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 2011

Four of the legislative proposals submitted by the Committee in 2011 were incorporated into measures enacted into law during the 2011 legislative session. These include:

1. Destitute children: Family Court proceedings [L. 2011, c. 605]: This measure established a new Article 10-C of the Family Court Act delineating judicial procedures regarding destitute children, filling a gap left by the repeal of the original Social Services Law §392 upon enactment of the permanency law [L. 2005, c. 3]. The statute, as well as a chapter amendment enacted in 2012 [L. 2012, c. 3], provides a definition of "destitute child" and delineates the procedures for local social services officials to initiate court proceedings, take destitute children into care, if necessary, notify the parents and other interested parties, seek relatives or other interested persons to provide alternatives to foster care and provide services to the child and family to ameliorate the conditions that occasioned court intervention.

Related amendments were made to Article 10-A of the Family Court Act to include destitute children among those youth who are subject to permanency hearings and to Social Services Law §398 to require local departments of social services to file petitions in Family Court regarding destitute children taken into care. Finally, the measure repeals Family Court Act §1059, since it conflicts with more recent legislation regarding abandoned children. Effective: immediately upon approval by the U.S. Department of Health and Human Services of a foster care State plan amendment to include destitute children to be submitted by the New York State Office of Children and Family Services.

2. Child support obligations of indigent obligors [L. 2011, c. 436]: This Family Court Advisory and Rules Committee measure codifies the Court of Appeals decision in Rose *v*. Moody, 83 N.Y.2d 65 (1993), *cert. denied*, 511 U.S. 1084 (1994) in order to substitute a rebuttable presumption, rather than a mandate, for a minimum $25 per month child support order where imposition of a child support obligation would reduce the support obligor's income to a level below the poverty level set by the United States Department of Health and Human Services for a single adult. The presumption in favor of a minimum of a $25 per month order would be rebuttable by consideration of the same factors enumerated in Family Court Act §413(1)(f) and Domestic Relations Law §240(1-b)(f) that justify departures from the Child Support Standards Act, and if rebutted, the court would be permitted to order child support in an amount it deems to be "just and appropriate." Further, in cases in which the obligor's income would fall above the poverty level but below the obligor's self-support reserve, the measure authorizes the court, in its discretion, to award or allocate health, education and child care

expenses, in addition to the basic child support order. Effective: Nov. 15, 2011.

3. Orders for child support obligors to participate in work programs [L. 2011, c. 592]: This measure amended chapter 182 of the Laws of 2010 with respect to orders for individuals who are liable for child support to seek employment or to participate in job training, employment counseling or other available programs designed to lead to employment. Recognizing that the parent liable for child support is not always the respondent in the proceeding before the Family Court, the measure substituted the phrase "support obligor" for the term "respondent." Further, the measure amended section 437-a of the Family Court Act to authorize employment-related orders to be made in proceedings for modifications of child support orders, not simply for establishment of orders of child support in the first instance. Finally, subdivision two of section 454 of the Family Court Act was amended to authorize the Family Court to issue an order for a respondent found to be in violation of a child support order to seek employment or participate in employment-related programs as provided in Family Court Act §437-a. Effective: Jan. 12, 2012.

4. Strangulation and criminal obstruction of blood circulation or breathing: Family offense petitions [L. 2011, c. 309]: This measure amended Family Court Act §821 to add Strangulation and Criminal Obstruction of Blood Circulation or Breathing to the list of family offenses that may be alleged in a Family Court family offense petition. The amendment conforms the petition provisions to the family offenses that were enumerated in Family Court Act §812(1) as part of chapter 405 of the Laws of 2010. Effective: August 3, 2011.

