 (2nd Dept., 2016); Matter of Kole HH, 84 A.D.3d 1518 (3rd Dept., 2011); Matter of Patricia B., 61 A.D.3d 861 (2d Dept., 2009), *lve. app. denied*, 13 N.Y.3d 713 (2009); Matter of Andrew Y., 44 A.D.3d 1063 (2d Dept., 2007); Matter of Candace S., 38 A.D.3d 786 (2d Dept., 2007), *lve. app. denied*, 9 N.Y.3d 805 (2007); Matter of Amanda WW., 43 A.D.3d 1256 (3d Dept., 2007); Matter of Collin H., 28 A.D.3d 806 (3d Dept., 2006). Dispositions in child protective cases include, *inter alia*, release of a child under supervision for one year, subject to a one-year extension, or placement of a child until the next permanency planning hearing. Permanency planning hearings must be convened for children in foster care, as well as children directly placed with relatives and other individuals, once they have been in care for eight months and then every six months thereafter. *See* Family Court Act §§1052, 1054, 1055, 1057, 1089. Thus, orders of protection even in the most extreme cases of severe child abuse may only last for six months or one year, subject to equally limited extensions, although identical allegations in other categories of cases would justify far longer orders.

The Family Court Advisory and Rules Committee is proposing a measure to remedy this problem. Similar to orders of protection in family offense cases, the proposal provides that orders of protection issued in child protective proceedings against individuals who are related by blood or marriage to the child or who were members of the child's household at the time of the disposition would be authorized to last up to two years or, or, upon findings of special circumstances or a violation of an order of protection, up to five years. The definition of special circumstances contained in Family Court Act §827(a)(vii) would be incorporated by reference:

> For the purposes of this section aggravating circumstances shall mean physical injury or serious physical injury to the petitioner caused by the respondent, the use of a dangerous

> instrument against the petitioner by the respondent, a history of repeated violations of prior orders of protection by the respondent, prior convictions for crimes against the petitioner by the respondent or the exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household.

Such orders would be able to be extended upon judicial review, with notice to all affected parties, in the context of a permanency hearing under Article 10-A of the Family Court Act or other post-dispositional proceeding under Article 10. These provisions for time-limited orders would, therefore, be consistent with the requirement for time-limited orders with authorizations for periodic judicial review as established by the Court of Appeals in Matter of Sheena D., 8 N.Y.3d 136 (2007).

The time limits in Family Court Act §1056 stand in sharp contrast to the duration limits of family offense orders of protection, which were extended by the Legislature in 2003 to up to two years or, if aggravating circumstances or a violation of an order of protection are found, up to five years. *See* Family Court Act §842 [L. 2003, c. 579]. Orders of protection in custody, visitation and other civil proceedings in Supreme and Family Court may last for specified periods until the youngest child reaches majority. Indeed, the Family Court in Child Protective Services *ex rel* Ashley B. *v.* William B., 7 Misc.3d 1017(A), 2005 *WL* 1021565, NY Slip Op. 50637 (Fam. Ct., Suff. Co., 2005)(Unrep.), in issuing a longer order in admitted contravention of the statutory language, stated:

> The facts of this case involve a grandfather who sexually abused his granddaughter. It is more likely than not that if not prevented from being a part of this child's life he may appear at some social or family function at a future date and the child and her siblings would not be protected by a Family Court order of protection.
>
> FCA § 115 provides that the Family Court has exclusive original jurisdiction over abuse and neglect proceedings as set forth in Article 10. FCA § 1011 states that the Article is designed to help and protect children from injury or mistreatment and to safeguard their physical, mental and emotional well-being. Since the Court is statutorily empowered to issue an order of protection until a child's 18th birthday in a custody/visitation matter, it defies logic that the Court would not have a similar power under a child abuse/neglect proceeding.

Similar to Child Protective Services *ex rel* Ashley B., *supra*, the case of Matter of Makayla I. *v.* Harold J., *supra*, compels enactment of the Committee's proposal.

Notwithstanding the Appellate Division's agreement in Makayla I. with the Family Court's conclusion that the best interests of two children would be served by prohibiting contact by the grandfather with his grandchild and step-grandchild in light of his sexual abuse, the Court was constrained to limit the duration of the order of protection regarding the grandchild to the one-year duration of the supervision order. Underscoring the anomalous nature of the current statute, the Court remanded the case regarding the order of protection with respect to the step-grandchild for the Family Court to determine whether the grandfather was related by blood or marriage to a "member of the child's household." Clearly both children required protection from serious sexual abuse and the disparate treatment of the two children by virtue of the language of the current law impeded the Court's ability to fulfill its mission of ensuring safety for both children,

Under current law, a parent, relative or other household member living in the home of the child who is the subject of a child abuse case, who has subjected the child to sexual abuse or other severe forms of child abuse, may only be ordered out of the home for the period of the disposition, typically six months (until the next permanency planning hearing) or one year, which may be extended for an additional year (if supervision had been ordered). Incorporation into Family Court Act §1056 of the family offense periods of two years and, where special circumstances have been found, five years, is essential to prevent further injury to children and critically important to effectuate the purpose clause of the child protective article of the Family Court Act, that is, as stated in Family Court Act §1011, "to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well-being."

Proposal

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

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

Section 1. The opening paragraph of subdivision 1 of section 1056 of the family court act, as amended by chapter 526 of the laws of 2013, is amended to read as follows:

The court may [make] issue an order of protection in assistance or as a condition of any other order made under this part. Such order of protection shall remain in effect concurrently with, shall expire no later than the expiration date of, and may be extended concurrently with, such

other order made under this part, except as provided in subdivision four and subdivision four-a of this section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by a person who is before the court and is a parent or a person Legally responsible for the child's care or the spouse of the parent or other person legally responsible for the child's care, or both. Such an order may require any such person:

§ 2. Section 1056 of the family court act is amended by adding a new subdivision 4-a to read as follows:

4-a. The court may issue an order of protection 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 article and who is not a parent of the child, independently of any other order made under this part which may contain any provision authorized under subdivision one of this section. Such order of protection issued under this section may remain in effect for a period of up to two years or, if the court finds special circumstances, a period of up to five years. For purposes of this section, "special circumstances" shall mean physical injury or serious physical injury caused by the respondent to the protected person or persons or any minor child, the use of a dangerous instrument by the respondent against the protected person or persons or any minor child, a history of violations of orders of protection by the respondent, prior convictions for crimes against the protected person or persons or a minor child by the respondent or the exposure by the respondent of the protected person or persons or a minor child or any family or household member to physical injury or acts constituting a sex offense as defined in subdivision (e) of section one thousand twelve of this article and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the protected person or persons or a minor child or any family or household member. Such order of protection may be extended independently or concurrently with, any order issued under this article or article ten-A of this chapter. Such order shall be subject to annual review, modification or vacatur by the court, upon motion by any party

as provided herein. The total period of such order shall be no more than two years, or if there was a finding of special circumstances, five years from the date of the initial order.

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

18. Family Court reviews of administrative suspensions of driver's licenses for failure to pay child support and eligibility for restricted use licenses

[F.C.A. §454; S.S.L. §111-b(12); V.T.L.§§510, 530]

Of the many mechanisms for child support enforcement required by Federal law and embodied in New York State law, suspension of driver's licenses as a penalty for accumulation of more than four months of unpaid arrears has been widely recognized as an effective deterrent. The threat of a suspension propels many support obligors to pay their outstanding obligations. However, in cases where the suspension is actually imposed, it often has the effect of undermining its statutory goal of promoting payment. The Congressional Research Service, in a report issued in 2011, noted that, according to census data, approximately 76 percent of employees nationally commute to work in private vehicles and 11 percent commute by car-pool; many entry-level jobs require driver's licenses and many jobs are inaccessible by public transportation, especially in suburban and rural areas.[26] The report indicated that suspensions may be particularly punitive for low-income support obligors, "may lessen a person's ability to keep a job or find work, and thus impede a non-custodial parent's ability to fulfill his or her child support obligation."[27]

The Family Court Advisory and Rules Committee is submitting a measure designed to mitigate this counterproductive effect by delineating a clear method for the Family Court to review administrative suspensions following the support obligor's exhaustion of administrative remedies and clarifying the uses to which a restricted use license may be put during the period of suspension. The measure would alter the means of challenging unsuccessful administrative challenges to administrative driver's license suspensions and would add flexibility to the statute regarding restrictive licenses.

