# Report of the Family Court Advisory and Rules Committee

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

January 2005

# 2005 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

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

### A. Legislation Enacted in 2004

Two of the Committee's legislative proposals, one regarding child support and paternity and one regarding juvenile delinquency, were enacted during the 2004 legislative session:

_____• **Restitution in juvenile delinquency proceedings [Laws of 2004, ch. 317]**: This measure provides that adjudicated juvenile delinquents may be ordered to pay restitution, not only for damage to property, but also for unreimbursed medical expenses. It requires victim impact statements prepared for use at juvenile delinquency dispositional hearings to include the amount of unreimbursed medical expenses, if any, incurred by victims to the extent that the information is available to the Family Court without delaying dispositional proceedings. **Effective: Nov. 8, 2004.**

• **Authority of Family Court Support Magistrates [Laws of 2004, ch. 336]**: This measure resolves ambiguities in the statutory framework governing child support magistrates and eliminates several limitations on their authority that impede the expeditious, comprehensive resolution of child support and paternity proceedings. The measure amends the Civil Practice Law and Rules and Family Court Act to clarify that Family Court support magistrates and judges are authorized to adjudicate the vast majority of paternity proceedings, contested as well as uncontested, with the exception of those involving a defense of equitable estoppel, and would explicitly be empowered to issue subpoenas to produce prisoners. Further, in order to expedite enforcement of child support orders by permitting prompt confirmation hearings by judges, support magistrate willfulness determinations that include recommendations for incarceration are not subject to the 30-day objection process, but have no force or effect until and unless confirmed by Family Court judges. **Effective: Nov. 8, 2004.**

### B. New and Modified Legislative Proposals

The Committee is proposing a comprehensive legislative agenda, including 16 new and modified proposals and 25 proposals recommended in prior years. The new and modified proposals address child neglect and abuse, foster care, termination of parental rights, child support, paternity, family offense and interstate custody and visitation proceedings, providing needed clarification and enhancing the Unified Court System's ability to handle these cases effectively. In its agenda of new and modified proposals, the Committee is recommending the following:

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

2. Stays of administrative fair hearings regarding child abuse and neglect reports: The parallel judicial and administrative systems for determining the validity of reports of child abuse and maltreatment at times operate at cross-purposes and under different time constraints and produce inconsistent results. The Committee is proposing a measure to ensure that in cases in which parallel Family Court proceedings are in progress, the administrative fair hearing process would not precipitously advance without awaiting the results of the Family Court matter. The measure would require that, in a case in which a Family Court child protective proceeding is pending regarding a child named in a child abuse or maltreatment report, the time frames for requesting an administrative amendment of the report or fair hearing, as well as the time frame for the administrative agency to resolve the fair hearing, would not begin to run until the disposition or the conclusion of a period of adjournment in contemplation of dismissal in the Family Court matter.

3. Termination of parental rights on the ground of homicide: New York State's strong public policy against allowing individuals convicted of murdering members of their family from having custody or visitation with their surviving children, embodied in the *Lee Ann Cruz Act* of 1998, is reflected incompletely in New York State's termination of parental rights statute. The Committee is proposing a measure that would specifically include, as a ground for termination of parental rights, homicide of the child's other parent, unless the homicide was committed by a victim of domestic violence where the violence was a contributing factor to the homicide. Termination of parental grounds would also include homicide of another child in the home, not simply a sibling of the child, where the perpetrator was a person legally responsible for the child, as the term is broadly defined in Article 10 of the Family Court Act. Finally, the measure would repeal the anomalous provision of the Social Services Law that requires that, while a termination of parental rights petition for severe abuse or homicide must presumptively be filed immediately upon the Family Court's issuance of an order dispensing with the agency's obligation to expend reasonable efforts to reunite the family, the petition may not be heard until the child has been in foster care for a period of one year.

. 4. Orders of protection in termination of parental rights and permanency proceedings: While permanency for children in foster care is often achieved with the understanding, agreed- upon by everyone involved, that some contact will continue with the child's birth family, there have been instances in which continuing contact with a birth parent – for example, threatening or stalking

behavior by a disturbed birth parent – has endangered the child and destabilized the child's new family. Since prospective adoptive or foster parents and birth parents do not meet the definition of family contained in Article 8 of the Family Court Act, the current statutory structure provides no vehicle to protect these children and their new families short of a criminal prosecution for a non-family offense. The Family Court Advisory and Rules Committee is proposing a measure to create a Family Court remedy for this problem by authorizing orders of protection to be issued in conjunction with the disposition of termination of parental rights cases and permanency hearings regarding children freed for adoption. Additionally, the measure would permit orders of protection in child protective proceedings to require the respondent to stay away, *inter alia*, from a "person with whom the child has been paroled, remanded, placed or released by the court..." Finally, the proposal would make a technical correction to the statutory citations in Family Court Act §1072 regarding orders of protection and supervision.

_____5. Clarification of permanency hearings regarding children freed for adoption: Experience under the comprehensive reform of permanency hearings regarding children who have been freed for adoption, which was enacted in 2002, has revealed two areas in which further statutory clarification would be helpful. The Committee is proposing two technical amendments regarding the status and definition of freed children to clear up lingering ambiguities. First, the measure would clarify that where the Family Court has stated its determination that guardianship and custody of a child will be committed as a result of a finding of termination of parental rights, the child would be deemed to continue in foster care, notwithstanding the fact that the formal written order may not yet have been entered. Second, the measure would clarify that the provisions regarding reviews of children freed for adoption apply only to children whose rights have been terminated regarding both parents, whether by a termination petition, by a surrender or by the death of one or both parents. The provisions would not apply to children who continue to have a parent whose consent to adoption is required, pursuant to section 111 of the Domestic Relations Law. Such children would continue to be covered by the permanency hearing and foster care placement provisions under which they were placed, that is, Article 10 of the Family Court Act or section 358-a or 392 of the Social Services Law.

_____6. Clarification of authority of support magistrates in paternity proceedings: In United States *v.* Kerley, -F.Supp.2d-, 2004 WL 1555119 (S.D.N.Y., 2004), *app. pending*, (2d Cir., 2005), the United States District Court, Southern District of New York, dismissed a prosecution under the *Deadbeat Parents Punishment Act* [18 U.S.C. §228], based upon its assumption that the Family Court support magistrate, who had issued the underlying child support order after a Family Court judge had adjudicated paternity, had no jurisdiction to do so. In order to eliminate all doubts about the authority of support magistrates, the Committee is proposing a measure that would clarify that Family Court judges, after adjudicating contested paternity matters, would be authorized either to resolve outstanding issues of child support themselves or to refer the proceedings to support magistrates for issuance of final orders of child support.

7. Duration of orders of probation in family offense cases: In 2003, the Legislature lengthened the permissible duration of orders of protection in Family Court family offense cases from one to two years and, where aggravating circumstances have been found, from three to five years. Laws of 2003, chapter 579. However, concomitant changes were not made to Family Court Act

§841( c), which authorizes respondents in such cases to be placed on probation as a disposition of an Article 8 proceeding. The Family Court Advisory and Rules Committee is proposing a measure to remedy that disparity by authorizing the Family Court to place a respondent on probation for a period of up to two years or, where an order of protection pursuant to Family Court Act §842 has been issued for five years, a period of up to five years.

8. Expediting appeals in child welfare cases: Achievement of permanent homes promptly for children in foster care requires expeditious resolution of cases, not only at the trial level, but also at the appellate level. The National Council of Juvenile and Family Court Judges, the American Bar Association and, most recently, the National Center for State Courts in a comprehensive study have recommended a variety of initiatives to ensure that appeals in child-related matters, most particularly, child protective and termination of parental rights proceedings, be handled on an expedited basis. As part of the statewide case reviews conducted as part of Chief Judge Judith Kaye's "Adoption Now" initiative, delays in termination of parental rights appeals have frequently been identified as barriers to prompt adoption. For children ultimately returned home to their parents, such delays can have a similarly damaging effect. The Committee, therefore, is proposing a measure to mitigate various sources of delay on appeal – to clarify the automatic applicability of preferences; to simplify the process for assignment of counsel and granting of poor person relief on appeal where counsel has been assigned in Family Court; to codify the intensive case management and scheduling order process currently in use in some parts of New York State; and to impose more rigorous enforcement of existing statutory time-frames for preparation of transcripts. Significantly, to underscore the statutory intent to expedite appeals, the language has been strengthened from the proposal's 2004 version.

9. "One Family/One Judge": Continuity of court in termination of parental rights, surrender and adoption proceedings: Children caught in the limbo of foster care must be given permanent homes – preferably through return to their families, but otherwise through adoption or other alternative – as quickly as possible, a requirement for New York State's eligibility for significant federal foster care funding under the federal *Adoption and Safe Families Act* and a critical mandate for the healthy development of the children themselves. Consistent with national recommendations implemented in New York's "Model Permanency Planning Parts," the Committee's proposal would reduce one significant source of delay by promoting continuity of the court and the judge. It would provide a preference for filing an adoption proceeding in the same court and to be heard, to the extent practicable, before the same judge, where the child is under the jurisdiction of the Family Court as a result of a Family Court child protective, foster care, surrender or termination of parental rights proceeding. If filed in a different court, the court in which the case is filed would be required to ascertain promptly whether the child is under the jurisdiction of a Family Court and, if so, which Court. The Court in which the adoption is pending would then be required to communicate promptly with the judge who presided over the Family Court litigation and to defer to that judge's determination as to the exercise of jurisdiction over the adoption. Factors to be considered in the determination would include, among others, the relative familiarity of each court with the facts and circumstances of the case, the convenience of each court to the residence of the adoptive parents, the ability of the law guardian to continue to represent the child and the relative ability of each court to determine the adoption proceeding expeditiously. Similar preferences would be provided to assure continuity in surrender and termination of parental rights proceedings.

10. Educational and early intervention services for children in foster care: New federal mandates require that all children under the age of three who are the subjects of substantiated cases of child abuse or neglect be referred for early intervention services and that all children in foster care, who were in receipt of special education services prior to their entry into care, continue to receive services under their "Individualized Education Plans" until new IEP's are developed and implemented. In light of these new mandates and recognizing that children in foster care are at substantial risk for significant educational impairments, the Committee is proposing legislation to ensure that critical pre-school, early intervention, special education, education and vocational services are provided to all children whose permanency planning is being monitored by the Family Court. The measure would require child protective agencies to include information in permanency plans submitted pursuant to the *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7] regarding steps taken and planned to ensure the prompt enrollment of foster children in pre-school and school programs, immediate transfer of necessary records and referral for evaluation of eligible children for "early intervention program" services. The measure would require the New York State Education Department to promulgate regulations requiring school districts to cooperate with agencies' education efforts, to retain children in the same school to the extent possible and, consistent with the recent federal re-authorization of the *Individuals with Disabilities in Education Act*, to promptly transfer records where necessary. It would require children under three adjudicated for child abuse and neglect to be referred for early intervention services, as mandated by the federal *Child Abuse Prevention and Treatment Act*. Further, the proposal would address the critical educational deficiencies of persons in need of supervision (PINS) upon release from placement that were identified by the Vera Institute of Justice.[1] Similar to the juvenile delinquency pre-release provisions of Laws of 2000, ch. 181, it would require submission of pre-release reports in PINS cases that delineate steps for the prompt enrollment of PINS in school or vocational programs upon their release from placement.

11. Criminal history and child abuse screening of individuals with whom children are placed: One significant, albeit unsurprising, side effect of the implementation in New York State of the federal *Adoption and Safe Families Act of 1997* [Public Law 105-89] has been the increasing reliance upon alternatives to foster care, including direct placements of children with "suitable persons" and appointment of non-parent guardians and custodians. Unlike the comprehensive provisions requiring criminal records and child maltreatment screening of prospective foster and adoptive parents, pursuant to Social Services Law §378-a, comprehensive screening is not required in direct placement, custody and guardianship proceedings. The Committee is thus proposing legislation to remedy these gaps. The proposal would require courts to direct criminal records and child abuse screening of individuals accepting direct placements of children into their homes and of non-parents applying for custody and it would authorize the courts to direct such screening of individuals over the age of 18 residing in their homes. While the Surrogate's Court Procedure Act provides for child maltreatment screening of prospective guardians, the measure would direct criminal records screening of prospective guardians and, in the courts' discretion, of individuals over the 18 in their homes.

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[1] *See Changing the PINS System in New York: A Study of the Implications of Raising the Age Limit for Persons in Need of Supervision (PINS),* p.34 (Vera Inst., Sept., 2001).

12. Requirements for expeditious permanency planning for children in foster care: Consistent with the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7], the Committee is proposing legislation that would require local departments of social services and, as applicable, authorized child care agencies, to gather information necessary for the formulation and effectuation of permanency plans promptly when a child enters care and on an ongoing basis thereafter. The proposal would amend Family Court Act §1017 to require child protective agencies, in abuse and neglect cases involving children removed from their homes, to conduct immediate investigations to locate suitable non-custodial parents, not simply other relatives, with whom the children may reside. Information obtained in such investigations and that which is obtained in diligent searches for parents of abandoned infants pursuant to Family Court Act §1055 would be recorded in the child's Uniform Case Record. The proposal would also amend section 384-a of the Social Services Law to require agency officials to obtain information from parents executing a voluntary placement instrument regarding the children's other parents, any individuals to whom the parent placing the children had been married at the time of conception or birth and any other individuals who would be entitled to notice of a proceeding to terminate parental rights. Information thus obtained would likewise be recorded in the child's Uniform Case Record. Significantly, to broaden the pool of potential resources available to assist in planning for children, Family Court Act §1035 would be expanded to include additional individuals entitled to notice of pending child protective proceedings.

13. Determinations of the Family Court regarding children in foster care: This proposal would amend Family Court Act §1039-b to provide that representatives of authorized agencies and law guardians, as well as social services officials, would have standing to initiate motions for orders to dispense with the requirement of reasonable efforts for the reunification of children with their families. Conforming the various provisions for such orders to the burden of proof required for termination of parental rights proceedings, it would clarify that the Family Court's determinations to dispense with reasonable efforts would have to be based upon clear and convincing evidence. Finally, the proposal would incorporate the provision of the Social Services Law that defines "diligent efforts" into the reasonable efforts provisions. Consistent with Matter of Marino S., 100 N.Y.2d 361, 372 (2003), *cert. denied,* 124 S.Ct. 834 (2003), the measure provides that if the court issues an order dispensing with the requirement of reasonable efforts, the order has the effect of dispensing as well with the element of proof of "diligent efforts" in termination of parental rights proceedings.

14. Modification of orders of child support: The enactment of the "cost of living adjustment" (COLA) provisions in the child support statute, pursuant to the federal *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* [Public Law 104-193], has created a disparity in the ability of litigants in child support matters to obtain modifications of child support orders. Those cases covered by the COLA provisions – cases in which custodial parents are on public assistance, which are adjusted every three years automatically, and cases in which custodial parents request child support services in accordance with Title IV-D of the federal *Social Security Act*, which are adjusted upon request – are subject to modification every two years. In accordance with the Court of Appeals decision in Tompkins County Support Collection Unit on behalf of Linda S. Chamberlin *v.* Boyd M. Chamberlin, 99 N.Y.2d 328 (2003), a challenge to a COLA brings up the whole child support order for review, not simply the COLA itself. Those cases not covered by the COLA provisions are limited to the traditional prerequisites for modification, a change in circumstances or newly discovered

evidence. The Committee proposes to remedy this disparity by authorizing applications to modify child support orders every three years, unless the parties have specifically opted out in a written agreement or stipulation to a court order of child support.

15. Orders of protection in child abuse and neglect proceedings: Filling a glaring gap in the otherwise comprehensive automated domestic violence registry, the Committee is resubmitting its proposal to require that orders of protection in child protective proceedings be entered onto the statewide automated registry. This would ensure that law enforcement agencies and the courts would have ready access to available information regarding such orders. The proposal also accords discretion to the Family Court, where "good cause" is demonstrated, to issue orders of protection in Article 10 cases that may continue until the 18th birthday of the youngest child for whom neglect or abuse has been found. This parallels the permissible duration of orders of protection in custody cases and would eliminate the burden imposed upon domestic violence victims and the courts by the necessity for annual extensions of protective orders. This measure would greatly enhance the protections available to victims of domestic violence, as well as the usefulness of the registry as a resource for law enforcement agencies and the courts. Finally, the proposal would make a technical correction to the statutory citations in Family Court Act §1072 regarding orders of protection and supervision.

16. Service by mail and inter-court communication in *Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA]* cases; technical amendment to personal jurisdiction provision of the Civil Practice Law and Rules [CPLR]: The proposal would amend the *UCCJEA* to: (1) permit service of process out of state by mail with delivery confirmation, by means specified in CPLR 313 or by means directed by court; (2) require telephone testimony or depositions to be recorded and preserved for transcription; and (3) clarify that communications between courts are mandatory in certain circumstances. Further, the proposal would make a technical amendment to section 302(b) of the CPLR, that is, to add cross-references to the *Uniform Interstate Family Support Act* [Art. 5-B of the Family Court Act] and the *UCCJEA* [Art. 5-A of the Domestic Relations Law].

C. Previously Endorsed Measures

The Committee is recommending resubmission of the following 25 proposals:

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

2. Clarification of Time-frames for Preliminary Proceedings in Child Abuse and Neglect

Cases: The federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7] impose stringent time-frames for preliminary determinations regarding all children removed from their homes and placed into foster care, regardless of whether the removals were on consent or not. As delays have been frequent in child abuse and neglect cases in which children were removed from their homes with the consent of the parent or parents, the Committee is proposing legislation to clarify that petitions in such cases must be filed within three days and that the initial determination of whether to continue foster care must be made within three days of the filing date. Additionally, consistent with the strict construction accorded the pre-petition removal provisions of the Family Court Act by the Court of Appeals, in its recent decision in Nicholson *v.* Scoppetta, - N.Y.3d -, 2004 WL 2381177 (2004), the measure would clearly delineate the filing and judicial application requirements applicable to those provisions.

3. Requirements for Notices of Indicated Child Maltreatment Reports and Changes in Foster Care Placements: Absolutely essential to the effort to expedite permanency for children in furtherance of the goals of the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7], the Committee is resubmitting its proposal to assure that the Family Court, the parties and law guardians are promptly informed of any changes in placement that may warrant Court intervention. Equally critical, in an effort to effectuate the *ASFA* precept that safety of the child is paramount, the measure would require notice of any indicated child abuse or maltreatment reports as well. The proposal would amend Family Court Act §§1055 and 1055-a, as well as Social Services Law §§358-a and 392, to require an agency with whom a child has been placed, either voluntarily or as a result of an abuse or neglect finding, or to whom guardianship and custody has been transferred as a result of the child being freed for adoption, to report any change in the child's placement status within 30 days to the Court, the parties and the law guardian, and to report any indicated reports of child abuse or maltreatment. Changes of placement would include, but not be limited to, cases in which the child has been moved from the foster or pre-adoptive home or program into which he or she has been placed, cases in which the foster or pre-adoptive parents move out of state with the child, and, with respect to children not freed for adoption, cases in which the child has been discharged from foster care on a trial or final basis.

4. Clarification of child protective permanency hearing provisions: The proposal would amend Family Court Act §1055(b) to reorganize and simplify the issues to be determined at a permanency hearing in an abuse or neglect proceeding, sharpening the focus upon the determinations required by the federal and New York State *Adoption and Safe Families Act* by eliminating extraneous and duplicative provisions.

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

guardianship and custody of the child or to extend the term of the suspended judgment.

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

7. Continuing representation of juveniles in post-dispositional juvenile delinquency and PINS proceedings: New York State statutes, as well as federal regulations, implementing the federal *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7] make clear that the *ASFA* permanency planning mandates apply to all children in foster care, including those in care as a result of juvenile delinquency and PINS petitions. The reauthorization of the federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273] in 2002 required states to certify their compliance with the *Adoption and Safe Families Act* as a prerequisite, not only for federal foster care assistance pursuant to Title IV-E of the *Social Security Act* [42 U.S.C.], but also for eligibility for federal juvenile justice funding. 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. The Committee is thus resubmitting its proposal, similar to section 1016 of the Family Court Act, to require that appointments of law guardians for children in placement in juvenile delinquency and PINS proceedings continue for the duration of the placements.

8. Permanency hearing requirements in juvenile delinquency and persons in need of supervision (PINS) proceedings: The reauthorization of the federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273] in 2002 made compliance with the *Adoption and Safe Families Act* a requirement not only for New York State to receive federal foster care assistance pursuant to Title IV-E of the *Social Security Act* [42 U.S.C.], but also for eligibility for federal juvenile justice funding. This proposal, therefore, extends the *ASFA* requirements to juvenile delinquency and PINS proceedings in order to provide the Family Court and litigants with the information needed to fulfill these requirements. The measure would require that dispositional and permanency hearing orders in juvenile delinquency and PINS proceedings involving foster care placements include: a description of the visitation plan between the juvenile and his or her parent or legally-responsible adult; a service plan designed to fulfill the permanency goal for the juvenile; a direction that the parent or other person legally responsible be notified of, and be invited to be present at, any planning conferences convened by the placement agency with respect to the child; and a warning that if the juvenile remains in placement for 15 out of 22 months, the agency may be required to file a petition to terminate parental rights. A copy of the court order and service plan would have to be provided to the parent or other person legally responsible for the child's care.

9. Service of juvenile delinquency petitions upon non-custodial parents: Just as in child abuse, child neglect and persons in need of supervision (PINS) proceedings, so, too, in juvenile delinquency proceedings the child's non-custodial parent may be a critical player in achieving an

appropriate disposition. Sometimes a non-custodial parent or his or her extended family may provide appropriate placement resources for a child, both temporarily during the pendency of the action and on a more extended basis at disposition, or may at the very least provide helpful participation that may positively influence the child's behavior. Since the permanency planning mandates of the *Adoption and Safe Families Act* apply in juvenile delinquency cases, involvement by both custodial and non-custodial parents may be important. The Committee, therefore, proposes that a summons and copy of the petition in juvenile delinquency cases should be served upon non-custodial, as well as custodial, parents and other persons legally responsible.

10. Dispositional and pre-dispositional alternatives and procedures for admissions and violations of orders of probation and suspended judgment in persons in need of supervision (PINS) cases: Consistent with the recent enactment of limitations on the use of detention and placement in persons in need of supervision (PINS) cases, the Committee proposes to require the Family Court to consider alternatives to detention, including conditional release, prior to imposition of pre-dispositional detention. Further, the proposal would require the Court to order the "least restrictive available alternative" as its disposition, similar to the requirement in juvenile delinquency cases [Family Court Act §352.2(2)(a)]. Intensive probation supervision, an effective means of avoiding resort to costly out-of-home placements, would be included as one of the alternatives, to the extent available in a particular county. The proposal would also add a new Section 743 to the Family Court Act, establishing a judicial allocution procedure for accepting admissions in PINS cases, analogous to the allocution provision in juvenile delinquency cases [Family Court Act §321.3]. Finally, it would delineate the procedures for violations of suspended judgment and probation, drawing upon existing juvenile delinquency provisions. *See* FCA §§360.2, 360.3.

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

12. Violations of Adjournments in Contemplation of Dismissal and Orders of Conditional Discharge in Juvenile Delinquency Cases: This proposal cures a gap in the post-dispositional procedures applicable in juvenile delinquency cases that was identified in two appellate decisions. First, the proposal clarifies that, as in probation violation cases, the period of a conditional discharge is tolled during the pendency of a violation petition. *See* Matter of Donald MM, 231 A.D.2d 810, 647 N.Y.S.2d 312 (3rd Dept., 1996). Second, the proposal delineates the procedures and time frames for restoring cases adjourned in contemplation of dismissal to the calendar for an adjudicatory or dispositional hearing, whichever is applicable. *See* Matter of Edwin L., 88 N.Y.2d 593 (1996).

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

14. Family Court authority to recommend that the New York State Office of Children and Family Services conduct investigations regarding agency compliance: Building on the successful results achieved in reviews of children freed for adoption, the Committee proposes that in all cases involving a foster care placement, extension or periodic review, the Court, as part of its disposition, would have discretion to recommend to the New York State Office of Children and Family Services that it investigate the facts and circumstances concerning the discharge of responsibilities by local social services districts and compliance with applicable statutes and regulations, pursuant to Social Services Law §395. While generally optional, this recommendation would be required in any case in which the Court has made a determination, pursuant to the federal and state *Adoption and Safe Families Act* [Public Law 103-89; Laws of 1999, ch.7], that reasonable efforts, where appropriate, should have been, but were not, made to prevent the child's placement in foster care or to facilitate reunification of the child with his or her family.

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

16. Authority of Supreme and Family Court to direct investigations and filing of child protective petitions in custody cases: The ability of Family Court judges to call upon local social services districts to perform child protective investigations and to file child protective petitions, pursuant to Family Court Act §§817 and 1034, has often proven invaluable both to protect children and to facilitate an accurate determination of their "best interests." Building upon these provisions, the Committee is again proposing that both the Family Court Act and Domestic Relations Law be amended to authorize Supreme and Family Court judges in the course of pending custody cases to direct investigations pursuant to Family Court Act §1034 and, if the investigations determine that any allegations are "indicated," to direct the child protective agency to file child protective petitions with respect to those allegations. Prior to any direction to file a petition, the agency, as well as the subject of the allegations, would have to be given notice and an opportunity to be heard and the Court would have the alternative options of directing the law guardian or other individual to file the petition. *See* Family Court Act §1032(b).

17. Child support obligations of indigent support obligors: Recognizing that current law creates an anomaly in calculating the child support obligation for non-custodial parents whose income would be reduced below the poverty level, the Committee proposes simplification of the standard. Significantly, the Committee's proposal would codify the decision of the Court of Appeals in Rose *v.*

Moody, 83 N.Y.2d 65 (1993), *cert. denied*, 511 U.S. 1084 (1994), which held the inflexible minimum $25 per month child support obligation unconstitutional.

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

19. Child support and paternity: The Committee is again proposing a comprehensive set of amendments to the child support and paternity legislation enacted in 1997 [Laws of 1997, ch. 398]. The 1997 legislation, enacted in order to implement the federal *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* [Public Law 104-193], was ambiguous in several procedural respects and failed to address the important question of what procedural safeguards are necessary in cases involving paternity acknowledgments by parents who are themselves under the age of 18. The proposal requires such acknowledgments to be executed before a judge or support magistrate and clarifies procedures applicable to "cost of living adjustment" proceedings and petitions to challenge administrative genetic testing directives.

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

21. Access by probation to order of protection registry for purposes of investigations in family offense and various Family Court proceedings: In light of the importance of evidence of domestic violence to determinations in custody, visitation, guardianship and child protective proceedings, the Committee is again proposing legislation that would allow local probation departments to have access to the statewide automated registry of orders of protection and related warrants for pre-dispositional investigations conducted in these categories, as well as family offense, proceedings. The measure would also explicitly authorize, but not require, courts to request probation departments to conduct pre-dispositional or pre-sentence investigations in criminal and Family Court family offense cases.

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

23. Unauthorized disclosure of information from statewide automated registry of orders of protection: As the statewide automated registry of orders of protection and warrants has grown into a substantial database containing over 1, 245, 415 orders of protection, the need to ensure its security and integrity grows ever more critical. The Committee is thus re-submitting its proposal delineating civil and criminal penalties for unauthorized release of data from the statewide automated registry of orders of protection and warrants.

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

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

* * *

In 2004, with Chief Judge Judith S. Kaye presiding, the Committee convened an unprecedented, highly successful round-table at the New York State Judicial Institute to review various child welfare proposals, including those prepared by the Committee, those submitted by the New York State Office of Children and Family Services, and those submitted by both houses of the Legislature. Legislative, executive and judicial representatives participated, along with advocates for parents, children and child welfare agencies. A high degree of consensus was achieved that has and will continue to facilitate progress in efforts to improve New York State's compliance with the federal *Adoption and Safe Families Act* through improvement of its legislative structure. The Committee hopes to follow this round-table with a similar session regarding education of children in foster care during the coming year. Additionally, in 2004, the Committee developed and revised numerous official forms for pleadings, process and orders for promulgation by the Chief Administrative Judge, including, among others, forms to facilitate compliance with the requirements of the federal Adoption and Safe Families Act. These forms have been placed 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. Sara Schechter and Peter Passidomo, Co-Chairs
Janet R. Fink, Counsel
Family Court Advisory and Rules Committee
New York State Office of Court Administration
25 Beaver Street, Suite 1170
New York, New York 10004

## II. New or Modified Measures

1. Ensuring compliance with court orders in child welfare cases
(FCA §§1055(b), (d); FCA §1055-a(11); SSL §§384-b, 392)

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

First, the measure would amend Family Court Act §§1055(b), 1055-a and Social Services Law §392 to provide that an agency's failure to provide services ordered by the Family Court, whether to assist family reunification or an alternate permanency plan, may constitute grounds for a finding that required reasonable efforts have not been made. Under current law, the only reference to a sanction for violating a direction by the Court is the authorization in Family Court Act §1015-a to punish a violation of an order for services by contempt under Judiciary Law §753. Utilization of the Court's authority to make a "no reasonable efforts" finding provides a meaningful and less drastic alternative mechanism to secure compliance. Importantly, this determination is curable, that is, an agency can demonstrate compliance and suffer the penalty only for the period of violation. *See* 45 C.F.R. §1356.21(b)2).[2]

Agency failures to comply with judicial orders for services may cause serious harm to children and their families and warrant effective judicial responses. In accordance with Family Court Act §1015-a, an agency may be directed to provide services to the child and family, authorized by the comprehensive annual social services plan,"to facilitate the protection of the child, the rehabilitation of the family and, as appropriate, the discharge of the child from foster care." Pursuant to Family Court Act §1055(c) and Social Services Law §392(8), an agency may be directed to "undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the best interests of the child..." In addition to encouraging and facilitating visitation between the child, parents, siblings and grandparents, the court order may include a specific plan of action for the agency including, but not limited to, "requirements that such agency assist the parent in obtaining adequate housing, employment, counselling, medical care or psychiatric treatment." Further, Family Court Act §1055-a(7) authorizes the Family Court, in a review of a child

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

freed for adoption, to direct the agency to place the child in an adoptive home and/or to provide services to the child and prospective adoptive parent or parents.

Second, with respect to children for whom adoption is the permanency plan, the proposal would amend Family Court Act §§1055(b) and (d) and Social Services Law §§392(5-a) and (6) to provide that a failure by an agency to comply with a court order to file a petition to terminate parental rights within 90 days of the order would be grounds for a determination that appropriate reasonable efforts had not been made to further the child's permanency plan. An exception would be made if the agency, for good cause shown and upon notice to all parties, including the law guardian, obtained a stay, modification or extension of the order. While Social Services Law §§384-b(3) and 392(6) authorize the law guardian or foster parents to file the petition where the agency fails to do so on a timely basis, the measure would provide that the fact that the law guardian or foster parents either filed or could have filed a termination of parental rights petition would not relieve the agency of the responsibility to comply with the court order. Once again, the Family Court's finding of "no reasonable efforts" can be rectified, that is, an agency can demonstrate compliance and suffer the penalty only for the period of violation. *See* 45 C.F.R.§1356.21(b)2).

Children's sense of time – weeks or months may seem like a life-time for a child – require everyone involved in the child welfare system to treat every case with a sense of urgency. The Family Court's important, federally-imposed responsibility in this regard is to keep up the momentum, using all available means to minimize the disruption in children's lives and to ensure that, as quickly as possible, they can achieve stability, either through return to their families or through another permanent home.

Rigorous judicial monitoring of each case, including enforcement of court orders through prompt imposition of sanctions, where necessary, is a critical element of the standards governing the "Model Courts" designated in New York and Erie Counties by the National Council of Juvenile and Family Court Judges, which have been replicated in various other counties. *See Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, 1995). It is a central element as well of the "problem-solving" approach to the mission of the courts long championed by Chief Judge Judith Kaye and recognized by the national Conference of Chief Justices and Conference of State Court Administrators in a joint resolution in 2000.[3] Significantly, it was highlighted in the *Trial Court Performance Standards*, published by the Bureau of Justice Assistance of the United States Justice Department:[4]

Courts should not direct that certain actions be taken or be prohibited and then allow

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[3] Conference of Chief Justices/Conference of State Court Administrators, CCJ Resolution 22/COSCA Resolution 4 In Support of Problem-solving Courts (Aug. 3, 2000)[in Casey, P. and Hewitt, W., *Court Responses to Individuals in Need of Services: Promising Components of a Service Coordination Strategy for the Courts,* Appendix A, pps. 57, 58 (Nat'l. Center for State Courts, 2001)]. *See also* J.S. Kaye, "Strategies and Need for Systems Change: Improving Court Practice for the Millennium," 38 *Fam. & Conciliation Cts. Rev.* 159 (Apr., 2000)

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

those bound by their orders to honor them more in the breach than in the observance.