B. New and Modified Legislative Proposals

As in 2011, highest among the Family Court Advisory and Rules Committee's priorities is the pressing need for more Family Court judges, since the fixed number of 154 judgeships authorized in the Family Court Act has remained virtually unchanged for well over a decade, notwithstanding the Court's far higher and more complex workload.[1] The Committee also places a high priority upon the efforts by the Permanent Judicial Commission on Sentencing to implement Chief Judge Lippman's proposal to raise the age of criminal responsibility in New York State to 18 for non-violent offenses. Additionally, the Committee is proposing a comprehensive legislative agenda, including 12 new and modified proposals and 14 proposals previously recommended. These proposals address all areas of Family Court practice, thereby providing needed clarification and enhancing the Unified Court System's ability to handle these cases effectively. Its agenda of new and modified proposals includes the following:

1. Roles, rights and responsibilities of non-respondent parents in child neglect and abuse

[1] *See Kids and Families Still Can't Wait: The Urgent Case for New Family Court Judgeships* (NYS Senate Policy Group, Oct. 30, 2009); *A Call to Action: The Crisis in Family Court* (Fund for Modern Courts, Feb., 2009); *The Long Road Home* 177-178 (Children's Rights, Nov., 2009); A.Schepard & T.Liebmann, "Law and Children: Ending a 3.5- Minute Justice in New York's Family Court," *N.Y.L.J.* Nov. 13, 2009, p.3, col. 1; K. Carroll & A. White, "Disorder and Delay: There's Been a Dramatic Increase in Abuse and Neglect Charges Filed Against City Parents, and Family Court is Overwhelmed Again," 15 *Child Welfare Watch* 5-7, 26 (Winter, 2008); *The Permanency Legislation of 2005: An Unfunded mandate –Critical Resource Needs for New York City's Children and Families* (NYC Bar Assoc. Council on Children, 2007).

proceedings in Family Court: Notwithstanding a growing trend toward identifying and engaging both parents, including those not charged as respondents, as well as their extended families, in resolving child protective proceedings, article 10 of the Family Court Act contains a number of gaps and anomalies with respect to the treatment of non-respondent parents. This measure inserts provisions that explicitly encourage greater participation by non-respondent parents in abuse or neglect proceedings concerning their children and expands the pretrial and dispositional options available to ensure the children's safety and well being with due regard for the legal rights of both parents. The measure defines and differentiates the notices to, and roles of, parents recognized by law and those whose legal status has not been determined. It further authorizes release of children to non-respondent parents, both during the pendency of the child protective proceeding and as a disposition, while providing for supervision by the social services agencies of the child with clarity as to the conditions of the supervision. Finally, it includes non-respondent parents in the provisions of Family Court Act §1055-b through which a child abuse or neglect matter may be resolved through an order of custody under article six of the Family Court Act in cases in which supervision by the social services agency and further involvement by the Family Court is determined not to be necessary.

2. Child abuse and termination of parental rights proceedings based upon severe or repeated child abuse: The authorization in Family Court Act §1051 for the Family Court to render findings of severe or repeated child abuse by clear and convincing evidence, instead of a mere preponderance, permitted such findings to be used at later termination of parental rights proceedings brought on those grounds, thus obviating the need to retry the abuse allegations. However, to satisfy the definition of severe or repeated child abuse, as prescribed in Social Services Law §384-b(8), the Family Courts must include a finding that the child care agency either made diligent efforts to reunite the family or that such efforts had been excused by the court, a finding that would be premature at the stage of the earlier child abuse proceeding. Therefore, this measure would permit additional findings regarding the abuse itself to be made concurrently with child abuse findings under Family Court Act §1051, while deferring the findings regarding diligent efforts to the later termination of parental rights proceeding. Additionally, the proposal would add sections 130.95 and 130.96 of the Penal Law to the list of sexual offenses and other felonies that constitute severe abuse, as defined in Social Services Law §384-b(8)(a). These offenses, which were added to the Penal Law in 2006, add aggravating factors to -- and are therefore more serious than – the crimes already listed in Social Services Law §384-b(8). Both of these predatory sex crimes, both Class A-II felonies, which are among the most serious crimes in the Penal Law, warrant inclusion in the definition of "severe abuse," both as grounds for termination of parental rights and as bases for enhanced findings in child abuse proceedings under Article 10 of the Family Court Act.