1. Challenges to denials of administrative hearings regarding administrative license suspensions: Pursuant to Title IV-D of the Federal *Social Security Act*, all State plans, as a condition for eligibility for 66 percent Federal reimbursement for State child support programs, must include procedures to "withhold or suspend, or to restrict the use of driver's licenses,

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

[27] *Id.* at page 11.

professional and occupational licenses, and recreational and sporting licenses of individuals owing overdue support or failing, after receiving appropriate notice, to comply with subpoenas or warrants relating to paternity or child support proceedings." *See* 42 USC §666(a)(16). Congress afforded states "a great deal of flexibility in implementing license suspension programs"[28] and did not mandate specific procedures for the suspension and reinstatement of such licenses. New York laws, recently extended to August 31, 2023, thus prescribe two methods for suspending drivers' licenses of child support obligors who have accumulated more than four months of unpaid arrears:

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

- The Support Collection Unit (SCU) of a local Department of Social Services may administratively direct DMV to suspend an obligor's license under Social Services Law §111-b(12). An obligor in default is provided notice that the SCU intends to direct the suspension and the obligor has 45 days to challenge the determination, a challenge that may only be based upon a failure to receive actual notice of the suspension. Among the bases for a successful challenge are: the arrears have been paid in full; the obligor is in receipt of public assistance or Supplemental Security Income (SSI), the obligor's income is below the self-support reserve, or that the obligor is able to make a satisfactory payment arrangement with the SCU. A satisfactory payment arrangement requires, among other things, a confession of judgment and payments of support and arrears pursuant to an income execution. The SCU has up to 75 days to review the obligor's challenge. If, after the review, the obligor disagrees with the SCU determination, he or she may file objections with the Family Court pursuant to Family Court Act §454(5). The review is based on written submissions and unless the Family Court finds that the SCU's decision to suspend the driver's license was "based upon a clearly erroneous determination of fact or error of law," the Court must deny the objections.

While both methods can be effective in promoting collection of support arrears, they often have the perverse effect noted above of preventing obligors from finding and maintaining employment, thus hampering their ability to make support payments. With respect to

[28] Congressional Research Service, *supra* note 16, at p.6.

administrative suspensions under Social Services Law §111-b(12), an unemployed or underemployed obligor may not be able to reach a satisfactory repayment agreement with the SCU in order to avoid or terminate the suspension. An obligor whose license has been suspended will generally not have the license reinstated until he or she has a job with support being deducted via an income execution. Moreover, the limitation of the grounds for challenges significantly impedes full review. The Committee's measure thus amends subdivision twelve of Social Services Law §111-b to permit administrative reviews – and thus ultimately judicial reviews – of license suspensions on grounds in addition to lack of actual notice of the suspension.

While the Family Court may review a support obligor's objections to an administrative denial by the SCU of a challenge to an administrative driver's license suspension, experience statewide demonstrates that almost no support obligors avail themselves of that remedy. The Family Court has received only a handful of objections to administrative denials of license suspension challenges.

In order to make the process to challenge denials resulting from administrative reviews more accessible to litigants, especially those without legal representation, the proposed measure would amend subdivision five of Family Court Act §454 to substitute the more familiar petition process. Since the Family Court does not charge fees for initiating actions, such a change would not add any expense for the litigant; nor would it encumber the litigant with an undue burden of service since the process would be similar to the current notification requirements regarding objections. The measure would require the obligor to submit financial disclosure documents, since, as in all child support proceedings, the information is critically important to the resolution of the matters. Conforming amendments referencing the petition process for judicial review would be added to section 111-b of the Social Services Law and subdivision 4-e of section 510 of the Vehicle and Traffic Law.

Support obligors whose licenses have been suspended routinely file modification petitions with the court seeking reviews of suspensions, only to be informed by the courts that they must follow the procedures in FCA §454. Because of the strict time limits in that section and subdivision twelve of section 111-b of the Social Services Law, support obligors are often by this time precluded from taking appropriate action to have their licenses returned. And because the written objection process proves to be too onerous for many support obligors, they are often unable to obtain the relief to which they would otherwise be entitled. By shifting the process from a written objection to a petition and appearance, the Family Court can ensure that support obligors challenging their license suspensions are given the necessary opportunities to collect and present the evidence necessary to obtain effective judicial review of their cases.

2. Restricted use licenses: The Committee's measure clarifies an apparent contradiction in the activities permitted under a restricted use license pursuant to section 530 of the Vehicle and Traffic Law. In both judicial and administrative license suspension cases, a support obligor may apply for a restricted use license which is limited to travel to and from his or her place of employment or school, commuting as part of a job-search and in other limited circumstances. Family Courts are routinely faced with obligors who report that they are unable to find and maintain employment as a result of license suspensions. Without the ability to address what may be a root cause of a non-custodial parent's unemployment, the Court has only two options when addressing violations of child support orders – either lower the support obligation or continue the order, which will ultimately result in greater arrears and possible incarceration – neither of which achieves the goal of increasing support payments to custodial parents for the benefit of their children.

Vehicle and Traffic Law §530(3)(a) permits a restricted use license to be used "during the time the holder is actually engaged in pursuing or commuting to or from his business, trade, occupation or profession," clearly permitting use both for commuting and for job-seeking. The enumerated activities permitted in subdivision three exclude any driving that is a part of the license holder's job, and, consequently, exclude driving any commercial vehicle or vehicle for hire, such as a car service or taxi. Vehicle and Traffic Law §530(5), however, states that obligors, whose licenses have been suspended for non-payment of support, may nonetheless drive most vehicles for hire with the exception of commercial vehicles defined in Vehicle and Traffic Law §501-a(4). These sections appear to be in contradiction, since a vehicle for hire would be used as part of a driver's job, not simply for commuting. The measure, therefore, amends subdivision three of section 510 of the Vehicle and Traffic Law to harmonize the subdivisions by making it clear that where a restricted use license is issued to a driver whose license had been suspended for failure to pay child support, the restricted use license may be used for driving that is a part of the job. While preserving the exclusion of commercial vehicles, the measure permits a restricted license to be used for driving other types of motor vehicles "incident to the [license] holder's business, trade, occupation or profession." A clarifying amendment is also proposed for Vehicle and Traffic Law §530(5).

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

> States are continuing to make changes during each legislative session, with a number of states easing up on driver's license restrictions in particular in order to allow the obligor[s] to continue working so that they can meet their support obligation in the future.[29]

Indiana law, for example, authorizes a person "whose driving privileges have been suspended by the [B]ureau [of Motor Vehicles] by an administrative action and not by a court order [to] petition a court for specialized driving privileges". [30] West Virginia permits an obligor to avoid a court ordered license suspension if it would cause significant hardship to "the person . . . the person's employees, or to persons, businesses or entities to whom the person provides goods or services; " the obligor must pay a portion of the arrears and establish a payment plan for the remainder, which must be paid within one year.[31] California and Louisiana permit restricted-use licenses to be in effect for a designated period without limiting their use to the commute to and from work.[32]

Consistent with this growing national trend, enactment of the Committee's proposal would increase the effectiveness of driver's license suspensions as a tool to promote, rather than impede, child support payments.

Proposal:

AN ACT to amend the family court act, the social services law and the vehicle and traffic law, in relation to family court reviews of administrative driver's license suspensions for failure to pay child support and eligibility for restricted use licenses

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

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

[31] *See* W. Va. Code §48-15-209.