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

Proposal

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

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

Section 1. Paragraph (iv) of subdivision (b) of section 1055 of the family court act, as amended by chapter 7 of the laws of 1999, is amended by adding a final unnumbered paragraph to read as follows:

The failure of a social services official or agency to comply with a direction by the court in accordance with subdivision ( c) of this section or section one thousand fifteen-a of this article may result in a finding pursuant to subparagraph (B) of this paragraph that reasonable efforts, where appropriate, have not been made. Except as provided by subdivision (d) of this section, the failure of a social services official or agency to institute a proceeding to legally free the child for adoption within ninety days of entry of an order so directing shall result in a finding pursuant to subparagraph (B) of this paragraph that reasonable efforts, where appropriate, have not been made in furtherance of the permanency plan of adoption.

§2. Subdivision (d) of section 1055 of the family court act, as amended by chapter 666 of the laws of 1976, is amended to read as follows:

(d) In addition to or in lieu of an order of extension or continuation of a placement made pursuant to subdivision (b), the court may make an order directing a social services official or other duly authorized agency to institute a proceeding to legally free the child for adoption, if the court finds reasonable cause to believe that grounds therefor exist. Upon a failure by such official or agency to institute such a proceeding within ninety days after entry of such order, the court shall permit the foster parent or parents in whose home the child resides to institute such a proceeding unless the social services official or other duly authorized agency caring for the child, for good cause

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

§3. Subdivision 11 of section 1055-a of the family court act, as added by chapter 638 of the laws of 1988, is amended to read as follows:

11. Where the court has entered an order of disposition concerning a child freed for adoption [and not placed in a prospective adoptive home], pursuant to paragraph (b) or (c) of subdivision seven of this section, directing that the child be placed for adoption or directing the provision of services or assistance to the child, and the agency charged with the guardianship and custody of the child fails, prior to the next permanency hearing pursuant to subdivision three or nine or rehearing of the proceeding pursuant to subdivision ten of this section, to comply with such order, the court [at the time of such rehearing] may, in the best interests of the child, enter an order committing the guardianship and custody of the child to another authorized agency, may make a finding pursuant to paragraph (b) of subdivision six of this section that reasonable efforts, where appropriate, have not been made to ensure and expedite the child's permanency plan of adoption, or may make any other order authorized pursuant to section two hundred fifty-five of this act.

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

(iv) In the event that the social services official or authorized agency having care and custody

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

§5. Subdivision 5-a of section 392 of the social services law, as amended by chapter 145 of the laws of 2000, is amended by adding a final unlettered paragraph as follows:

The failure of a social services official or agency to comply with a direction by the court in accordance with subdivision eight of this section may constitute a ground for a finding pursuant to subdivision six of this section that reasonable efforts, where appropriate, have not been made. In the case of a child whose permanency plan is adoption, except as provided by paragraph ( c) of subdivision six of this section, the failure of a social services official or agency to institute a proceeding to legally free the child for adoption within ninety days of entry of an order so directing shall constitute a ground for a finding pursuant to subdivision six of this section that reasonable efforts, where appropriate, have not been made to further the child's permanency plan of adoption.

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

(c) in the case of a child whose care and custody have been transferred temporarily to an authorized agency directing any agency specified in subdivision four of this section to institute a proceeding, pursuant to section three hundred eighty-four-b of this chapter, to legally free such child for adoption, if the court finds reasonable cause to believe that grounds therefor exist. Upon a failure by such agency to institute such proceeding within ninety days after entry of such order, the court shall permit the foster parent or parents in whose home the child resides to institute such a

proceeding unless the agency, for good cause shown and upon due notice to all parties to the proceeding, including the law guardian, has obtained a stay, modification or extension of such order, or unless the court has reasonable cause to believe that such foster parent or parents would not obtain approval of their petition to adopt the child in a subsequent adoption proceeding. The failure of the social services official or agency to institute such a proceeding within ninety days of entry of an order by the court directing such official or agency to do so shall constitute grounds for a finding by the court pursuant to this subdivision that reasonable efforts, where appropriate, have not been made to further the child's permanency plan of adoption, unless the social services official or other duly authorized agency caring for the child, for good cause shown and upon due notice to all parties to the proceeding, including the law guardian, has obtained a stay, modification or extension of such order. The fact that the foster parent or parents or the law guardian filed or could have filed a proceeding to legally free the child shall not relieve the agency or social services official of the finding that reasonable efforts, where appropriate, have not been made to further the child's permanency plan of adoption and of other remedies provided by law for failure to comply with a court order; [or]

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

2. Stays of administrative fair hearings regarding reports of child abuse or maltreatment (SSL §§22(4), 422(8), 424-a(1))

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

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

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

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

allegation forming the basis of a report of child abuse or maltreatment creates an "irrebuttable presumption" that credible evidence supports the allegation. A Family Court finding is thus conclusive proof by statute of the fact that a report is "indicated" and, as noted, is dispositive as well of whether an allegation of abuse or neglect against the subject of the report (the "Respondent" in the Family Court proceeding) has been proven by a preponderance of the evidence or, in cases of severe or repeated child abuse, by the higher level of clear and convincing evidence.

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

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

Proposal

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

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

Section 1. Paragraph (a) of subdivision 4 of section 22 of the social services law, as added by chapter 473 of the laws of 1978, is amended to read as follows:

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

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

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

(ii) Upon receipt of a request to amend the record of a child abuse and maltreatment report the department shall immediately send a written request to the child protective service or the state agency which was responsible for investigating the allegations of abuse or maltreatment for all records, reports and other information maintained by the service or state agency pertaining to such indicated report. The service or state agency shall as expeditiously as possible but within no more than twenty working days of receiving such request, forward all records, reports and other

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

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

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

the inquiry is made is the subject of an indicated report of child abuse or maltreatment. The department shall notify forthwith the subject of the report of such determinations and that a fair hearing has been scheduled pursuant to paragraph (b) of this subdivision. The sole issue at such hearing shall be whether the subject has been shown by some credible evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report.

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

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

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

§3. Subparagraph (ii) of paragraph (e) of subdivision 1 of section 424-a of the social services law, as amended by chapter 12 of the laws of 1996 , is amended to read as follows:

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

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

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

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

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

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

simply and expeditiously had the Committee's proposal been the law at the time. In support of the finding that reasonable efforts to reunite the family would have been pointless in such an egregious case, the Court quoted the Court of Appeals' decision in Matter of Marino S., 100 N.Y.2d 361, 372 (2003), *cert. denied,* 124 S.Ct. 834 (2003):

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

Finally, with respect to homicide and, indeed, all forms of severe abuse, the proposal would amend Social Services Law §384-b(4)(e) to eliminate an anomaly in the current law, that is, the one-year waiting period before a case of severe abuse may be tried. In conformity with the federal *Adoption and Safe Families Act*, the Social Services Law was amended in 1999 to require an immediate permanency hearing and, presumptively, an immediate filing of a termination of parental rights petition upon a finding that reasonable efforts to reunify a family are not required because of severe abuse or homicide. However, as an apparent compromise to retain a vestige of the pre-*ASFA* statute, the amendment contained a proviso that the fact-finding hearing in such a case must be deferred until the child been in foster care for a period of one year . Although the petition in such a case must be duly filed in Family Court and although the agency is no longer obligated to work with the parent, the petition must remain on a "suspense" calendar until the lapse of the one-year period, ostensibly to afford the parent an opportunity to self-rehabilitate. Not surprisingly, this cumbersome statute has rarely been used, as agencies have continued to try to fit severe abuse and homicide cases into the permanent neglect mold. *See, e.g.,* Matter of Diane H., -A.D.3d-, 2004 Slip.Op. 08867 (2d Dept., Nov. 29, 2004); Matter of Kasey Marie M., 292 A.D.2d 190 (1st Dept., 2002). No reason exists to maintain the fiction that the one-year waiting period in these tragic, extreme cases will result in reunited families. Since its only effect is to harm children by delaying their achievement of permanent homes, this proviso should be repealed.

Proposal

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

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

Section 1. Paragraph (e) of subdivision 4 of section 384-b of the social services law, as amended by chapter 7 of the laws of 1999 is amended to read as follows:

(e) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, severely or repeatedly abused such child or was convicted of murder or manslaughter, or an attempt thereof, of the child's other parent or of a sibling or another child in the home, as provided in subsection (A) of

subparagraph (iii) of paragraph (a) of subdivision eight of this section, and, except as provided for herein, the child has been in the care of an authorized agency for the period of one year immediately prior to the initiation of the proceeding under this section. Where a court has determined that reasonable efforts to reunite the child with his or her parent are not required, pursuant to the family court act or this chapter, a petition to terminate parental rights on the ground of severe abuse or homicide as set forth in subparagraph (iii) of paragraph (a) of subdivision eight of this section may be filed immediately upon such determination[; provided, however, that the fact finding hearing on such petition shall commence no sooner than one year from the date the child first entered care and the court shall consider at such hearing the actions by the parent during the entire period prior to the hearing].

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

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

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

4. Orders of protection in termination of parental rights proceedings, child protective proceedings and permanency hearings regarding children freed for adoption
(FCA §§634, 1055-a, 1056, 1072; SSL §384-b)

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

The Family Court Advisory and Rules Committee is proposing a measure to create a Family Court remedy for this problem. First, the proposal would amend the termination of parental rights and permanent neglect statutes, Family Court Act §634 and Social Services Law §384-b, to add authority for the Family Court, for good cause after giving the birth parent notice and an opportunity to be heard, to issue an order of protection in conjunction with an order of disposition committing guardianship and custody of the child. The order of protection, which may remain in effect until the child's 18th birthday, may, among other conditions, prohibit the birth parent from contact with the child and the child's foster or pre-adoptive parent. Second, the proposal would amend Family Court Act §1055-a to authorize such an order to be issued as part of the disposition of a permanency hearing regarding a child freed for adoption. Third, the measure would amend Family Court Act §1056 to add a condition to orders of protection in child protective proceedings requiring the respondent to stay away, *inter alia*, from a "person with whom the child has been paroled, remanded, placed or released by the court..." Finally, the proposal would amend Family Court Act §1072 to make a technical correction to the statutory citations for the provisions regarding orders of protection and supervision.

Enactment of this measure would fill a significant gap in the current statutory framework governing child welfare cases and would further the fundamental precept underlying the federal and New York State *Adoption and Safe Families Acts*, that is, that "the health and safety of children is of paramount importance." *See* Social Services Law §384-b(1); 42 U.S.C. §§629b(a)(9), 670, 671(a).

Proposal

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

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

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

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

The court may enter an order under section six hundred thirty-one committing the guardianship and custody of the child to the petitioner on such conditions, if any, as it deems proper. The court, for good cause shown, may issue an order of protection under section six hundred fifty-six of this article directing the respondent to observe conditions enumerated therein, which may include, among others, staying away from the child and from the home, school, business or place of employment of the child or the child's foster or pre-adoptive parent or parents. The order, which may remain in effect until the child's eighteenth birthday, may only be issued after giving notice and an opportunity to be heard to the respondent.

§2. Subdivision 8 of section 1055-a of the family court, as amended by chapter 663 of the laws of 2002, is amended by adding two new sentences at the end thereof to read as follows:
The court, for good cause shown, may issue an order of protection under section six hundred fifty-six or section one thousand fifty-six of this act directing a person whose parental rights had been terminated or surrendered to observe conditions enumerated therein, which may include, among others, staying away from the child and from the home, school, business or place of employment of the child or the child's foster or pre-adoptive parent or parents. The order, which may remain in effect until the child's eighteenth birthday, may only be issued after giving notice and an opportunity to be heard to the person or persons restrained by the order.

§3. Paragraph (a) of subdivision 1 of section 1056 of the family court, as amended by chapter 483 of the laws of 1995, is amended to read as follows:

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

§4. The opening sentence of section 1072 of the family court act, as amended by chapter 1039 of the laws of 1973, is amended to read as follows:

If a parent or other person legally responsible for a child's care is brought before the court for failing to comply with the terms and conditions of an order of supervision issued under section one thousand fifty-four or [of] one thousand fifty-seven, an order of protection issued under section one thousand fifty-six or a temporary order of protection issued under section one thousand twenty-seven or one thousand twenty-nine of this article and if, after hearing, the court is satisfied by competent proof that the parent or other person did so willfully and without just cause, the court may:

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

13. Upon the entry of an order committing guardianship and custody of a child pursuant to this section, the court, for good cause shown, may issue an order of protection under section six hundred fifty-six of the family court act directing the respondent to observe conditions enumerated therein, which may include, among others, staying away from the child and from the home, school, business or place of employment of the child or the child's foster or pre-adoptive parent or parents. The order, which may remain in effect until the child's eighteenth birthday, may only be issued after giving notice and an opportunity to be heard to the respondent.

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

5.____Clarification of the status and definition of children freed for adoption
(FCA §§1055(h), 1055-a(1))

In 2002, the Legislature enacted a comprehensive reform of the statutory framework governing children who have been freed for adoption by virtue of parental surrender or termination of parental rights. *See* Laws of 2002, ch. 663. Experience under the new law, while largely salutary, has revealed two areas in which further statutory clarification would be helpful. The Family Court Advisory and Rules Committee is, therefore, submitting a measure containing two technical amendments regarding the status and definition of freed children.

First, the proposal would amend Family Court Act §1055(h) to clarify that, where the Family Court has stated its determination that guardianship and custody of a child will be committed as a result of a finding of termination of parental rights, the child would be deemed to continue in foster care, notwithstanding the fact that the formal written order may not yet have been entered. This amendment is needed to clear up a source of confusion that has arisen regarding children placed for one or more one year periods as a result of child protective findings under Article 10 of the Family Court Act, who are the subjects of termination of parental rights proceedings. Where the Family Court has announced its determination to commit guardianship and custody of the child, chapter 663 requires that a freed-child permanency hearing be scheduled to be completed within 60 days, regardless of whether the written order of commitment has been entered as yet. However, if the child's Article 10 placement is due to expire during this interim period, the law is silent regarding whether an Article 10 petition to extend placement and to convene a permanency hearing must also be filed. The Committee's proposal would make clear that it would not. The Court's oral statement of its determination would have the effect of suspending the Article 10 order and of placing the child into freed-child status, that is, foster care status that would last "until such time as an adoption or other alternate living arrangement is finalized." [Family Court Act §1055(h)].

Second, Family Court Act §1055-a(1) would be amended to make clear that the provisions regarding reviews of children freed for adoption apply only to children whose rights have been terminated regarding both parents, whether by a termination petition, by a surrender or by the death of one or both parents. Children who continue to have a parent whose consent to adoption is required, pursuant to section 111 of the Domestic Relations Law, would not be subject to the permanency hearing provisions applicable to children who have been fully freed for adoption. Instead, such children would continue to be covered by the permanency hearing and foster care placement provisions under which they were placed, that is, Article 10 of the Family Court Act or section 392 of the Social Services Law. This distinction is vital, because it determines the time-table for permanency hearings, the parties required to be noticed, the dispositional alternatives and types of services that may be ordered by the Family Court and the permanency plans applicable to the child and his or her family. Perhaps most important, if the child retains a parent whose consent to an adoption is required, reunification efforts may continue to be fruitful as to that parent; alternatively, that parent may have relatives who may be alternate resources for the child.

Enactment of this proposal will facilitate the permanency process for children in care by eliminating ambiguities in the law that have caused confusion and disparate practices. Adding clarity to the statute will add consistency to New York State's implementation of its recent freed-

child permanency hearing reforms and will thus aid the State in its efforts to comply with the requirements of the federal *Adoption and Safe Families Act* [P.L. 105-89]..

Proposal

AN ACT to amend the family court act, in relation to permanency hearings regarding children in foster care

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

Section 1. Subdivision (h) of section 1055 of the family court act, as amended by chapter 663 of the laws of 2002, is amended to read as follows:

(h) Any order made under this section shall be suspended upon the entry of an order of disposition with respect to a child whose custody and guardianship have been committed pursuant to section three hundred eighty-four-b of the social services law, and shall expire upon the expiration of the time for appeal of such order or upon the final determination of any such appeal and any subsequent appeals authorized by law; provided, however, that where custody and guardianship have been committed pursuant to section three hundred eighty-four-b of the social services law, where the court has stated its determination on the record that custody and guardianship will be so committed but the order of commitment has not yet been entered, or where the child has been surrendered pursuant to section three hundred eighty-three-c or three hundred eighty-four of the social services law, the child shall nonetheless be deemed to continue in foster care until such time as an adoption or other alternative living arrangement is finalized. A permanency hearing or hearings regarding such child shall be conducted in accordance with section one thousand fifty-five-a of this act. Nothing in this subdivision shall cause such order of placement to be suspended or to expire with respect to any parent or other person whose consent is required for an adoption against whom an order of disposition committing guardianship and custody of the child has not been made.

§2. Paragraph ( c) of subdivision 1 of section 1055-a of the family court act, as amended by chapter 534 of the laws of 1999, is amended to read as follows:

(c) "child freed for adoption" shall mean a child who was originally placed with a commissioner of social services in accordance with section one thousand fifty-five of this article or section three hundred fifty-eight-a of the social services law and whose custody and guardianship has been subsequently committed to an authorized agency pursuant to section three hundred

eighty-three-c, section three hundred eighty-four or section three hundred eighty-four-b of the social services law. Such category shall include a child whose parent or parents have died during the period in which the child was in foster care and for whom there is no surviving parent who would be entitled to notice or consent pursuant to section one hundred eleven or one hundred eleven-a of the domestic relations law. Such category shall not include a child who has been freed for adoption with respect to one parent but who has another parent whose consent to an adoption is required pursuant to section one hundred eleven of the domestic relations law;

§3. This act shall take effect immediately.

6. Clarifying the authority of support magistrates in paternity proceedings (FCA §439)

In United States *v.* Kerley, -F.Supp.2d-, 2004 WL 1555119 (S.D.N.Y., 2004), *app. pending*, (2d Cir., 2005), the United States District Court, Southern District of New York, dismissed a prosecution under the *Deadbeat Parents Punishment Act* [18 U.S.C. §228], a federal criminal statute under which parents who fail to fulfill interstate support obligations to their children can face up to two years incarceration. The Court, in interpreting Family Court Act §439, assumed that the Family Court support magistrate, who had issued the underlying child support order following a Family Court judge's adjudication of the issue of paternity, had no jurisdiction to do so. While it is arguable that this was a serious misinterpretation of both the letter and the intent of the New York State statutory framework, this ruling may have serious implications for the enforceability of untold numbers of child support orders issued by Family Court support magistrates in paternity proceedings statewide. Therefore, the Family Court Advisory and Rules Committee deems it imperative that any possible ambiguity, any possible source of misinterpretation of statutory language, be eliminated.

The Committee is proposing a measure to clarify subdivisions (a), (b) and ( c) of Family Court Act §439 with respect to contested paternity cases. The measure would add language specifically authorizing Family Court judges in such cases, once orders of filiation have been issued, to refer the proceedings to support magistrates for issuance of final orders of child support, if child support remains in issue. This clarifying language would simply mirror current practice in every Family Court statewide and would reflect the universal understanding of Family Court professionals regarding the current law governing the authority of support magistrates. All doubts as to the authority of support magistrates to issues orders of child support in such cases would be removed.

The District Court's confusion in United States *v.* Kerley stemmed from the language of Family Court Act §439(a), which currently provides that support magistrates are "not empowered to hear, determine and grant any relief with respect to...issues of contested paternity involving claims of equitable estoppel..."[5] [Emphasis added]. However, Family Court Act §439(b) currently goes on to provide that "where the respondent denies paternity and paternity is contested on the grounds of equitable estoppel, the support magistrate shall not be empowered to determine the issue of paternity, but shall transfer the proceeding to a judge of the court for a determination upon the issue of paternity" – clearly implying that the referral to a judge is solely for a determination of the issue of paternity, that is, who is the father. [Emphasis added]. To compound the apparent variation in language, Family Court Act §439( c) currently provides that, in a paternity matter contested on the ground of equitable estoppel, the support magistrate may issue a temporary order of support and then refer the matter to a Family Court judge, who, following issuance of an order of filiation, may either

[5] In 2004, legislation was enacted to authorize support magistrates to determine all contested paternity matters except those involving issues of equitable estoppel, a significant expansion over the prior law, which precluded support magistrates from determining any contested paternity matters. *See* Laws of 2004, ch. 336. However, the question raised in the Kerley case regarding the authority of support magistrates to determine support following judicial determinations of paternity remains to be resolved regarding the equitable estoppel cases that continue to require adjudication by Family Court judges.

determine outstanding issues of support or "return" the matter to a support magistrate for resolution of support issues – language that is possibly subject to the anomalous interpretation that a referral to a support magistrate would only be permissible where a support magistrate had issued a temporary order of support in the first instance.

Clarification of the New York statutory framework is essential, not only to ensure the continued viability and enforceability of child support orders issued by support magistrates for the benefit of children and families, but also for New York State to comply with the requirements of Title IV-D of the federal *Social Security Act* [42 U.S.C. §§ 651 *et seq*., pursuant to which New York State receives federal reimbursement of two-thirds of the cost of the State's child enforcement program. Family Court Act §439-a, which requires the use of quasi-judicial Family Court support magistrates, is the State's means of implementing the federal requirement for an "expedited process" for child support establishment and enforcement. *See* 42 U.S.C. § 666(a)(2). Federal regulations require that 75% of actions for determining child support, including paternity proceedings where child support is in issue, be completed within six months and that 90% be completed within one year. *See* 45 C.F.R. § 303.101(a)(2)(i). The use of support magistrates, specially-trained professionals with expertise in the intricacies of child support, whose caseloads consist solely of child support and paternity matters, is essential for the expeditious resolution of these often complex cases.

In order to prevent future cases like People *v*. Kerley – and in order to prevent parents from avoiding their support obligations to their children – any possible ambiguities in New York statutes must be eliminated. To the extent that Family Court Act §439 can be said to be confusing or subject to misinterpretation, its disparate provisions must be harmonized. The Committee's proposal would provide unequivocally that, once an order of filiation has been issued by a Family Court judge in a paternity case referred by reason of a contested issue of equitable estoppel, the judge would be authorized either to issue an order of child support or to refer the matter to a support magistrate for such an order.

Proposal

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

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

Section one. Subdivisions (a), (b) and (c) of section 439 of the family court act, as amended by chapter 336 of the laws of 2004, are amended to read as follows:

(a) *[Effective until June 30, 2005.]* 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 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 subdivision five of section four hundred fifty-four or section four hundred fifty-five of this act, issues of contested paternity 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 is issued by a judge in a paternity proceeding and child support is in issue, the judge, or support magistrate upon referral from the judge, shall 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 act 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.

(a) *[Effective June 30, 2005.]* 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 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 act, issues of contested paternity 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 is issued by a judge in a paternity proceeding and child support is in issue, the judge, or support magistrate upon referral from the judge, shall 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 act 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 which is heard by a support magistrate, the support magistrate shall advise the mother and putative father 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 pursuant to section five hundred forty-two of this act, provided, however, that where the respondent denies paternity and paternity is contested on the grounds of equitable estoppel, the support magistrate shall not be empowered to determine the issue of paternity, but shall transfer the proceeding to a judge of the court for a determination [upon] of the issue of paternity. Where an order of filiation is issued by a judge in a paternity proceeding and child support is in issue, the judge, or support magistrate upon referral from the judge, shall immediately make a temporary or final order of support, as applicable. Whenever an order of filiation is made by a support magistrate, the support magistrate also shall

make a final or temporary order of support.

(c) The support magistrate, in any proceeding in which issues specified in section four hundred fifty-five of this act, or issues of custody, visitation, including visitation as a defense, orders of protection or exclusive possession of the home are present or in which paternity 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 [shall be returned] to a support magistrate for [a final determination upon the issue of] further proceedings regarding child support [payments] or other matters within the authority of the support magistrate.

§2. This act shall take effect immediately.

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

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

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

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

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

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

<u>Proposal</u>

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

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

Section 1. Subdivision (c) of section 841 of the family court act, as amended by chapter 222 of the laws of 1994, is amended to read as follows:

(c) placing respondent on probation for a period not exceeding [one year, and requiring] two years or, if an order of protection has been issued for five years pursuant to section eight hundred forty-two of this article, five years. The order may require respondent to participate in a batterer's education program designed to help end violent behavior, which may include referral to drug and alcohol counseling, and to pay the costs thereof if respondent has the means to do so, provided, however, that nothing contained herein shall be deemed to require payment of the costs of any such program by the petitioner, the state or any political subdivision thereof; or

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

8. Expediting appeals in child welfare cases
(FCA §§1112, 1115, 1121; CPLR 1101, 5521)

The recent "Child and Family Service Review," conducted by the Administration for Children and Families of the United States Department of Health and Human Services (HHS), concluded that New York State, with among the lowest scores in the nation, "faces a serious challenge in meeting the National Standard that children have permanency and stability in their living situations." Whereas the National Standard, promulgated by HHS in accordance with the federal *Adoption and Safe Families Act* [Public Law 105-89], calls for reunification of 76.2% of foster children with their parents within one year, New York's record in Fiscal Year 1999 was only 54.2%. Whereas the National Standard further calls for finalization of 34% of adoptions of foster children within two years of children's placement into foster care, only 3% of the adoptions in New York in Fiscal Year 1999 met that standard.[6] New York State, now in the process of implementing its "Program Improvement Plan" prior to a reevaluation by federal authorities, clearly has a long way to go in order to reduce the prolonged waits experienced both by children ultimately returned to their parents and those ultimately adopted. Federal reimbursement is in jeopardy, but, even more importantly, the well-being of New York's foster children and their families is at stake.

Achievement of permanent homes promptly for children in foster care requires expeditious resolution of cases, not only at the trial level, but also at the appellate level. As part of Chief Judge Judith Kaye's "Adoption Now" initiative, a ground-breaking collaboration among the Unified Court System, the New York State Office of Children and Family Services and the New York City Administration for Children's Services, comprehensive reviews have periodically been conducted statewide of cases of children freed for adoption but not yet adopted. Delays in termination of parental rights appeals have persistently been identified in the reviews as barriers to prompt adoption – not the full explanation of the above-noted delays, but certainly significant factors. For children ultimately returned home to their parents, delays, including those stemming from the appellate process, can have a corrosive effect upon family stability and impede the children's ability to reunite successfully with their parents. As a complement to the comprehensive effort within the Unified Court System to reduce all aspects of appellate delay statewide through administrative and other initiatives,[7] the Family Court Advisory and Rules Committee is proposing legislation to plug loopholes in the current statutes

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[6] *See Final Report of the Child and Family Services Review of New York State: Executive Summary*, p. 2 (2002)(available at http://www.acf.hhs.gov/programs/cb/cwrp/executive/ny/html) .

[7] The Appellate Divisions in the Second and Third Departments, for example, have successfully instituted rigorous case management programs and the First Department is developing a system for expedited transmittal of records. The Second Department initiative, which entailed revisions of the court's rules, training efforts, publication of a "best practices" document and designations of particular clerks in both the Family Courts and Appellate Division to monitor appeals, includes the important element of close monitoring of the transcript process. *See* Anderson, "Second Department Changes Rules to Speed Up Cases," *New York Law Journal*, Dec. 31, 2002, p. 1, col. 5. Additionally, the Family Court, Erie County, as part of its "Model Permanency Planning Court" initiative, has been working closely with the Appellate Division, Fourth Department, to ensure that appeals that are noticed, but abandoned and not perfected by the appellants, are dismissed on a timely basis so that adoptions can move forward. *See* Keith and Flango, *Expediting Dependency Appeals: Strategy to Reduce Delay* (National Center for State Courts, 2002), pp. 27-28.

in order to ensure that child-related appeals are expedited in a manner consistent with the rights of all litigants.

The National Council of Juvenile and Family Court Judges, the American Bar Association and, most recently, the National Center for State Courts in a comprehensive study, have each recommended a variety of specific initiatives, as well as time-frame targets, to ensure that appeals in child-related matters, most particularly, child protective and termination of parental rights proceedings, be handled on an expedited basis. [8] Drawing upon these recommendations, as well as upon its own study of the appeals experience in each of the Appellate Divisions and the Court of Appeals, the Committee, therefore, is proposing a measure addressing various aspects of the appellate process. The proposal has been strengthened from its 2004 version to underscore the clear intent to expedite appeals at every stage. Briefly, the proposal contains the following:

• Preferences: Sections 1112(a) and 1121(1) of the Family Court Act and Rule 5521 of the Civil Practice Law and Rules would be made consistent in identifying the various child-related proceedings entitled to an automatic appellate preference without the need for a separate motion;

• Assignment of counsel and poor person relief: Family Court Act §1118 and section 1101 of the Civil Practice Law and Rules would be amended to eliminate the necessity of motions for poor person relief and assignment of counsel in the Appellate Division in cases in which the attorney certifies that the appellant was represented by assigned counsel or a legal aid or legal services program in the Family Court and remains indigent. Upon submission of such a certification by an attorney, the appellant would be deemed presumptively eligible for an assignment of counsel and a granting of poor person relief, which, *inter alia*, would result in a waiver of fees.

• Filing of notice of appeal: The requirement in Family Court Act §1115 that the appellant file a copy of the notice of appeal with the county attorney or, in New York City, with the corporation counsel, in private cases in which those public agencies are not involved, would be deleted and the provision would be clarified to require service upon a law guardian, if any. Service of the notice upon the county attorney or corporation counsel would continue to be required in cases in which that attorney or counsel represents the respondent.

• Transcripts: Family Court Act §1121(7) would be amended to subject transcription services to the same deadlines as court reporters, to delete the engulfing exception "where practicable" and to specifically authorize the Appellate Divisions, as well as the Administrative Judges, to establish procedures to effectuate the timely preparation of transcripts.

• Setting of Expedited Deadlines: Family Court Act §1121(7) would also be amended to explicitly permit the Appellate Divisions to establish procedures, similar to those utilized successfully in the Appellate Division, Second Department, for the issuance of scheduling orders or their functional equivalents to ensure timely filing of all briefs and, in those instances in which extensions of time are granted, to set new, expedited deadlines to prevent undue delays.

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[8] *See* Keith and Flango, *Expediting Dependency Appeals: Strategy to Reduce Delay* (National Center for State Courts, 2nd Ed., 2003), pp. 8-9; "The Appeals Process," in *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, Fall, 2000), at 37-40; "Improving the Appellate Process in Child Abuse and Neglect Cases," 2 *ABA Child Court Works* #6:1 (American Bar Assoc., Dec., 1998).

Recognizing that nowhere is the adage "justice delayed is justice denied" more true than in cases in which an entire childhood can elapse during the course of litigation, this comprehensive measure would mitigate various sources of appellate delay. Enactment of the proposal would enhance efforts by the Unified Court System to provide prompt appellate review to litigants in cases involving children in four significant respects, that is, by clarifying the automatic applicability of preferences, by simplifying the process for assignment of counsel and granting of poor person relief on appeal where counsel has been assigned in Family Court, by codifying the intensive case management and scheduling order process currently in use in some parts of New York State and by imposing more rigorous enforcement of existing statutory time-frames for preparation of transcripts.

Proposal

AN ACT to amend the family court act and the civil practice law and rules, in relation to appeals in family court cases

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

Section 1. Subdivision (a) of section 1112 of the family court act, as amended by chapter 34 of the laws of 1991, is amended to read as follows:

a. An appeal may be taken as of right from any order of disposition and, in the discretion of the appropriate appellate division, from any other order under this act. An appeal from an intermediate or final order [or decision] in a case involving abuse or neglect may be taken as of right to the appellate division of the supreme court [and shall have preference over all other matters]. Pending the determination of such appeal, such order [or decision] shall be stayed where the effect of such order [or decision] would be to discharge the child, if the family court or the court before which such appeal is pending finds that such a stay is necessary to avoid imminent risk to the child's life or health. A preference in accordance with section five thousand five hundred twenty-one of the civil practice law and rules shall be afforded, without the necessity of a motion, for appeals under article three, parts one and two of article six, articles seven and ten of this act and sections three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, three hundred eighty-four-b and three hundred ninety-two of the social services law.