3. Transfers of probation supervision in child support, family offense, persons in need of supervision and juvenile delinquency proceedings in Family Court: Chapter 97 of the Laws of 2011 made far-reaching changes to Family Court Act §176 affecting orders of probation in family offense, child support, juvenile delinquency and persons in need of supervision (PINS) proceedings, some of which stand in contradiction to venue and other provisions of law and create unnecessary burdens for the courts and litigants. First, the measure would repeal Family Court Act §175, since, in contravention of chapter 97, it provides that where an alleged violation of an order of probation supervision occurs in a county other than the county in which the order of probation had originally

been issued, either county would be a proper venue in which the probation violation may be heard. Second, the proposal requires the Family Court to transfer probation supervision to the probation department in the county where the probationer resides, including in cases in which the probationer's relocation occurs subsequent to the issuance of the order of probation. It thus eliminates the provision in chapter 97 that placed the responsibility upon probationers, whether adult or juvenile, to request permission from the Family Court to relocate their residences and gave the Family Court authority to rule upon such requests. Third, the measure provides that a transfer of probation supervision to the county in which the probationer resides creates a rebuttable presumption that subsequent proceedings regarding the probation order, including proceedings for a probation violation or proceedings to extend the duration or modify the conditions of probation would be heard in the county providing the supervision. The presumption would be rebuttable if the Family Court in the county providing the supervision "determines that there is a compelling reason to return the proceeding" to the Family Court that issued the order of probation, *e.g.,* danger to a victim of domestic violence. The presumption would not apply to the wide range of other post-dispositional proceedings that are unrelated to the order of probation, since petitioners and the Family Courts in such cases retain discretion to exercise other venue options. *See* People *v.* Mitchell, 15 N.Y.3d 93 (2010)(requirement in Criminal Procedure Law §410.80(2) to transfer jurisdiction to county providing probation supervision applies only to proceedings relating to the probation order, not to all post-dispositional proceedings). Fourth, the measure requires that only once a probation violation, modification or extension proceeding has been filed would the Family Court record from the original court be requisitioned. The requisition would cover only those portions relevant to the order of probation and would allow transmission by electronic means. Finally, the measure treats New York City as one jurisdiction, rather than as five individual counties, with respect to Family Court Act §176, since the New York City Department of Probation covers all five counties and is thus able to transfer probation supervision internally without court orders.

4. Authority of support magistrates in child support and paternity proceedings in Family Court: In an attempt to minimize fragmentation of Family Court proceedings, this measure would eliminate two restrictions upon the authority of the Support Magistrates, that is, the requirements that only Family Court judges may adjudicate paternity proceedings involving issues of equitable estoppel and objections to denials of relief in administrative fair hearing challenges to suspensions of drivers' licenses. Support Magistrates are highly trained legal specialists, who are knowledgeable and experienced in adjudicating paternity and child support proceedings and whose vital role in New York State's successful child support program has been increasingly recognized. Litigants in paternity proceedings first appear before Support Magistrates, are then referred to Family Court judges if issues of equitable estoppel are identified or raised and then, if paternity is found, return to Support Magistrates for adjudication of the child support aspects of the proceeding. If Support Magistrates were authorized to adjudicate paternity proceedings from start to finish, cases would be resolved far more expeditiously and efficiently, to the benefit of families and the courts. Likewise, authorizing a challenge to a license suspension fair hearing to be heard by the Support Magistrate who had issued the child support order whose violation had caused the suspension would facilitate a more effective and timely resolution by a jurist familiar with the underlying child support proceeding.

5. Child support obligations of indigent and near-indigent support obligors: Chapter 436 of the Laws of 2011 remedied the failure of the child support statutes to provide an avenue for indigent non-

custodial parents to rebut the automatic imposition of minimum child support orders of $25 per month, but failed to correct a long-standing anomaly in the interpretation of New York's self-support reserve provisions. The current statute has been interpreted literally to mean that the more children a non-custodial parent is obligated to support the less the child support obligation would be. This measure resolves the anomaly by equalizing the applicable minimum support amounts regardless of the number of children and by making all such amounts rebuttable. The measure also delineates the minimum order levels in annual, rather than monthly, amounts so as to be consistent with the publication by NYS OTDA of annual poverty and self-support levels.