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

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

Section 1. Subdivision 5 of section 454 of the family court act, as amended by chapter 468 of the laws of 2012, is amended to read as follows:

(5) The court may review a support collection unit's denial of [a] an administrative challenge made by a support obligor pursuant to paragraph (d) of subdivision twelve of section one hundred eleven-b of the social services law if [objections thereto are] a petition is filed by a support obligor who has received notice that the office of temporary and disability assistance intends to notify the department of motor vehicles that the support obligor's driving privileges are to be suspended. [Specific written objections to]

a. The petition challenging a support collection unit's denial may be filed by the support obligor within thirty-five days of the mailing of the notice of the support collection unit's denial. A support obligor who files such [objections] a petition shall serve a copy of the [objections] petition upon the support collection unit and the support obligee, [which] each of whom shall have ten days from such service to file a written [rebuttal to such objections and] answer. On or before the return date of the petition, the support collection unit shall provide to the court a copy of the record upon which the support collection unit's denial was made, including all documentation submitted by the support obligor. Proof of service shall be filed with the court at the time of filing of [objections] the petition and any [rebuttal. The court's review shall be based upon the record and submissions of the support obligor and the support collection unit upon which the support collection unit's denial was made. Within forty-five days after the rebuttal if any, is filed, the] answer.

b. The support obligor shall submit to the court the financial disclosure required by subdivision (a) of section four hundred twenty-four-a of this act. The court shall not determine the petition in the absence of such submission.

c. The court shall (i) deny the [objections] petition and remand to the support collection unit or (ii) [affirm] grant the [objections] petition if the court finds the determination of the support collection unit is based upon a clearly erroneous determination of fact or error of law[, whereupon]. If the court grants the petition, it shall direct the support collection unit not to notify the department of motor vehicles to suspend the support obligor's driving privileges.

d. Provisions set forth herein relating to procedures for [appeal to] review by the family court by individuals subject to suspension of driving privileges for failure to pay child support shall apply solely to such cases and not affect or modify any other procedure for review or appeal of administrative enforcement of child support requirements.

§2. Paragraphs (d) and (f) of subdivision 12 of section 111-b of the social services law, paragraph (d) as amended by chapter 309 of the laws of 1996 and paragraph (f) as added by chapter 81 of the laws of 1995, are amended to read as follows:

(d)(1) A support obligor may challenge in writing the correctness of the determination of the support collection unit that the obligor's driving privileges should be suspended, and in support of the challenge may submit documentation demonstrating mistaken identity, error in calculation of arrears, financial exemption from license suspension pursuant to the conditions enumerated in paragraph (e) of this subdivision, the absence of an underlying court order to support such determination, or other reason that the person is not subject to such determination. Such documents may include but are not limited to a copy of the order of support pursuant to which the obligor claims to have made payment, other relevant court orders, copies of cancelled checks, receipts for support payments, pay stubs or other documents identifying wage withholding, and proof of identity. The support collection unit shall review the documentation submitted by the support obligor, shall adjust the support obligor's account if appropriate, and shall notify the support obligor of the results of the review initiated in response to the challenge within seventy-five days from the date of the notice required by paragraph (b) of this subdivision. If the support collection unit's review indicates that the determination to suspend

driving privileges was correct, the support collection unit shall notify the support obligor of the results of the review and that the support obligor has thirty-five days from the date of mailing of such notice to satisfy the full amount of the arrears or commence payment of the arrears/past due support as specified in paragraph (e) of this subdivision and if the support obligor fails to do so, the support collection unit shall notify the department of motor vehicles to suspend the support obligor's driving privileges pursuant to section five hundred ten of the vehicle and traffic law. The support obligor shall be further notified that if the support obligor files [objections with] a petition for review by the family court and serves [these objections] the petition on the support collection unit within thirty-five days from the date of mailing of the notice denying the challenge pursuant to subdivision five of section four hundred fifty-four of the family court act, the support collection unit shall not notify the department of motor vehicles to suspend the support obligor's driving privileges until fifteen days after entry of [judgement] judgment by the family court denying the [objections] relief requested in the petition.

(2) A support obligor may within thirty-five days of mailing of the notice denying his or her challenge by the support collection unit [request that the] file a petition seeking family court review of the support collection unit's determination pursuant to subdivision five of section four hundred fifty-four of the family court act. If the support obligor [requests the] files a petition seeking family court [to] review of the determination of the support collection unit, the support collection unit shall not notify the department of motor vehicles to suspend the support obligor's driving privileges until fifteen days after mailing of a copy of the judgment by the family court to the support obligor denying the [objections] relief requested in the petition.

(f) A support obligor [who alleges that he or she has not received actual notice pursuant to paragraph one of subdivision (b) of this section and] whose driving privileges were suspended may at any time request a review pursuant to [subdivision] paragraph (d) of this [section] subdivision or comply with the requirements of [subdivision] paragraph (e) of this [section] subdivision, and upon a determination that he or she has not accumulated support

arrears equivalent to or greater than the amount of support due for a period of four months or that he or she meets the requirements of [subdivision] paragraph (e) of this [section] subdivision, the department shall notify the department of motor vehicles that the suspension of driving privileges shall be terminated. If the support collection unit upholds the suspension, the support obligor may seek a review by the family court of the determination pursuant to paragraph (d) of this subdivision and section four hundred fifty-four of the family court act.

§3. Paragraph (3) of subdivision 4-e of section 510 of the vehicle and traffic law, as amended by chapter 601 of the laws of 2007, is amended to read as follows:

(3) Upon receipt of notification from the office of temporary and disability assistance of a person's failure to satisfy support arrears or to make satisfactory payment arrangements thereon pursuant to paragraph (e) of subdivision twelve of section one hundred eleven-b of the social services law or notification from a court issuing an order pursuant to section four hundred fifty-four or four hundred fifty-eight-a of the family court act or section two hundred forty-four-b of the domestic relations law, the commissioner or his or her agent shall suspend the license of such person to operate a motor vehicle. In the event such person is unlicensed, such person's privilege of obtaining a license shall be suspended. Such suspension shall take effect no later than fifteen days from the date of the notice thereof to the person whose license or privilege of obtaining a license is to be suspended, and shall remain in effect until such time as the commissioner is advised that the person has satisfied the support arrears or has made satisfactory payment arrangements thereon pursuant to paragraph (e) of subdivision twelve of section one hundred eleven-b of the social services law or until such time as the court issues an order to terminate such suspension;

§4. Subdivisions (3) and (5) of section 530 of the vehicle and traffic law, subdivision (3) as amended by chapter 539 of the laws of 1990 and subdivision (5) as amended by section 31 of part LL of chapter 56 of the laws of 2010, are amended to read as follows:

(3) Such license or privilege and renewal thereof shall be issued for a period not exceeding the period during which such person's regular driver's license or privilege has been suspended or revoked, shall be marked and identified as a restricted use license or privilege and shall be valid only: (a) during the time the holder is actually engaged in pursuing or commuting to or from his or her business, trade, occupation or profession,

(b) en route to and from a driver rehabilitation program or related activity specified by the commissioner at which his or her attendance is required,

(c) to and from a class or course at an accredited school, college or university or at a state approved institution of vocational or technical training,

(d) en route to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of his or her household, as evidenced by a written statement to that effect from a licensed medical practitioner, or

(e) en route to and from a place, including a school, at which the child or children of the holder are cared for on a regular basis and which is necessary for the holder to maintain such holder's employment or enrollment at an accredited school, college or university or at a state approved institution of vocational or technical training and shall contain the terms and conditions under which it is issued and is valid.

In the event the holder of a restricted use license or privilege is convicted of: any violation (other than parking, stopping or standing) or of operating a motor vehicle for other than his or her employment, business, trade, occupational or professional or other purposes for which the license or privilege was issued, or does not comply with other requirements established by the commissioner, such license or privilege may be revoked and the holder shall not be eligible to receive a license or privilege pursuant to this section for a period of five years from the date of such revocation. Subject to the limitations of subdivision five of this section, a restricted use license issued to a person whose license has been suspended for failure to make

payments of child support or combined child and spousal support shall be valid for operation of a motor vehicle incident to the holder's business, trade, occupation or profession.