§2. Section 1115 of the family court act, as amended by chapter 582 of the laws of 1991, is amended to read as follows:

§1115. Notices of Appeal. [(a) ] An appeal as of right shall be taken by filing the original notice of appeal with the clerk of the family court in which the order was made and from which the appeal is

taken[, upon the corporation counsel of the city of New York, if the family court involved is in a county within the city of New York, upon the county attorney of the county in which the family court is located, if not within the city of New York, and upon the appellee.

(b)] A notice of appeal shall be served on any adverse party as provided for in subdivision one of section five thousand five hundred fifteen of the civil practice law and rules [. Additionally, the] and upon the law guardian, if any. The appellant shall file two copies of such notice, together with proof of service, with the clerk of the family court who shall forthwith transmit one copy of such notice to the clerk of the appropriate appellate division or as otherwise required by such appellate division.

_____§3. Section 1118 of the family court act, as added by chapter 324 of the laws of 1990, is amended to read as follows:

§1118. Applicability of civil practice law and rules.

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

further motion. The appointment of counsel and granting of poor person relief by the appellate division shall continue for the purpose of filing a notice of appeal or motion for leave to appeal to the court of appeals.

§4. Subdivision (a) of section 1120 of the family court act, as amended by chapter 582 of the laws of 1991, is amended to read as follows:

(a) Upon an appeal in a proceeding under this act, the [court] appellate division to which such appeal is taken, or is sought to be taken, shall assign counsel to any person upon a showing that such person is one of the persons described in section two hundred sixty-two of this act and is financially unable to obtain independent counsel or upon certification by an attorney in accordance with section one thousand one hundred eighteen of this article. The [court] appellate division to which such appeal is taken, or is sought to be taken, may in its discretion assign counsel to any party to the appeal. Counsel assigned under this section shall be compensated and shall receive reimbursement for expenses reasonably incurred in the same manner provided by section seven hundred twenty-two-b of the county law. The appointment of counsel by the appellate division shall continue for the purpose of filing a notice of appeal or motion for leave to appeal to the court of appeals. Counsel may be relieved of his or her representation upon application to the court to which the appeal is taken for termination of the appointment, by the court on its own motion or, in the case of a motion for leave to appeal to the court of appeals, upon application to the appellate division. Upon termination of the appointment of counsel for an indigent party, the court shall promptly appoint another attorney.

§5. Subdivisions 1, 3, 5 and 7 of section 1121 of the family court act, as added by chapter 582 of the laws of 1991, are amended to read as follows:

1. Consistent with the provisions of sections 354.2, seven hundred sixty and one thousand fifty-two-b of the family court act, the provisions of this section shall apply to appeals taken [in proceedings brought] from [an order] orders issued pursuant to articles three, seven and ten and [part] parts one and two of article six of this act, and pursuant to sections three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, three hundred eighty-four-b and three hundred ninety-two of the social services law.

* * *

3. It shall also be the duty of such counsel or law guardian to ascertain whether the party represented by such attorney wishes to appeal and, if so, to serve and file the necessary notice of appeal

and, as applicable, to apply for leave to appeal as a poor person, to file a certification of continued indigency and continued eligibility for appointment of counsel pursuant to section one thousand one hundred eighteen of this article and such other documents as may be required by the appropriate appellate division.

* * *

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

* * *

7. Such transcript shall be completed within thirty days from the receipt of the request of the appellant [, where practicable]. Where such transcript is not completed within such time period, the court reporter or director of the transcription service responsible for the preparation of the transcript shall notify the administrative judge of the appropriate judicial district. Such administrative judge shall establish procedures to [assist in] effectuate the timely preparation of such transcript. The appellate divisions may establish additional procedures to effectuate the timely preparation of transcripts.

The appellate divisions shall establish procedures to ensure the expeditious filing and service of the appellant's brief, the answering brief and any reply brief, which may include issuance of scheduling orders. The appellant shall perfect the appeal within sixty days of receipt of the transcript of the proceeding in which the order or judgment appealed from was issued, or within any different time that the appellate division has by rule prescribed for perfecting such appeals under subdivision (c) of rule five thousand five hundred thirty of the civil practice law and rules or as otherwise specified by the appellate division**.** Such sixty-day or other prescribed period may be extended by [order of] the appellate division for good cause shown upon written application to the appellate division showing merit to the appeal and a reasonable ground for an extension of time.[An order] Upon the granting of such an extension [of time may impose a schedule for], the appellate division shall issue new deadlines that ensure the expeditious filing and service of the appellant's brief, the answering brief and any reply brief.

§6. Subdivision (e) of section 1101 of the civil practice law and rules, as added by chapter 216 of the laws of 1992, is amended to read as follows:

(e) When motion not required. Where a party is represented in a civil action by a legal aid society or a legal services or other nonprofit organization, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society or organization, all fees and costs relating to the filing and service shall be waived without the necessity of a motion and the case shall be given an index number, or, in a court other than the supreme or county court, an appropriate filing number, provided that a determination has been made by such society, organization or attorney that such party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, and that an attorney's certification that such determination has been made is filed with the clerk of the court along with the summons and complaint or summons with notice or third-party summons and complaint or otherwise provided to the clerk of the court. Where an attorney certifies, pursuant to section one thousand one hundred eighteen of the family court act and in accordance with procedures of the appropriate appellate division, that a party or child who is the subject of an appeal has been represented in the family court by assigned counsel or a law guardian or by a legal aid society or a legal services or other nonprofit organization, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society or organization, and, in the case of counsel assigned to an adult party, that the party continues to be indigent, the party or child shall be presumed eligible for poor person relief pursuant to this section.

§7. Subdivision (b) of rule 5521 of the civil practice law and rules, as amended by chapter 582 of the laws of 1991, is amended to read as follows:

(b) Consistent with the provisions of section one thousand one hundred twelve of the family court act, appeals from orders, judgments or decrees in proceedings brought pursuant to articles three, seven and ten and [part] parts one and two of article six of the family court act, and pursuant to sections three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, three hundred eighty-four-b and three hundred ninety-two of the social services law, shall be given preference and may be brought on for argument on such terms and conditions as the court may direct[, upon application of any party or counsel for a minor who is the subject of the proceeding] without the necessity of a motion.

§8. This act shall take effect immediately.

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

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

Continuity of the court and the judge have been identified as essential elements for the prompt achievement of permanency for children in foster care. Federally-issued guidelines for state statutes implementing the *Adoption and Safe Families Act* , as well as guidelines adopted by the National Council of Juvenile and Family Court Judges governing "Model Courts" nationally, including those in New York and Erie Counties, emphasize the importance of having the same judge preside from the outset of a child protection proceeding to the fulfillment of a permanent home for a child, whether it be return, adoption or alternate plan.[9] Significantly, research has demonstrated that the filing of an adoption petition in the same county and before the same judge can measurably reduce the average time between freeing a child for adoption and finalization of the adoption from over one year to under six months.[10] This finding is particularly noteworthy when viewed in the context of earlier research demonstrating significant delays between freeing and finalization, notwithstanding the fact that an overwhelming majority of the children adopted were already residing in their adoptive homes at the time they were freed.[11]

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

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

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

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

Enactment of this measure would significantly advance the efforts of the Unified Court System, through Chief Judge Judith S. Kaye's "Adoption Now" collaborative initiative in conjunction with the New York State Office of Children and Family Services and the New York City Administration for Children's Services, to ensure that the large number of children freed for adoption in New York State but not yet adopted – approximately 5000 – can be adopted without delay.

Proposal

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

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

Section 1. Paragraph (iv) of subdivision (a) of section 115 of the family court act, as amended by chapter 409 of the laws of 2002, is amended to read as follows:

(iv) proceedings to permanently terminate parental rights to guardianship and custody of a child: (A) by reason of permanent neglect, as set forth in part one of article six of this act and paragraph (d) of subdivision four of section three hundred eighty-four-b of the social services law, [and] (B) by reason of mental illness, mental retardation and severe or repeated child abuse, as set forth in paragraphs (c) and (e) of subdivision four of section three hundred eighty-four-b of the social services law and (C) by reason of the death of one or both parents, where no guardian of the person of the child has been lawfully appointed, or by reason of the abandonment of the child for a period of six

months immediately prior to the filing of the petition, where a child is under the jurisdiction of the family court as a result of a placement in foster care by the family court pursuant to article ten of this act or section three hundred fifty-eight-a or three hundred ninety-two of the social services law, unless the court declines jurisdiction pursuant to section three hundred eighty-four-b of the social services law;

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

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

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

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

subdivision, stating:

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

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

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

4. Upon petition by an authorized agency, a judge of the family court, or a surrogate, may approve such surrender, on such notice to such persons as the surrogate or judge may in his or her discretion prescribe. If the child is being surrendered as a result of, or in connection with, a proceeding before the family court pursuant to article ten of the family court act, the petition shall be filed in the family court that exercised jurisdiction over such proceeding and shall be assigned, wherever practicable, to the judge who presided over such proceeding. The petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to section three hundred eighty-four- c, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice pursuant to such section. No person who has received such notice and been afforded an opportunity to be heard may challenge the validity of a surrender approved pursuant to

this subdivision in any other proceeding. However, this subdivision shall not be deemed to require approval of a surrender by a surrogate or judge for such surrender to be valid.

§6. Paragraph (c) of subdivision 3 of section 384-b of the social services law, as amended by chapter 607 of the laws of 1996 , and paragraph (d) of such subdivision, as added by chapter 666 of the laws of 1976, are amended and a new paragraph (c-1) is added to such subdivision to read as follows:

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

(c-1) Before hearing a petition under this section, the court in which the termination of parental rights petition has been filed shall ascertain whether the child is under the jurisdiction of a family court pursuant to a placement in a child protective or foster care proceeding and, if so, which court exercised jurisdiction over the most recent proceeding. If the court determines that the child is under the jurisdiction of a different family court, the court in which the termination of parental rights

petition was filed shall stay its proceeding for not more than thirty days and shall communicate with the court that exercised jurisdiction over the most recent proceeding. The communication shall be recorded or summarized on the record by the court in which the termination of parental rights petition was filed. Both courts shall notify the parties and law guardian, if any, in their respective proceedings and shall give them an opportunity to present facts and legal argument or to participate in the communication prior to the issuance of a decision on jurisdiction. The court that exercised jurisdiction over the most recent proceeding shall determine whether it will accept or decline jurisdiction over the termination of parental rights petition. This determination of jurisdiction shall be incorporated into an order regarding jurisdiction that shall be issued by the court in which the termination of parental rights petition was filed within thirty days of such filing. If the court that exercised jurisdiction over the most recent proceeding determines that it should exercise jurisdiction over the termination of parental rights petition, the order shall require that the petition shall be transferred to that court forthwith but in no event more than thirty-five days after the filing of the petition. The petition shall be assigned, wherever practicable, to the judge who heard the most recent proceeding, If the court that exercised jurisdiction over the most recent proceeding declines to exercise jurisdiction over the adoption petition, the court in which the termination of parental rights petition was filed shall issue an order incorporating that determination and shall proceed forthwith.

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

§7. Subdivision 3 of section 113 of the domestic relations law, as amended by chapter 531 of the laws of 1998, is amended to read as follows:

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

(b)(i) If the adoption petition is filed pursuant to subdivision eight of section one hundred twelve of this article or subdivision ten of section three hundred eight-three-c or subdivision eleven of section three hundred eighty-four-b of the social services law, the petition shall be filed in the county where the termination of parental rights proceeding or judicial surrender proceeding, as applicable, is pending and shall be assigned, wherever practicable, to the same judge.

(ii) In any other agency adoption proceeding, the petition shall be filed in the same court and, wherever practicable, shall be assigned to the same judge of the county in which parental rights had been terminated [or], a judicial surrender had been approved or the most recent proceeding under article ten of the family court act or section three hundred fifty-eight-a or three hundred ninety-two of the social services law had been heard, whichever occurred last, or in the county where the adoptive parents reside or, if such adoptive parents do not reside in this state, in the county where such authorized agency has its principal office. The following procedures shall be applicable in cases where the child is under the jurisdiction of a family court, but where the adoption petition has been filed in a court other than the court that presided over the termination of parental rights, surrender or most recent proceeding under article ten of the family court act or section three hundred fifty-eight-a or three hundred ninety-two of the social services law, whichever occurred last:

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

(B) If the court determines that the child is under the jurisdiction of a different family court, the court in which the adoption petition was filed shall stay its proceeding for not more than thirty days and shall communicate with the family court judge who exercised jurisdiction over the most recent permanency or other proceeding involving the child. The communication shall be recorded or summarized on the record by the court in which the adoption petition was filed. Both courts shall notify the parties and law guardian, if any, in their respective proceedings and shall give them an opportunity to present facts and legal argument or to participate in the communication prior to the issuance of a decision on jurisdiction.

(C) The family court judge who exercised jurisdiction over the most recent permanency or other proceeding involving the child shall determine whether he or she should assume or decline jurisdiction over the adoption proceeding. In making its determination, the family court judge shall

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

(D) If the family court that exercised jurisdiction over the most recent permanency or other proceeding determines that it should exercise jurisdiction over the adoption petition, the order of the court in which the adoption petition was filed shall direct the transfer of the proceeding forthwith but in no event more than thirty-five days after the filing of the petition. The petition shall be assigned, wherever practicable, to the family court judge who heard the most recent permanency or other proceeding involving the child.

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

(iii) Neither such authorized agency nor any officer or agent thereof need appear before the judge or surrogate. The judge or surrogate in his or her discretion may accept the report of an authorized agency verified by one of its officers or agents as the report of investigation hereinbefore required. In making orders of adoption the judge or surrogate when practicable must give custody only to persons of the same religious faith as that of the adoptive child in accordance with article six of the social services law.

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

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

The Family Court Advisory and Rules Committee is proposing legislation to bring New York State into conformity with recent federal legislative mandates, requirements that are critically important for the health and welfare of children in foster care and that are conditions for New York State's continued eligibility to receive vital federal funds. These mandates reflect a recognition that children in the foster care system too often are caught in a vicious cycle: abuse and neglect frequently trigger disabilities and developmental delays in children while, at the same time, children with disabilities and developmental delays are at greater risk of further abuse, neglect and family disruption. First, the *Keeping Children and Families Safe Act of 2003* [P.L. 108-36] amends the *Child Abuse Prevention and Treatment Act* [42 U.S.C. §5106a(b), *et seq.*] to require that, as a condition for states' receipt of federal funding, all states must enact provisions and implement procedures for the referral of all children under the age of three who are involved in "substantiated" cases of child abuse or neglect to early intervention services programs funded under the *Individuals with Disabilities Education Act* [20 U.S.C. §§1431-1445; reauthorized as P.L. 108-446].[12] Second, section 614 of the 2004 amendments to the *Individuals with Disabilities Education Act* [P.L. 108-446] require, *inter alia*, that children in foster care, who received special education while in their home districts, be provided "immediately" with a "free, appropriate public education, including comparable services identified in the previously held IEP [Individual Education Plan]" until a new IEP is adopted and implemented. It further provides that if the child is transferred into a new school, the new school must immediately request, and the original school must immediately provide, "the IEP and supporting documents and any other records relating to the provision of special education or related services to the child." The Committee's proposal codifies these requirements and makes additional, needed changes to ensure that children, both while in and at the point of exiting, foster care receive necessary educational services.

Research has demonstrated that approximately 50 to 60 percent of infants and toddlers in foster care exhibit developmental delays, a rate that is four to five times the rate in the general population.[13]

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[12] The federally-supported "early intervention" program of comprehensive services for children up to the age of three is administered in New York State by the Department of Health. *See* Public Health Law Art.25, Tit. II-A. *See also,* U.S.H.H.S. Admin. For Children and Families Information Memorandum ACYF-CB-IM-03-04 (Aug. 11, 2003); Dicker and Gordon, "Opening the Door to Early Intervention for Abused and Neglected Children: A New CAPTA Requirement," 23 *ABA Child Law Practice* 3:1 (May, 2004).

[13] J. Silver, "Integrating Advances in Infant Research with Child Welfare Policy and Practice," 16 *Children's Services: Protecting Children: Children Birth to Three in Foster Care* 1:12, 14, 15 (2000); J. Silver, "Starting Young, Improving Children's Outcomes," in J. Silver *et al.,*, eds., *Young Children and Foster Care* (1999); "American Academy of Pediatrics Policy Statement: Developmental Issues for Young Children in Foster Care," 106 *Pediatrics* 5:1145-1150 (Nov., 2000). *See also*, *Ensuring the Healthy Development of Foster Children: A Guide for Judges, Advocates and Child Welfare Professionals* (NYS Perm. Jud. Comm. on Justice for Children, 1999); S. Dicker and E. Gordon,

School-age children in foster care demonstrate poor academic achievement and deficits in behavioral and cognitive development, often exacerbated by frequent disruptions in school placements; they generally function approximately one to two years behind their peers, have poor attendance and are at greater risk of dropping out.[14]

Compounding these difficulties, children in foster care are often less likely than their peers to receive appropriate evaluations and treatment interventions for these problems. *See generally,* S. Dicker and E. Gordon, "Safeguarding Foster Children's Rights to Health Services," in *Children's Law Institute* (Practicing Law Inst., July, 1999). A study of New York City foster children by Advocates for Children of New York demonstrated significant under-utilization of pre-school and early intervention programs, delays in enrolling children in school programs, frequent changes in school placements, over-utilization of highly restrictive special educational settings and limited pre-college and vocational preparation for older adolescents.[15] The study recommends, *inter alia,* enactment of a law "setting forth specific guidelines for providing educational services to children in foster care..."[16]

Conforming to the federal requirements and building upon the legislation enacted in 2000 regarding enrollment of juvenile delinquents in school and vocational programs [Laws of 2000, ch. 181], the Family Court Advisory and Rules Committee is recommending legislation to address these critical, continuing problems. The Family Court's responsibility to promote permanency for children, pursuant to the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7; Laws of 2000, ch. 145], demands no less. Indeed, the federal regulations promulgated to implement *ASFA* focus on the need to achieve successful outcomes for children, assuring their safety and well-being. States' compliance with *ASFA* is to be measured, in part, by the provision to children

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"Harnessing the Hidden Influence of the Courts to Enhance the Healthy Development of Foster Children," 16 *Children's Services: Protecting Children: Children Birth to Three in Foster Care* 1:36,40, 42 (2000); J.S.Kaye, "Strategies and Need for Systems Change: Improving Court Practice for the Millennium," 38 *Fam. & Conciliation Courts Rev.* 159 (Apr., 2000).

[14] *Foster Children and Education* (Vera Inst. of Justice, 2004); *Changing the PINS System in New York: A Study of the Implications of Raising the Age Limit for Persons in Need of Supervision (PINS),* p. 34 (Vera Inst., Sept., 2001); N. Trocme and C. Caunce, "The Educational Needs of Abused and Neglected Children: A Review of the Literature," 106 *Early Child Development & Care* 101, 112 (1995); S. Kaplan, *et al.*, "Child and Adolescent Abuse and Neglect Research: A Review of the Past Ten Years, Part I: Physical and Emotional Abuse and Neglect," 38 *J. Amer.Acad. of Child & Adol. Psychiatry* 10:1214, 1216 (Oct., 1999); "American Academy of Pediatrics Policy Statement: Developmental Issues for Young Children in Foster Care," 106 *Pediatrics* 5:1145-1150 (Nov., 2000); *Educational Neglect: The Delivery of Educational Services to Children in New York City's Foster Care System* 11 (Advocates for Children of New York, July, 2000); S. Dicker and E. Gordon, "Safeguarding Foster Children's Rights to Health Services," in *Children's Law Institute* (Practicing Law Inst., July, 1999).

[15] *Educational Neglect: The Delivery of Educational Services to Children in New York City's Foster Care System* 2-5, 27, 33- 35, 39-40, 43 (Advocates for Children of New York, July, 2000)

[16] Id. at 5, 53.

of "appropriate services to meet their educational needs" and "adequate services to meet their physical and mental health needs." 65 *Fed. Reg.* 16:4078 (Jan. 25, 2000); 45 *C.F.R.* §1355.34(b)(1)(iii). The Committee proposes, therefore, that the permanency hearing provisions of Articles 7 and 10 of the Family Court Act and section 392 of the Social Services Law be amended to incorporate consideration of these important issues into the permanency hearing process.

First, as in the 2000 legislation regarding juvenile delinquents, the proposal requires the agency with which a Person in Need of Supervision (PINS) is placed – the local Department of Social Services or an authorized child care agency operating under contract – to engage in constructive planning for the child's release and to report to the Family Court and to the parties on such efforts. Where an extension of placement is not being sought, a report would be required 30 days prior to the conclusion of the placement period. Where the agency is requesting an extension of placement and, concomitantly, a permanency hearing, the report would be required to be annexed to the petition, which must be filed 60 days prior to the date on which the permanency hearing must be held. The release plan mandated in the report would be required to delineate the steps that the agency has taken or will be taking to ensure that the juvenile would be enrolled in school promptly after release, that records would be promptly transferred and that special education services, if any, would continue until such time as the new local education agency develops and implements a new Individual Education Plan, as necessary. For a juvenile not subject to the State's compulsory education law who affirmatively elects not to continue in school, the agency would be required to describe steps taken or planned to promptly ensure the juvenile's gainful employment or enrollment in a vocational program. In the case of an extension of placement/permanency hearing, this release plan would be reviewed by the Court in conjunction with its review of the permanency plan. As is the case with the permanency plan, the Court's order pursuant to section 756-a of the Family Court Act would include a determination of the adequacy of the release plan and would specify any necessary modifications. These provisions would help to ameliorate the serious deficiencies in agency referrals of youth to school and vocational programs upon release from foster care as identified in the study by Advocates for Children of New York, as well as the serious decline in school attendance by PINS following release that was documented in the study by the Vera Institute of Justice. [17] Moreover, the provisions would promote compliance with the *Adoption and Safe Families Act* in its clear applicability to status offense proceedings.[18]

Second, permanency plans for children in foster care pursuant to a child protective or voluntary foster care proceeding would be required to include information on steps taken and planned by the child protective or authorized agency to ensure that the local education agency takes necessary steps to ensure children's prompt enrollment in pre-school and school programs and to ensure required evaluations and referrals for early intervention and special educational services. In the case of older adolescents, the permanency plan would be required to document the assistance provided to the children in obtaining further schooling, gainful employment and/or vocational assistance. In

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[17] Id. at 4, 52; *Changing the PINS System in New York: A Study of the Implications of Raising the Age Limit for Persons in Need of Supervision (PINS)*, p. 34 (Vera Inst., Sept., 2001).

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

reviewing the permanency plan, which must be attached to the petition and served upon the parties and law guardian, the Family Court would be required to determine whether these steps are adequate or whether the plan must be modified.

These provisions will ensure compliance with federal mandates and will inure to the benefit of children of all ages in foster care. Their special benefits for the almost 40% of foster children in New York State who are under five years of age cannot be over-emphasized.[19] As recognized by the American Academy of Pediatrics, in its policy statement regarding young children in foster care, "Early interventions are key to minimizing the long-term and permanent effects of traumatic events on the child's brain."[20] Although foster care caseworkers are referral sources for early intervention services, their referral rates have been lower than would be expected for the foster care population in New York,[21] a record that must change under the new federal law. Similarly, children between the ages of three and five identified as having a disability are eligible for pre-school special education pursuant to the federal *Individuals with Disabilities Education Act* administered in New York State by school districts pursuant to section 4410 of the Education Law. Importantly, all children in New York State, whether or not suspected of any disability or developmental delay, are eligible for pre-kindergarten services pursuant to the "Universal Pre-kindergarten Program" [Education Law §3602-e; Laws of 1997, ch. 436], another program found to have been under-utilized with respect to the foster care population.[22]

Recognizing that cooperation by, and inter-agency collaboration with, school districts will be essential to the implementation of permanency and release plans involving provision of educational services, the proposal would amend section 112 of the Education Law to require the New York State Education Department to promulgate regulations mandating school districts to cooperate in the implementation of these plans, to facilitate continuity of educational programs and to ensure immediate transfers of necessary records. The importance of continuity and the impact of frequent school disruption on children's achievement can not be stressed enough.[23] Further, the annual

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[19] S. Dicker, "The Promise of Early Intervention for Foster Children and Their Families," *Interdisciplinary Report on At-Risk Children and Their Families* (Civic Research Inst., Oct., 1999); *Ensuring the Healthy Development of Foster Children: A Guide for Judges, Advocates and Child Welfare Professionals* (NYS Perm. Jud. Comm. on Justice for Children, 1999).

[20] "American Academy of Pediatrics Policy Statement: Developmental Issues for Young Children in Foster Care," 106 *Pediatrics* 5:1145-1150 (Nov., 2000).

[21] *Educational Neglect: The Delivery of Educational Services to Children in New York City's Foster Care System* 26-31 (Advocates for Children of New York, July, 2000).

[22] Id. at 33-34.

[23] *See, e.g.,* Christian, "Educating Children in Foster Care" (National Conf.of State Legislatures, 2004; available at www.ncsl.org/programs/cyf/CPIeducate.htm); Massinga & Pecora, "Providing Better Opportunities for Older Children in the Child Welfare System," 14 *Future of Children: Children, Families and Foster Care* #1 (Winter, 2004; available at www.futureofchildren.org/pubs-info2825/pubs-info.htm?doc+209538).

report by the Education Commissioner to the Governor and Legislature, currently mandated by section 112 of the Education Law, would be required to address educational services provided to children in, and released from, foster care, as well as compliance by local school districts with the Department's regulations.

Enactment of this measure would ensure conformity with the new federal statutes requiring early intervention referrals and continuity in special education services for children in foster care, at the same time significantly enhancing New York State's compliance with the federal *Adoption and Safe Families Act*. Most important, it will ensure an educated foster care population.

Proposal

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

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

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

(iii) The local commissioner of social services or the person with whom the respondent has been placed under this section shall submit a report to the court, law guardian or attorney of record, and presentment agency, if any, not later than thirty days prior to the conclusion of the placement period; provided, however, that where the local commissioner of social services or person with whom the respondent has been placed files a petition for an extension of the placement and a permanency hearing pursuant to section seven hundred fifty-six-a of this article, such report shall be submitted not later than sixty days prior to the date on which the permanency hearing must be held and shall be annexed to the petition.

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

(1) If the respondent is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma following release, such plan

shall include, but not be limited to, the steps that the agency with which the respondent is placed has taken and will be taking in conjunction with the local education agency to ensure the immediate enrollment of the respondent in an appropriate school or educational program leading to a high school diploma and the transfer of necessary records in advance of or immediately upon release or, if such release occurs during the summer recess, immediately upon the commencement of the next school term.

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

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

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

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

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

(v) with regard to the completion or extension of placement ordered by the court pursuant to

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

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

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

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

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

(C) the steps that must be taken by the agency with which the child is placed in conjunction with the local education agency to ensure the prompt delivery of appropriate educational and vocational services to the child, including immediate enrollment in school and transfer of necessary records during the child's foster care placement or his or her discharge or trial discharge from foster care. The plan shall provide as follows:

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

appropriate school or educational program leading to a high school diploma and the transfer of necessary in advance of or immediately upon any change in the child's foster care placement or his or her discharge or trial discharge from foster care or, if such change in foster care placement or discharge or temporary discharge occurs during the summer recess, immediately upon the commencement of the next school term.

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

(3) If the child is under three years of age or if agency has reason to believe that the child may have a developmental delay or disability or if the child had been found eligible to receive early intervention or special education services prior to or during the foster care placement, in accordance with title II-A of article twenty-five of the public health law or article eighty-nine of the education law, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking to make any necessary referrals of the child for early intervention services or, as appropriate, to ensure that the local education agency makes any necessary referrals or arranges for special educational evaluations or services and provides necessary records immediately in accordance with state and federal law.

(4) If the child is not subject to article sixty-five of the education law and elects not to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the child is placed have taken and will be taking to assist the child to become gainfully employed or enrolled in a vocational program immediately upon any change in the child's foster care placement or the child's discharge or trial discharge from foster care.

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

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

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

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

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

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

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

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

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

(c) the steps that must be taken by the agency with which the child is placed in conjunction with the local education agency to ensure the prompt delivery of appropriate educational and vocational services to the child, including immediate enrollment in school and transfer of necessary records during the foster care placement of the child or discharge or trial discharge of the child from foster care. The plan shall provide as follows:

(i) If the child is subject to article sixty-five of the education law or elects to participate

in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking in conjunction with the local education agency to ensure the child's continued enrollment in an appropriate school or educational program leading to a high school diploma and transfer of necessary in advance of or immediately upon any change in the child's foster care placement or his or her discharge or trial discharge from foster care or, if such change in foster care placement or discharge or temporary discharge occurs during the summer recess, immediately upon the commencement of the next school term.

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

(iii) If the child is under three years of age and is the subject of a substantiated case of abuse or neglect, or if agency has reason to believe that the child may have a developmental delay or disability, or if the child had been found eligible to receive early intervention or special education services prior to or during the foster care placement, in accordance with title II-A of article twenty-five of the public health law or article eighty-nine of the education law, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking to make any necessary referrals of the child for early intervention services or, as appropriate, to ensure that the local education agency makes any necessary referrals or arranges for special educational evaluations or services and provides necessary records immediately in accordance with state and federal law.

(iv) If the child is not subject to article sixty-five of the education law and elects not to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking to assist the child to become gainfully employed or enrolled in a vocational program immediately upon any change in the child's foster care placement or his or her discharge or trial discharge from foster care.

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

(c) in the case of a child freed for adoption who is over the age of fourteen and who has withheld his or her consent to an adoption, at the review most immediately following the child's fourteenth birthday, examine the report of the law guardian of such child concerning the facts and circumstances with regard to the child's decision to withhold consent and the reasons therefor; [and]

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

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

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

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

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

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

(c) the steps that must be taken by the agency with which the child is placed in conjunction with the local education agency to ensure the prompt delivery of appropriate educational and vocational services to the child, including immediate enrollment in school and transfer of necessary records during the foster care placement of the child or discharge or trial discharge of the child from foster care. The plan shall provide as follows:

(1) If the child is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking in conjunction with the local education agency to ensure the child's continued enrollment in an appropriate school or educational program leading to a high school diploma and transfer of necessary in advance of or immediately upon any change in the child's foster care placement or his or her discharge or trial discharge from foster care or, if such change in foster care placement or discharge or temporary discharge occurs during the summer recess, immediately upon the commencement of the next school term.

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

(3) If the child is under three years of age and is the subject of a substantiated case of abuse or neglect, or if agency has reason to believe that the child may have a developmental delay or disability, or if the child had been found eligible to receive early intervention or special education services prior to or during the foster care placement, in accordance with title II-A of article twenty-five of the public health law or article eighty-nine of the education law, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking to make any necessary referrals of the child for early intervention services or, as appropriate, to ensure that the local education agency makes any necessary referrals or arranges for special educational evaluations or services and provides necessary records immediately in accordance with state and federal law.

(4) If the child is not subject to article sixty-five of the education law and elects not to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the child is placed has taken and will be taking to assist the child to become gainfully employed or enrolled in a vocational program immediately upon any change in the child's foster care placement or his or her discharge or trial discharge from foster care.

§9. Paragraphs (b) and (c) of subdivision 5-a of section 392 of the social services law, as amended by chapter 145 of the laws of 2000, are amended and a new subdivision (d) is added to such subdivision to read as follows:

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

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

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

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

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

4-a of section one thousand fifty-five-a of the family court act and paragraph (c) of subdivision 3-a of section three hundred ninety-two of the social services law. The department shall promulgate regulations to facilitate: the retention of children placed or remanded into foster care in their original schools and, if that is not feasible or determined to be in the child's best interests, the immediate enrollment of the children in school and transfer of necessary records. Nothing herein contained shall be deemed to apply to responsibility for the provision or payment of care, maintenance or other services subject to the provisions of the executive law, mental hygiene law, social services law or any other law.

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

section;  and any recommendations to ensure compliance with the rules of regents, regulations of the commissioner, and this chapter.