6. Orders for participation in work-related programs in child support proceedings in Family Court: In order to eliminate any possible question as to New York State's compliance with the Title IV-D of the Federal *Social Security Act* and its regulations, the Family Court Advisory and Rules Committee, together with the Governor's office and the New York State Office of Temporary and Disability Assistance is proposing a chapter amendment to the child support work program legislation enacted in 2011. *See* L. 2011, c. 592. Federal law requires that, with respect to children receiving public assistance, all State child support plans must authorize the adjudicator to address violations of child support orders by directing child support obligors to participate in "work activities," as defined in 42 U.S.C. §607(d), unless they are "incapacitated." *See* 42 U.S.C. §666(a)(15). The exemption contained in Family Court Act §437-a for child support obligors who are "in receipt of supplemental security income or social security disability payments" may apply in some instances to obligors who would not meet the Federal definition of "incapacitated." Thus, the measure would clarify that Family Court Act §454, which has a discrete provision applicable to cases involving public assistance recipients, rather than Family Court Act §437-a, would apply to orders for work programs in support violation cases. Additionally, conforming Family Court Act §437-a to Family Court Act §451, the proposal would to permit work program orders in any proceeding for a modification, not simply a proceeding denominated one to decrease a child support order.

7. Orders for recoupment of over-payments: Neither the Family Court Act nor the Domestic Relations Law address an issue that is frequently presented in both Family and Supreme Court proceedings, that is, the question of whether a support obligor who has overpaid on a child support order may recoup all or part of those payments. Since the equities in particular cases often favor court intervention to provide some redress to a party who has overpaid, the Family Court Advisory and Rules Committee is proposing a measure to fill this substantive and procedural void. First, the Committee's proposal provides that the court that issued or modified the child support order for which an overpayment is alleged possesses continuing jurisdiction over an application for recoupment. Where the order was issued by a Supreme Court without a reservation of exclusive jurisdiction, the Family Court would also be authorized to adjudicate such an application. Second, the measure provides a standard for determining whether recoupment of all or part of the alleged overpayment would be appropriate, that is, "where the interests of justice require," as well as specification of the proof required. The applicant would need to provide proof of the overpayment, as well as proof "that the amount of the recoupment and the method and rate of its collection will not substantially impair the custodial parent's ability to meet the financial needs of the child or children." Finally, the court would be required to state its reasons on the record for any order granting or denying recoupment.

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

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

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

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

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

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

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

9. Services for youth in juvenile delinquency and persons in need of supervision proceedings in Family Court: For the ever-shrinking population of adjudicated juvenile delinquents and Persons in Need of Supervision who require placement, provision of adequate services, both in the facilities and

in the youth's communities to aid in their reintegration upon release, is absolutely essential. This measure is designed to ensure provision of necessary services and to increase the alternatives available to the Family Courts both at the dispositional stage and later when faced with applications for extensions of placement in juvenile delinquency and PINS proceedings. The proposal includes, *inter alia*:

• delineation of the responsibility for the Family Court not only to consider, but also to craft, a case-specific order, that meets the needs and best interests of the juveniles and, in juvenile delinquency cases, that balances these factors with the need for protection of the community;

• authorization for the Family Court to be able to order specific services that are necessary to facilitate the juveniles' successful return home;

• discretion for the Family Court to order intensive supervision, which may include participation in a community-based rehabilitative program, in conjunction with probation, as a disposition for adjudicated juvenile delinquents and PINS who would otherwise be placed and, in juvenile delinquency cases, to include electronic monitoring as a condition of the order;

• authorization for the Family Court to order that, in lieu of extending placement in juvenile delinquency and PINS cases, juveniles may be placed on probation for up to one year or that, in juvenile delinquency cases, juveniles may be conditionally discharged;

• a requirement that "[r]outine, emergency or other mental health treatment, including administration of psychotropic medication, shall be provided by licensed mental health professionals as authorized by law;" and

• a requirement that the New York State Education Department develop and implement standards to promote school stability for youth in out-of-home care, to require that facility educational programs meet State standards and generate credits for youth that will be recognized by local school districts and to require local school districts to promptly enroll youth in school upon their release.