(5) A restricted use license or privilege shall be valid for the operation of any motor vehicle, except a vehicle for hire as a taxicab, livery, coach, limousine, van or wheelchair accessible van or tow truck as defined in this chapter subject to the conditions set forth herein, which the holder would otherwise be entitled to operate had his drivers license or privilege not been suspended or revoked. Notwithstanding anything to the contrary in a certificate of relief from disabilities or a certificate of good conduct issued pursuant to article twenty-three of the correction law, a restricted use license shall not be valid for the operation of a commercial motor vehicle. A restricted use license shall not be valid for the operation of a vehicle for hire as a taxicab, livery, coach, limousine, van or wheelchair accessible van or tow truck where the holder thereof had his or her drivers license suspended or revoked and

(i) such suspension or revocation is mandatory pursuant to the provisions of subdivision two or two-a of section five hundred ten of this title; or

(ii) any such suspension is permissive for habitual or persistent violations of this chapter or any local law relating to traffic as set forth in paragraph d or i of subdivision three of section five hundred ten of this title; or

(iii) any such suspension is permissive and has been imposed by a magistrate, justice or judge of any city, town or village, any supreme court justice, any county judge, or judge of a district court. Except for a commercial motor vehicle as defined in subdivision four of section five hundred one-a of this title, the restrictions on types of vehicles which may be operated with a restricted license contained in this subdivision shall not be applicable to a restricted license issued to a person whose license has been suspended for failure to make payments of child support or combined child and spousal support pursuant to paragraph three of subdivision four-e of section five hundred ten of this title.

§5. This act shall take effect immediately; provided, however, that:

(a) the amendments to subdivision 5 of section 454 of the family court act made by section one of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith;

(b) the amendments to paragraphs (d) and (f) of subdivision 12 of section 111-b of the social services law made by section two of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith;

(c) the amendments to paragraph (3) of subdivision 4-e of section 510 of the vehicle and traffic law made by section three of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith; and

(d) the amendments to subdivision 5 of section 530 of the vehicle and traffic law made by section four of this act shall not affect the expiration of such subdivision and shall expire and be deemed repealed therewith.

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19. Permanency planning in juvenile delinquency and persons in need of supervision proceedings in Family Court
[F.C.A. §§312.1, 320(2), 353.3, 355.5, 736, 741, 756, 756-a]

When the Legislature enacted chapter 3 of the Laws of 2005, the landmark child welfare permanency legislation, it deferred consideration of the significant constellation of issues relating to permanency planning and permanency hearings regarding juvenile delinquents and Persons in Need of Supervision (PINS). In 2021, the Legislature enacted legislation to implement the Federal *Family First Prevention Services Act (FFPSA)*, which included provisions regarding proposed congregate care placements of juvenile delinquents and Persons in Need of Supervision. See L. 2021, c. 56, Part L; Public Law 115-123 §§50741, 50742. However, critically important reentry planning issues remain for those youth not covered by the "Qualified Residential Treatment Program" process. The permanency hearing provisions, including those regarding planning for return of the youth from all out-of-home care settings, are vital for the successful resolution of these cases for the youth, their families and their communities. They are essential for the Judiciary's ability to fulfill its mandates under each of the Federal statutes applicable in the juvenile justice context, including, *inter alia*, the *Adoption and Safe Families Act* [Public Law 105-89], the *Preventing Sex Trafficking and Strengthening Families Act* [Public Law 113-183] and the *Juvenile Justice Reform Act of 2018* (Public Law 115-385). Significantly, the *Juvenile Justice Reform* Act, in re-authorizing and expanding the *Juvenile Justice and Delinquency Prevention Act of 1974* [34 U.S.C. §10101 *et seq.*], requires States to include prompt educational records and academic credit transfers as part of the planning process for release of youth from out-of-home care. That State compliance with Federal Title IV-E mandates is a prerequisite to receipt of federal funding is evident from the regulations promulgated by the Children's Bureau of the United States Department of Health and Human Services. *See* 45 *C.F.R.* Parts 1355-1357. As the Family Court, Queens County, has observed, permanency hearings in juvenile delinquency and PINS proceedings "serve the same purpose" as those in child abuse and neglect cases. *See* In the Matter of Mario S., 38 Misc. 3d 444 (Fam. Ct., Qns. Co., 2012). Recent enactments as part of the New York State budgets, most recently including the *FFPSA* provisions, underscore this equivalence by amending juvenile delinquency and PINS, as well as child protective, provisions. If the Family Court is to be able to exercise its critical monitoring functions and convene meaningful permanency hearings in juvenile delinquency and PINS proceedings, it must have the benefit of at least the same information that is required to be presented in child welfare proceedings. The Court must make determinations of specificity at least comparable to those in child welfare proceedings and the parties must have the benefit of continuity of legal representation. None of the applicable Federal statutes make any distinction between juvenile justice and child welfare proceedings for those states, including New York, that receive significant Federal foster care funding under Title IV-E of the *Social Security Act* for placements of juvenile delinquents and status offenders.

To that end, the Family Court Advisory and Rules Committee has developed a proposal that incorporates essential elements of the child welfare permanency hearing article of the Family Court Act (Article 10-A) into the permanency hearing provisions of Articles 3 and 7 of the Act. It would provide greater specificity regarding the services that must be provided for youth, would implement the Federal educational requirements noted above and would expand the alternatives available to the Court both in dispositional and permanency hearings in juvenile delinquency and PINS cases. Briefly, the proposal contains the following provisions:

- Notices to non-custodial parents: To ensure that all possible resources are engaged in the resolution of juvenile delinquency and PINS proceedings, the proposal would require that noncustodial parents, if any, be given notices of their children's cases in Family Court to enable them to appear. This supplements the existing requirement that a summons be issued for an accused juvenile's parent or other person legally responsible. The local probation department that generally interviews parties at the outset for adjustment purposes, as well as the presentment agency (prosecution), would be charged with the responsibility of asking the custodial parent for the necessary contact information for parents other than those already notified. In juvenile delinquency cases, the presentment agency must send the notice, along with a copy of the petition, to the noncustodial parent or parents at least five days before the appearance date. In PINS cases, where there is most often no presentment agency, the Family Court would be charged with sending the notice. Consistent with Family Court Act §§341.2(3) and 741(c), however, the absence of the parent who was sent the notice to appear in court would not be grounds to delay the proceedings.

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

• Continuity of counsel: The proposal provides necessary continuity in representation by attorneys for juveniles in both delinquency and PINS cases. Similar to the requirement in Family Court Act §1016 for the appointment of the attorney for the child in a child protective proceeding to continue during the life of a dispositional or post-dispositional order, Family Court Act §§320.2(2) and 741(a) would be amended to continue the appointment of the child's attorney in juvenile delinquency and PINS proceedings for the entire period of a dispositional order, an adjournment in contemplation of dismissal and any extensions of permanency hearings, violation hearings or other post-dispositional proceedings. As in child protective cases, the appointment would automatically continue unless the Family Court relieves the attorney or grants the attorney's application to be relieved, in which case the Court must appoint another attorney immediately. While the current practice of the attorney submitting a voucher for payment at the close of a proceeding would continue, the attorney would be able, as in child protective proceedings, to submit a separate application for compensation for post-dispositional services rendered.

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

• Permanency planning: Where a dispositional order places the juvenile in a juvenile delinquency case with a county Department of Social Services or, in the case of juvenile delinquents outside New York City, with the New York State Office of Children and Family Services for non-secure or limited secure care, the dispositional order must contain or have annexed the same elements as child protective placement orders, including a description of the family visitation plan, the service plan if available (or if not yet available, then within 60 days of the disposition) and a directive that notice be given to the parents of any planning conferences. Similar requirements apply to PINS cases, but in light of the shorter placements authorized under

part K of chapter 56 of the laws of 2019, the deadlines for the plans must be shorter. These elements of a permanency order in juvenile delinquency and PINS cases are as critical as those already recognized by the Legislature in its recent enactments implementing the Federal laws noted above, most particularly, *FFPSA* and the *Preventing Sex Trafficking and Strengthening Families Act*. The latter statute, incorporated into New York State law in 2015 and 2016, requires placement agencies to document – and the courts to monitor – the provision of age and developmentally appropriate services to youth using a "reasonable and prudent parent" standard, requires youth 14 and older to be integrally involved in planning for their futures and requires documentation of the services necessary to assist juveniles these youth to make the transition from foster care to successful adulthood, limits the permanency goal of "Another Planned Permanent Living Arrangement" to youth 16 years of age and older and requires specification of "a significant connection to an adult willing to be a permanency resource" for youth in such cases. *See* L. 2016, c. 54; L. 2015, c. 56.