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

11. Criminal and child maltreatment history screening of persons with whom children are directly placed and non-parents seeking guardianship or custody of, or visitation with, children (DRL §240(1-a); FCA §§ 653, 662, 1017, 1027, 1055; SCPA § 1707)

In requiring fingerprinting of prospective foster and adoptive parents and adults over the age of 18 residing in their homes, the legislation implementing the federal *Adoption and Safe Families Act* ("ASFA"; Public Law 105-89] made substantial strides toward assuring the safety and well-being of children. *See* Laws of 1999, ch. 7; Laws of 2000, ch. 145. However, a significant, albeit unsurprising, side effect of *ASFA* has been the increasing reliance upon alternatives to foster care, including direct temporary remands and long-term placements of children with "relatives or other suitable persons" and appointment of non-parents as guardians and custodians. Unlike the comprehensive provisions requiring criminal records and child maltreatment screening of prospective foster and adoptive parents, pursuant to Social Services Law §378-a, comprehensive screening is not required in direct remand or placement and in non-parent custody or guardianship proceedings. Since Judges of the Family and Surrogate's Courts must be confident that children before them will be adequately protected and well-cared for in <u>any</u> home into which they are placed and with any adult with whom they regularly spend time, the Committee is proposing legislation to remedy these gaps.

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

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

Finally, in child protective proceedings under Article 10 of the Family Court Act, the proposal would require criminal records and child maltreatment screening of any "relative or other suitable person" with whom the child is temporarily remanded, pursuant to Family Court Act §§1017 and 1027, or with whom the child is placed, pursuant to subdivision (a) of the Family Court Act §1055. The measure would accord discretion to the Family Court to direct such screening regarding individuals over the age of 18 residing in the person's home. Although not involving foster care, direct remands and direct placements under Article 10 of the Family Court Act clearly involve removals of children from their homes, implicating constitutionally-recognized interests, and thus require the same balancing of relative harms recognized by the Court of Appeals in its recent decision in Nicholson *v.* Scoppetta, - N.Y.3d -, 2004 WL 2381177 (2004). The Court must be assured that in remanding a child to a non-parent, it is truly protecting the child from an imminent risk to his or her life or health and not creating another source of risk to the child. In placing a child on a long-term basis, the Court must find that it is in the child's best interests and that it would be contrary to the child's welfare to be returned home. Clearly, judicial decisions regarding direct remands and placements must be as fully informed as those regarding placements, both temporary and long-term, of children in foster and adoptive homes. To that end, enactment of the Committee's criminal history and child maltreatment screening proposal is critically important.

Proposal

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

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

Section 1. Subdivision 1-a of section 240 of the domestic relations law, as amended by chapter 452 of the laws of 1988, is amended to read as follows:

1-a. In any proceeding brought pursuant to this section to determine the custody or visitation of minors, a report made to the statewide central register of child abuse and maltreatment, pursuant to title six of article six of the social services law, or a portion thereof, which is otherwise admissible as a business record pursuant to rule forty-five hundred eighteen of the civil practice law and rules shall not be admissible in evidence, notwithstanding such rule, unless an investigation of such report conducted pursuant to title six of article six of the social services law has determined that there is some credible evidence of the alleged abuse or maltreatment and that the subject of the report has been notified that the report is indicated. In addition, if such report has been reviewed by the state commissioner of social services or his or her designee and has been determined to be unfounded, it shall not be admissible in evidence. If such report has been so reviewed and has been amended to

delete any finding, each such deleted finding shall not be admissible. If the state commissioner of social services or his or her designee has amended the report to add any new finding, each such new finding, together with any portion of the original report not deleted by the commissioner or his or her designee, shall be admissible if it meets the other requirements of this subdivision and is otherwise admissible as a business record. If such a report, or portion thereof, is admissible in evidence but is uncorroborated, it shall not be sufficient to make a fact finding of abuse or maltreatment in such proceeding. Any other evidence tending to support the reliability of such report shall be sufficient corroboration. Before entry of a final order of custody or visitation where the prospective custodian or applicant for visitation is not a parent of the child, the court shall require a criminal history report from the New York state division of criminal justice services regarding such prospective custodian or applicant for visitation and may require such a report regarding individuals over the age of eighteen residing in the home of the prospective custodian or applicant for visitation.

§2. Section 653 of the family court act, as amended by chapter 580 of the laws of 1966, is amended to read as follows:

§653. Rules of court; criminal history check. Rules of court, not inconsistent with any law, may authorize the probation service to interview such persons and obtain such data as will aid the court in determining a habeas corpus or custody proceeding under section six hundred fifty-one. Before entry of a final order of custody or visitation where the prospective custodian or applicant for visitation is not a parent of the child, the court shall require a criminal history report from the New York state division of criminal justice services regarding such prospective custodian or applicant for visitation and may require such a report regarding individuals over the age of eighteen residing in the home of the prospective custodian or applicant for visitation.

§3. Section 662 of the family court act is amended to read as follows:

§662. Rules of court; criminal history check. Rules of court, not inconsistent with any law, may authorize the probation service to interview such persons and obtain such data as will aid the court in exercising its power under section six hundred sixty-one. Before entry of a final order of guardianship where the prospective guardian is not a parent of the child, the court shall require a criminal history report from the New York state division of criminal justice services regarding such prospective guardian and may require such a report regarding individuals over the age of eighteen residing in the home of the prospective guardian.

§4. Subparagraph (i) of paragraph (a) of subdivision 2 of section 1017 of the family court act, as added by chapter 744 of the laws of 1989, is amended to read as follows:

(i) place the child with such relative and [conduct] order such other and further investigations and reports as the court deems necessary. Such reports shall include, but are not limited to, a criminal history report from the division of criminal justice services regarding such relative and a report from the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether such relative has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law. The court may, in its discretion, order such reports regarding persons over the age of eighteen residing in such person's home; or

§5. Subdivision (b) of section 1027 of the family court act is amended by adding a new paragraph (v) to read as follows:

(v) If the court issues an order pursuant to paragraph (i) placing a child in the custody of a suitable person other than the respondent, the court shall require the commissioner of such district to perform such other and further investigations and to obtain such reports as the court deems necessary. Such reports shall include, but are not limited to, a criminal history report from the division of criminal justice services regarding such person and a report from the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether such person has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law. The court may, in its discretion, order such reports regarding persons over the age of eighteen residing in such person's home.

§6. Subdivision (a) of section 1055 of the family court act, as added by chapter 962 of the laws of 1970, is amended to read as follows:

(a) For purposes of section one thousand fifty-two the court may place the child in the custody of a relative or other suitable person, or of the local commissioner of social services or of such other officer, board or department as may be authorized to receive children as public charges, or a duly authorized association, agency, society or in an institution suitable for the placement of a child. Prior to entry of an order under this subdivision placing a child directly in the custody of a relative or other suitable person, the court shall require the local commissioner of social services to perform

such other and further investigations and to obtain such reports as the court deems necessary. Such reports shall include, but are not limited to, a criminal history report from the division of criminal justice services regarding such person and a report from the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether such person has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law. The court may, in its discretion, order such reports regarding persons over the age of eighteen residing in such person's home.

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

1. If the court [be] is satisfied that the interests of the infant will be promoted by the appointment of a guardian or by the issuance of temporary letters of guardianship of [his] the infant's person or [of his] property, or both, it must make a decree accordingly. The same person may be appointed guardian of both the person and the property of the infant or the guardianship of the person and of the property may be committed to different persons. The court may appoint a person other than the parent of the infant or the person nominated by the petitioner. Before making a decree appointing a guardian of the person of an infant who is not the parent of the infant, the court shall direct the provision of a criminal history report from the division of criminal justice services regarding the prospective guardian and may direct thge provision of such a report regarding individuals over the age of eighteen residing in the home of the prospective guardian. When the court is informed that the infant, a person nominated to be a guardian of such infant, the petitioner, or any individual eighteen years of age or over who resides in the home of the proposed guardian is a subject of or another person named in an indicated report, as such terms are defined in section four hundred twelve of the social services law, filed with the statewide register of child abuse and maltreatment pursuant to title six of article six of the social services law or is or has been the subject of or the respondent in or a party to a child protective proceeding commenced under article ten of the family court act which resulted in an order finding that the child is an abused or neglected child, the court shall obtain such records regarding such report or proceeding as it deems appropriate and shall give the information contained therein due consideration in its determination.

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

12. Requirements for expeditious permanency planning with respect to children in foster care (FCA §§1017, 1035, 1055; S.S.L §§384-a, 392)

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

Recognizing the importance of early, comprehensive investigation to the swift movement of children out of foster care, the federal *Adoption and Safe Families Act of 1997* contains an express authorization for agencies to engage in efforts to place a child in a potentially permanent placement simultaneously with efforts to reunify the family. *See* Public Law 105-89, §101; 42 U.S.C.A. §671(a)(15)(F). As recognized by the federal Department of Health and Human Services, taking immediate steps to identify and locate non-custodial parents and relatives meets the goals both of maximizing efforts to work with a child's family <u>and</u> preparing the case for termination of parental rights and adoption, where reunification proves inappropriate.[24] The Family Court Advisory and Rules Committee is thus proposing legislation that would obligate local departments of social services and, as applicable, authorized child care agencies, to gather information necessary for the formulation and effectuation of permanent plans promptly when a child enters care and on an ongoing basis thereafter and that would ensure that all potential parental resources are given notice of proceedings regarding their children.

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

Second, in an effort to ensure that both parents are given the opportunity to participate in cases vitally affecting their children, Family Court Act §1035 would be amended to require that notice of the pendency of a child protective proceeding, as well as a summons and petition, be sent to the following additional individuals:

(i) any person whose name appears as a parent on the child's birth certificate;

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

(ii) any person married to the child's mother at the time of the child's birth or conception;
(iii) any person who was named in an order of filiation;
(iv) any person who acknowledged paternity pursuant to Public Health Law §4135-b.
(v) any person whom the agency has reason to believe is a parent of the child, based upon support, visitation or other conduct evincing an intent to assert parental rights and fulfill parental obligations.

Third, the proposal would amend section 1055 of the Family Court Act to require that identifying information obtained in the course of a diligent search for parents of abandoned children be recorded in the "Uniform Case Record," thus preserving it for later use in termination of parental rights proceedings. The provision would be amended as well to clarify that, in accordance with the federal *Adoption and Safe Families Act*, initial placements and extensions thereof must be measured from the date of a child's entry into care. Any period of adjournment of an extension of placement (permanency) hearing, therefore, would be included within the period of placement up to one year. *See* Public Law 105-89, §103(b); 42 U.S.C.A. §675(a)(F).

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

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

> The early identification and involvement of non-respondent parents have proven to be an important key in preventing foster care placement. Even if the non-respondent parent is unable to take custody of his or her child for a reason such as incarceration, for example, that parent nevertheless may have extended family members who can come forward to care for the child.[25]

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

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

Proposal

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

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

Section 1. Subdivisions 1 and 2 of section 1017 of the family court act, as added by chapter 744 of the laws of 1989 and subdivision 1 as amended by chapter 657 of the laws of 2003, are amended to read as follows:

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

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

(b) in the case of a relative, whether such relative seeks approval as a foster parent pursuant to

the social services law for the purposes of providing care for such child, or wishes to provide free care and custody for the child during the pendency of any orders pursuant to this article.

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

(a) where the court determines that the child may reside with a suitable non-respondent parent or other person related to such child[, either]:

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

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

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

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

§2. The opening paragraph of subdivision (d) of section 1035 of the family court act, as amended by chapter 526 of the laws of 2003, is amended to read as follows:

Where the respondent is not the child's parent, service of the summons and petition shall also be

ordered on both of the child's parents; where only one of the child's parents is the respondent, service of the summons and petition shall also be ordered on the child's other parent. The summons and petition shall also be served upon: (i) any person whose name appears as a parent on the child's birth certificate; (ii) any person who was married to the child's mother at the time of birth or conception of the child; (iii) any person who was named in an order of filiation; (iv) any person who acknowledged paternity in accordance with section four thousand one hundred thirty-five-b of the public health law; and (v) any person whom the agency has reason to believe is a parent of the child, based upon support, visitation or other conduct evincing an intent to assert parental rights and fulfill parental obligations. The summons and petition shall be accompanied by a notice of pendency of the child protective proceeding advising the parents or parent of the right to appear and participate in the proceeding as an interested party intervenor for the purpose of seeking temporary and permanent custody of the child, and to participate thereby in all arguments and hearings insofar as they affect the temporary custody of the child during fact-finding proceedings, and in all phases of dispositional proceedings. The notice shall also indicate that:

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

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

* * *

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

* * *

(vii)(A) Upon placing a child under the age of one, who has been abandoned by either of his or her parents, with a local commissioner of social services, the court shall, where either of the parents do not appear after due notice, include in its order of disposition pursuant to section [ten hundred] one thousand fifty-two of this article, a direction that such commissioner shall promptly commence a diligent search to locate the child's non-appearing parent or parents or other known relatives who are legally responsible for the child, and to commence a proceeding to commit the guardianship and custody of such child to an authorized agency pursuant to section three hundred eighty-four-b of the social services law, six months from the date that care and custody of the child was transferred to the commissioner, unless there has been communication and visitation between such child and [his] such parent or parents or other known relatives or persons legally responsible for the child. In addition to such diligent search, the local commissioner of social services shall provide written notice to the child's parent or parents or other known relatives as provided for in this paragraph. Such notice shall be served upon such parent or parents or other known relatives in the manner required for service of process pursuant to section six hundred seventeen of this [chapter] act. Information regarding such diligent search, including, but not limited to, the name, last known address, date of birth, social security number, employer's address and any other identifying information to the extent known regarding the non-appearing parent, shall be recorded in the uniform case record maintained pursuant to section four hundred nine-f of the social services law.

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

1-b. Upon accepting the transfer of care and custody of a child from the parent, guardian or other person to whom care of the child has been entrusted, a local social services official shall obtain information to the extent known from such person regarding the other parent, any person to whom the parent transferring care and custody had been married at the time of the conception or birth of the child and any other person who would be entitled to notice of a proceeding to terminate parental rights pursuant

to section three hundred eighty-four-c of this article. Such information shall include, but not be limited to, name, last-known address, date of birth, social security number, employer's address and any other identifying information. Any information provided pursuant to this subdivision shall be recorded in the uniform case record maintained pursuant to section four hundred nine-f of this article; provided, however, that the failure to provide such information shall not invalidate the transfer of care and custody.

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

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

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

13. Determinations of the Family Court
regarding children in foster care
(FCA §§352.2, 754, 1039-b, 1052(b)(i)(A); SSL §§358-a, 392)

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

Unfortunately, the statutory provisions implementing the federal mandate are a patchwork of inconsistent provisions, none of which articulate any burden of proof or threshold of evidence required and only one of which contains a procedural framework for the judicial determination to dispense with reasonable efforts. Judicial authority to dispense with the reasonable efforts requirement is contained in the statutory provisions governing voluntary placements of children into foster care, as well as placements in persons in need of supervision, juvenile delinquency and child abuse and neglect proceedings. *See* Social Services Law §§ 358-a(3)(b); 392(6-a); Family Court Act §§352.2(2)(c), 754(2)(b), 1039-b, 1052(b). All are silent on the quantum of proof required and only the child abuse and neglect provisions [Family Court Act §§1039-b and 1052(b)] delineate a motion procedure. In all other sections, the statute simply requires the Family Court to make the determination if the requisite circumstances are present. This has the clearly-unintended effect of restricting the standing to request this determination in child protective proceedings, but not in any other cases involving placements of children, and of leaving ambiguous the level of evidence required. The proposal of the Family Court Advisory and Rules Committee seeks to remedy these disparities.

The proposal would require clear and convincing evidence for the determination to dispense with reasonable efforts, a threshold consistent with the constitutionally-required quantum of proof for termination of parental rights. *See* Santosky *v.* Kramer, 455 U.S. 745 (1982). Further, the proposal would amend sections 1039-b and 1052(b) of the Family Court Act to provide that representatives of authorized agencies and law guardians, as well as social services officials, would have standing to initiate motions for orders to dispense with the requirement of reasonable efforts for the reunification of children with their families. Where the designated circumstances are present, no reason exists to restrict the Family Court's determination to cases in which a social services official makes a motion, although clearly social services officials should continue to have primary responsibility to move with dispatch in such cases. In the absence of a motion by a social services official, the authorized agency or law guardian should have

standing to put the "reasonable efforts" issue before the Family Court. The child's exigent need for permanency – for an expeditious exit from the limbo of foster care – demands this type of statutory flexibility.

Finally, in order to conform the statute to the Court of Appeals' decision in Matter of Marino S., 100 N.Y.2d 361 (2003), *cert. denied*, 124 S.Ct. 834 (2003), the proposal would also incorporate a key provision of the Social Services Law into Family Court Act §1039-b, that is, the equation of the definition of "reasonable" and "diligent" efforts. In Matter of Marino S., the Court of Appeals affirmed the Appellate Division, First Department, conclusion that the "reasonable efforts" provisions of the *Adoption and Safe Families Act* encompass the existing statutory and decisional law regarding "diligent efforts" that pre-dated its enactment. *See also* Matter of Kyle M., 5 A.D.3d 489 (2d Dept., 2004); Matter of La'Asia S., 191 Misc.2d 28, 45 (Fam. Ct., N.Y.Co., 2002).

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

Consistent with the case law and clear intent of the statute, the incorporation by reference of the "diligent efforts" definition of Social Services Law §384-b(7)(f) into Family Court Act §1039-b would assure the continued viability of the substantial body of pre-*ASFA* appellate case law construing the "diligent efforts" requirement. Significantly, it would provide all parties with requisite notice that an order issued under the Family Court Act dispensing with the "reasonable efforts" requirement would eliminate the requirement of proving "diligent efforts" in a subsequent termination of parental rights proceeding.

Proposal

AN ACT to amend the family court act and social services law, in relation to determinations by the family court regarding children in foster care

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

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

For the purpose of this section, when an order is entered pursuant to section 353.3 or 353.4 of this article, reasonable efforts to prevent or eliminate the need for removing the respondent from [the] his

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

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

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

§3. Subdivision (a), the opening sentence of subdivision (b) and subdivision (c) of section 1039-b of the family court act, as added by chapter 7 of the laws of 1999, are amended and a new subdivision (e) is added to such section to read as follows:

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

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

* * *

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

* * *

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

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

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

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

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

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

§6. The opening sentence of subdivision 6-a of section 392 of the social services law, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

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

§7. This act shall take effect immediately.

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

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

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

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

However, in reality, the provisions do just that – that is, litigants in public assistance and child

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

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

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

Proposal

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

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

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

§451. Continuing jurisdiction.

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

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

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

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

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

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

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

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

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

15. Extension of the permissible duration and entry of orders of protection issued in child abuse and neglect cases onto the statewide automated order of protection and warrant registry (FCA §§ 1029, 1056, 1072; Exec. L. §221-a)

The statewide registry of orders of protection and warrants, established pursuant to the *Family Protection and Domestic Violence Intervention Act of 1994* [Laws of 1994, ch. 222, 224], has become an invaluable tool both for law enforcement and the courts. With in excess of 1,245,415 orders of protection in the database, as of November 28, 2004,[26] and with the database now connected to the national "Protection Order File" maintained by the National Crime Information Center (Federal Bureau of Investigation), the registry helps to assure informed judgments at all stages of domestic violence cases.

As use of the database becomes more and more routine, however, its limitations become more apparent, specifically the gaps in the data contained in the system. While the registry purports to contain all orders of protection issued in domestic violence cases, the statute establishing the registry specifies only orders of protection and related warrants issued in criminal and Family Court family offense, matrimonial, child support, paternity and child custody cases, as well as orders of protection issued in non-family offense criminal cases against victims of domestic violence. *See* Executive Law §221-a(1). Orders of protection and related warrants issued in child abuse and neglect cases, pursuant to Article 10 of the Family Court Act, are not entered onto the registry. As a result of this omission, law enforcement and courts are seriously hampered in their inquiries regarding both the existence of outstanding orders, including possibly conflicting orders, and the parties' histories of orders of protection. Significantly, the requirement that courts, when issuing protective orders, inquire as to the existence of other orders of protection with respect to the parties does not apply in child protective proceedings. Moreover, although the family violence to be prevented may be just as serious, if not more so, as that in matrimonial cases, section 1056 of the Family Court Act permits an order of protection against respondent parents or legal guardians to last only as long as a dispositional order, that is, one year, subject to annual extensions.

The Family Court Advisory and Rules Committee, therefore, is offering a legislative proposal to remedy this gap. The proposal would require that information regarding orders of protection and related warrants in child protective proceedings brought pursuant to Article 10 of the Family Court Act be included on the statewide registry. It would require Family Court, when issuing temporary and final orders of protection, pursuant to sections 1029 and 1056 of the Family Court Act, to make inquiry as to the existence of other orders of protection issued with respect to the parties. Additionally, it would permit orders of protection in such cases to be of comparable duration to those permitted in matrimonial cases under sections 240(3) and 252 of the Domestic Relations Law. Lastly, it would make a technical correction to the statutory citations for the provisions regarding orders of protection and supervision Family Court Act §1072.

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

Article 10 of the Family Court Act specifically requires courts to consider issuing orders of protection to exclude domestic violence perpetrators from the home in lieu of removing the child; no requirement exists, nor would one be appropriate, for custodial parents in such situations to bring separate Article 8 proceedings to obtain orders of protection. Yet orders of protection in Article 10 cases are not entered onto the registry, creating an impression that they are not taken as seriously as domestic violence orders in other cases and, importantly, creating confusion for both law enforcement and the courts in obtaining a complete order of protection picture with respect to an alleged abuser.

This proposal would recognize that domestic violence is often inextricably linked with child abuse and that victims of domestic violence in child abuse and neglect cases require as much protection from their abusers as in other proceedings . As the Court of Appeals recognized, in its decision in Nicholson *v.* Scoppetta, - N.Y.3d -, 2004 WL 2381177 (2004), victims of domestic violence may not be charged with child neglect by reason of their children's exposure to domestic violence unless they have failed to exercise a minimum degree of care and unless the child is thereby placed in imminent risk of impairment. If a child neglect proceeding is brought against the abuser, the order of protection issued to protect both the abuse victim and the children should provide as much protection as orders of protection issued in family offense and all other cases – a precept that compels inclusion of the order on the statewide domestic violence registry, and consequently, on the federal "Protection Order File" as well. That domestic violence and child abuse frequently coexist in homes has been widely recognized, with estimates of the overlap ranging from 40% to 60%.[27] Research has estimated that children are abused at a rate 1,500 times higher than the national average in homes where domestic violence is also present.[28] Significantly, child sexual abuse has also been closely correlated with domestic violence.[29] Therefore, inclusion of orders of protection in such cases on the registry, as well as authorization for the orders to continue for longer periods, will significantly advance the Legislature's goal of providing an integrated response in all family violence cases and of protecting all victims of domestic abuse, both parents and children, from suffering further violence.

With this legislation, courts handling all types of family violence cases would be able to make

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[27] *See* "The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association" (Amer. Bar Assoc., 1994), p. 18; "Diagnostic and Treatment Guidelines on Domestic Violence" (Amer. Medical Assoc.,1992). *See also* M, Fields, "The Impact of Spouse Abuse on Children, and its Relevance in Custody and Visitation Decisions in New York State," 3 *Cornell J. of Law and Pub. Policy* 222, 224 (1994); A. Jones, *Next Time She'll be Dead* 84 (1994) [citing, E. Stark and A. Flitcraft, "Women and Children at Risk: A Feminist Perspective on Child Abuse," 18 *Int'l. J. Health Services* 1:97 (1988); L. McKibben, *et al.*, "Victimization of Mothers of Abused Children: A Controlled Study," 84 *Pediatrics* #3 (1989); L. Walker, *The Battered Woman Syndrome* 59 (1984)].

[28] "The Violence Against Women Act of 1990: Hearings on S. 2754," Senate Committee on the Judiciary, Report 1-545, 101st Cong., 2d Sess. 37 (1990)[cited in J. Zorza, "Woman Battering: A Major Cause of Homelessness," *Clearinghouse Review* (Special Issue, 1991)].

[29] L. Hoff, *Battered Women as Survivors* 240 (1990); M. Roy, *Children in the Crossfire* 89-90 (1988); Hewitt and Friedrich, "Effects of Probable Sexual Abuse on Preschool Children," in M.Q. Patton, ed., *Family Sexual Abuse* 59-74 (1991) [cited in J. Zorza, *supra*, at 424-425].

more informed decisions as to the appropriateness of issuing protective orders or warrants and the need for particular conditions. Importantly, the courts would then be able to determine whether orders of protection issued would be in conflict with any other such orders outstanding in *any* criminal, matrimonial or Family Court proceeding statewide, including child protective proceedings, and the courts would be cognizant of the respondent's prior history with respect to compliance with orders of protection. Further, in child protective proceedings, the Family Court would be able to enter orders of duration appropriate to the circumstances of particular cases, thereby eliminating the need to request annual extensions or to initiate independent actions.

Proposal

AN ACT to amend the family court act and the executive law, in relation to orders of protection in child protective proceedings

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

Section 1. Subdivision (a) of section 1029 of the family court act, as amended by chapter 673 of the laws of 1988, is amended to read as follows:

(a) The family court, upon the application of any person who may originate a proceeding under this article, for good cause shown, may issue a temporary order of protection, before or after the filing of such petition, which may contain any of the provisions authorized on the making of an order of protection under section [ten hundred] one thousand fifty-six. Prior to issuing a temporary order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties. If such order is granted before the filing of a petition and a petition is not filed under this article within ten days from the granting of such order, the order shall be vacated. In any case where a petition has been filed and a law guardian appointed, such law guardian may make application for a temporary order of protection pursuant to the provisions of this section.

§2. The opening unlettered paragraph of subdivision 1 and subdivision 4 of section 1056 of the family court act, as amended by chapter 483 of the laws of 1995, are amended to read as follows:

1. The court may [make] issue an order of protection in assistance or as a condition of any other order made under this part. [Such] Prior to issuing an order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties. An order of protection issued under this section shall remain in effect concurrently with, shall expire no later than the expiration date of, and may be extended concurrently with, [such other] another order [made] issued under this part, [except as provided in subdivision four of this section]. However, for good cause shown, the court may direct that an order of protection issued under this section shall

remain in effect for a specified period beyond the expiration of the dispositional order, but in no event beyond the eighteenth birthday of the youngest child for whom a finding of child abuse or neglect has been made. The order of protection may set forth reasonable conditions of behavior that the court deems necessary and proper to protect the health and safety of the child and the child's caretaker to be observed for a specified time by a person who is before the court and is a parent or a person legally responsible for the child's care or the spouse of the parent or other person legally responsible for the child's care, or both. Such an order may require any such person:

* * *

4. The court may enter an order of protection independently of any other order made under this part, against a person who was a member of the child's household or a person legally responsible as defined in section one thousand twelve of this chapter, and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household. An order of protection entered pursuant to this subdivision may be for [any] the period of time [up to the child's eighteenth birthday] and upon such conditions as [the court deems necessary and proper to protect the health and safety of the child and the child's caretaker] are authorized by subdivision one of this section.

§3. The opening sentence of section 1072 of the family court act, as amended by chapter 1039 of the laws of 1973, is amended to read as follows:

If a parent or other person legally responsible for a child's care is brought before the court for failing to comply with the terms and conditions of an order of supervision issued under section one thousand fifty-four or [of] one thousand fifty-seven, an order of protection issued under section one thousand fifty-six or a temporary order of protection issued under section one thousand twenty-seven or one thousand twenty-nine of this article and if, after hearing, the court is satisfied by competent proof that the parent or other person did so willfully and without just cause, the court may:

§4. Subdivision 1 of section 221-a of the executive law, as amended by chapter 462 of the laws of 2002, is amended to read as follows:

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

the criminal procedure law and, insofar as they involve victims of domestic violence as defined by section four hundred fifty-nine-a of the social services law, section 530.13 of the criminal procedure law and sections two hundred forty and two hundred fifty-two of the domestic relations law, and orders of protection issued by courts of competent jurisdiction in another state, territorial or tribal jurisdiction, and all warrants issued pursuant to sections one hundred fifty-three and eight hundred twenty-seven of the family court act, and arrest and bench warrants as defined in subdivisions twenty-eight, twenty-nine and thirty of section 1.20 of the criminal procedure law, insofar as such warrants pertain to orders of protection; provided, however, that warrants issued pursuant to section one hundred fifty-three of the family court act pertaining to articles three[,] <u>and</u> seven [and ten] of such act and section 530.10 of the criminal procedure law shall not be included in the registry. The superintendent shall establish and maintain such registry for the purposes of ascertaining the existence of orders of protection, temporary orders of protection and warrants and for enforcing the provisions of paragraph (b) of subdivision four of section 140.10 of the criminal procedure law.

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

16. Service of process, communications between courts and taking of testimony by telephone, audio-visual or other electronic means under the *Uniform Child Custody Jurisdiction and Enforcement Act*; technical amendment to Civil Practice Law and Rules (DRL §§75-g, 75-i, 75-j, 77-h; CPLR 302(b))

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

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

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

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

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

followed in taking testimony by these means, including, for example, the swearing-in of witnesses and the ruling on objections in depositions.

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

Now enacted in 39 states, plus the District of Columbia, the *UCCJEA* has become an increasingly useful vehicle for the resolution of the frequent inter-jurisdictional issues that arise in custody cases. Enactment of the Committee's proposal would significantly ease the burden on litigants in initiating and conducting proceedings under the *UCCJEA* and would make a needed correction to the personal jurisdiction provision of the Civil Practice Law and Rules .

Proposal

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

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

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

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

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

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

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

2. A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony and the procedures to be followed by the persons taking such deposition or testimony. Any such testimony or deposition shall be recorded and preserved for transcription.

§4. Section 77-h of the domestic relations law, as added by chapter 386 of the laws of 2001, is amended to read as follows:

§ 77-h. Service of petition and order. Except as otherwise provided in section seventy-seven-j of this title, the petition and order must be served, by any method authorized by the law of this state, upon respondent and any person who has physical custody of the child. Service of process may be made by personal delivery outside the state in the manner prescribed in section three hundred thirteen of the civil practice law and rules, or by priority or other form of mail addressed to the person that can ensure a delivery receipt or confirmation, or by any manner directed by the court that is reasonably calculated to give actual notice.

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

(b) Personal jurisdiction over non-resident defendant in matrimonial actions or family court proceedings. A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state. The family court may exercise personal jurisdiction over a non-resident respondent to the extent provided in sections one hundred fifty-four and one thousand thirty-six and article 5-B of the family court act and article 5-A of the domestic relations law.

§6. This act shall take effect immediately.

## III Previously Endorsed Measures

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

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

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

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

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

• the remedies contained in Family Court Act §846-a that are available to the Family Court once a willful violation has been found;[30] and

• the options contained in Family Court Act §847 for a victim of an alleged act constituting a family offense to seek the filing of an accusatory instrument in a criminal court,[31] as well as to file a new family offense petition or a violation petition.

Second, section 846-a of the Family Court Act would be amended to more clearly delineate the powers of the Family Court to impose sanctions upon a finding of a willful violation of an order of protection or temporary order of protection and to modify or issue a new order of protection or temporary

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

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

order of protection. The Court's authority to place a violator on probation and to require, as a condition of probation, *inter alia*, that the violator participate and pay the costs of a batterer's education program would be articulated – a recommendation consistent with the statutorily-required evaluation of the 1994 legislation by the New York State Office for the Prevention of Domestic Violence and Division of Criminal Justice Services.[32] Where a violator is already on probation, the Court would be authorized to revoke or modify the order of probation. Additionally, the Court's power to compel payment of legal fees and costs, law guardian fees and costs, restitution and medical expenses would be clarified, as would the Court's authority to suspend an order of visitation or require that visitation be supervised. None of these are new powers; all are powers currently exercised by the Courts. *See, e.g.,* Matter of C.B. *v.* J.U., 5 Misc.3d 1004 (Sup. Ct., N.Y. Co., 2004)(supervised visitation ordered). Consolidating several scattered provisions, the proposal would also enumerate the options available to the Court to commit the violator to jail for up to six months,[33] revoke or suspend a firearms license and direct the surrender of firearms.

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

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

Proposal

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

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

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

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[32] *Family Protection and Domestic Violence Intervention Act of 1994: Evaluation of the Mandatory Arrest Provisions: Third Interim Report to the Governor and the Legislature* (Oct., 2000), pp. 14, 30.