10. Referrals for diversion services, warrants and orders of protection in persons in need of supervision proceedings in Family Court: The comprehensive reform of the PINS statute enacted in 2005 [L. 2005, c. 57, Part E] has inured to the benefit of many children and families by ensuring the provision of diversion services, in lieu of PINS prosecutions, on a more uniform basis. However, the 2005 statute is unnecessarily restrictive in permitting diversion service referrals and actually curtailed the ability of parents under the preexisting law to secure vital emergency relief in some cases in which harm to the children or their families is imminent. The Committee is, therefore, proposing that diversion service referrals be permitted at any time during the pendency of a PINS proceeding and that two provisions to Article 7 of the Family Court Act be restored that would constitute narrow exceptions to the diversion prerequisites to the filing of PINS petitions. These exceptions would permit filing of PINS petitions without the required diversion documentation where a child has absconded and cannot be located or where a temporary order of protection is needed to avert imminent harm to the petitioner or the petitioner's family. In each of these circumstances, reflecting the prevalent practice in Family Courts statewide prior to the 2005 legislation, once a child has been apprehended on the warrant or is served with the temporary order of protection and appears in Family

Court, the Court would then refer the family to the diversion agency, pursuant to Family Court Act §742(b), unless the Court has determined that there is a substantial likelihood that the child would again abscond or pose the threat of harm, as applicable, or that the referral to the diversion agency would be contrary to the child's best interests. With these changes, PINS would thereby become a far more effective vehicle for addressing emergencies requiring immediate court intervention, while still furthering the goal of minimizing court intervention once the need for emergency relief has subsided.

11. Conditional surrenders: Two decades of experience under the statutes delineating the requirements for enforceability of conditions in surrenders, both judicial and extra-judicial, have revealed all too many cases in which ostensibly plain terms of the statutes have not been followed. Frequently, birth parents have been induced to execute surrenders, particularly extra-judicial surrenders, upon the assumption that informal agreements or side letters of understanding would be enforceable even though they were not presented to the Family or Surrogate's Court for approval and were not incorporated into any written court orders. The Committee's proposal reiterates existing explicit requirements that all conditions accompanying surrenders, both of children in and out of foster care, must be approved by the Family or Surrogate's Court as being in the child's best interests and must be incorporated into a court order in order to be enforceable. To underscore the need for judicial oversight, the measure prohibits extra-judicial surrenders executed on or after the effective date of the statute (January 1, 2013) from containing any conditions. Only judicial surrenders executed on or after that date could contain enforceable conditions and birth parents executing surrenders would have to be so advised. Agreements for post-adoption contact between the surrendered child and birth siblings and half-siblings, where either the child and/or siblings or half-siblings are 14 years of age or older, would likewise require their written consent in order to be enforceable. A copy of the court order incorporating any post-adoption contact agreement or other conditions would need to be given to all parties to the agreement.

12. Persons in need of supervision and juvenile delinquency proceedings: procedures for admissions and violations of orders of disposition and adjournment in contemplation of dismissal: To fill gaps in the post-dispositional procedures applicable in juvenile delinquency and PINS cases, the Committee is submitting a proposal clarifying the various provisions of Articles 3 and 7 of the Family Court Act regarding violations by juveniles. First, the proposal clarifies that, as in probation violation cases, the period of a conditional discharge would be tolled during the pendency of a violation petition. *See* Matter of Donald MM, 231 A.D.2d 810, 647 N.Y.S.2d 312 (3rd Dept., 1996). Second, the proposal delineates the procedures and time frames for restoring cases adjourned in contemplation of dismissal to the calendar for an adjudicatory or dispositional hearing. *See* Matter of Edwin L., 88 N.Y.2d 593 (1996). Third, the proposal would permit allegations in probation violation petitions to be supported by hearsay evidence, although the ultimate proof would have to be competent. Fourth, the proposal would toll juvenile delinquency placements with county Departments of Social Services where the juveniles have absconded, as is already the law where juveniles abscond from placements with the New York State Office of Children and Family Services. Fifth, it would delineate the procedures for violations of suspended judgment and probation, drawing upon existing juvenile delinquency provisions. *See* F.C.A. §§360.2, 360.3. Finally, with respect to the fact-finding stage of PINS proceedings, in response to a long line of appellate cases, the proposal would 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].