Unquestionably, these features of the permanency legislation, most specifically addressing the needs of adolescents in all categories of out-of-home care, are equally essential for the adolescents who comprise the juvenile delinquency and PINS caseloads of the Family Courts statewide. Planning for the juveniles' release to their families, the predominant permanency goal in juvenile delinquency and PINS cases, must begin early and, where their families will not be a resource, the identification of suitable permanency resources is critically important. As recent reports regarding New York's placement system point out, youth exiting out-of-home care are especially vulnerable and have significant needs that must be met if they are to make a successful adjustment to the community.

• Educational and vocational release planning in juvenile delinquency and PINS proceedings: Any finding that reasonable efforts, as required by both Federal and State law, have been made to further the permanency goals of juvenile delinquents and PINS must include advance efforts to ensure their prompt enrollment in a school or vocational program upon release from out-of-home care. The proposal thus amends both the juvenile delinquency and PINS statutes for agencies in which youth are placed to notify the school districts in which the youth will be attending school upon release not less than 14 days in advance of their release, to promptly transfer records to the school districts and to try to coordinate release dates with school terms so as to minimize disruption to the youths' educational programs. The proposal further requires that local school districts enroll youth exiting placement in school within five business days of their release.

Consistent with the school stability provisions of the Federal *Fostering Connections to Success and Adoption Improvement Act of 2008* [Public Law 110-351] and the *Every Student Succeeds Act* [Public Law 114-95], school authorities would also be required to ensure that, where

appropriate, students may remain in the schools they attended prior to their placement or remand into foster care. As noted, section 205 of the Federal *Juvenile Justice Reform Act of 2018* requires States to include in their State Plans prompt educational records and academic credit transfers as part of the planning process for release of youth from out-of-home care**.** Significantly, recognizing the importance of ensuring that youth in placement receive academic credits, the New York State Education Department proposed, and the Legislature enacted, legislation requiring that such youth receive high school diplomas if they have satisfied academic requirements. *See* L. 2021, c. 754.

All of these provisions further the goals embodied in and are consistent with the *Guiding Principles for Providing High-Quality Education in Juvenile Justice Secure Care Settings* jointly issued by the United States Department of Education and Department of Justice in December, 2014. The cover letter, from the Attorney General and Secretary of Education that accompanied the *Guiding Principles,* dated December 8, 2014, stated that:

> For youth who are confined in juvenile justice facilities, providing high-quality correctional education that is comparable to offerings in traditional public schools is one of the most powerful – and cost-effective – levers we have to ensure that youth are successful once released and are able to avoid future contact with the justice system. High-quality correctional education, training, and treatment are essential components of meaningful rehabilitation because these equip youth with the skills needed to successfully reenter their communities and either continue their education or join the workforce.

While referring to secure settings, the document notes that "the principles and core activities should also inform the services provided to any youths so displaced, regardless of where they are located or for how long." *Id.* at 2. The *Guidelines* stress the need for timely and comprehensive reentry planning, transfers of school records to ensure expeditious re-enrollment and full compliance with the *Individuals with Disabilities Education Act (IDEA). See also,* Letter from the Attorney General and Secretary of Education, dated December 5, 2014, regarding *IDEA* requirements.

It is most ironic that PINS, many, if not most, of whom had been adjudicated for truancy or other school difficulties, are the only category of juveniles before the Family Court who do not have specific statutory rights to school and vocational release planning. Therefore, the Committee's proposal conforms the PINS statute to the juvenile delinquency school and vocational release mandates of chapter 181 of the Laws of 2000 and to chapter 3 of the Laws of 2005, which added identical provisions for children in foster care. While, as of 2020, placements are no longer authorized for PINS cases in which the sole allegation is truancy [L. 2019, c. 56, part K], many, if

not most, PINS cases include truancy among the child's other problems. The proposal requires the agency with which a PINS is placed – the local Department of Social Services or an authorized child care agency operating under contract – to engage in constructive planning for the child's release, including arranging appropriate educational and/or vocational programs, and to report to the Family Court and to the parties on such efforts. Where an extension of placement or permanency hearing is not being sought, the proposal requires a report regarding the child's release plan 30 days prior to the conclusion of the placement period in juvenile delinquency cases and 14 days in PINS cases. Where the agency is requesting an extension of placement and permanency hearing, including cases under *FFPSA* in which a "Qualified Residential Treatment Program" hearing is sought, the report must be annexed to the petition, which must be filed 60 days prior to the date on which the permanency hearing must be held in juvenile delinquency cases, with shorter time-frames applicable to PINS cases.

The release plan mandated in the report must delineate the steps that the agency has taken or will be taking to ensure that the PINS would be enrolled in school promptly after release, that records would be promptly transferred and that special education services, if any, would continue until such time as the new local education agency develops and implements a new Individual Education Plan, as necessary. As in juvenile delinquency and foster care cases, for a PINS not subject to the State compulsory education law who affirmatively elects not to continue in school, the agency must describe steps taken or planned to promptly ensure the juvenile's gainful employment or enrollment in a vocational program. In a consolidated extension of placement and permanency hearing, this release plan would be reviewed by the Family Court in conjunction with its review of the permanency plan and the Court's order would include a determination of the adequacy of the release plan and would specify any necessary modifications. Recognizing that, of all children in out-of-home care, PINS children are among the most likely to have serious educational deficits and needs, these provisions would help to ameliorate the serious, pervasive deficiencies in agency referrals of youth to school and vocational programs upon release from foster care.[i33]

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[33] *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 Impllications 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).

The importance of increasing efforts to ensure that both juvenile delinquents and PINS are able to stay in, re-enroll in and succeed in school cannot be overstated. High school drop-outs are 3.5 times as likely to be arrested as high school graduates and more than eight times more likely to be incarcerated in jails or prisons. Even a 10% increase in graduation rates has been estimated to prevent approximately 180 murders and 9,000 aggravated assaults in New York annually.[34]

• Placement and permanency hearing orders: As noted, the Federal *Adoption and Safe Families Act* [Public Law 105-89], the *Fostering Connections to Success and Adoption Improvement Act of 2008* [Public Law 110-351] , the *Preventing Sex Trafficking and Strengthening Families Act* [Public Law 113-183] and, most recently, the *Family First Prevention Services* Act [Public Law 115-123], significantly augment the responsibilities of the Family Court to monitor and shape the placements of all youth in out-of-home care. Since New York State receives Federal foster care reimbursement under Title IV-E of the *Social Security Act* for such delinquent youth when they are originally placed in or are "stepped down to" non-secure facilities housing 25 children or fewer or to foster homes, the Committee's proposal requires permanency hearings for juveniles placed with local Departments of Social Services and with the New York State Office of Children and Family Services for both limited secure and non-secure facilities. Although New York State does not receive Federal Title IV-E foster care reimbursement for youth in limited secure facilities, these youth are likely, during the course of placement, to be transferred into Title IV-E- eligible non-secure facilities. Convening permanency hearings for this small population of placed youth greatly facilitates the planning process for their release and assures compliance with the Federally-required time-limits applicable once the youth are transferred. Such hearings are already often the practice statewide, thus imposing no new burdens upon NYS OCFS or the New York City Administration for Children's Services, but should be made uniform through a statutory requirement. *See, e.g.*, Matter of Donovan Z., 6 Misc.3d 1023(A), 800 N.Y.S.2d 345 (Fam. Ct., Monroe Co., 2005)(Unreported opinion).

Further, as in the child welfare permanency legislation, the proposal requires that permanency hearing orders in juvenile delinquency and PINS proceedings include: a description of

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[34] *See* Fight Crime, Invest in Kids, *Getting Juvenile Justice Right in New York: Proven Interventions Will Cut Crime and Save Money* (2007) at pages 4, 6.

the visiting plan between the juvenile and his or her parent or legally-responsible adult and siblings; a service plan designed to fulfill the permanency goal for the juvenile;[35] a direction that the parent or other person legally responsible be notified of, and be invited to be present at, any planning conferences convened by the placement agency with respect to the child; and a warning that if the juvenile remains in placement for 15 out of 22 months, the agency may be required to file a petition to terminate parental rights. A copy of the court order and service plan must be provided to the juvenile, his or her attorney and the juvenile's parent or other legally responsible individual. *Cf.*, Family Court Act §§1089(d)(2)(vii)(A), 1089(e).