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

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

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

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

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

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

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

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

1. modify an existing order or temporary order of protection to add reasonable conditions of behavior to the existing order [of protection,] or temporary order or make a new order of protection or temporary order of protection in accordance with section eight hundred twenty-eight or eight hundred forty-two of this article, [may order the forfeiture of bail in a manner consistent with article five hundred forty of the criminal procedure law if bail has been ordered pursuant to this act, may] as applicable;

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

be deemed to require payment of the costs of any such program by the petitioner, the state or any political subdivision thereof;

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

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

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

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

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

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

9. revoke or, in the case of a violation of a temporary order of protection, suspend any license of the respondent to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law immediately, and arrange for the immediate surrender and disposal of any firearm such respondent owns or possesses, if the court determines that the willful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, stalking, assault or attempted assault [and if such a respondent is licensed to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law, the court may also immediately revoke such license and may arrange for the immediate surrender and disposal of any firearm such respondent owns or possesses]. If the willful failure to obey such order involves the infliction of serious physical injury as defined in subdivision ten of section 10.00

of the penal law or the use or threatened use of a deadly weapon or dangerous instrument, as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, such revocation and immediate surrender and disposal of any firearm owned or possessed by respondent shall be mandatory, pursuant to subdivision eleven of section 400.00 of the penal law.

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

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

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

* * *

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

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

b. place the party found to have violated the order of protection or temporary order of protection

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

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

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

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

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

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

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

i. in accordance with paragraph g of subdivision three of this section and section eight hundred forty-six-a of the family court act, immediately revoke or, in the case of a violation of a temporary order of protection, suspend any license to carry, possess, repair and dispose of firearms pursuant to section 400.00

of the penal law of the party found to have violated the order, and arrange for the immediate surrender and disposal of any firearm such party owns or possesses, if the court determines that the willful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, stalking, assault or attempted assault. If the willful failure to obey such order involves the infliction of serious physical injury as defined in subdivision ten of section 10.00 of the penal law or the use or threatened use of a deadly weapon or dangerous instrument, as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, such revocation and immediate surrender and disposal of any firearm owned or possessed by such party shall be mandatory, pursuant to subdivision eleven of section 400.00 of the penal law.

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

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

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

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

b. place the party found to have violated the order of protection or temporary order of protection on probation in accordance with subdivision (c) of section eight hundred forty-one of the family court

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

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

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

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

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

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

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

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

disposal of any firearm such party owns or possesses, if the court determines that the willful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, stalking, assault or attempted assault. If the willful failure to obey such order involves the infliction of serious physical injury as defined in subdivision ten of section 10.00 of the penal law or the use or threatened use of a deadly weapon or dangerous instrument, as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, such revocation and immediate surrender and disposal of any firearm owned or possessed by such party shall be mandatory, pursuant to subdivision eleven of section 400.00 of the penal law.

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

2. Clarification of time-frames for preliminary proceedings in child abuse and neglect proceedings (FCA §§1021, 1022, 1026, 1027, 1035)

The patchwork of statutory provisions governing the preliminary stages of child abuse and neglect proceedings have caused significant confusion and disparities in interpretation in different parts of the state. Delays in bringing cases into Family Court for the first hearing have been especially frequent in child abuse and neglect cases in which children were removed from their homes with the consent of the parent or parents – delays stemming from varying interpretations of statutory terms, such as "forthwith," and from gaps in the statutory framework. The decision of the Court of Appeals in Nicholson *v.* Scoppetta, - N.Y.3d -, 2004 WL 2381177 (2004), stressing the need for strict adherence to statutory criteria and time-frames governing pre-petition removals, has underscored the need to make the statutory framework crystal clear and unambiguous. In an effort to enhance New York State's compliance with the federal *Adoption and Safe Families Act* [Public Law 105-89] and to ensure fairness to children removed from their homes, as well as their parents, the Committee is proposing legislation to clarify the applicable procedures.

The federal and state *Adoption and Safe Families Act* impose stringent time-frames for preliminary determinations regarding all children removed from their homes and placed into foster care, regardless of whether or not the removals were on consent . As a condition of federal foster care reimbursement under Title IV-E of the federal *Social Security Act*, a judicial determination must be made that a removal of a child from his or her home is contrary to the welfare (in New York's terms, "best interests") of the child in the first court ruling that sanctions even a temporary removal. A further finding that reasonable efforts had been made to prevent or shorten the removal must be made within 60 days. *See* 42 U.S.C. §§471(a)(15), 472(a)(1); 45 C.F.R. §1356.21; Family Court Act §§1022(a), 1027(b), 1028(b). While the "contrary to welfare" finding may be made within 60 days of removal where a voluntary placement agreement has been executed (in New York, an agreement pursuant to Social Services Law §384-a), the shorter time frame applies where a child has been removed in the context of a child protective proceeding, even if the agency secured the consent of the parent for the removal. Failure to make a timely "contrary to welfare" finding results in a loss of federal foster care reimbursement for the child's entire stay in foster care. 45 C.F.R. §1356.21.

These federal requirements have been engrafted onto the Family Court Act, supplementing the series of provisions regarding time-frames for filing child protective petitions and for convening preliminary hearings. Part 2 of Article 10 of the Family Court Act was designed to bring cases in to Family Court quickly in order to further the stated statutory purposes of safeguarding children while also providing due process of law for parents. *See* Family Court Act §1011. However, the goals are frustrated by the confusion of provisions in the Family Court Act as it currently reads:

• Family Court Act §1021 provides that where a child has been removed from home with the parent's consent, if the child is not returned within three days, the procedures contained in Part 3 of Article 10 (filing the petition, issuing a summons, convening the first appearance) must be followed "forthwith."

• Family Court Act §1022, which applies to children in imminent risk of harm where the parent's consent to removal is not forthcoming and where there is neither time to file a petition nor to hold a removal hearing, authorizes the Family Court to issue an order of removal prior to the filing of a petition. However, it does not specify how quickly the order must be issued. If the child is not returned within three days, a petition must be filed within three days of the issuance of the removal order.

• Family Court Act §§1024 and1026, which define procedures for emergency removals of children prior to the filing of a petition without a court order, require that a petition be filed "forthwith," an undefined time-frame that may be extended for up to three court days upon a showing of good cause.[34]

• In cases where a child was removed without a court order, Family Court Act §1027(a) requires the Family Court to convene a hearing "as soon as practicable" following the filing of a petition to determine whether to issue a court order continuing the removal.

• Family Court Act §1035 requires that once a petition has been filed alleging abuse, the respondent parent or other person legally responsible must appear to answer the petition within three court days; once a petition has been filed alleging neglect, respondent must appear within three court days, if the child was temporarily removed, and within seven court days if the child was not. While this provision makes no distinction regarding removals based upon consent, there have been disparate interpretations as to the applicable time-frame in consent cases.

The Committee's proposal would clarify each of these provisions in order to better fulfill their statutory purposes, protect New York State from a substantial loss of federal funding under *ASFA* and facilitate adherence to the requirements of the Nicholson decision. First, with respect to removals upon consent, Family Court Act §1021 would be amended to require a petition to be filed and a summons or warrant, as applicable, to be issued within three court days from the date of removal. Family Court Act §1035(c), which regulates the date of the respondent's first appearance, would be amended to clarify its applicability to all removal cases, regardless of consent. Upon a consent removal, the official removing the child would be required to give the parent or other person legally responsible contact information regarding the upcoming filing of a petition and convening of a hearing, as well as information regarding visitation with the child and the right to apply for return of the child.

Second, with respect to removals upon a court order prior to the filing of a petition, Family Court Act §1022 would be amended to require the court order to be obtained immediately, but in no event later than the next court date. To the extent that, in many counties, a court order may be obtained from a judge even when the court is not in session, that desirable practice should certainly continue. The petition would be required to be filed on the next court date following issuance of the order and, consistent with Family Court Act §1035(c), the first appearance would have to take place within three court days of the filing of the petition.

Third, with respect to emergency removals prior to the filing of a petition and without a court order, Family Court Act §1026(c) would be amended to require the filing of a petition no later than the next date that the court is in session. The current authorization for a three-court-day extension upon a showing of good cause would be retained. Again, consistent with Family Court Act §1035(c), the first appearance by the parties would have to take place within three court days of the filing of the petition.

Finally, in order to harmonize the initial appearance sections and ensure compliance with *ASFA* requirements, the phrase "as soon as practicable" in Family Court Act §1027(a) would be replaced by

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[34] Significantly, in addressing the serious consequences of emergency removals, the Court of Appeals in Nicholson cited Tenenbaum *v.* Williams, 193 F.3d 581 (2d Cir., 1999), *cert. denied,* 529 U.S. 1098 (2000), which held that emergency removals without court orders implicate the Fourth Amendment and should be invoked only in the most exigent of circumstances.

"on the same date the petition has been filed." In cases in which a child had been removed without a court order, either on consent or on an emergency basis, under Family Court Act §§1021, 1024 and 1026, the hearing under Family Court Act §1027 would need to be convened on the date of filing of the petition, even prior to the respondent's first appearance, in order to ensure that the required front-end *ASFA* findings would be made on a timely basis. Where an order had been issued pursuant to Family Court Act §1022, presumably containing the required front-end *ASFA* "contrary to the best interests" finding, however, the hearing under Family Court Act §1027 regarding continuation of the foster care would be required within three court days of the filing of the petition, as provided in Family Court Act §1035(c). This flexibility would permit continuation of the practice, common outside New York City, of obtaining an initial removal order prior to the filing of the petition and then convening the hearing under Family Court Act §1027 on the date of the respondent's first appearance in court. At the same time, it would underscore the necessity of convening a prompt hearing under Family Court Act §1027 regarding continuation of the removal of children initially removed in the absence of a court order, either on consent or by reason of an emergency. Family Court Act §1028, which permits a respondent, who had not been present or represented by counsel at a hearing held pursuant to Family Court Act §1027, to request a hearing regarding return of the child, would remain unchanged.

New York State's inadequate performance in the recent federal Title IV-E audit should be a wake-up call to tighten up the New York State statutory framework so that all required judicial findings are made on a timely basis in accordance with the *Adoption and Safe Families Act* . Enactment of these provisions in advance of the follow-up federal audit will help to ensure that New York's multi-million dollar federal foster care reimbursement will not be placed at risk, while, at the same time, enhancing the due process afforded to both parents and children.

Proposal

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

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

Section 1. Section 1021 of the Family Court Act, as amended by chapter 205 of the laws of 1990, is amended to read as follows:

§1021. Temporary removal with consent. A peace officer, acting pursuant to his or her special duties, or a police officer or an agent of a duly authorized agency, association, society or institution may temporarily remove a child from the place where he or she is residing with the written consent of his or her parent or other person legally responsible for his or her care, if the child is an abused or neglected child under this article. The officer or agent shall, coincident with removal, give written notice to the parent or other person legally responsible for the child's care of the right to apply to the family court for the return of the child pursuant to section one thousand twenty-eight of this act, and of the right to be represented by counsel in proceedings brought pursuant to this article and procedures for obtaining counsel, if indigent. Such notice shall also include the name, title, organization, address and telephone

number of the person removing the child, the name, address, and telephone number of the authorized agency to which the child will be taken, if available, the telephone number of the person to be contacted for visits with the child, and the information required by section one thousand twenty-three of this act. A copy of the instrument whereby the parent or legally responsible person has given such consent to such removal shall be appended to the petition alleging abuse or neglect of the removed child and made a part of the permanent court record of the proceeding. [If] A copy of the instrument shall be given to the parent or legally responsible person, together with a notice of the telephone number of the child protective agency to contact to ascertain the date, time and place of the filing of the petition and of the hearing that will be held pursuant to section one thousand twenty-seven of this article. Unless the child is [not] returned [within three days from the date of removal, the procedure required in part three of this article] sooner, a petition shall be filed and a summons or warrant, as applicable, shall be [applied forthwith] issued within three court days from the date of removal. In such a case, a hearing shall be held and findings shall be made as required pursuant to section one thousand twenty-seven of this article on the same day the petition is filed.

§2. The final unnumbered paragraph of subdivision (a) of section 1022 of the family court act, as added by chapter 171 of the laws of 1990, is amended to read as follows:

Any order directing the temporary removal of a child pursuant to this section shall state the court's findings with respect to the necessity of such removal, whether the respondent was present at the hearing and, if not, what notice the respondent was given of the hearing, and whether the [removal or the request therefor has been made pursuant to this section or section ten hundred twenty-one or ten hundred twenty-four of this article] respondent was represented by counsel.

§3. Subdivision (b) of section 1022 of the family court act, as added by chapter 962 of the laws of 1970, is amended to read as follows:

(b) [The] Any order pursuant to this section shall be issued immediately, but in no event later than the next court day, following the removal of the child. The order shall specify the facility to which the child is to be brought. Except for good cause shown or unless the child is sooner returned to the place where he or she was residing, a petition shall be filed under this article and a summons or warrant, as applicable, shall be issued [within three days of] on the next court date following the issuance of the order.

§4. Subdivision (c) of section 1026 of the family court act, as amended by chapter 962 of the laws of 1970, is amended to read as follows:

(c) If the child protective agency for any reason does not return the child under this section, or if the child protective agency concludes it appropriate, it shall [forthwith] cause a petition to be filed under this act no later than the next day the court is in session. The court may order an extension, only upon good cause shown, of up to three court days from the date of such child's removal. If the child has not been returned sooner, a hearing shall be held and findings shall be made as required pursuant to section one thousand twenty-seven of this article on the same day the petition is filed.

§5. Subdivision (a) of section 1027 of the family court act, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

(a) In any case involving abuse or in any case where the child has been removed without court order, either upon consent or because of an emergency, pursuant to section one thousand twenty-one or one thousand twenty-four of this article, respectively, the family court shall hold a hearing [as soon as practicable after the filing of a] on the same day the petition has been filed to determine whether the child's interests require protection pending a final order of disposition. [In any such case, any] In any case involving neglect in which continued removal of a child is sought and in which a court order had been issued pursuant to section one thousand twenty-two of this article, a hearing under this section shall be held within three court days of the filing of the petition. Additionally, any person originating a proceeding under this article shall, or the law guardian may apply for, or the court on its own motion may order, a hearing at any time after the petition is filed to determine whether the child's interests require protection pending a final order of disposition. [In any other case under this article, any person originating a proceeding under this article or the law guardian may apply for, or the court on its own motion may order, a hearing at any time after the petition is filed to determine whether the child's interests require protection pending a final order of disposition.] Notice of [the] any hearing under this section shall be provided pursuant to section one thousand twenty-three of this [act] article.

§6. Subdivision (c) of section 1035 of the Family Court Act, as added by chapter 962 of the laws of 1970, is amended to read as follows:

(c) On the filing of a petition under this article in which neglect only is alleged, the court shall forthwith cause a copy of the petition and a summons to be issued, requiring the parent or other person legally responsible for the child's care or with whom [it] the child is residing to appear at the court to answer the petition within three court days, where the child has been temporarily removed under this article, whether or not such removal was upon consent, and otherwise within seven court days. The court may also require the person thus summoned to produce the child at the time and place named.

§7. This act shall take effect immediately.

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

Reflecting a pronounced legislative trend at both federal and state levels, the ongoing oversight responsibility of the Family Court with respect to children in foster care has increased sharply in the past few years, culminating most recently in the passage of the federal *Adoption and Safe Families Act of 1997* [Public Law 105-89] and its state implementing legislation [Laws of 1999, ch. 7]. Both the federal and State *Adoption and Safe Families Act*s emphasize that the safety of the child is paramount, compelling the conclusion that the Court must be informed on a timely basis of all events affecting child safety, especially indicated reports of abuse or maltreatment. Equally as important, the federal *ASFA* measures success in terms of outcomes, that is, the States' ability to reach federally-established targets for timely achievement of permanency for children. The first "Child and Family Service Review (CFSR)," conducted by the Administration for Children and Families of the United States Department of Health and Human Services (HHS), concluded that New York State, with among the lowest scores in the nation, demonstrated how far New York State has to go to achieving the federal targets. New York achieved reunification within one year of only 54.2% of the children in foster care in Fiscal Year 1999, compared to the national target of 76.2%. Even more serious, only 3% of the adoptions in New York State in Fiscal Year 1999 were finalized within two years of the children's placement into foster care, compared to the national target of 34%.[35] New York State's inadequate performance compels legislative action before the next CFSR – scheduled to occur after the conclusion of the implementation by the New York State Office of Children and Family Services of its "Program Improvement Plan"– in order to ensure that the Family Courts can exercise their important monitoring functions on the basis of complete, timely information. The Committee's proposal to require prompt notice of indicated reports of child abuse or maltreatment and of changes in children's placements is critically important to the effort to bring New York State into compliance with *ASFA*.

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

Recognizing that "time is of the essence" where children are concerned, the Family Court Advisory and Rules Committee is submitting an expanded version of its earlier proposal to assure that the Family Court, the parties and law guardians are informed promptly of any changes in placement that may warrant Court intervention. The proposal would amend sections 1055 and 1055-a of the Family Court Act , as well as sections 358-a and 392 of the Social Services Law, to require an agency with whom a child has been placed, either voluntarily or as a result of an abuse or neglect finding, or to whom guardianship and custody

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[35] *See Final Report of the Child and Family Services Review of New York State: Executive Summary*, p. 2 (2002)(available at http://www.acf.hhs.gov/programs/cb/cwrp/executive/ny/html) .

has been transferred as a result of the child being freed for adoption, to report to the Court, the parties and the law guardian within 30 days of any change in the child's placement status and within five days of the date that any report of abuse or maltreatment is found to be indicated. The two types of reports, in fact, are related, as the existence of an indicated report of maltreatment may bear directly upon the suitability of a planned status change.[36]

Changes in placement covered by the notification requirement would include, but not be limited to, cases in which the child has been moved from the foster or pre-adoptive home or program into which he or she has been placed, cases in which the foster or pre-adoptive parents move out of state with the child and, with respect to children not freed for adoption, cases in which a trial or final discharge of the child from foster care has been made. The report must provide enough information for the litigants and the Court to assess whether further Court intervention may be indicated. It must state the reasons for the change, as well as the grounds for the agency's conclusion that the change is in the best interests of the child. This notification requirement does not contemplate court action in every case; nor does it interfere with the discretion of social services agencies to make necessary changes. However, acknowledging that this after-the-fact reporting may, in fact, be less than what may be called for in particular cases, the proposal includes a caveat that it is not intended to limit the current discretion of the Family Court to condition changes in placement, including trial and final discharges, upon prior notice to the Court, the parties and law guardian.[37]

While the *Adoption and Safe Families Act* increases the frequency of judicial reviews of children in foster care to 12 months, and, with respect to children freed for adoption, six months, delays of that magnitude in reporting significant changes in status of the children may seriously impede the ability of the Court and of the litigants to respond effectively and may, in some cases, cause harm to the children involved. This proposal will facilitate timely, informed responses to changes in children's placements, prompting more expeditious and effective resolution of children's cases.

Proposal

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

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

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

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

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

Except as provided for herein, in any order issued pursuant to this section, the court may require the child protective agency to make progress reports to the court, the parties, and the child's law guardian on the implementation of such order. Where the order of disposition is issued upon the consent of the parties and the child's law guardian, such agency shall report to the court, the parties and the child's law guardian no later than ninety days after the issuance of the order, unless the court determines that the facts and circumstances of the case do not require such report to be made. A report of any change in placement shall be required within thirty days of such change in any case in which the child is moved from the foster home or program into which he or she has been placed or in which the foster parents move out of state with the child. Each report shall state the reasons for such change, as well as the grounds for the agency's conclusion that such change is in the best interests of the child. Nothing in this section shall limit the authority of the court to order that no change in placement may be made, except in an emergency posing an imminent risk to the child, without prior notice to the court, the parties and the child's law guardian. A report shall also be required to be submitted to the court, the parties and the law guardian of any indicated report of child abuse or maltreatment in which the child or another child residing in the same home is the subject within five days of the indication of the report; provided, however, that where the indicated report concerns a child in a foster boarding or prospective adoptive home, the agency may redact the address of the home.

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

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

§3. Subdivision 3 of section 358-a of the social services law is amended by adding a new paragraph

(g) to read as follows:

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

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

10. In any order issued pursuant to this section, the court may require the social services official or authorized agency charged with temporary custody or guardianship and custody of the child to make progress reports to the court, the parties and the child's law guardian on the implementation of such order. A report of any change in placement shall be required within thirty days of such change in any case in which the child is moved from the foster home or program into which he or she has been placed or in which the foster parents move out of state with the child. Each report shall be made in any case in which the child is moved from the foster or prospective adoptive home or foster care program into which he or she has been placed or in which the foster or prospective adoptive parent or parents move out of state with the child. Nothing in this section shall limit the authority of the court to order that no change in placement may be made, except in an emergency posing an imminent risk to the child, without prior notice to the court, the parties and the child's law guardian. A report shall also be required to be submitted to the court, the parties and the law guardian of any indicated report of child abuse or maltreatment where the child or another child in the same home is the subject within five days of the indication of the report; provided, however, that where the indicated report concerns a child in a foster boarding or prospective adoptive home, the agency may redact the address of the home.

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

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

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

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

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

Enactment of this proposal would greatly facilitate compliance with the myriad requirements of the *Adoption and Safe Families Act* by providing the parties and the Family Court with a streamlined set of findings, set forth in logical order, that must be addressed in each permanency hearing and incorporated into each permanency order. The content of the hearing closely parallels that which was recommended both by the federal Children's Bureau in its state statutory guidelines and by the National Council of Juvenile and Family Courts in the standards that govern courts that it has designated as "model courts," including those in

Erie and New York County.[38]

Proposal

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

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

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

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

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

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

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[38] *See* Duquette and Hardin, *Adoption 2002: The President's Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children* (Children's Bureau, U.S. Dept. of Health and Human Services, June, 1999), pps. IV-28 - IV-29; N.C.F.C.J., *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (1995), pps. 85-86; N.C.J.F.C.J., *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (2002), pps. 20-22.

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

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

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

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

7. any other factors that the court deems appropriate.

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

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

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

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

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

2. if the permanency plan for the child is adoption, guardianship or some other

permanent living arrangement other than reunification with the parent or parents of the child, whether reasonable efforts are being made to make and finalize such alternate permanent placement;

[5.whether or when the child: (i) will be returned to the parent; (ii) should be placed for adoption with the social services official filing a petition for termination of parental rights; (iii) should be referred for legal guardianship; (iv) should be placed permanently with a fit and willing relative; or (v) should be placed in another planned permanent living arrangement if the social services official has documented to the court a compelling reason for determining that it would not be in the best interest of the child to return home, be referred for termination of parental rights and placed for adoption, placed with a fit and willing relative, or placed with a legal guardian;

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

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

4. any other factors [which] that the court deems appropriate.

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

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

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

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

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

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

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

immediately and completed within 60 days. If guardianship and custody of the child has been transferred as a result of a violation finding, a permanency hearing would have to be convened immediately in accordance with Family Court Act §1055-a and, again, would have to be completed within 60 days. Subsequent permanency hearings in such cases would be required at six-month intervals pursuant to chapter 663 of the Laws of 2002.

A review of the case law regarding suspended judgment underscores the compelling need for this clarifying legislation. Several appellate cases have held that the expiration of the period of a suspended judgment without further action by the parties or the court "does not result in an automatic termination of parental rights." Matter of Josh Ray O., 267 A.D.2d 1048 (4th Dept., 1999); Commissioner of Social Services and Catholic Guardian Society on behalf of T/C Children *v.* Rufelle C., 156 Misc.2d 410 (Fam. Ct., Kings Co., 1992). However, it is by no means clear that such expiration without further action results in the converse, that is, a dismissal of the proceeding, loss of jurisdiction by the Family Court or negation of the original finding of permanent neglect. This ambiguity in the statute was brought into sharp focus in the recent case of Matter of Jonathan B., 5 A.D.3d 477 (2d Dept., 2004), *lve. app. dismissed*, 2 N.Y.3d 791 (2004), in which the Appellate Division, Second Department, permitted an agency to proceed with a motion to revoke a suspended judgment, notwithstanding the fact that the period of the suspended judgment had lapsed.

Proposal

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

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

Section 1. Section 633 of the family court act is amended to read as follows:

§633. 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 responsible for the care of the child.

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

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

(d) Not later than sixty days before the expiration of the period of suspended judgment, the

petitioner shall file a report with the family court and all parties, including the respondent, law guardian and intervenors, if any, regarding respondent's compliance with the terms of the suspended judgment. The report shall be reviewed by the court on the scheduled court date. Unless a petition, motion or order to show cause has been filed prior to the expiration of the period of suspended judgment alleging a violation or seeking an extension of the period of the suspended judgment, the terms of the disposition of suspended judgment shall be deemed satisfied and an order committing the guardianship and custody of the child shall not be entered.

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

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

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

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

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

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

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

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

Recognizing that "[e]ach party must be competently and diligently represented in order for juvenile and family courts to function effectively," the National Council of Juvenile and Family Court Judges recommends that attorneys for all parties "[a]ctively participate in every critical stage of the proceedings." N.C.F.C.J., *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (1995), pps. 22-23.[39] In a similar vein, the United States Department of Health and Human Services advocates that "the same legal representatives for the child, parent, and State remain involved throughout the case," that parents be represented at all hearings and that counsel be provided at government expense if the parents are indigent. Duquette and Hardin, *Adoption 2002: The President's Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children* (Children's Bureau, U.S. Dept. of Health and Human Services, June, 1999), pps. IV-4 - IV-5, VII-5 - VII-6. Significantly, the statute in California requires assigned counsel for the parent to represent the parent at all stages "unless relieved by the court upon the substitution of other counsel or for cause." Cal. Welf. &

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[39] These guidelines were endorsed by the Conference of Chief Justices and the American Bar Association in 1995 and have been utilized as the standards for the permanency planning initiatives in the Family Courts in New York and Erie Counties, both of which have been designated as "Model Courts" by the National Council of Juvenile and Family Court Judges.

Instit. Code §317(d) (West, 1997).[40]

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

The implementing legislation for the *Adoption and Safe Families Act* requires the Family Court to notify respondents of their right to have counsel or other representatives accompany them to case conferences, but provides no mechanism for effectuating that right. *See* FCA§1055; SSL §§358-a, 392; Laws of 1999, ch. 7. While respondent parents have a right to counsel in child welfare hearings in Family Court pursuant to section 262 of the Family Court Act, no authorization exists either for continuing appointments to cover interim conferences or for appointments of counsel for parents in juvenile delinquency or PINS proceedings. In contrast to sections 1016, 1055(b)(iii), 1055-a(12) and 1120(b) of the Family Court Act and subdivision (4-a) of section 392 of the Social Services Law, which specifically provide that the appointment of a law guardian continues without further court order or appointment, sections 1022-a and 1033-b of the Family Court Act simply require appointment of counsel for an indigent respondent at the first appearance. These sections contain no language providing for the post-disposition continuation of the appointment or entitlement to remuneration for such services. Section 1052-b of the Family Court Act requires counsel for the respondent parent to notify the parent of the right to an appeal and the procedures for instituting an appeal and, if necessary, file a notice of appeal and section 1120(a) of the Family Court Act requires assignment of counsel to an indigent respondent on appeal. However, neither provision provides for the continuation of the original appointment. No comparable provision exists to section 1016 of the Family Court Act, which provides that the law guardian is "entitled to compensation for services rendered subsequent to the disposition of the petition."

Continuing the involvement of counsel after the conclusion of hearings in court will significantly increase the likelihood of expeditious resolution of child welfare matters through engagement of

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[40] A policy memorandum in one California Juvenile Court limiting the automatic representation to the first permanency hearing was struck down by an appellate court as inconsistent with this statute. Matter of Tanya H. *v.* Toby B., 17 Cal.App.4th 825, 21 Cal. Rptr.2d 503 (Ct. App., 1993). *See also Katheryn S. v. Superior Court of Orange County*, 82 Cal.App.4th 958, 98 Cal.Rptr.2d 741 (2000). *Cf.*, Matter of Janet O. *v.* Superior Court, 42 Cal. App.4th 1058, 50 Cal. Rptr.2d 57 (1996)(limiting statute to parents continuing to express interest in the proceedings)..

respondent parents in the conference process, an important feature of the New York City and Erie County Family Court "Model Courts" initiatives. Promoting the principle of continuity of counsel will enhance the likelihood that respondent parents will be represented by attorneys who are well-informed about their cases and their needs and who will advocate for the services necessary for a prompt resolution of the case.[41] Enactment of this measure, therefore, will inure to the benefit, not only of the parents, but also of their children and, concomitantly, to the Family Court in fulfilling its responsibilities under the *Adoption and Safe Families Act*.

Proposal

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

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

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

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

(ix) the parent contesting placement, the permanency plan or visitation plan for his or her child as part of a dispositional hearing, violation of court order proceeding, extension of placement or permanency hearing under articles three and seven of this act.

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

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

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

(ii) No placement shall be extended or continued pursuant to this subdivision except upon a permanency hearing held concerning the need for extending or continuing the placement. Such hearing shall be held upon the petition filed by the person, agency or institution with whom the child was placed, or the motion of the child or the child's law guardian or of the foster parent or

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[41] *See* K. Bailie, "The Other 'Neglected' Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them," 66 *Ford. L.Rev.* 2285, 2323 (May, 1998).

parents in whose home the child resides at the time of the application for extension of placement. The initial permanency hearing shall be held no later than twelve months following placement. Placement shall be deemed to have commenced as set forth in paragraph (i) of this subdivision. Each subsequent permanency hearing shall be held no later than twelve months following the preceding permanency hearing. In any proceeding under this section, when appointing an attorney or attorneys for the respondent parent or parents pursuant to section two hundred sixty-two of this act, the court shall, to the extent practicable, appoint an attorney or attorneys who previously represented the respondent parent or parents in proceedings involving the child.

* * *

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

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

(A) a description of the visitation plan;

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

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

Except as provided for herein, in any order issued pursuant to this section, the court may require the child protective agency to make progress reports to the court, the parties, counsel for the parties and the child's law guardian on the implementation of such order. [Where the order of disposition is issued upon the consent of the parties and the child's law guardian, such] The agency

shall report to the court, the parties, counsel for the parties and the child's law guardian no later than ninety days after the issuance of the order, unless earlier directed by the court or unless the court determines that the facts and circumstances of the case do not require such report to be made.

§4. Paragraph (e) of subdivision (3) of section 358-a of the social services law, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

(e) The order granting the petition of a social services official and approving an instrument executed pursuant to section three hundred eighty-four-a of this chapter may include conditions, where appropriate and specified by the judge, requiring the implementation of a specific plan of action by the social services official to exercise diligent efforts toward the discharge of the child from care, either to his or her own family or to an adoptive home; provided, however, that such plan shall not include the provision of any service or assistance to the child and his or her family which is not authorized or required to be made available pursuant to the comprehensive annual services program plan then in effect. An order of placement shall include, at the least:

(i) a description of the visitation plan;

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

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

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

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

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

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

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

(i) a description of the visitation plan;

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

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

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

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

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

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

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

7. Continuing representation of juveniles in post-dispositional juvenile delinquency and person in need of supervision proceedings (FCA §§320.2, 741(a))

One of the central precepts underlying the New York State Family Court Act is the necessity of representation of juveniles at every stage of the proceedings, a precept "based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition." Family Court Act §241. The Act recognizes that juveniles "often require the assistance of counsel to help protect their interests and to help them express their wishes to the court." *Id*. Both the juvenile delinquency and persons in need of supervision (PINS) statutes explicitly require appointment of a law guardian at the outset of proceedings, require the law guardian's personal appearance at every hearing and provide for the continuation of the appointment on appeal. *See* Family Court Act §§307.4(2), 320.2(2), 320.3, 341.2(1), 728(a), 741(a), 1120(b). What is less clear, however, is whether the appointment of a law guardian, absent an appeal, continues after the disposition of a juvenile delinquency or PINS proceeding. The Family Court Advisory and Rules Committee is recommending enactment of a measure to clarify that ambiguity.

Similar to the requirement in Family Court Act §1016 for the appointment of the law guardian in a child protective proceeding to continue during the life of a dispositional or post-dispositional order, the Committee is proposing a measure that would amend Family Court Act §§320.2(2) and 741(a) to continue the law guardian's appointment in a juvenile delinquency and PINS proceedings for the entire period of a dispositional order, an adjournment in contemplation of dismissal and any extensions of placement, violation hearings or other post-dispositional proceedings. As in child protective cases, the appointment would automatically continue unless the court relieves the law guardian or grants the law guardian's application to be relieved, in which case the court must immediately appoint another law guardian. While the current practice of the law guardian submitting a voucher for payment at the close of a proceeding would continue, the law guardian would be able, as in child protective proceedings, to submit a separate application for compensation for post-dispositional services rendered.

Particularly with the enactment of the federal *Adoption and Safe Families Act* [Public Law 105-89], as well as its implementing regulations and state statutes, the needs of juvenile delinquents and persons in need of supervision for continuing legal representation have become ever more acute. *See* Laws of 1999, ch. 7; Laws of 2000, ch. 145; 45 *CFR* Parts 1355, 1356. In juvenile delinquency cases, Family Court Act §§353.3(7) and 355.5(7)(e) impose explicit obligations upon placement agencies to develop and implement release plans for juveniles in placement in order to ensure that the juveniles will be enrolled in either school or a vocational programs promptly upon release. These statutes and regulations 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 reauthorization of the federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273] in 2002 required states to certify their compliance with the *Adoption and Safe Families Act* as a prerequisite, not only for federal foster care assistance pursuant to Title IV-E of the Social Security Act [42 U.S.C.], but also for eligibility for federal juvenile justice funding. 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.

Proposal

AN ACT to amend the family court act, in relation to continuing representation by law guardians in juvenile delinquency and persons in need of supervision cases

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

Section 1. Subdivision 2 of section 320.2 of the family court act, as added by chapter 920 of the laws of 1982, is amended to read as follows:

2. At the initial appearance the court must appoint a law guardian to represent the respondent pursuant to the provisions of section two hundred forty-nine if independent legal representation is not available to such respondent. Whenever a law guardian has been appointed by the family court to represent a child in a proceeding under this article, such appointment shall continue without further court order or appointment during the period covered by any order of disposition issued by the court, an adjournment in contemplation of dismissal, or any extension or violation thereof, or during any permanency hearing, other post-dispositional proceeding or appeal. All notices and reports required by law shall be provided to such law guardian. Such appointment shall continue unless another appointment of a law guardian has been made by the court or unless such law guardian makes application to the court to be relieved of his or her appointment. Upon approval of such application to be relieved, the court shall immediately appoint another law guardian to whom all notices and reports required by law shall be provided. A law guardian shall be entitled to compensation pursuant to applicable provisions of law for services rendered up to and including disposition of the petition. The law guardian shall, by separate application, be entitled to compensation for services rendered after the disposition of the petition. Nothing in this section shall be construed to limit the authority of the court to remove a law guardian from his or her assignment.

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

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

such parent or responsible person of the commencement of the proceeding and such initial appearance, the court shall appoint a law guardian and shall, unless inappropriate, also appoint a guardian ad litem for such respondent, and in such event, shall inform the respondent of such rights in the presence of such law guardian and any guardian ad litem.

* * *

d. Whenever a law guardian has been appointed by the family court to represent a child in a proceeding under this article pursuant to subdivision (a), such appointment shall continue without further court order or appointment during an order of disposition issued by the court, an adjournment in contemplation of dismissal, or any extension or violation thereof, or any permanency hearing, other post-dispositional proceeding or appeal. All notices and reports required by law shall be provided to such law guardian. Such appointment shall continue unless another appointment of a law guardian has been made by the court or unless such law guardian makes application to the court to be relieved of his or her appointment. Upon approval of such application to be relieved, the court shall immediately appoint another law guardian to whom all notices and reports required by law shall be provided. A law guardian shall be entitled to compensation pursuant to applicable provisions of law for services rendered up to and including disposition of the petition. The law guardian shall, by separate application, be entitled to compensation for services rendered after the disposition of the petition. Nothing in this section shall be construed to limit the authority of the court to remove a law guardian from his or her assignment.

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

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

The reauthorization of the federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273] in 2002 made compliance with the *Adoption and Safe Families Act* a requirement not only for New York State to receive federal foster care assistance pursuant to Title IV-E of the *Social Security Act* [42 U.S.C.], but also for eligibility for federal juvenile justice funding. The enactment of amendments in 2000 to New York State's legislation implementing the federal *Adoption and Safe Families Act* ["*ASFA,"* Public Law 105-89] underscored the Legislature's recognition that the reasonable efforts, permanency planning and permanency hearing requirements of *ASFA* are fully applicable to juvenile delinquency and persons in need of supervision ("PINS") proceedings in Family Court and, in fact, are critical aspects of the State's compliance with federal foster care [*Social Security Act*, 42 U.S.C. Title IV-E] funding mandates. *See* Laws of 2000, ch. 145; Senate Memorandum in Support of S 7892-a.[42] The amendments require case-specific, rather than categorical, exclusions of juvenile delinquency and PINS proceedings from the mandate to file termination of parental rights proceedings for juveniles who have been in care for 15 of the most recent 22 months. Particularized findings must be made at the earliest pre-trial detention hearings regarding whether reasonable efforts had been made to prevent detention or facilitate return home and whether detention is in the child's best interests. Significantly, the amendments clarify that permanency hearings must be held in juvenile delinquency proceedings within 30 days of a finding that reasonable efforts are not required or, if no such finding has been made, no later than 12 months after the child entered foster care and every 12 months thereafter. *Id.* That these amendments were compelled by federal law is evident from the regulations promulgated on January 25, 2000 by the Children's Bureau of the United States Department of Health and Human Services. 45 *C.F.R.* Parts 1355-1357; 65 *Fed.Reg.* 4019-4093 (Jan. 25, 2000).

If the Family Court is to be able to exercise its critical monitoring functions and convene meaningful permanency hearings in juvenile delinquency and PINS proceedings, it must have the benefit of the same information that is required to be presented in other child welfare proceedings and it must make determinations of comparable specificity. To that end, the Family Court Advisory and Rules Committee has developed a proposal to conform the dispositional and permanency hearing provisions of Articles 3 and 7 to those in Article 10 of the Family Court Act. The proposal extends the *ASFA* requirements to juvenile delinquency and PINS proceedings in order to provide the Family Court and litigants with the information needed to fulfill these requirements.

The measure would require that dispositional and permanency hearing orders in juvenile delinquency and PINS proceedings involving foster care placements include: a description of the visitation plan between the juvenile and his or her parent or legally-responsible adult; a service plan designed to fulfill the permanency goal for the juvenile; [43] a direction that the parent or other person legally responsible be notified of, and be invited to be present at, any planning conferences convened by the placement agency with respect to the child; and a warning that if the juvenile remains in placement for 15 out of 22 months, the agency may be required to file a petition to terminate parental

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[42] McKinney's Session Laws of New York(Aug., 2000), No.5, p.A-424, A-426, A-427.

[43] If a service plan has not been prepared by the date of disposition, it must be disseminated to the Family Court, presentment agency, law guardian and parent or person legally responsible for the child's care within 90 days of the issuance of the dispositional order.

rights. A copy of the court order and service plan would be required to be provided to the parent or other legally responsible individual.

This measure is vital to address the current conundrum faced by the Family Court: it is charged with the responsibility to conduct permanency hearings, monitor permanency planning and issue fact-specific permanency orders in juvenile delinquency and PINS proceedings but it is not given the information or authority it requires to discharge that responsibility. If the Family Court and all parties are provided with specific service plans and if the agency's responsibilities to work with, and provide appropriate visitation to, the juveniles' parents and other legally-responsible adults is clearly articulated, the likelihood of successful permanency planning is significantly increased – a benefit not only to New York State in its efforts to demonstrate compliance with *ASFA*, but also to the juveniles and their families. As one child welfare expert has written:

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

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

Proposal

AN ACT to amend the family court act, in relation to dispositional and permanency hearings in juvenile delinquency and persons in need of supervision proceedings

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

Section 1. Section 353.3 of the family court act is amended by adding a new subdivision 4-a to read as follows:

4-a. When the respondent is placed in a nonsecure facility or foster care home pursuant to paragraph (c) of subdivision three or subdivision four of this section, the dispositional order or an attachment to the order incorporated by reference into the order shall include:

(a) a description of the visitation plan;

(b) a service plan, if available. If the service plan has not yet been developed, then the service plan must be filed with the court and delivered to the presentment agency, law guardian and parent or other person or persons legally responsible for the care of the respondent no later than ninety days from the date the disposition was made; and

(c) a direction that the parent or other person or persons legally responsible for the respondent shall be notified of any planning conferences, of their right to attend the conferences, and of their right to have counsel or another representative or companion with them. If the respondent is placed with the commissioner of social services, the order shall contain a direction that the parent or other person or persons legally responsible for the respondent shall be notified of any planning conferences to be held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and of their right to have counsel or another representative or companion with them.

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

§2. Section 355.5 of the family court act is amended by adding a new subdivision 9 to read as follows:

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

(a) a description of the visitation plan;

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

(c) a direction that the parent or other person or persons legally responsible for the respondent shall be notified of any planning conferences, including those held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences, and their right to have counsel or another representative or companion with them.

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

required by law to file a petition to terminate the parental rights of the parent or person legally responsible for the respondent.

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

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

(i) a description of the visitation plan;

(ii) a service plan, if available. If the service plan has not yet been developed, then the service plan must be filed with the court and delivered to the presentment agency, law guardian and parent or other person or persons legally responsible for the care of the respondent no later than ninety days from the date the disposition was made; and

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

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

§4. Subdivisions (e) and (f) of section 756-a of the family court act are re-lettered (f) and (g) and such section is amended by adding a new subdivision (e) to read as follows:

(e) If the order from the permanency hearing extends the respondent's placement or if the respondent continues in placement under a prior order, the order or an attachment to the order incorporated into the order by reference shall include:

(i) a description of the visitation plan;

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

(iii) a direction that the parent or other persons legally responsible for the respondent shall be notified of any planning conferences to be held pursuant to subdivision three of section four hundred nine-e of the social services law, of their right to attend the conferences and of their right to have counsel or another representative or companion with them.

A copy of the court's order and the service plan shall be given to the parent or other person

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

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

9. Service of summonses upon parents in juvenile delinquency proceedings (FCA §312.1)

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

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

The importance of notifying and involving all of the parents in a juvenile delinquency proceeding is underscored by the applicability of the mandates of the federal *Adoption and Safe Families Act* [Public Law 105-89] to juvenile delinquency cases. Most recently, in reauthorizing the federal *Juvenile Justice and Delinquency Prevention Act* as part of the *21st Century Department of Justice Appropriations Act* [Public Law 107-273], Congress mandated compliance with the *ASFA* strictures in juvenile delinquency cases, not only for eligibility for federal Title IV-E foster care reimbursement, but also as a prerequisite to states' receipt of federal juvenile justice funding. Significantly, these requirements include, not only the judicial findings, but also the requirements for development and review of case plans with the participation of the child's parents. *See* 42 U.S.C. §§671, 675, 5633(28).

Incorporating *ASFA* mandates into New York's juvenile delinquency statute, sections 307.4(8) and 320.5(5) of the Family Court Act require the Court to determine at the time detention is ordered whether the juvenile's retention in the home would be contrary to his or her best interests and whether reasonable efforts, if appropriate, had been made to prevent or eliminate the need for the juvenile's removal from home and to make it possible for the juvenile to return home. As was underscored by New York's unsuccessful performance in the recent federal Title IV-E audit, particularly in juvenile delinquency cases, if these findings are not made on a timely basis at the outset of a child's detention, even though detention facilities are not Title IV-E-eligible, New York State will not be able to receive any federal funding for the juvenile even if he or she is ultimately placed in a IV-E -eligible program. Similar findings must be made at the dispositional stage as a prerequisite to placement in programs for which federal reimbursement under Title IV-E may be available. Additionally, periodic permanency hearings must be held, similar to those in child protective proceedings, at which further "reasonable efforts" and "contrary to the best interests" findings must be made. *See* Family Court Act §§352.2(2)(b), 355.5.

Clearly where involvement of non-custodial parents and through them, their extended family, may make it possible for a juvenile to avoid or shorten a foster care placement or may further prompt achievement of the juvenile's permanency goal, New York State's compliance with *ASFA* would be enhanced. Equally, if not more, important, engagement of a juvenile's entire family in addressing his or her delinquent conduct furthers the Family Court's capacity to fulfill its statutory duty under Family Court Act §§301.1 and 352.2(2)(a) to formulate dispositions responsive both to the needs and best interests of the juvenile and the need for community protection.

Proposal

AN ACT to amend the family court act, in relation to service of summonses upon parents in juvenile delinquency cases

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

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

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

§2. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to juveniles who are the subjects of juvenile delinquency petitions filed on or after such effective date.

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

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

First, the Committee proposes that section 739 of the Family Court Act be amended to preclude detention unless alternatives to detention would not be appropriate and to incorporate the provision, analogous to section 320.5(2) of the Family Court Act, authorizing release of the respondent juvenile upon appropriate terms and conditions. Incorporation of a mandate for the Family Court to consider whether there are alternatives to the use of detention adds a measure of precision to the furtherance of the same goal – "avoid[ance of] unnecessary and expensive institutional placements in foster care or detention" – as in the statutory requirement for the Family Court to find "special circumstances" prior to imposition of pre-dispositional detention or foster care. *See* Memorandum in Support of Governor's Program Bill #94; Family Court Act §720(5)[Laws of 2001, ch. 383, Part V, §2].

Second, the Committee's measure would amend section 754 of the Family Court Act to add a provision, adapted from section 352.2(2)(a) of the Family Court Act, to require that any disposition ordered be the "least restrictive available alternative" consistent with the respondent juvenile's needs and best interests. This mandate is consistent both with the goal of reducing the use of non-cost-effective placements and with long-standing case law regarding PINS. *See*, e.g., Matter of Theresa C., 222 A.D.2d 1107 (4th Dept., 1995); Matter of Sandra XX, 169 A.D.2d 992 (3rd Dept., 1991); Matter of John H., 48 A.D.2d 879 (2nd Dept., 1975). Closely related to this principle, the proposal authorizes the Family Court to place any adjudicated person in need of supervision, who would otherwise be placed out of the home, into an intensive probation supervision program, where available, for all or part of the period of probation to the extent such a program is available. The New York State Division of Probation and Correctional Alternatives would be directed to promulgate regulations to guide local probation departments that elect to operate such programs, addressing such issues as: maximum probation officer caseloads; special training requirements for intensive supervision probation officers; nature and frequency of the probation contacts with the juveniles, schools and other agencies; and the level and type of supervision, treatment and other program components. Intensive supervision is a critically-needed dispositional alternative, particularly in light of removal of placement in facilities operated by the New York State Office of Children and Family Services as a permissible alternative. *See* Laws of 1996, ch. 309. While some State funding has been appropriated for intensive supervision programs for juvenile delinquents since 1994, no such

reimbursement was made available in persons in need of supervision cases, despite the obvious cost-effectiveness of such alternatives to far more expensive placements.

Each of these provisions is consistent with the conclusions reached by the Vera Institute of Justice in its two studies, *Changing the PINS System in New York: A Study of the Implications of Raising the Age Limit for Persons in Need of Supervision (PINS)* (Vera Inst., Sept., 2001) and *Changing the Status Quo for Status Offenders: New York State's Efforts to Support Troubled Teens* (Vera Inst., Dec., 2004), that were commissioned by the New York State Office of Children and Family Services. The 2001 study characterized detention and placement as the "most expensive" and "least satisfying" pre-dispositional and dispositional options for the juveniles, their families and the system as a whole – options that have not been demonstrated to improve either the truancy or absconding problems that form the gravamen of most PINS petitions and that have drained resources away from more promising solutions. *Id*., at p. 34, 38. The 2004 study highlights the efficacy of the use of creative alternatives to detention and placement for PINS.

Third, the Committee's proposal adds a new section 743 to the Family Court Act, establishing a judicial allocution procedure for accepting admissions in PINS cases analogous to the allocution required in juvenile delinquency cases [Family Court Act §321.3]. The Committee's proposal requires the Family Court, before accepting an admission in a PINS case, to ascertain that the juvenile respondent committed the act or acts to which an admission is being entered, is voluntarily waiving his or her right to a hearing and is aware of the dispositional alternatives that may be ordered as a result of the adjudication that is the likely consequence of the admission.

In Matter of Tabitha L.L., 87 N.Y.2d 1009 (1996), the Court of Appeals held that it would be inappropriate to incorporate section 321.3 of the Family Court Act into Article 7 in the absence of specific legislative authorization. It did not determine whether an allocution procedure is constitutionally required, since that issue was not preserved for appellate review. In a subsequent case, Matter of Tabitha E., 271 A.D.2d 719, 720 (3rd Dept., 2000), however, the Appellate Division, Third Department, held it to be reversible error for the Family Court to accept an admission in a PINS proceeding without first advising the respondent of her right to remain silent. *Accord*, Matter of Matthew RR, 9 A.D.3d 514 (3d Dept., 2004); Matter of Nichole A., 300 A.D.2d 947 (3rd Dept., 2002); Matter of Ashley A., 296 A.D.2d 627 (3rd Dept., 2002)(PINS probation violation proceeding); Matter of Jody W., 295 A.D.2d 659 (3rd Dept., 2002); Matter of Shaun U., 288 A.D.2d 708 (3rd Dept., 2001). The Committee submits that considerations of due process -- equally compelling in PINS as in juvenile delinquency cases -- militate in favor of equivalent protections and, therefore, urges the Legislature to enact a provision for PINS cases comparable to the allocution requirement applicable to juvenile delinquency proceedings.

Finally, the proposal delineates the procedures for violations of orders of suspended judgment and probation, drawing upon existing juvenile delinquency procedures. *See* Family Court Act §§360.2, 360.3. Violations of both orders of probation and suspended judgment require the filing of a verified petition, a hearing at which the juvenile is represented by counsel and a determination by competent proof that the juvenile committed the violation charged without just cause. Periods of dispositions of suspended judgment and probation are tolled during the pendency of the violation petition.

Upon a finding of a violation, the Family Court may adjourn the matter for a new dispositional hearing in accordance with subdivision (b) or (c) of section 749 of the Family Court Act or, at minimum, provide the juvenile with an opportunity to present evidence. *See* Matter of Casey W., 3 A.D.3d 785 (3d Dept., 2004); Matter of Josiah RR, 277 A.D.2d 654 (3rd Dept., 2000). The Court may revoke, continue or modify the order of probation or suspended judgment. If the order is revoked, the Court must order a

different dispositional alternative enumerated in section 754(a), must state the reasons for its determination and must make the findings required by section 754(b) of the Family Court Act. *See* Matter of Nathaniel JJ, 265 A.D.2d 660 (3rd Dept., 1999), *after remittitur*, 270 A.D.2d 783 (3rd Dept., 2000)(PINS probation violation matter remanded twice for specific findings, first with respect to the reasons for the disposition and second as to the 16-year old respondent's needs, if any, for independent living services).[44] In matters, such as Nathaniel J.J., in which the juvenile is placed pursuant to section 756 of the Family Court Act, these findings are mandated as well by both the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch.7; Laws of 2000, ch. 145].

Proposal

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

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

Section 1. Subdivision (a) of section 739 of the family court act is amended by adding a new unlettered paragraph at the end thereof to read as follows:

The court shall not direct detention unless available alternatives to detention would not be appropriate, including, but not limited to, conditional release in accordance with subdivision (d) of this section.

§2. Section 739 of the family court act is amended by adding a new subdivision (d) to read as follows:

(d) Rules of court shall define permissible terms and conditions of release. The court may in its discretion release the respondent upon such terms and conditions as it deems appropriate. The respondent shall be given a written copy of any such terms and conditions. After giving notice and an opportunity to be heard to the respondent through his or her law guardian, the court may modify or enlarge such terms and conditions.

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

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

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

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

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

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

The provisions of this subdivision shall not be waived.

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

§4. Paragraph (a) of subdivision 2 of section 754 of the family court act, as amended by chapter 7 of the laws of 1999, is amended to read as follows:

(a) The order shall state the court's reasons for the particular disposition. In determining an appropriate order of disposition, the court shall consider the least restrictive available alternative enumerated in subdivision one that is consistent with the needs and best interests of the respondent. If the court places the child in accordance with section seven hundred fifty-six of this part, the court in its order shall determine: (i) whether continuation in the child's home would be contrary to the best interest of the child and where appropriate, that reasonable efforts were made prior to the date of the dispositional hearing held pursuant to this article to prevent or eliminate the need for removal of the child from his or her home and, if the child was removed from his or her home prior to the date of such hearing, that such removal was in the child's best interest and, where appropriate, reasonable efforts were made to make it possible for the child to return safely home. If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that the lack of such efforts was appropriate under the circumstances, the court order shall include such a finding; and (ii) in the case of a child who has attained the age of sixteen, the services needed, if any, to assist the child to make the transition from foster care to independent living. Nothing in this subdivision shall be construed to modify the standards for directing detention set forth in section seven hundred thirty-nine of this article.

§5. Subdivision (b) of section 757 of the family court act, as amended by chapter 309 of the laws of 1996, is amended to read as follows:

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

§6. Section 757 of the family court act is amended by adding a new subdivision (e) to read as follows:

(e) If the respondent has been found to be a person in need of supervision, and if the court further finds that, absent intensive probation supervision, the respondent would be placed pursuant to section seven hundred fifty-six of this act, the court may direct the respondent to cooperate with a program of intensive probation supervision during any period up to the term of probation. The local probation department may provide intensive probation supervision to respondents so directed pursuant to this subdivision in accordance with regulations to be promulgated by the state division of probation and correctional alternatives pursuant to subdivision one of section two hundred forty-three of the executive law.

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

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

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

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

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

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

article. The court may revoke the order of probation and proceed to make any order that might have been made at the time the order of probation was entered.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

appropriated therefor.

§11. This act shall take effect on the ninetieth day after it shall have become a law; provided, however, that (i) sections 5, 6, 7, 8 and 9 of this act shall apply to juveniles found to have committed acts that are the bases for adjudicating them to be persons in need of supervision, respectively, that occurred on or after the effective date of such sections, and (ii) section 10 of this act shall take effect immediately.

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

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

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

First, in determining whether an accused juvenile delinquent should be detained prior to disposition, the Family Court would be required to consider whether there are available, appropriate alternatives to detention. Where the Court determines that grounds for detention exist under current statutory standards, the Court would have the discretion to release a juvenile on condition of cooperation with a program of electronic monitoring, if such program is available under the auspices of the local probation department and if such a program would obviate the concerns that otherwise would have caused the juvenile to be detained, that is, if electronic monitoring would ensure the juvenile's likely appearance in Family Court or minimize the risk of commission of an act that would be a crime if committed by an adult, as applicable. Such an alternative to otherwise costly detention has been used extensively in the federal system and in other jurisdictions. *See, e.g.,* Colorado Children's Code, Col. Rev. Stat., Tit. 19, Art. 2, Pt.3, §19-2-302(4)(h). As a form of conditional release, obviating the necessity of detention, it would be consistent with cases in the criminal arena.[45]

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

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

"specifically prescribed" in the Family Court Act in order to be applicable, this provision would provide the necessary analogue to section 65.10(4) of the Criminal Procedure Law, the statutory response to the decision of the Court of Appeals in People *v.* McNair, 87 N.Y.2d 772 (1996). *See* Laws of 1996, ch. 653. A program of electronic monitoring, to the extent available, would be permissible as a component of an intensive supervision regimen, but it would not replace the in-person contacts so vital to the success of probation, particularly as applied to juveniles. Enactment of an authorization for electronic monitoring in New York is long-overdue. Several other states utilize this option as a vital component of a dispositional plan in juvenile delinquency cases.[46]

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

Intensive supervision is a critically-needed dispositional alternative. Enhanced state reimbursement has been available for several years for intensive probation supervision for adults. Far smaller amounts were first made available for juvenile delinquents starting in 1994, but these were encumbered by a budgetary stipulation limiting the program's availability to the rare instance where the Family Court has determined that a juvenile had been drug-involved at the time of the offense. Notwithstanding the limited funding, juvenile intensive supervision programs established and largely funded by local probation departments, such as the program formerly operating in New York City, have been effective in providing a meaningful alternative to costly placements, albeit reaching but a small number of the juveniles who would benefit from such programs. The New York City program, which is scheduled to start anew as the "Enhanced Supervision Program (ESP)," was a rigorous one utilizing a 1:15 probation officer-to-juvenile ratio, requiring two home visits by the officer per month and participation by youth in community service efforts. Nationally, such programs are recognized as providing cost-effective, safe alternatives to residential placement.[47]

Significantly, not only does intensive probation supervision save money, but it may also facilitate access to federal dollars . Funds from the federal child welfare programs can be made available to localities for these programs if the Division of Probation and Correctional Alternatives and local probation departments work in partnership with the New York State Office of Children and Family Services and local social services districts. If intensive supervision services that are provided to youth in order to prevent placement are explicitly included in the statewide plan for child welfare services, federal

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

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

reimbursement at a rate of 75% would be available as a preventive service under Title IV-B of the Social Security Act. 42 U.S.C.A. §§622, 623 [Social Security Act, Title IV-B; Public Law 96-272].[48] Federal reimbursement for child welfare services to prevent placement of juvenile delinquents is contemplated, so long as the facilities where the youth would have been placed are eligible for federal foster care funding -- that is, they are not secure detention centers or forestry camps or training schools housing over 25 juveniles. 42 U.S.C. §672(c) [Social Security Act, Title IV-E; Public Law 96-272]. Indeed, in order to increase its eligibility for foster care reimbursement under this section, the New York State Office of Children and Family Services in recent years has moved toward conversion of its facilities to house under 25 residents.

The New York State Legislature has recognized the applicability of the federal mandates to juvenile delinquency cases, including most recently, the *Adoption and Safe Families Act* [Public Law 105-89], by incorporating into State law the requirements that Family Court judges make findings, prior to ordering both detention and placements of juveniles into facilities eligible for federal reimbursement, that "reasonable efforts" have been made to prevent the placements. *See* Family Court Act §§352.2(2)(b); Laws of 1999, ch. 7; Laws of 2000, ch. 145. Eliminating unnecessary placements of juvenile delinquents will facilitate State compliance with, and concomitant eligibility of funding from, the federal *Adoption and Safe Families Act* and the *Juvenile Justice and Delinquency Prevention Act*, in light of the applicability of the strict permanency planning mandates to all juveniles in placement facilities that are in receipt of federal foster care funding. *See* Public Law 107-273; V. Hemrich, "Applying *ASFA* to Delinquency and Status Offender Cases," 18 *ABA Child Law Practice* #9: 129, 133 (November, 1999).

Even apart from federal or state funding eligibility, investing intensive probation supervision resources in youth who would otherwise be likely to be placed would result in substantial savings of placement dollars, since probation supervision, even with enhanced officer-to-juvenile ratios and electronic monitoring programs, represents but a fraction of the cost of residential placement.[49] Importantly, however, the proposal does not <u>require</u> such expenditures, as both the electronic monitoring and the intensive probation provisions authroize their utilization only "to the extent available" in a particular locality.

<u>Proposal</u>

AN ACT to amend the family court act and the executive law, in relation to alternatives to detention and conditions of probation in juvenile delinquency cases

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

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

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

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

The court shall not direct detention unless available alternatives to detention would not be appropriate, including, but not limited to, conditional release in accordance with subdivision two of this section. If the court makes a finding, pursuant to paragraph (a) or (b) of this subdivision, that detention is nonetheless necessary, the court may consider whether utilization of electronic monitoring, to the extent available, as a condition of release would address the basis for the finding, that is, significantly reduce the substantial probability that the respondent will not return to court on the return date or the substantial risk that the respondent may before the return date commit an act that if committed by an adult would constitute a crime, as applicable. If the court so finds and if such a program is available in the county, the court may order the probation department to supervise the respondent through a program of electronic monitoring, which shall be implemented in accordance with regulations to be promulgated by the division of probation and correctional alternatives pursuant to subdivision one of section two hundred forty-three of the executive law.

§2. Subdivision 3 of section 353.2 of the family court act is amended by re-lettering paragraphs (e) and (f) as (f) and (g) and adding a new paragraph (e) to such subdivision to read as follows:

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

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

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

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

1985, is amended to read as follows:

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

calendar year, which shall include such information relative to the administration of probation and correctional alternatives throughout the state as may be appropriate. He or she may from time to time publish reports regarding probation including probation in family courts, and the operation of the probation system including probation in family courts and any other information regarding probation as he or she may determine provided expenditures for such purpose are within amounts appropriated therefor.

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

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

In 1996, appellate courts in New York State identified two significant gaps in the procedural framework governing juvenile delinquency cases, both in the area of violations of court orders. The Family Court Advisory and Rules Committee is proposing legislation to eliminate both of these gaps by clarifying applicable procedures in cases of alleged violations of adjournments in contemplation of dismissal (ACD's) and of orders of conditional discharge in juvenile delinquency proceedings.

Article 3 of the Family Court Act is completely silent as to the procedures to be followed and the threshold showing required, not only to establish a violation of the conditions of an ACD sufficient to restore the case to the calendar, but also to trigger either a fact-finding or dispositional hearing, as applicable. Subdivision one of section 315.3 of the Family Court Act simply provides that "[u]pon *ex parte* motion by the presentment agency, or upon the court's own motion, made at the time the order is issued or at any time during its duration, the Family Court may restore the matter to the calendar."

In Matter of Edwin L., 88 N.Y.2d 593 (1996), the Court of Appeals declined to incorporate a specific hearing requirement for violations of conditions in cases adjourned in contemplation of dismissal into Article 3 of the Family Court Act in the absence of explicit legislation. The Court stated:

> We hold that the requirements of due process are satisfied when a Family Court determines, after conducting an inquiry into the allegations of the violation petition, and providing the juvenile with an opportunity to respond to those allegations, that there is a legitimate basis for concluding that the juvenile has violated a condition of an ACD order and states the reasons, on the record, for reaching that determination.

88 N.Y.2d, at 603. Noting that the scope of the hearing will vary according to the circumstances of particular cases, the Court left a determination of the degree of formality required to the discretion of the Family Court. It did, however, assume, in the absence of statutory guidance, that a violation petition would be filed, providing notice to the juvenile of the violation, that the juvenile would be given an opportunity to respond to the petition with or without a hearing, and that hearsay evidence would be admissible to establish the allegations of the petition.

The Committee's proposal codifies these elements of the holding in Matter of Edwin L. and provides needed amplification of the applicable procedures. The proposal requires a verified petition, which must be served on the respondent juvenile, for restoration to the calendar of a juvenile delinquency matter adjourned in contemplation of dismissal and provides the respondent with an opportunity to respond to the motion. Filling a gap in the Family Court Act, the proposal authorizes the Family Court to order that the respondent juvenile be detained and provides for an expedited determination of the violation petition in such cases, consistent with the criteria and time frames applicable in other detention cases. The measure codifies the direction in Matter of Edwin L. that

hearsay evidence should be admissible.[50] If the petition to restore the matter to the calendar is sustained, the case would be set down for a fact-finding or dispositional hearing, depending upon whether the matter had been adjourned in contemplation of dismissal before or after entry of a fact-finding order. Similar to the provision regarding probation violations [Family Court Act §§360.2(4), (5)], the proposal further provides that the period of the ACD would be tolled during the pendency of the petition, and that, if the petition to restore the matter to the calendar is dismissed, the period during which the petition was pending would be credited to the period of the adjournment in contemplation of dismissal.

Finally, the Committee's proposal effectuates the apparent intention of the Legislature to provide identical procedures for adjudicating violations of orders of probation and conditional discharge. While sections 360.2 and 360.3 articulate a procedure governing violations of both probation and conditional discharge, references to conditional discharge appear to have been inadvertently omitted from two subdivisions of those sections. In Matter of Donald MM, 231 A.D.2d 810, 647 N.Y.S. 2d 312 (3rd Dept., 1996), *lve. app. denied*, 89 N.Y.2d 804 (1996), the Appellate Division, Third Department, read into section 360.2(4) of the Family Court Act a requirement that the period of a conditional discharge be tolled during the pendency of a violation petition, as in probation violation cases. The Court held that the omission of the requirement was unintentional, as "it is apparent from a reading of all provisions of this statute that the Legislature did not intend for probationary periods and conditional discharges to be treated differently." The Committee's proposal incorporates this tolling requirement into subdivision four of section 360.2 of the Family Court Act. Using the same rationale, it remedies a similar gap in subdivision five of the same section, which requires credit for the period of pendency of a violation petition to be given in cases in which the violation has not been sustained.

Proposal

AN ACT to amend the family court act, in relation to violations of adjournments in contemplation of dismissal and orders of conditional discharge in juvenile delinquency cases

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

Section 1. Subdivision 1 of section 315.3 of the family court act, as amended by chapter 237 of the laws of 1991, is amended to read as follows:

1. Except where the petition alleges that the respondent has committed a designated felony act, the court may at any time prior to the entering of a finding under section 352.1 and with the consent of the respondent order that the proceeding be "adjourned in contemplation of dismissal." An adjournment in contemplation of dismissal is an adjournment of the proceeding, for a period not to exceed six months, with a view to ultimate dismissal of the petition in furtherance of justice. Upon

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

issuing such an order, providing such terms and conditions as the court deems appropriate, the court must release the respondent. The court may, as a condition of an adjournment in contemplation of dismissal order, in cases where the record indicates that the consumption of alcohol may have been a contributing factor, require the respondent to attend and complete an alcohol awareness program established pursuant to [paragraph six-a of subdivision (a) of] section [19.07] 19.25 of the mental hygiene law. [Upon *ex parte* motion by the presentment agency, or upon the court's own motion, made at the time the order is issued or at] At any time during [its] the duration of an order issued pursuant to this section, the court may restore the matter to the calendar in accordance with subdivision four of this section. If the proceeding is not restored, the petition is, at the expiration of the order, deemed to have been dismissed by the court in furtherance of justice.