The Committee's proposal is vital to address the current conundrum faced by the Family Court: that is, that the Court is charged with the responsibility to conduct permanency hearings, monitor permanency planning and issue fact-specific permanency orders in juvenile delinquency and PINS proceedings, but it is not given the information or authority it requires to discharge that responsibility. If the Family Court and all parties are provided with specific service plans, if needed services are ordered, if representation by the juveniles' attorneys is continued without interruption and if the agencies' responsibilities to work with, and provide appropriate visitation to, the juveniles' parents and other legally responsible adults and siblings are clearly articulated, the likelihood of successful permanency planning is significantly increased. This would benefit not only New York State in its efforts to demonstrate compliance with Federal law, but also the juveniles, their families and the communities to which the juveniles return.

In Matter of Robin G., 20 Misc.3d 328 (Fam. Ct., Queens Co., 2008), for instance, at a combined permanency/extension of placement hearing, the Family Court made a finding of no reasonable efforts against NYS OCFS since neither it, nor the authorized agency having custody of the juvenile, made reasonable efforts to facilitate the juvenile's return to her mother's home; no services or counseling were provided to the mother, who was not involved in the child's transition planning, and no plan was in place to ensure that the child's mental health needs would be met upon her release. Concomitantly, Matter of Donovan Z., 6 Misc.3d 1023(A), 800 N.Y.S.2d 345 (Fam. Ct., Monroe Co., 2005)(Unreported opinion) provides a more positive example of a case where, at a combined permanency/extension of placement hearing, the Family Court was able to

[35] If a service plan has not been prepared by the date of disposition in a juvenile delinquency proceeding, it must be disseminated to the Family Court, presentment agency, child's attorney and parent or person legally responsible for the child's care within 60 days of the issuance of the dispositional order.

ascertain that both the juvenile's and his mother's needs to facilitate his ultimate release home were being met by OCFS.

The importance of these provisions is underscored as well in the recently revised, nationally recognized guidelines approved by the National Council of Juvenile and Family Court Judges.[36] As one child welfare expert has written:[37]

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

Proposal

AN ACT to amend the family court act, in relation to permanency planning in juvenile delinquency and persons in need of supervision proceedings in family court

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

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[36] *Enhanced Juvenile Justice Guidelines: Improving Court Practice in Juvenile Justice Cases* (National Council of Juvenile and Family Court Judges, Jan., 2019).

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

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

4. Upon the filing of a petition under this article, the presentment agency shall notify any non-custodial parents of the respondent who had not been issued a summons in accordance with subdivision one of this section, provided that the addresses of any such parents have been provided. The probation department and presentment agency shall ask the custodial parent or person legally responsible for information regarding any other parent or parents of the respondent. The notice shall inform the parent or parents of the right to appear and participate in the proceeding and to seek temporary release or, upon disposition, direct placement of the respondent. The presentment agency shall send the notice to the non-custodial parent at least five days before the return date. The failure of a parent entitled to notice to appear shall not be cause for delay of the respondent's initial appearance, as defined by section 320.1 of this article.

§2. Subdivision 2 of section 320.2 of the family court act, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

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

notices and reports required by law shall be provided. The attorney for the respondent shall be entitled to compensation pursuant to applicable provisions of law for services rendered up to and including disposition of the petition. The attorney shall, by separate application, be entitled to compensation for services rendered after the disposition of the petition. Nothing in this section shall be construed to limit the authority of the court to remove an attorney from his or her assignment.

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

4-a. Where the respondent is placed with the office of children and family services or the commissioner of social services pursuant to subdivision two, three or four of this section or section 353.7 of this article, the dispositional order or an attachment to the order incorporated by reference into the order shall include:

(a) a description of the plan to facilitate visitation, including any plans for visits and/or contact with the respondent's siblings. If the visitation plan has not yet been developed, then the visitation plan must be filed with the court and delivered to the presentment agency, attorney for the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than sixty days from the date the disposition was made; and

(b) a service plan, if available. If the service plan has not yet been developed, then the service plan must be filed with the court and delivered to the presentment agency, attorney for the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than sixty days from the date the disposition was made; and

(c) a direction that the parent or parents or other person or persons legally responsible for the respondent shall be notified of any planning conferences to be held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and of their right to bring counsel or another representative or companion with them;

and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as required by federal law.

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

§4. Paragraphs (a), (b) and (c) of subdivision 7 of section 353.3 of the family court act, paragraphs (a) and (b) as amended by section 6 of part G of chapter 58 of the laws of 2010, and paragraph (c) as amended by section 16 of part L of chapter 56 of the laws of 2015, are amended to read as follows:

(a) Where the respondent is placed pursuant to subdivision two [or], two-a, three or four of this section and where the agency is not seeking an extension of the placement pursuant to section 355.3 of this part, such report shall be submitted not later than thirty days prior to the conclusion of the placement.

(b) Where the respondent is placed pursuant to subdivision two [or], two-a, three or four of this section and where the agency is seeking an extension of the placement pursuant to section 355.3 of this part and a permanency hearing pursuant to section 355.5 of this part, such report shall be submitted not later than sixty days prior to the date on which the permanency hearing must be held and shall be annexed to the petition for a permanency hearing and extension of placement.

(c) Where the respondent is placed pursuant to subdivision two [or], two-a, three or four of this section, such report shall contain a plan for the release, or conditional release (pursuant to section five hundred ten-a of the executive law), of the respondent to the custody of his or her parent or other person legally responsible, or to another permanency alternative as provided in paragraph (d) of subdivision seven of section 355.5 of this part. For purposes of this paragraph, "placement agency" shall refer to the office of children and family services, the commissioner of

social services or the authorized agency under contract with the office of children and family services or commissioner of social services with whom the respondent has been placed. The release or conditional release plan shall provide as follows:

(i) If the respondent is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the respondent is placed has taken and will be taking in conjunction with the local education agency to [facilitate] ensure the immediate enrollment of the respondent in [a] an appropriate school or educational program leading to a high school diploma [following] within five days of release, or, if such release occurs during the summer recess, immediately upon the commencement of the next school term. The placement agency shall ascertain the school calendar from the school district and shall, to the extent possible, work with the school district so that the timing of respondent's release from the program and enrollment in school are minimally disruptive for the respondent and further his or her best interests. Not less than fourteen days prior to the respondent's release, the placement agency shall notify the school district where the respondent will be attending school and transfer all necessary records, including, but not limited to, the respondent's course of study, credits earned and academic record.

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

(iii) If the respondent is not subject to article sixty-five of the education law and does not elect to participate in an educational program leading to a high school diploma, such plan shall

include, but not be limited to, the steps that the agency with which the respondent is placed has taken and will be taking to assist the respondent to become gainfully employed or enrolled in a vocational program following release.

§5. The opening paragraph of subdivision 2, the opening paragraph of subdivision 3, subdivisions 5 and 6, and paragraph (d) of subdivision 7 of section 355.5 of the family court act, the opening paragraph of subdivision 2 and the opening paragraph of subdivision 3 as amended by chapter 145 of the laws of 2000, subdivision 5 as added by chapter 7 of the laws of 1999, subdivision 6 as amended by section 1 of part B of chapter 327 of the laws of 2007, and paragraph (d) of subdivision 7 as amended by section 18 of part L of chapter 56 of the laws of 2015, are amended and a new subdivision 11 is added to such section to read as follows:

Where a respondent is placed with a commissioner of social services or the office of children and family services pursuant to subdivision two, two-a, three or four of section 353.3 of this [article] part for a period of twelve or fewer months and resides in a foster home or in a non-secure or limited secure facility:

Where a respondent is placed with a commissioner of social services or the office of children and family services pursuant to subdivision two, two-a, three or four of section 353.3 of this [article] part for a period in excess of twelve months and resides in a foster home or in a non-secure or limited secure facility:

5. A petition for an initial or subsequent permanency hearing shall be filed by the office of children and family services or by the commissioner of social services with whom the respondent was placed. Such petition shall be filed no later than sixty days prior to the end of the month in which an initial or subsequent permanency hearing must be held, as directed in subdivision two of this section. The petition shall be accompanied by a permanency hearing report that contains the information required by subdivision seven of section 353.3, subdivision ten of this section if applicable, and subdivision (c) of section one thousand eighty-nine of this act regarding the

determinations that the court must make in accordance with subdivision seven of this section and section three hundred ninety-three of the social services law.