§2. Section 315.3 of the family court act is amended by adding a new subdivision 4 to read as follows:

4. An application to restore the matter to the calendar in accordance with subdivision one of this section shall be in the form of a verified petition which shall be served on the respondent, who shall have an opportunity to be heard with respect thereto. The petition shall state the factual basis for the restoration, including the condition or conditions alleged to have been violated and the time, place and manner in which such violation occurred. The respondent is entitled to counsel at all stages of a proceeding under this section, and the court shall advise the respondent of such right at the initial appearance on any petition filed hereunder. Upon request, the court shall grant a reasonable adjournment to the respondent in order to respond to the petition and, if the factual allegations of the petition are contested, to prepare for a hearing. If the court determines that the respondent should be detained in accordance with the criteria in subdivision three of section 320.5, the court shall hear and determine the petition within three days; provided, however, that for good cause shown, the court may adjourn the matter for not more than three additional days. If, after hearing the petition, the court finds that the presentment agency has demonstrated by relevant and material evidence that one or more conditions of the order have been violated, the court shall state on the record the reasons for such determination, grant the petition, restore the matter to the calendar and schedule the proceeding for a fact-finding hearing or dispositional hearing, as applicable. Upon filing the petition, the period of the adjournment in contemplation of dismissal shall be interrupted. Such interruption shall continue until such time as the court determines the petition. If the court denies the petition, the period during which the petition was pending shall be credited to the period of the adjournment in contemplation of

dismissal.

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

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

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

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

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

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

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

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

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

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

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

Proposal

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

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

Section 1. Paragraph (c) of subdivision 3 of section 454 of the family court act is amended to read as follows:

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

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

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

(b) [The] If the court [may at any time, where circumstances warrant it, revoke an order of] finds, after a hearing, that a party who has been placed on probation [. Upon such revocation, the

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

§3. This act shall take effect immediately.

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

In 1986, as part of the legislation requiring periodic reviews of voluntarily-placed foster children freed for adoption, the Family Court was specifically authorized to recommend in its dispositional orders that the New York State Department of Social Services (now the Office of Children and Family Services) investigate the facts and circumstances of local social service districts' discharge of their responsibilities for the care and welfare of children in their custody pursuant to section 395 of the Social Services Law. *See* Laws of 1986, ch. 902.[51] These provisions, expanded in 1988 to apply to freed children originally placed as a result of child protective proceedings, were then consolidated into section 1055-a(7) of the Family Court Act in 1999 when that provision was revised to encompass all permanency hearings held regarding children freed for adoption. *See* Laws of 1988, ch. 638; Laws of 1999, ch. 534. However, no analogous provisions were enacted with respect to children in foster care who were not freed for adoption, although the utility of such provisions for those children is clearly equally as great. The Family Court Advisory and Rules Committee proposes to remedy this gap.

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

Additionally, court records in all cases referred would be made available to the New York State Office of Children and Family Services to assist in its review or investigation. Further, while the referral to OCFS may provide the Court with a useful alternative to the imposition of contempt sanctions, the availability of this option would not impair the authority of the Court to utilize section 156 of the Family Court Act and Article 19 of the Judiciary Law in appropriate cases. Finally, conforming changes would be made as well with respect to reviews of children freed for adoption, pursuant to section 1055-a of the Family Court Act. In a case involving a freed child, the referral to OCFS would only be mandatory if the Family Court had reason to believe that the local social services

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

district had violated a court order, pursuant to section 1055-a(7)(c) of the Family Court Act, directing provision of services or assistance to the child and the prospective adoptive parent as authorized or required by the applicable comprehensive annual services program plan.

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

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

Proposal

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

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

Section 1. Section 1055 of the family court act is amended by adding a new subdivision (j) to read as follows:

(j) In addition to or in lieu of an order of placement or an extension or continuation of a placement made pursuant to subdivision (b), where the court has reason to believe that the local social services district has failed to comply on a timely basis with applicable state and federal laws

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

§2. Paragraphs (c), (d) and (e) of subdivision 7 of section 1055-a of the family court act, as amended by chapter 83 of the laws of 2002, are amended to read as follows:

(c) directing the provision of services or assistance to the child and the prospective adoptive parent authorized or required to be made available pursuant to the comprehensive annual services program plan then in effect. Such order shall include, where appropriate, the evaluation of eligibility for adoption subsidy pursuant to title nine of article six of the social services law, but shall not require the provision of such subsidy. Violation of such an order shall be subject to punishment pursuant to section seven hundred fifty- three of the judiciary law and shall result in an order pursuant to paragraph (d) of this of this subdivision;

(d) *[Effective until June 30, 2007]*: recommending that the state office of children and family services investigate the facts and circumstances concerning the discharge of responsibilities for the care and welfare of such child by a social services district pursuant to section three hundred ninety-five of the social services law and/or other applicable state and federal laws and regulations. The court may make such an order where the court has reason to believe that the local social services district has failed to comply on a timely basis with applicable state and federal laws and regulations and shall make such an order where the social services district has not complied on a timely basis with an order issued pursuant to paragraph (c) of this subdivision. The court shall make available to the state office of children and family services all relevant court records relating to the proceeding or any related proceedings. Nothing in this section shall limit the authority of the court pursuant to

section one hundred fifty-six of this act and article nineteen of the judiciary law; or

(d) *[Effective June 30, 2007]*: recommending that the state department of social services conduct a child welfare services utilization review pursuant to section three hundred ninety-eight-b of the social services law. The court shall make available to the department all relevant court records relating to the proceeding or any related proceedings; or

(e) *[Effective June 30, 2007]*: recommending that the state department of social services investigate the facts and circumstances concerning the discharge of responsibilities for the care and welfare of such child by a social services district pursuant to section three hundred ninety-five of the social services law and/or other applicable state and federal laws and regulations. The court may make such an order where the court has reason to believe that the local social services district has failed to comply on a timely basis with applicable state and federal laws and regulations and shall make such an order where the social services district has not complied on a timely basis with an order issued pursuant to paragraph (c) of this subdivision. The court shall make available to the state office of children and family services all relevant court records relating to the proceeding or any related proceedings. Nothing in this section shall limit the authority of the court pursuant to section one hundred fifty-six of this act and article nineteen of the judiciary law.

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

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

§4. This act shall take effect immediately.

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

Experience under the recently-enacted legislation regarding conditional surrenders of children [Laws of 2002, chapter 76] has revealed one area in which the statute, while otherwise salutary, may actually impede the use of conditional surrenders in appropriate cases, thus delaying permanency for children in foster care. That statute, *inter alia*, provided that prior to accepting a surrender conditioned upon adoption by a particular individual, the authorized child care agency would be required to have fully investigated and approved the designated individual as a qualified adoptive parent, not simply as a qualified foster parent. The Family Court Advisory and Rules Committee is proposing a much-needed corrective measure.

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

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

Proposal

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

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

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

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

adoptive parent. No such agency shall draw or receive money from public funds for the support of any such child except upon the written order or permit of the social services official of the county or city sought to be charged with the support of such child.

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

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

§3. This act shall take effect immediately.

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

In adjudicating various types of proceedings in Family Court, the ability of the Family Court judges to call upon local social services districts to perform child protective investigations pursuant to section 1034 of the Family Court Act has often proven invaluable, both to protect children before the Court and to assist the Court in fulfilling its statutory duty to accurately determine the children's "best interests." It has been utilized to obtain an independent investigation, for example, where an allegation of child abuse or neglect has been made by a party or by the law guardian or where it becomes evident during the course of a proceeding that child maltreatment may have occurred. Where the investigation results in a determination by the agency that the child maltreatment allegation is "indicated" – *i.e.*, supported by credible evidence, as provided by section 412(12) of the Social Services Law – the Court may direct an individual to file a child protective petition, pursuant to section 1032(b) of the Family Court Act, where the child protective agency has not already done so. *See* Besharov, Practice Commentaries, McKinney's Cons. Laws of NY, Book 29A, Family Court Act §1034, p. 76. What is not altogether clear, however, is whether the Family Court has the authority to direct a child protective agency, not only to investigate, but also to file a child protective petition.[52]

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

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

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

the petition."[53]

The importance of delineating specific authority to the Family and Supreme Court to direct investigations and, if indicated, filings of child protective petitions cannot be overstated. All too often, child protective investigations are performed and result in an "indicated" report, only to be closed the same day without any petition being drawn or services being provided to the families to ensure protection of the children or remediation of the problems found.[54] While many such cases should be addressed through provision of services, rather than filing of a petition, there are instances where a petition, often in addition to services, would be more appropriate. For example, where serious concerns exist as to the safety of children from abusive parents, simply granting custody to relatives in the absence of a child protective petition may provide insufficient protection both to the children and their kin; kinship homes may be better supported in the context of a child protective proceeding. This measure will help to ensure that where specific allegations of child maltreatment have been found upon investigation to be supported by credible evidence, the Family or Supreme Court would be able to direct the filing of a petition and thereby to facilitate appropriate court intervention to further the protection of the children and assistance to the family.

Proposal

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

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

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

1-d. On its own motion or on the motion of any party or the law guardian in proceedings under this section, the court may direct an investigation pursuant to section one thousand thirty-four of the family court act. If the investigation results in an indicated report as defined in subdivision

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[53] As noted in the Practice Commentary to section 254 of the Family Court Act, the County Attorney or Corporation Counsel does not actually "represent" the petitioner, as in the case of a typical attorney-client relationship, but, rather, represents the State with the attendant obligation to "seek justice." Besharov, Practice Commentaries, McKinney's Cons. Laws of NY, Book 29A, Family Court Act §254, p. 283. *See also*, *Lawyer's Code of Professional Responsibility*, Ethical Consideration 7-14; *Standards of Practice for lawyers Representing Child Welfare Agencies* (American Bar Assoc.; Aug., 2004). Significantly, in child abuse cases, the New York City Corporation Counsel and, outside New York City, the District Attorney is a "necessary party" to the proceeding. Family Court Act §254(b).

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

twelve of section four hundred twelve of the social services law, the court, after giving the local social services commissioner and the subject of the report notice and an opportunity to be heard, may direct the commissioner to file a child protective petition under article ten of the family court act with respect to allegations found in the investigation to be indicated. The court may direct that the child protective petition be heard by the judge presiding over proceedings under this section.

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

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

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

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

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

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

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

Compounding the infirmity identified in Rose *v.* Moody, the statutes contain ambiguous provisions leading to anomalous, unintended results. Both subdivision (1)(d) of section 413 of the Family Court Act and subdivision (1-b)(d) of section 240 of the of the Domestic Relations Law provide that "where the annual amount of the basic child support obligation would reduce the non- custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater." A literal reading of this provision as applied to an indigent non-custodial parent would compel the conclusion that the child support obligation would constitute the difference between the non-custodial parent's income and the self- support reserve in virtually all instances, as that figure would generally be greater than $25 per month. For example, a non-custodial parent with no income would be ordered to pay $12, 569 in child support, since the difference between $0 and the self-support reserve ($12, 569 annually, the level in 2004) is $12, 569, a greater amount than $25 per month ($300 annually).

Additionally, in cases where the basic child support obligation would reduce the non-custodial parent's income to a level below the self-support reserve but not below the poverty level, both subdivisions provide alternative standards for determining child support, that is, the greater of $50 per month or the difference between the non-custodial parents' income and the self-support reserve. However, both statutes are silent regarding whether separate amounts may also be ordered in such cases for child care, future medical and educational expenses, in accordance with subparagraphs four, five, six and seven of paragraph (c) of both subdivision one of section 413 of the Family Court Act and subdivision (1-b) of section 240 of the Domestic Relations Law. Several cases have, therefore, disallowed the inclusion of any of these expenses as part of the child support order in such circumstances. *See* Callen *v.* Callen, 287 A.D.2d 818 (3rd Dept., 2001); In Re Rhianna R., 256 A.D.2d 1184 (4th Dept., 1998)[citing Matter of Cary (Mahady) *v.* Megrell, 219 A.D.2d 334 (3rd Dept., 1996), *lve. app. dismissed,* 88 N.Y.2d 1065 (1996)]; Dunbar *v.* Dunbar, 233 A.D.2d 922 (4th Dept., 1996).

The Family Court Advisory and Rules Committee is recommending legislation to correct these anomalies and to codify the decision in Rose *v*. Moody. The proposal would make the presumption in favor of a minimum order of $25 per month rebuttable by a showing that such an order would be unjust or inappropriate, based upon the factors applicable to departures from the child support standards. *See* Domestic Relations Law §240(1-b)(f); Family Court Act §413(1)(f). The Family or Supreme Court would thus be authorized to order payment of an amount it deems to be just and appropriate. It would eliminate the proviso that "[i]n no instance shall the court order child support below $25 per month." Further, the proposal would delete the alternative standard for determining the child support obligation for non-custodial parents for whom imposition of the obligation would cause their incomes to fall below the poverty level, that is, the "difference between the non-custodial parent's income and the self-support reserve." Finally, in cases where imposition of the basic child support obligation would reduce the non-custodial parent's income to an amount below the self-support reserve, but not the poverty, level, the measure would clarify that the Court would be authorized, although not required, to direct payments for child care, educational and health care expenses, as part of its child support order.[55]

Proposal

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

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

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

(d) Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the noncustodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month [or the difference between the noncustodial parent's income and the self- support reserve, whichever is greater], provided, however, that if the court finds that such basic child support obligation is unjust or inappropriate, which finding shall be based upon considerations of the factors set forth in paragraph (f) of this subdivision, the court shall order the non-custodial parent to pay such amount of the child support as the court finds just and appropriate. Notwithstanding the provisions of paragraph (c) of this

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

subdivision, where the annual amount of the basic child support obligation would reduce the noncustodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be fifty dollars per month or the difference between the noncustodial parent's income and the self- support reserve, whichever is greater, in addition to any amounts that the court may, in its discretion, order in accordance with subparagraphs four, five six and/or seven of paragraph (c) of this subdivision .

* * *

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

* * *

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

support agreement or compromise that includes an amount for child support less than twenty-five dollars per month.]

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

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

* * *

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

custodial parent's income is less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue.

* * *

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

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

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

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

While explicitly not diminishing the non-custodial parent's basic support obligation and in no way superseding the issuance of orders for periodic payments pursuant to the *Child Support Standards Act*, the proposal would authorize the Supreme or Family Court, under such terms and conditions as it deems appropriate, to direct the non-custodial parent to pay an amount to establish a security account designated for the benefit of the child, including, but not limited to, a trust account or annuity, to meet the child's future needs. The proposal would require the Court to be specific in setting forth the parameters of the account, including, as applicable, the specific purposes of the account; the person or entity that will act as trustee, custodian or administrator of the funds in the account; the person or entity that will act as the trustee, custodian or administrator of the funds in the account in the event of the death of the designated trustee, custodian or administrator; the disposition of the funds after the emancipation or death of the child or children named as beneficiaries; the particular structure that will fulfill the purposes of the account; and any further provisions necessary to accomplish the purpose of the account.

Proposal:

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

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

Section 1. Paragraph (c) of subdivision 1-b of section 240 of the domestic relations law is amended by adding a new subparagraph 8 to read as follows:

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

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

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

§3. This act shall take effect immediately.

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

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

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

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

Third, the proposal adds clarity to the procedure for challenging an administrative directive to submit to a genetic test in cases in which a paternity petition has not yet been filed. The measure would require such a challenge to be initiated by the filing of a petition that must be personally served upon, or mailed to, the local department of social services. The local agency would have an opportunity to respond within 10 days of the date of such personal service or within 15 days of the date of such mailing, as applicable. Significantly, the proposal clarifies that individuals who are married or were married to each other at the time of the conception or birth of the child, as well as a putative father in a case in which the child's mother had been married to someone else at the time of the conception or birth of the child, would be exempt from administrative genetic testing directives. Since these cases may involve application of complex doctrines of equitable estoppel, res judicata and the presumption of legitimacy, they are more appropriately addressed in the context of judicial proceedings.

Finally, as a matter of fundamental fairness, the proposal would amend the Civil Practice Law

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

Proposal

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

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

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

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

§2. Subdivision (a) of section 516-a of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

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

paternity by a child under the age of eighteen shall be executed only before a judge or support magistrate of the family court.

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

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

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

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

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

14. Where the support collection unit determines that there is a basis for an upward adjustment, it shall also file a proposed order together with a copy of the current order of support and an affidavit in support thereof with the clerk of the appropriate court, and send a copy of such proposed order and affidavit by first class mail to the parties. Such affidavit shall include, but not be limited to: specific

findings of fact describing the sources of income used; the calculations upon which the proposed adjustment is based; if joint tax return information has been utilized in the calculations, the allocation of income to the support obligor, to his or her spouse and, if applicable, to the custodial parent; in cases in which the current order of support was based upon a finding pursuant to paragraph (f) of subdivision one of section four hundred thirteen of the family court act or paragraph (f) of subdivision one-b of section two hundred forty of the domestic relations law, the bases for determining whether the factors giving rise to such finding remain present; the names, dates of birth and social security numbers of any children covered by the order; and the date of mailing and address to which the initial notice of the rights and obligations of the parties was sent pursuant to subdivisions sixteen and seventeen of this section.

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

1. (a) An acknowledgment of paternity of a child, as provided for in article five-B or section five hundred sixteen-a of the family court act, by a written statement, witnessed by two people not related to the signator or as provided for in section four thousand one hundred thirty-five-b of the public health law; provided, however, that an acknowledgment of paternity by a child under the age of eighteen shall be executed only before a judge or support magistrate of the family court. Prior to the execution of such acknowledgment by the child's mother and the respondent, they shall be advised, orally, which may be through the use of audio or video equipment, and in writing, of the consequences of making such an acknowledgment. Upon the signing of an acknowledgment of paternity pursuant to this section, the social services official or his or her representative shall file the original acknowledgment with the registrar.

* * *

2. (a) when the paternity of a child is contested, a social services official or designated representative may [order] direct the mother, the child, and the alleged father to submit to one or more genetic marker or DNA tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether or not the alleged father is the father of the child. The [order] direction may be issued prior or subsequent to the filing of a petition with the court to establish paternity, shall be served on the parties by certified mail, and shall include a sworn statement which either (i) alleges paternity and sets forth facts establishing a reasonable possibility of the requisite sexual contact between the parties, or (ii) denies paternity and sets forth facts establishing a reasonable

possibility that the party is not the father. The parties shall not be required to submit to the administration and analysis of such tests if they are married or were married to each other at the time of the conception or birth of the child, if the mother was married to another individual at the time of the conception or birth of the child, if the parties sign a voluntary acknowledgment of paternity in accordance with paragraph (a) of subdivision one of this section, or if there has been a written finding by the court in a pending or prior proceeding that it is not in the best interests of the child on the basis of res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman.

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

5. Objections. (a) Where there is an objection to a cost of living adjustment, either party or the support collection unit shall have thirty-five days from the date of mailing of the adjusted order by the support collection unit to submit to the court identified thereon specific written objections, requesting a hearing on the adjustment of the order of support.

* * *

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

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

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

(a) Immediately preceding or following the in-hospital birth of a child to an unmarried woman, the person in charge of such hospital or his or her designated representative shall provide to the child's mother and putative father, if such father is readily identifiable and available, the documents and written instructions necessary for such mother and putative father to complete an acknowledgment of paternity witnessed by two persons not related to the signatory; provided, however, that an acknowledgment of paternity by a child under the age of eighteen shall be executed only before a judge or support magistrate of the family court. Such acknowledgment, if signed by both parties, at any time following the birth of a child, shall be filed with the registrar at the same time at which the certificate of live birth is filed, if possible, or anytime thereafter. Nothing herein shall be deemed to require the person in charge of such hospital or his or her designee to seek out or otherwise locate a putative father who is not readily identifiable or available. The acknowledgment shall be executed on a form provided by the commissioner developed in consultation with the appropriate commissioner of the department of family

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

to the child in which either signatory is a party; that the "date of an administrative or a judicial proceeding" shall be the date by which the respondent is required to answer the petition; that after the expiration of sixty days of the execution of the acknowledgment, either signatory may challenge the acknowledgment of paternity in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof on the party challenging the voluntary acknowledgment; that they may wish to consult with an attorney before executing the acknowledgment; and that they have the right to seek legal representation and supportive services including counseling regarding such acknowledgment; that the acknowledgment of paternity may be the basis for the putative father establishing custody and visitation rights to the child; if the acknowledgment is signed, it may be the basis for requiring the putative father's consent prior to an adoption proceeding; the mother's refusal to sign the acknowledgment shall not be deemed a failure to cooperate in establishing paternity for the child; and the child may bear the last name of either parent, which name shall not affect the legal status of the child. In addition, the governing body of such hospital shall insure that appropriate staff shall provide to the child's mother and putative father, prior to the mother's discharge from the hospital, the opportunity to speak with hospital staff to obtain clarifying information and answers to their questions about paternity establishment, and shall also provide the telephone number of the local support collection unit.

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

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

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

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

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

§11. This act shall take effect immediately.

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

Section 516 of the Family Court Act, which requires court approval of an agreement between the mother and putative father for the support and education of an out-of-wedlock child and, when so approved, bars other remedies for the support and education of the child, has long generated constitutional controversy and serious questions as to its continued efficacy. In Matter of Clara C. *v.* William L., 96 N.Y.2d 244 (2001), the Court of Appeals, in a 4-3 decision, declined to rule on the constitutionality of section 516 of the Family Court Act on the ground that a narrower ground for decision was available. The Court held that the Family Court's failure to adequately review the compromise agreement before approving it contravened the statutory proviso that an agreement is binding "only when the court determines that adequate provision has been made" for the support of the child. Three judges of the Court of Appeals, however, would have ruled that the statute was unconstitutional as applied in that it denied the out-of-wedlock child equal protection of the laws:

> Our concurring position at minimum raises serious doubts as to the continued general efficacy of compromise arrangements under section 516, even when the Family Court meticulously performs its statutory obligation to ensure the adequacy of the child support provisions of the agreement...Leaving the constitutional issue in limbo until another case makes it way to our Court in which the settlement was properly approved – so that the constitutional issue would have to be reached – does not serve the best interests of nonmarital children, their mothers or putative fathers in paternity matters.

96 N.Y.2d at 253 (concurring opinion). The Family Court Advisory and Rules Committee proposes that the issue not be left in limbo and that this now-obsolete, discriminatory statute be repealed.

This proposal finds support, not only in the concurrence in Clara C., but also in the decision of the United States District Court in Williams *v.* Lambert, 902 F. Supp. 460 (S.D.N.Y., 1995). The Court in Williams held that section 516 can withstand constitutional challenge only if its operative language is deemed not to bar other remedies –that is, if out-of-wedlock children are not foreclosed from seeking remedies available to children born of marriages, including actions to modify child support. Most recently, the Family Court, Orange County, in Matter of Ilene P.V. *v.* Felix V., 3 Misc.3d 759 (Fam. Ct., Orange Co., 2004), declined to apply section 516 to foreclose a subsequent action to modify. Invoking the holding in Clara C., the Court held that, since no inquiry had been made at the time of entry of the 516 agreement regarding the adequacy of support for the child, the preclusive effect of section 516 in barring other remedies would not be imposed.

Section 516 of the Family Court Act, enacted in 1962 but derived from the old Domestic Relations Law, originally served two purposes. First, it encouraged putative fathers to settle paternity claims, thereby reducing the necessity for legal proceedings. Agreements under section 516 offered the putative father certainty and a limitation on his future support obligation, while the interests of the child and mother were protected by the requirement for judicial review. Second, the statute helped ensure that the child would not be without support from the father. By furnishing an incentive to settle, the statute sought to prevent support of the out-of-wedlock child from becoming lost in the intricacies of the

paternity adjudicatory process and the uncertainties of its outcome. Bacon *v.* Bacon, 46 N.Y.2d 477, 480 (1979).

As noted in both the concurrence in Clara C. and the federal court in Williams, however, the linchpin of the Bacon decision -- the "complex and difficult problems of proof" in paternity cases -- no longer stands as a justification for retention of section 516 of the Family Court Act. Technological advances in blood genetic marker testing, the statutory enactments requiring their use, and the evidentiary weight the courts are mandated to accord such test results combine to simplify the proof in paternity proceedings, thus rendering them far less daunting as a means of obtaining orders of filiation and support for children. Indeed, in the Clara C. case, blood tests indicated a 99.9% probability that William L. was the father. Consequently, it would not have been difficult to prove paternity and afford the child the benefits of all available child support remedies, including the ability to seek modification, all of which were barred because of the section 516 agreement.

Although blood grouping tests had been in use in paternity proceedings for many years, until 1981 they were admissible only for the purposes of excluding the respondent as the father. As a result of scientific advances in the field, the Legislature, impressed by the increasing accuracy of the tests, amended section 532 of the Family Court Act to permit the use of blood tests as positive evidence of paternity as well. The most recent amendments of both state and federal law, as well as appellate decisions, have accorded weight to blood and other genetic test results in some cases that is tantamount to evidentiary certitude. *See* Laws of 1997, ch. 398; Laws of 1994, ch. 170; *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* [Public Law 104-193]; Barber *v.* Davis, 120 A.D.2d 364 (1st Dept., 1986); Nancy M. G. *v.* Dann OO, 148 A.D.2d 714 (2nd Dept., 1989); Discenza *v.* James M., 148 A.D.2d 196 (3rd Dept., 1989).

Williams *v.* Lambert, *supra*, is consistent with a long line of decisions casting constitutional doubt on the the disparate treatment of children who are born out-of-wedlock, as compared to children born to married couples. *See, e.g.,* Levy *v.* Louisiana, 391 U.S.68 (1968); Gomez *v.* Perez, 409 U.S. 535 (1973); Pickett *v.* Brown, 462 U.S.1 (1983); Clark *v.* Jeter, 486 U.S. 456 (1988); Mills *v.* Habluetzel, 456 U.S. 91 (1982). In Clark, the Supreme Court held that a six-year statute of limitations for paternity actions violated the equal protection clause in unacceptably differentiating between in-wedlock and out-of-wedlock children. Thereafter, the United States Supreme Court remanded Gerhardt *v.* Estate of Moore, 407 N.W. 2d 895 (1987), *judgment vacated*, 486 U.S. 1050 (1988), to the Supreme Court of Wisconsin for further consideration in light of Clark *v.* Jeter, *supra*. That case concerned a Wisconsin statute that allowed defendants in paternity proceedings to enter into settlements whereby they admitted paternity and paid off their child support obligation in one lump sum – a statute that, like section 516 of the Family Court Act, barred the child from further remedies. Upon reconsideration, the Wisconsin Supreme Court found that the same principle that rendered the differential treatment of children born out-of-wedlock, as opposed to marital children, unconstitutional in Clark *v.* Jeter applied to preclude enforcement of a paternity settlement as a bar to a child's subsequent independent action for support. Gerhardt *v*. Estate of Moore, 441 N.W. 2d 734 (1989).

Significantly, New York courts have held that individuals who were not parties to agreements under section 516 of the Family Court Act could not be deemed to be foreclosed from pursuing child support remedies. The New York Court of Appeals held, in Matter of Commissioner of Social Services of the City of New York *v.* Ruben O., 80 N.Y.2d 409 (1992), that a welfare official,

as assignee of the rights of a mother who had signed a section 516 agreement, is permitted to compel payment of child support despite the father's compliance with the court-approved agreement. Further, holding that the lower court had "failed in its duty to make an independent determination of the best interests of the child," the Supreme Court, Appellate Division, Fourth Department, in Matter of Michelle W. *v.* Forest James P., 218 A.D.2d 175, 178-9 (4th Dept., 1996), held an agreement under section 516 of the Family Court Act to be void and against public policy, where it released the obligor from any child support obligations beyond three years. In upholding a challenge by the law guardian, the Court stated:

> Indeed, a contract depriving a child of his rights is not binding upon the child [citations omitted]. Agreements cannot be upheld where children are treated as chattels and their rights bartered away...Here, the parties have in effect bargained away the birthright of the child. This agreement not only set forth the parental rights and support obligation of respondent, it completely eradicated his parental responsibilities. A parent cannot buy another parent's rightsor sell his or her own rights. A contract exchanging parental rights for compensation simply cannot be countenanced by the courts. [citation omitted].

*Accord*, Andre *v.* Warren, 248 A.D.2d 271 (1st Dept., 1998) (remand for appointment of law guardian and hearing on issue of whether agreement fulfills child's best interests); Department of Public Aid *ex rel* Cox *v*. Miller, 146 Ill.2d 399, 586 N.E.2d 1251 (S.Ct., Ill., 1992); Okla. Dept. of Human Services *ex rel* KAG *v.* TDG, 1993 Ok. 193, 861 P.2d 990 (1993). Significantly, section 513 of the Family Court Act has been amended to make it clear that in-wedlock and out-of-wedlock children must be treated similarly for the purposes of support, thus ending uncertainty about support awards for out-of-wedlock children.

These developments have rendered unnecessary, inappropriate and no longer in the child's best interests the compromise procedure and preclusion of further remedies contained in section 516 of the Family Court Act. Section 516 agreements that, like the one in Clara C., have been perfunctorily approved with limited judicial inquiry, are at the very least not enforceable and rest on a shaky constitutional limb. Section 516 of the Family Court Act, therefore, should be repealed.

Proposal

AN ACT to amend the family court act, in relation to agreement or compromise of support in paternity proceedings

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

Section 1. Section 516 of the family court act is REPEALED.

§2. This act shall take effect immediately.

REPEAL NOTE -- Section 516 of the family court act, proposed to be repealed by this act, provides for court approval of a written agreement or compromise for child support between a putative father and a mother or person on behalf of a child, which, when so approved, bars other remedies for child support.

21. Probation access to the statewide automated order of protection and warrant registry for the purpose of conducting pre-dispositional and pre-sentence investigations in family offense and other Family Court cases (Exec. L. §221-a; FCA §835; CPL §§390.20, 390.30)

In enacting the *Family Protection and Domestic Violence Intervention Act of 1994* [Laws of 1994, ch. 222, 224], the New York State Legislature demonstrated its intent to assure a more rigorous response by law enforcement agencies and the courts to domestic violence. Victims of domestic violence are afforded easy access to either or both Family and criminal courts for prosecution of family offense cases. In addition, offenders are subject to mandatory arrest and face heightened consequences for abusive acts in both courts. Local probation departments serving both family and criminal courts, therefore, require sufficient information regarding both the offense and the offender in order to assist the courts in responding effectively to these legislative changes.

To that end, the Family Court Advisory and Rules Committee is proposing legislation expressly authorizing local probation departments to obtain access to necessary information on the statewide automated registry of orders of protection and warrants, established pursuant to section 221-a of the Executive Law. Information regarding an individual's history of such orders may be essential, not only for the resolution of family offense cases, but also for custody, visitation, juvenile delinquency, persons in need of supervision (PINS) and criminal proceedings. Significantly, the proposal authorizes the courts to call upon local probation departments to perform investigations that will assist the courts in their disposition of family offense matters, and enables probation departments to obtain access to domestic violence registry information for these and other pre-dispositional investigations.

The family offense article of the Family Court Act implies, but does not explicitly authorize, involvement by probation departments in gathering information in aid of the Family Court's dispositions. While dispositional hearings "may commence immediately" upon completion of a fact-finding hearing, the article provides that the dispositional hearing may be adjourned by the Court "to enable it to make inquiry into the surroundings, conditions, and capacities of the persons involved in the proceedings." Family Court Act §§835(a), 836(b). Although not delegating the duty to make that inquiry to probation, subdivision (b) of section 835 of the Family Court Act provides that "[r]eports prepared by the probation service for use by the court at any time prior to the making of an order of disposition shall be deemed confidential information," which may "not be furnished to the court prior to the completion of a fact-finding hearing, but may be used in a dispositional hearing."