6. The respondent and his or her attorney shall be notified of the hearing and of the respondent's right to be heard. The permanency petition and accompanying report filed in accordance with subdivision five of this section shall be served on the respondent's attorney. The foster parent caring for the respondent or any pre-adoptive parent or relative providing care for the respondent, as well as the respondent's parents and other persons legally responsible for the respondent's care, shall be provided with notice of any permanency hearing held pursuant to this section by the office of children and family services or the commissioner of social services with whom the respondent was placed. Such foster parent, pre-adoptive parent and relative shall have the right to be heard at any such hearing; provided, however, no such foster parent, pre-adoptive parent or relative shall be construed to be a party to the hearing solely on the basis of such notice and right to be heard. The failure of the foster parent, pre-adoptive parent, or relative caring for the [child] respondent to appear at a permanency hearing shall constitute a waiver of the right to be heard and such failure to appear shall not cause a delay of the permanency hearing nor shall such failure to appear be a ground for the invalidation of any order issued by the court pursuant to this section.

(d) with regard to the completion of placement ordered by the court pursuant to section 353.3 or 355.3 of this part: whether and when the respondent: (i) will be returned to the parent or parents or other persons legally responsible for the respondent's care; (ii) should be placed for adoption with the local commissioner of social services filing a petition for termination of parental rights; (iii) should be referred for legal guardianship; (iv) should be placed permanently with a fit and willing relative; or (v) should be placed in another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the respondent if the respondent is age sixteen or older and (A) the office of children and family services or the local commissioner of social services has documented to the court: (1) the intensive, ongoing, and, as of

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

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

(i) a description of the plan to facilitate visitation, including any plans for visits and/or contact with the respondent's siblings;

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

(iii) a direction that the parent or parents or other person or persons legally responsible for the respondent's care shall be notified of any planning conferences, including those held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and their right to bring counsel or another representative or companion with them and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as required by paragraph (b) of subdivision seven of this section.

(b) Where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would further the respondent's needs and best interests and the need for protection of the community and would make it possible for the respondent to safely return home or to make the transition from foster care to successful adulthood, the court may include in its order a direction for a local social services, mental health or probation official or an official of the office of children and family services or office of mental health, as applicable, to provide or arrange for the provision of services or assistance to the respondent and his or her family. Such order regarding a local social services official shall not include the provision of any service or assistance to the respondent and his or her family that is not authorized or required to be made available pursuant to the county child and family services plan then in effect. In any order issued pursuant to this section, the court may require the official to make periodic progress reports to the court on the implementation of such order.

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

§6. Section 736 of the family court act is amended by adding a new subdivision (4) to read

as follows:

(4) In any proceeding under this article, the court shall cause a copy of the petition and notice of the time and place to be heard to be served upon any non-custodial parent of the child, provided that the address of such parent is known to or is ascertainable by the court. Service shall be made by ordinary first class mail at such parent's last known residence. The failure of such parent to appear shall not be cause for delay of the proceedings.

§7. Subdivision (a) of section 741 of the family court act, as amended by chapter 41 of the laws of 2010, is amended and a new subdivision (d) is added to such section to read as follows:

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

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

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

§8. Section 756 of the family court act is amended by adding two new subdivisions (f) and to read as follows:

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

(i) a description of the visitation plan, including any plans for visits and/or contact with the respondent's siblings. If the visitation plan has not yet been developed, then the visitation plan must be filed with the court and delivered to the presentment agency, attorney for the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than seven days from the date the disposition was made;

(ii) a service plan, if available. If the service plan has not yet been developed, then the service plan must be filed with the court and delivered to the presentment agency, attorney for the respondent and parent or parents or other person or persons legally responsible for the care of the respondent no later than seven days from the date the disposition was made; and

(iii) a direction that the parent or parents or other person or persons legally responsible for care of the respondent shall be notified of any planning conferences to be held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend

the conferences, and of their right to bring counsel or another representative or companion with them and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as required by paragraph (ii) of subdivision (d-1) of section seven hundred fifty-six-a of this part.

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

(g) Where the respondent has been placed pursuant to this section, the local commissioner of social services or the relative or suitable person with whom the respondent has been placed shall submit a report to the court, the attorney for the respondent and the presentment agency, if any, not later than fifteen days prior to the conclusion of the placement period, which, among other information, contains a plan for the release of the respondent to the custody of his or her parent or parents or other person or persons legally responsible for the respondent's care. The plan for respondent's release shall provide as follows:

(i) If the respondent is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma following release, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking in conjunction with the local education agency to ensure the immediate enrollment of the respondent in an appropriate school or educational program leading to a high school diploma within five business days of release or, if such release occurs during the summer recess, immediately upon the commencement of the next school term. The placement agency shall ascertain the school calendar from the school district and shall, to the extent possible, work with the school district so that the timing of respondent's release from the program and enrollment in

school are minimally disruptive for the respondent and further his or her best interests. Not less than fourteen days prior to the respondent's release, the placement agency shall notify the school district where the respondent will be attending school and transfer all necessary records, including, but not limited to the respondent's course of study, credits earned and academic record.

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

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

§9. Subdivisions (a), (b), (d) and paragraph (v) of subdivision (d-1) of section 756-a of the family court act, as amended by section 14-a of part K of chapter 56 of the laws of 2019, are amended, subdivision (d-1) of such section is amended by adding a new paragraph (vi) and three new subdivisions (j), (k) and (l) are added to such section to read as follows:

(a) In any case in which the [child] respondent has been placed pursuant to [paragraph (iii) of paragraph (a) of] section seven hundred fifty-six of this part, the [child] respondent, the person with whom the [child] respondent has been placed or the commissioner of social services may petition the court to extend such placement as provided for in this section. Such petition, accompanied by a permanency report, shall be filed at least fifteen days prior to the expiration of

the initial placement and at least thirty days prior to the expiration of any additional placement authorized pursuant to this section, except for good cause shown, but in no event shall such petition and permanency report be filed after the original expiration date. The permanency hearing report shall contain the information required by subdivision (c) of section one thousand eighty-nine of this act and shall contain recommendations and such supporting data as is appropriate regarding the determinations that the court must make in accordance with subdivision (d-1) of this section. The permanency hearing report shall include, but is not limited to, a plan for the release of the respondent to the custody of his or her parent or parents or other person or persons legally responsible for the respondent's care, or to another permanency alternative as provided in paragraph (iv) of subdivision (d-1) of this section. For purposes of this paragraph, "placement agency" shall refer to the commissioner of social services or an authorized agency under contract with the commissioner of social services with whom the respondent has been placed. The release plan shall provide as follows:

(i) If the respondent is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma following release, such plan shall include, but not be limited to, the steps that the placement agency has taken and will be taking in conjunction with the local education agency to ensure the immediate enrollment of the respondent in an appropriate school or educational program leading to a high school diploma within five business days of release or, if such release occurs during the summer recess, immediately upon the commencement of the next school term. The placement agency shall ascertain the school calendar from the school district and shall, to the extent possible, work with the school district so that the timing of respondent's release from the program and enrollment in school are minimally disruptive for the respondent and further his or her best interests. Not less than fourteen days prior to the respondent's release, the placement agency shall notify the school district where the respondent will be attending school and transfer all necessary records, including, but not limited to the respondent's course of study, credits earned and academic record.

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

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

(b) The court shall conduct a permanency hearing concerning the need for continuing the placement. The [child] respondent, the person with whom the [child] respondent has been placed and the commissioner of social services shall be notified of such hearing and shall have the right to be heard thereat. A copy of the petition and accompanying permanency hearing report shall be served on the respondent's attorney and upon the respondent's parent or parents.