The Committee's proposal resolves this ambiguity by making explicit the Family Court's discretion to order local probation departments to prepare investigations and reports for use in dispositional proceedings in family offense matters. While not limiting the scope of the information that can be requested in such an investigation, the proposal enumerates four areas of inquiry. First, the measure permits inquiry into "the presence or absence of aggravating circumstances," since the Court may order up to a three-year, rather than a one-year, order of protection where such circumstances, as defined in section 827(a)(vii) of the Family Court Act, have been found. Second, it permits investigation of "the extent of injuries or out-of-pocket losses to the victim which may form the basis for an order of restitution," a dispositional order authorized pursuant to subdivision

(e) of section 841 of the Family Court Act. Third, in order to prevent issuance of inconsistent orders and provide insight as to the respondent's record of compliance, the proposal permits inquiry into "the history of the respondent with respect to family offenses and orders of protection in this or other courts." Significantly, if the completion of the fact-finding stage coincides with the first appearance of both parties before the Family Court, this investigation may assist the Court in fulfilling its duty, pursuant to subdivision six of section 821-a of the Family Court Act, to "inquire as to the existence of any other orders of protection between the parties." Finally, the proposal permits inquiry into whether the respondent is licensed to possess and is in fact in possession of firearms, an inquiry that will aid the Court in setting conditions for orders of protection and, in cases of serious violation, will facilitate enforcement of the laws authorizing and, under certain circumstances, requiring suspension or revocation of firearms licenses and surrender of firearms. *See* Family Court Act §§842-a, 846-a; Laws of 1996, ch. 644; Laws of 1993, ch. 498.

Additionally, the proposed legislation allows criminal courts to obtain assistance from local probation departments to conduct pre-sentence investigations where relevant to the issuance of an order of protection, including instances in which such investigations are not required under the Criminal Procedure Law. Some family offenses currently require pre-sentence investigations, while others do not. Section 390.20 of the Criminal Procedure Law requires pre-sentence investigations in felony cases and in misdemeanor cases where a sentence of incarceration in excess of 90 days has been imposed, where consecutive incarcerative sentences aggregating in excess of 90 days have been imposed or, unless waived by the parties and the court, where a sentence of probation has been imposed. In all other cases, pre-sentence investigations are purely discretionary as an aid to the court in sentencing. While not altering the courts' discretion with respect to ordering pre-sentence investigations in non-mandated cases, this proposal explicitly adds an authorization for the courts to order such inquiries for the purpose of "issuance of an order of protection" pursuant to section 530.12 of the Criminal Procedure Law.

Where the family offense conviction is not for a felony, which requires a full-scale pre-sentence investigation, the proposal treats family offense convictions, whether for misdemeanors or violations, as misdemeanors eligible for "abbreviated investigations and short form reports," in accordance with section 390.30(4) of the Criminal Procedure Law. While not providing an exhaustive list of permissible areas of inquiry, the proposal enumerates the factors which the court must consider in determining whether an order of protection should issue, pursuant to subdivision (a) of section 530.12 of the Criminal Procedure Law -- specifically, the offender's access to weapons, abuse of controlled substances or alcohol and the offender's history of injury or threat of injury to family members. As in Family Court proceedings, the inclusion of inquiries regarding firearms will enhance the court's ability to frame appropriate conditions for orders of protection and, in cases involving serious violations, will afford the courts information necessary to enforce the provisions regarding firearms license suspension or revocation and firearms surrender. *See* Criminal Procedure Law §§530.12, 530.14; Laws of 1996, ch. 644; Laws of 1993, ch. 498.

Proposal

AN ACT to amend the family court act, the criminal procedure law and the executive law, in relation to pre-dispositional and pre-sentence investigations in family offense cases

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

follows:

Section 1. Subdivision 4 of section 221-a of the executive law, as amended by chapter 349 of the laws of 1995, is amended to read as follows:

4. Courts and law enforcement officials shall have the ability to disclose and share information with respect to such orders and warrants consistent with the purposes of this section, subject to applicable provisions of the family court act, domestic relations law and the criminal procedure law concerning the confidentiality, sealing and expungement of records. Designated representatives of a local probation service shall have access to information in the statewide registry of orders of protection and warrants necessary in order to respond to a judicial request for information pursuant to subdivision six of section eight hundred twenty-one-a of the family court act or subdivision six-a of section 530.12 of the criminal procedure law, or to prepare an investigation and report in proceedings conducted pursuant to sections 351.1, six hundred forty-two, six hundred fifty-six, six hundred sixty-two, seven hundred fifty, eight hundred thirty-five and subdivision (b) of section one thousand forty-seven of the family court act or article three hundred ninety of the criminal procedure law.

§2. The title and subdivision (a) of section 835 of the family court act, such subdivision as amended by chapter 529 of the laws of 1963, are amended to read as follows:

§835. Sequence of hearings; probation investigations and reports. a. Upon completion of the fact-finding hearing, the dispositional hearing may commence immediately after the required findings are made. In aid of its disposition, the court may adjourn the proceeding for an investigation and report by a local probation service. For the purposes of this article, the probation investigation and report may include, but is not limited to: the presence or absence of aggravating factors as defined in paragraph (vii) of subdivision (a) of section eight hundred twenty-seven of this article, the extent of injuries or out- of-pocket losses to the victim which may form the basis for an order of restitution pursuant to subdivision (e) of section eight hundred forty-one of this article, the history of the respondent with respect to family offenses and orders of protection in this or other courts, whether the respondent is in possession of any firearms and, if so, whether the respondent is licensed or otherwise authorized to be in possession of such firearms.

§3. Subdivision 3 of section 390.20 of the criminal procedure law is amended to read as follows:

3. Permissible in any case. For the purposes of sentence or issuance of an order of protection pursuant to subdivision five of section 530.12 of this chapter, the court may, in its discretion, order

a pre-sentence investigation and report in any case, irrespective of whether such investigation and report is required by subdivision one or two.

§4. Subdivision 4 of section 390.30 of the criminal procedure law, as amended by chapter 618 of the laws of 1992, is amended to read as follows:

4. Abbreviated investigation and short form report. In lieu of the procedure set forth in subdivisions one, two and three, where the conviction is of a misdemeanor or family offense, as defined in subdivision one of section 530.11 of this law, other than a felony, the scope of the pre-sentence investigation may be abbreviated and a short form report may be made. The use of abbreviated investigations and short form reports, the matters to be covered therein and the form of the reports shall be in accordance with the general rules regulating methods and procedures in the administration of probation as adopted from time to time by the state director of probation and correctional alternatives pursuant to the provisions of article twelve of the executive law. No such rule, however, shall be construed so as to relieve the agency conducting the investigation of the duty of investigating and reporting upon:

(a) the extent of the injury or economic loss and the actual out-of-pocket loss to the victim, including the amount of restitution and reparation sought by the victim, after the victim has been informed of the right to seek restitution and reparation, or

(b) in a case involving a family offense, as defined in subdivision one of section 530.11 of this chapter, the defendant's history of family offenses and orders of protection, including violations, in proceedings or actions in this or other courts, the extent of injuries or threats of injury to the complainant or members of complainant's family or household, the use or threatened use of dangerous instruments against the complainant or members of complainant's family or household, whether the defendant is in possession of any firearms and, if so, whether defendant is licensed or otherwise authorized to be in possession of such firearms, the extent to which the defendant poses an immediate and ongoing danger to the complainant or members of the complainant's family or household and any other information relevant to the issue of whether an order of protection, in addition to any other disposition, should be issued in accordance with subdivision five of section 530.12 of this chapter, or

(c) any matter relevant to the question of sentence or issuance of an order of protection that the court directs to be included in particular cases.

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

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

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

There are a variety of situations in which children and adults may be deemed by judges to require the protection afforded by a guardian *ad litem*. For example, in Family Court the respondent in a child protective proceeding (the parent of the child who is allegedly mistreated) may be under 18 years of age. Adults may require guardians *ad litem* when their own mental capacity is challenged, for instance, in termination of parental rights proceedings based on the parents' mental illness or retardation. Additionally, guardians *ad litem* are sometimes appointed in matrimonial proceedings in Supreme Court in lieu of a law guardian.

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

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

Proposal

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

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

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

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

§2. This act shall take effect immediately.

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

Recognizing the importance of security to the operation of computer systems, the Family Court Advisory and Rules Committee recommends the enactment of civil and criminal penalties for unauthorized disclosure of information from the statewide automated registry of orders of protection and warrants. This proposal is consistent with the requirement, contained in the federal *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* [Public Law 104-193, §303], for all states to have safeguards in place by October 1, 1997 against unauthorized disclosure of information with respect to paternity establishment or child support, or with respect to the whereabouts of a party for whom a protective order has been issued or as to whom the State has reason to believe physical or emotional harm might result from such disclosure.

One of the most important features of the *Family Protection and Domestic Violence Intervention Act of 1994* [Laws of 1994, ch. 222, 224] was its enactment of section 221-a of the Executive Law mandating the establishment of an automated statewide registry of orders of protection and warrants. The registry, which commenced operations on October 1, 1995, is designed to ensure that courts and law enforcement officials have available a system that will provide timely and accurate information relating to pending and prior orders of protection and warrants. It currently comprises an enormous and rapidly growing database of sensitive information; according to the Office of Court Administration, as of November 28, 2004, there were 1, 245,415 orders of protection entered onto the registry.

Orders of protection in matrimonial, criminal and Family Court cases and related warrants are required to be included in the registry. Various forms of identifying information regarding the parties must be included, particularly where, for example, in matrimonial and Family Court cases, fingerprint identification is not available. Additionally, the system includes court action information, an indication of the date process was served, the date of expiration of the order and the terms and conditions of the order. *See* Executive Law §221-a.

Much of the information to be contained in the registry is derived from records which would otherwise be shielded from such disclosure. By virtue of subdivision one of section 235 of the Domestic Relations Law, matrimonial records must be kept confidential for 100 years and may not be disclosed to non-parties or their attorneys without a court order. Section 166 of the Family Court Act protects Family Court records against "indiscriminate public inspection." Section 205.5 of the *Uniform Rules for the Family Court* gives definition to this statute, enumerating parties, their attorneys, agencies with which children are placed, and, by amendment in 1994, prosecutors insofar as necessary for a pending criminal investigation, as those who are authorized to have access to Family Court records without first obtaining a court order. However, possibly through inadvertence, the Legislature provided no sanction against unauthorized disclosure of information contained in the registry.

Adequate security is a crucial component of any computer system, but it is especially important in a system, such as the registry, that contains highly sensitive information, much of it

bearing statutory confidentiality protections. Misuse of the information in the registry may not only place intimate information inappropriately before the public eye, but it also may place domestic violence victims and their children in serious jeopardy if data is released to individuals who pose a threat to them. Security protections are also essential in light of the large number of authorized individuals with legitimate access to the system -- law enforcement officials statewide, court officials and others -- who must take seriously their mandate to preserve the confidentiality of the information.

Accordingly, the Family Court Advisory and Rules Committee proposes an amendment to section 221-a of the Executive Law to create criminal and civil penalties for unauthorized disclosure of data from the registry. This proposal was revised in 1996 to address the concerns raised by the Governor with respect to similar legislation that was vetoed in 1995 [S 3940, Veto Message #21].[56] Under the revised proposal, knowing and willful disclosure of information to individuals not authorized to receive it would subject violators to prosecution for a class A misdemeanor, the same criminal penalty that applies to the unauthorized willful disclosure of information from the statewide child abuse registry, pursuant to subdivision 12 of section 422 of the Social Services Law, and similar to that which applies to the willful disclosure of confidential HIV-related information under subdivision two of section 2783 of the Public Health Law. Such violators also may be subject to a civil fine of up to $5,000, as would persons who, through gross negligence, release or permit the release of information from the registry to individuals not authorized to receive it.

Proposal

AN ACT to amend the executive law, in relation to penalties for unauthorized disclosure of information from the statewide automated registry of orders of protection and warrants

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

Section 1. Subdivision 5 of section 221-a of the executive law, as amended by chapter 224 of the laws of 1994, is amended to read as follows:

5. [In] Except as provided in subdivision seven of this section, in no case shall the state or any local law enforcement official or court official be held liable for any violations of rules and regulations promulgated under this section, or for any damages for any delay or failure to file an order of protection, or to transmit to the law enforcement communication network pertaining to orders of protection or related family court arrest warrants, or for acting in reliance upon such

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

information. For purposes of this subdivision, law enforcement official shall include but not be limited to an employee of a [sheriffs] sheriff's office, or a municipal police department or a peace officer acting pursuant to his or her special duties.

§2. Section 221-a of the executive law is amended by adding a new subdivision 7 to read as follows:

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

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

24. Jurisdiction of the Family Court with respect to family offenses committed by juveniles under the age of sixteen (FCA §812(1); CPL §530.11(1))

The Family Court Advisory and Rules Committee is proposing legislation specifying that juvenile delinquency or Persons in Need of Supervision (PINS) proceedings, brought in accordance with Article 3 or 7 of the Family Court Act, rather than family offense proceedings pursuant to Article 8 of the Family Court Act, are the appropriate vehicles for addressing family offenses committed by juveniles under the age of 16.

The enactment of the *Family Protection and Domestic Violence Intervention Act of 1994* [Laws of 1994, chs. 222, 224] reflected the Legislature's recognition that domestic violence is "criminal conduct" that has a "corrosive" effect upon families, particularly upon women and children, and that "warrants stronger intervention" [Laws of 1994, ch. 222, §1]. The Legislature found:

> Abuse of a parent is detrimental to children whether or not they are physically abused themselves. Children who witness domestic violence are more likely to experience delayed development, feelings of fear, depression and helplessness and are more likely to become batterers themselves.

*Id.* Nowhere, however, in the Act or in the debate or hearings leading up to its enactment did the Legislature contemplate or consider children as the abusers. Left untouched by the Act were existing provisions in both section 812(1) of the Family Court Act and section 530.11(1) of the Criminal Procedure Law that specify that "if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the Penal Law, then the family court shall have exclusive jurisdiction over such proceeding."

A literal reading of those statutory provisions appears to permit family offense petitions to be brought against juveniles in accordance with Article 8 of the Family Court Act, notwithstanding the statutory framework established for juvenile delinquents and PINS pursuant to Articles 3 and 7 of the Act. Indeed, the Appellate Division, Second Department, in Marsha C. *v.* Latoya D., 224 A.D.2d 522, 638 N.Y.S.2d 129 (2d Dept., 1996), *leave to app. denied,* 88 N.Y.2d 804 (1996), held that a family offense, as defined in subdivision one of section 812 of the Family Court Act, where proven by a preponderance of the evidence, can be found to have been committed by a 15 year-old juvenile against her mother.

Article 8 of the Family Court Act is an inappropriate vehicle for proceeding against juveniles as it lacks important statutory provisions, some constitutionally required and some required by federal law, applicable to juveniles, including, *inter alia*, the right to a law guardian, proof beyond a reasonable doubt, consideration for adjustment or diversion, detention and placement in juvenile facilities separate and apart from adults, and orders of disposition appropriate to their needs and best interests. *See, e.g.,* Family Court Act §§249, 304.1, 308.1, 342.2,

352.2, 720, 734, 735, 754. The rights to law guardian representation and to proof beyond a reasonable doubt have been held to be of constitutional magnitude and, under New York law, are equally applicable in juvenile delinquency and PINS proceedings. *See* In re Gault, 387 U.S. 1 (1967); In re Winship, 397 U.S. 358 (1970); In re Iris R., 33 N.Y.2d 987 (1974). Unlike attorney representation in Article 8 proceedings pursuant to section 262 of the Family Court Act, law guardian representation in juvenile delinquency and PINS cases is presumptively non-waivable. *See* Family Court Act §249-a.

As Article 8 lacks provisions for detention and incarceration of juveniles, contempt penalties cannot be applied to them. The proscription against confinement of juveniles in adult jails, lock-ups and prisons, contained in New York law [Family Court Act §§ 304.1(2), 720(1)], is required as a condition of State funding under the federal *Juvenile Justice and Delinquency Prevention Act of 1974,* 42 U.S.C. §5633(a)(13). While there is no legal authority to confine juveniles in juvenile detention or long term juvenile placement facilities pursuant to Article 8 of the Family Court Act, such juveniles are also foreclosed from incarceration in adult facilities. Nor may juveniles be brought to criminal courts during hours when the family courts are closed in view of the lack of separate juvenile detention facilities in criminal courts.

The juvenile delinquency and PINS statutes provide full protection for victims of family offenses committed by juveniles, while, at the same time, furthering the special needs of juveniles and retaining the constitutional and statutory protections applicable to them. Articles 3 and 7 both authorize issuance of orders of protection and temporary orders of protection, permit detention in juvenile facilities in appropriate cases, permit orders of restitution, and provide for dispositions in juvenile programs tailored specifically to the juveniles' needs, their presenting problems and, in juvenile delinquency cases, considerations of public safety. *See* Family Court Act §§ 301.1, 304.1, 304.2, 320.5, 352.2, 352.3, 353.6, 720, 740, 754, 758-a, 759. Indeed, Article 8 proceedings are potentially duplicative of these other remedies. For example, the juvenile in Marsha C. was simultaneously adjudicated a Person in Need of Supervision for the same acts, thus raising a question as to the need for a family offense adjudication. *See* Matter of Latoya D., 224 A.D.2d 524, 638 N.Y.S.2d 128 (2d Dept., 1996), *leave to app. denied,* 88 N.Y.2d 804 (1996).

Victims' perspectives and allegations may be fully presented in both PINS and juvenile delinquency proceedings. More specifically, juvenile delinquency cases may be initiated by the filing of a petition by a presentment agency, containing allegations of behavior that would constitute misdemeanors or felonies if committed by adults. *See* Family Court Act §§310.1, 311.1. PINS cases may be initiated by petitions filed, *inter alia*, by peace or police officers, parents or legal guardians or "any person who has suffered injury as a result of the alleged activity of a person alleged to be in need of supervision, or a witness to such activity." *See* Family Court Act §733.

By requiring that juveniles who commit family offenses be dealt with pursuant to Article 3 or 7 of the Family Court Act, as applicable in particular cases, the Family Court Advisory and Rules Committee proposal will assure that family offenses committed by such juveniles are addressed appropriately.

Proposal

AN ACT to amend the family court act and the criminal procedure law, in relation to family offenses alleged to have been committed by juveniles under the age of sixteen

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

Section 1. The opening paragraph of subdivision 1 of section 812 of the family court act, as amended by chapter 635 of the laws of 1999, is amended to read as follows:

The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household, except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding in accordance with article three or seven of this act, as applicable. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this article, "members of the same family or household" shall mean the following:

§2. The opening paragraph of subdivision 1 of section 530.11 of the criminal procedure law, as amended by chapter 635 of the laws of 1999, is amended to read as follows:

The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household,

except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding in accordance with article three or seven of the family court act, as applicable. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this section, "members of the same family or household" shall mean the following:

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

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

Throughout New York State, custody and visitation cases comprise an increasingly significant proportion of the caseload of the Family Court[57] and are prevalent in contested matrimonial proceedings in Supreme Court. These sensitive, often volatile, cases raise some of the most difficult issues before the courts, with serious ramifications for both children and parents. Unfortunately, the statutory framework governing custody and visitation proceedings provides scant guidance and only limited powers for the courts in responding to violations of court orders. Apart from contempt, with its sanction of up to six months of incarceration, the statutes are silent as to available sanctions and procedures for enforcement of custody and visitation orders. *See* Family Court Act §156 (incorporating Article 19 of the Judiciary Law by reference). The Family Court Advisory and Rules Committee, therefore, is submitting a legislative proposal to address these omissions.

The proposal adds a new section 657 to the Family Court Act and a new section 242 to the Domestic Relations Law setting forth the powers of the courts and procedures to be followed when custody and visitation orders and related orders of protection are violated. The proposal requires a hearing, upon notice to all parties and the law guardian, if any, to determine whether competent proof establishes an alleged violation and, if so, whether the violation was willful. Where a violation has been established, the measure provides that the court may require that visitation with the child or children be supervised, that the violator participate in an available rehabilitative program and pay the costs of such program, and that the violator comply with the terms and conditions of a new or modified order of protection. In the event of a willful violation, the measure also authorizes the court to impose a sentence of incarceration, including intermittent or weekend detention, for a period of up to six months, probation for a period of up to one year, and/or to direct the violator to pay restitution, including out-of-pocket expenses and attorneys' fees incurred as a result of the violation. Finally, the proposal provides that a party placed on probation for violating an order of custody or visitation can be prosecuted for a violation of probation, which, if proven, may result in revocation of the order of probation and imposition of alternative sanctions.

In custody and visitation cases, Supreme and Family Courts are charged with responsibility for determining the best interests of children, both to protect family relationships that are vital to healthy child development and, at the same time, to protect children against the damaging effects of family violence where it has occurred. In order to fulfill these goals, it is essential that the courts have adequate procedural vehicles and a wide range of appropriate powers with which to enforce their orders. Enactment of the Committee's proposal would provide the Family and Supreme Courts with these needed mechanisms.

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[57] According to New York State Office of Court Administration figures, custody filings in Family Courts statewide increased 98%, from 85,334 in 1990 ( 16% of the total 540,209 petitions filed) to 169,111 in 2001 (24.7 % of the total 683,390 petitions filed), reflecting an escalation that continues to date.

Proposal

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

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

Section 1. The family court act is amended by adding a new section 657 to read as follows:

§657. Powers of the court on violation of a custody or visitation order. (a) If a party is brought before the court for failure to obey an order of custody or visitation or an order of protection or temporary order of protection issued under this article, the court shall hold a hearing, upon notice to the parties and law guardian, if any, in order to determine whether competent proof exists that the party has failed to obey any such order and, if so, whether such violation was willful.

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

(i) commit the party to jail for a term not to exceed six months, provided, however, that if appropriate, the court may direct that such commitment may be served upon certain specified days or parts of days or that the commitment be suspended; provided further that at any time within the term of such sentence, the court may revoke such suspension for good cause shown;

(ii) place the party on probation for up to one year under such conditions as the court may determine and in accordance with the provisions of the criminal procedure law;

(iii) direct the party to pay restitution to the petitioner for expenses incurred as a result of such violation, including, but not limited to, out-of-pocket expenses incurred as a result of the party's failure to cooperate with an order of custody or visitation, and to pay the fees and reasonable expenses of petitioner's counsel and of the law guardian, if any, that were incurred as a result of such violation; and

(iv) make an order in accordance with subdivision (c) of this section.

(c) If the court determines that the party violated an order issued under this article, whether or not such violation was willful, the court may:

(i) require any visitation to be supervised by a person or agency designated by the court;

(ii) require the respondent to participate in an available rehabilitative program, including, but not limited to, a non-residential substance abuse program or educational program or parent education program, and to pay the costs of such participation; and

(iii) issue or modify an order of protection or temporary order of protection in accordance with section six hundred fifty-five or six hundred fifty-six of this article.

(d) If the court has reasonable cause to believe that a party, who has been placed on probation in accordance with this section, has violated the terms and conditions of probation, the court, after giving notice and an opportunity to be heard to the parties and law guardian, if any, may revoke such order of probation and make any other order authorized by this section. The period of probation shall be deemed tolled as of the date of filing of the probation violation petition or motion, but, in the event that the court does not find that the order of probation was violated, the period of such interruption shall be credited to the period of probation.

§2. The domestic relations law is amended by adding a new section 242 to read as follows:

§242. Powers of the court on violation of a custody or visitation order. 1. If a party is brought before the court for failure to obey an order of custody or visitation or an order of protection or temporary order of protection issued under this article, the court shall hold a hearing, upon notice to the parties and law guardian, if any, in order to determine whether competent proof exists that the party has failed to obey any such order and, if so, whether such violation was willful.

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

a. commit the party to jail for a term not to exceed six months, provided, however, that if appropriate, the court may direct that such commitment may be served upon certain specified days or parts of days or that the commitment be suspended; provided further that at any time within the term of such sentence, the court may revoke such suspension for good cause shown;

b. place the party in violation on probation for up to one year under such conditions as the court may determine and in accordance with the provisions of the criminal procedure law;

c. direct the party to pay restitution to the other party for expenses incurred as a result of such violation, including, but not limited to, out-of-pocket expenses incurred as a result of the party's failure to cooperate with an order of custody or visitation, and to pay the fees and reasonable expenses of petitioner's counsel and of the law guardian, if any, that were incurred as a result of such violation; and

d. make an order in accordance with subdivision three of this section.

3. If the court determines that the party violated an order issued under this article, whether

or not such violation was willful, the court may:

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

b. require the party to participate in an available rehabilitative program, including, but not limited to, a non-residential substance abuse program or educational program or parent education program, and to pay the costs of such participation; and

c. issue an order of protection or temporary order of protection in accordance with subdivision three of section two hundred forty of this chapter.

4. If the court has reasonable cause to believe that a party, who has been placed on probation in accordance with this section, has violated the terms and conditions of probation, the court, after giving notice and an opportunity to be heard to the parties and law guardian, if any, may revoke such order of probation and make any other order authorized by this section. The period of probation shall be deemed tolled as of the date of filing of the probation violation petition or motion, but, in the event that the court does not find that the order of probation was violated, the period of such interruption shall be credited to the period of probation.

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

## IV. Future Matters:

Under the leadership of the Committee's Co-chairs, Hon. Sara Schechter, Judge of the Family Court, New York County, and Peter Passidomo, Chief Family Court Magistrate, the Family Court Advisory and Rules Committee was actively engaged in developing uniform and innovative policies and procedures for the administration and operation of the Family Courts in conjunction with reform initiatives in progress in Family Courts statewide, such as the Model and Best Practices Permanency Parts and Chief Judge Kaye's "Adoption Now" project. As noted, in April, 2004, the Committee, for the first time, convened a "Child Welfare Roundtable" at the New York State Judicial Institute in White Plains, with Chief Judge Kaye presiding and with a broad spectrum of judges, child welfare professionals, legislative and executive representatives and advocates participating. The roundtable was an unqualified success and the Committee is therefore planning to follow it with similar roundtables on other topics of concern, such as the educational needs of children in out-of-home care and the unmet need for supervised visitation programs statewide.

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

• **Child Welfare**: planning for the education roundtable and development of related proposals; further refinement of proposals regarding suspended judgments and notice and consent fathers; finalization of court rules regarding permanency hearings of children freed for adoption, as well as other recommendations of Chief Judge Kaye's "Adoption Now" initiative; review of whether recommendations should be made regarding possible conflicts of interest in dual representation of adoption agencies and adoptive parents in adoption cases; continued advocacy of subsidized guardianship and post-adoption contact, as well as other reforms to expedite achievement of permanency for children; continuation of efforts to enhance implementation of the federal and New York State *Adoption and Safe Families Acts* [Public Law 105-89; Laws of 1999, ch. 7] and to develop a more stream-lined, seamless judicial process for all cases of children in foster care; and, pending anticipated enactment of permanency legislation, development of proposals to incorporate elements of "Model Court" initiatives into Family Court practice and to promote "one family, one judge" system of processing.

• **Juvenile Justice:** planning for the education roundtable and development of related proposals, with particular attention to adolescents in the juvenile justice system; continued review of the implementation of the *Adoption and Safe Families Act* with respect to juvenile delinquency and status offense cases, including issues regarding parental involvement and parental representation; exploration of alternative approaches to address problems of status offenders, with particular focus upon chronic runaways and upon the impact of the recent statute expanding the age for status offense jurisdiction to 18 that became effective on July 1, 2002 [Laws of 2001, ch. 383]; and examination of the utilization and availability of probation, diversion and placement resources, and, in particular, alternatives to placement and detention, such as the use of electronic monitoring in juvenile delinquency cases.

• **Child Support and Paternity:** preparation of comments for the Matrimonial Commission

regarding child support issues, in particular, the $80,000 "cap" in the *Child Support Standards Act*; finalization of a uniform form for motions to vacate default orders; consideration of an intra-state analogue to the *Uniform Interstate Family Support Act* [Family Court Act Article 5-B]; development of a court rule regarding *UIFSA* filing dates, inter-county transfers of cases and expedited support procedures; continued development of recommendations regarding support in joint, split and shared custody and multiple family situations; and further development of proposals regarding remedies to enforce orders against self-employed obligors.

• **Custody, Visitation and Domestic Violence:** preparation of comments for the Matrimonial Commission, in particular, regarding unmet needs in the area of supervised visitation and issues regarding forensics and law guardians; development of possible roundtable or other initiatives regarding recommended practices and unmet needs in the area of supervised visitation and visitation exchanges; review of model parenting plans; development of a uniform form for appointment of forensic examiners; continued review of implementation of the *Uniform Child Custody Jurisdiction and Enforcement Act* [Domestic Relations Law Article 5-A; Laws of 2001, ch. 386] in order to identify further needs for court rules, forms and training; consideration of an intra-state analogue to the *UCCJEA*; and continued development of proposals to enhance the courts' effectiveness in responding to domestic violence.

• **Forms and Technology:** continuation of efforts to simplify current uniform forms to enhance access to justice for self-represented litigants and to streamline the comprehensive forms to implement the *Adoption and Safe Families Act*; development of proposed legislation to simplify and modernize the statutory Family Court data collection requirements in Family Court Act §§ 213, 385(1) and Judiciary Law §§ 212(2)(e), 216; and coordination of forms efforts with the implementation of the Uniform Case Management System ("UCMS") in Family Courts statewide.

This substantial agenda reflects the Committee's sustained focus upon fulfillment of Chief Justice Judith S. Kaye's vision of the courts as problem-solvers, not simply as case processors – a vision articulated as well in the joint resolution of the national Conference of Chief Justices and Conference of State Court Administrators.[58] Rigorous judicial oversight and effective enforcement of court orders are critical elements of this vision. Whether it be non-compliance by a juvenile respondent in a delinquency or person in need of supervision case, a parent or child protective or child care agency in a child welfare matter or an adult respondent in a support, paternity, custody or family offense proceeding, the Committee is seeking creative means to ensure that Family Courts receive necessary information on a timely basis, convene hearings promptly that comport with due process and

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[58] Conference of Chief Justices/Conference of State Court Administrators, CCJ Resolution 22/COSCA Resolution 4 In Support of Problem-solving Courts (Aug. 3, 2000)[in Casey, P. and Hewitt, W., *Court Responses to Individuals in Need of Services: Promising Components of a Service Coordination Strategy for the Courts,* Appendix A, pps. 57, 58 (Nat'l. Center for State Courts, 2001)]. *See also* J.S. Kaye, "Strategies and Need for Systems Change: Improving Court Practice for the Millennium," 38 *Fam. & Conciliation Cts. Rev.* 159 (Apr., 2000); J. S. Kaye, "Making the Case for Hands-On Courts: Judges are learning that a problem-solving approach can stop the cycles of drug use and dysfunction," *Newsweek*, Oct. 11, 1999; J.S. Kaye, "Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run," 48 *Hastings L.J.* 851, 860 (July, 1997).

secure compliance with judicial orders through imposition of diverse sanctions that are appropriate in severity and responsive to the individual problems presented. Equally as important are the Committee's efforts to incorporate, to the extent feasible, the principles of "front-loading" of services and conferencing, expedited judicial processes and continuous judicial monitoring into Family Court law and practice that have already demonstrated success in the "Model Courts" in Erie and New York County, in "Family Treatment Courts" in Suffolk and New York County, and in the rapidly-expanding reform initiatives statewide.[59]

The Committee, which includes experienced judges, support magistrates, Family Court clerks and court attorneys, practitioners and law school professors drawn from throughout New York State, brings a variety of valuable perspectives to the task of addressing the complex problems facing the Family Court. The substantial expertise of the Committee's active and diverse membership contributed to significant accomplishments in 2004, including significant legislative enactments and the promulgation of 38 new and revised forms, each of which have been posted on the Unified Court System's Internet web-site for ready public access (http://www.nycourts.gov). In 2005, the Committee hopes to compile a similar record of achievement as it grapples with the many difficult issues within its jurisdiction during these most difficult of times.

In conclusion, the Committee pledges to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman its continuing deep dedication in 2005 to improving the functioning of the Family Court and the quality of justice it delivers.

Respectfully submitted,

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[59] *See Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, 1995); *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, 2000); Schechter, "Owning *ASFA*," 53 *Juv. & Fam. Ct. Judges Journal* #4:1 (Fall, 2002); Schechter, "Family Court Case Conferencing and Post-dispositional Tracking: Tools for Achieving Justice for Parents in the Child Welfare System," 70 *Ford. L.Rev.* 427, 428 (Nov., 2001); M. Mentaberry, "OJJDP Fact Sheet: Model Courts Serve Abused and Neglected Children" (U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Jan., 1999).

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