(d)(i) At the conclusion of the first permanency hearing, the court may, in its discretion, order one extension of the placement for not more than six months;

(ii) At the conclusion of the second permanency hearing, the court may, in its discretion, order one extension of placement for not more than four months unless:

(A) The attorney for the child, at the request of the child, seeks an additional length of stay for the child in such program. If a request is made pursuant to this subparagraph, the court shall determine whether to grant such request based on the best interest of the child; or

(B) The court finds that extenuating circumstances [exists] exist that necessitate that the

child be placed out of the home.

(iii) An extension of placement under this section may and, if the placement is in a qualified residential treatment program pursuant to subdivision (h) of this section or section 756-b of this article, shall include a period of post-release supervision and aftercare.

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

(vi) with regard to the placement or extension of placement ordered by the court pursuant to subdivision (d) of this section, the steps that must be taken by the agency with which the respondent is placed to implement the plan for release submitted pursuant to paragraph (i) of subdivision (a) of such section, the adequacy of such plan and any modifications that should be made to such plan.

(j) If the order from the permanency hearing extends the respondent's placement or if the respondent continues in placement under a prior order, the order or an attachment to the order incorporated into the order by reference shall include:

(i) a description of the plan to facilitate visitation, including any plans for visits and/or contact with the respondent's siblings;

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

(iii) a direction that the parent or parents or other person or persons legally responsible for the respondent's care shall be notified of any planning conferences, including those held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and their right to bring counsel or another representative or companion with them and, further, that the respondent, if fourteen years of age or older, be involved in the development of plans as required by paragraph (ii) of subdivision (d-1) of this section.

(k) Where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would further the respondent's needs and best interests and would make it possible for the respondent to safely return home or to make the transition from foster care to successful adulthood, the court may include in its order a direction for a local social services, mental health or probation official or an official of the office of mental health, as applicable, to provide or arrange for the provision of services or assistance to the respondent and his or her family. Such order regarding a local social services official shall not include the provision of any service or assistance to the respondent and his or her family that is not authorized or required to be made available pursuant to the county child and family services plan then in effect. In any order issued pursuant to this section, the court may require the official to make periodic progress reports to the court on the implementation of such order.

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

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

IV. Future Matters:

Under the leadership of the Committee's co-chairs, Hon. Michele Pirro Bailey, Acting Supreme Court Justice of the Integrated Domestic Violence Part and Judge of the Family Court, Onondaga County, and Hon. Peter Passidomo, Judge of the Family Court, Bronx County, the Family Court Advisory and Rules Committee had a notably productive year in 2022, notwithstanding the substantial challenges posed by the coronavirus pandemic. The Committee recommended promulgation of numerous new and revised forms that have been posted on the Unified Court System's Internet web-site for ready public access (http://www.nycourts.gov). It supported the recommendation of the Commission on Parental Legal Representation to promulgate a Family Court rule regarding financial eligibility for appointed counsel [22 N.Y.C.R.R. §205.19]. Members of the Committee served as faculty for several judicial seminars regarding new statutes, including the *Family First Prevention Services Act,* the *Marijuana Regulation and Taxation Act,* the comprehensive revision of the law regarding the State Central Registry of Child Abuse and Maltreatment, the *Child-Parent Security Act* and the support of disabled adult dependents law, as well as seminars addressing domestic violence and recent child welfare case law.

In addition to reviewing legislative proposals, the Committee will continue its comprehensive review of the Family Court rules with a view towards recommending possible revisions. The Committee will consider lessons learned from the Family Court's virtual proceedings during the pandemic, including any innovative practices that should be continued. In light of the comprehensive report issued in October, 2020, by Jeh Johnson, Special Advisor on Equal Justice in the Courts, the Committee will continue its consideration of the racial justice implications of the issues that it examines and the recommendations that it offers. Further, the Committee's five subcommittees are expected to be actively engaged in the following projects, among others, during the coming year:

- Child Welfare: Implementation of the Federal and State *Family First Prevention Services Act*, which became effective in New York State in September, 2021, and the new Family Court rule implementing *FFPSA* , 22 N.Y.C.R.R. §205.18, continue to form a major focus of the Subcommittee's attention. The Subcommittee will also consider possible changes to statutes and policies and will continue its efforts to monitor implementation of additional legislation and regulations in the child welfare area with a view toward enhancing and expediting permanency efforts. Once the United States Supreme Court rules on the pending case of Brackeen *v.* Haaland, the Subcommittee will address any State-level changes that may need to be made regarding the federal *Indian Child Welfare Act.*

• Juvenile Justice: With the increase in the minimum age for juvenile delinquency proceedings, which became effective December 29, 2022, counties were obligated to provide alternative services to address crimes by young children. The adequacy of these specialized services, as well as mental health services for all age groups, will be a concern for the Subcommittee. The Subcommittee will also review implementation of the *Family First Prevention Services Act* regarding congregate care placements in juvenile delinquency and PINS cases, as well as the strict durational limits and cessation of State funding for out-of-home care in PINS cases, which took effect in 2020. The Subcommittee will continue to focus on the myriad questions and issues raised by the "raise the age" legislation, in particular, questions regarding detention, jail placements of youth, services upon release and alternatives to the current juvenile and adolescent offender laws, including the approaches in other states of commencing all cases in Family Court with a provision for transfer of serious cases involving the oldest adolescents to the adult system. Extension of the criminal justice discovery, sealing and expungement reforms to juvenile delinquency proceedings will continue to be a priority for the Subcommittee, as will the issue of inter-county juvenile delinquency proceedings, including the absence of adjustment consideration for foster care youth who commit offenses in counties in which they have been placed out of their homes.

• Child Support and Parentage: The Subcommittee will consider changes to the child support objection and support violation processes, as well as a continuation of its examination of issues engendered by the pandemic, particularly those involving self-represented litigants. Additionally, the Subcommittee will monitor implementation of the support of disabled adult dependents law [L. 2021, c. 437] and the gestational surrogacy and parentage provisions of the *Child-Parent Security* Act enacted in conjunction with the New York State budget [L.2020, c.56, Part L], continuing its assistance in presenting seminars and in developing forms and protocols. Child support ramifications of cases of joint or shared custody will remain a priority, as will issues regarding expansion of paternity proceedings to encompass parentage. The Subcommittee will continue to explore possible improvements to procedures regarding drivers' license suspensions, inter-county transfers of cases and approaches to child support proceedings involving non-wage income and self-employed individuals.

• Custody, Visitation and Domestic Violence: In light of the 2022 report of the Governor's Blue-ribbon Forensics Commission and the likely reintroduction of "Kyra's Law," the Subcommittee expects to focus its attention on issues regarding domestic violence, use of forensic experts and gaps in the availability of supervised visitation in custody and parental access cases. In the area of domestic violence, the Subcommittee will continue to monitor service, concurrent criminal jurisdiction, implementation of firearms statutes and other issues regarding orders of

protection, as well as means of protecting abuse victims from contact with abusers in court-related programs.

• Forms and Technology: The Subcommittee will continue to propose revisions of uniform forms as necessitated by new legislation, the increase in digitalization of court records and the vastly enhanced e-filing initiatives undertaken in light of the pandemic. The Subcommittee will continue its efforts to simplify forms and make them gender-neutral and inclusive.

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The Committee, which includes experienced judges, support magistrates, Family Court clerks and practitioners drawn from throughout New York State, brings a variety of valuable perspectives to the task of addressing the crushing workload and complex problems facing the Family Court. The substantial expertise of the Committee's active and diverse membership contributed to significant accomplishments in 2022 and with the substantial agenda described above, the Committee hopes to compile a similar record of achievement in 2023 as it grapples with the many difficult issues within its jurisdiction during these most difficult of times.

In conclusion, the Committee pledges its continuing deep dedication in 2023 to improving the functioning of the Family Court and the quality of justice it delivers to children and families in New York State.

Respectfully submitted,
Hon. Michele Pirro Bailey, Co-chair
Hon. Peter Passidomo, Co-chair
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Hon. Catherine DiDomenico
Hon. Alicea Elloras
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