C. Previously Endorsed Measures

The Committee is recommending resubmission of the following 14 proposals:

1. Educational neglect and Persons in Need of Supervision proceedings alleging truancy or school misbehavior**:** Educational problems, whether coming to the attention of the Family Court through a PINS or educational neglect proceeding, present among the most complex challenges for the Family Court and service agencies. A comprehensive approach amending both the education PINS and educational neglect statutes is critically needed. Educators must play a vital role in both the PINS and child protective processes and must be available to be called upon to assist in diverting both categories of cases from the court system where possible. The Family Court Advisory and Rules Committee is proposing a measure to ensure the active participation of educators both at the diversion and at the petition stages in both PINS and educational neglect proceedings. In PINS proceedings, regardless of whether or not they are the potential petitioners, school districts or local educational agencies would need to be consulted by the designated lead diversion agencies and their efforts to divert the proceeding or, at minimum, to resolve the education-related issues in the proceeding must be documented as a prerequisite to filing. Similar requirements would be applicable in child protective proceedings in which educational neglect is alleged, that is, that the investigating child protective agencies would be required to document efforts made by school districts or local educational agencies to resolve the education-related problems. The fact that such efforts were unsuccessful would need to be pled and proven the petition, since educational neglect would be redefined to cover failures by the parents to provide educational services "notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition." Where petitions in both categories of cases are filed in Family Court, education officials must be notified and made parties so that they may be enlisted to participate in resolving the education issues presented.

2. Orders for genetic testing in child protective proceedings: Family Court Act §564 permits the Family Court in cases other than paternity cases to enter orders of filiation in limited circumstances: where both parents are before the court, where the father waives the filing of a paternity petition and his right to be heard on that petition and where the court is satisfied as to sworn statements and testimony in support of paternity. In the absence of these requisites, the court's only alternative is to direct a party to file a paternity petition. The statute provides no authority for the court to direct genetic testing which, with current DNA technology, would provide a swift and accurate answer to questions of parentage. The Committee is proposing a measure that would amend sections 532 and 564 of the Family Court Act to authorize the court to order genetic testing in non-paternity proceedings upon the consent of both parents. Where consent is not obtained, the court would be permitted to direct any party to file a verified paternity petition. Where the mother's consent is not forthcoming by reason of her absence from the court, the court would be authorized to direct genetic testing so long as she had received notice and an opportunity to be heard.. As in paternity cases, no test would be ordered in cases where the court has made a written finding that testing would not be in the child's best interests by reason of res judicata, equitable estoppel or the presumption of legitimacy. Further, Family Court Act §564 would be amended to permit the Family Court to adjudicate paternity on the basis of genetic testing, not simply on the basis of sworn statements or testimony. Corresponding amendments would be made to child protective and permanency provisions of the Family Court Act [Family Court Act §§1035, 1089].

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 Acts* [Public Law 105-89; L. 1999, c. 7] and permanency legislation [L. 2005, c. 3], the Committee is submitting a revised version of its proposal to assure that the attorneys for the parties and for the children 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 proposal would also require prompt notice of any indicated child abuse or maltreatment reports. The proposal would amend Family Court Act §§1055 and 1089, as well as Social Services Law §§358-a, to require an agency with which 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 10 days in advance of the change (or within one business day after the change if carried out on an emergency basis), as well as any indicated reports of child abuse or maltreatment, to the parties' and children's attorneys, and to report any indicated reports of child abuse or maltreatment.

4. Putative fathers entitled to consent to adoptions and to notice of adoption, surrender and termination of parental rights proceedings: In 1980, following the decision of the Untied States Supreme Court in Caban *v.* Mohammed,441 US 388 (1979), the Legislature enacted new criteria defining those putative fathers who are entitled to consent to adoptions and those who are entitled simply to notice of termination of parental rights, surrender and adoption proceedings. Those entitled to notice may be heard regarding the children's best interests, but do not have veto power over their adoptions. L. 1980, c. 575. Notwithstanding the Legislature's goals of providing "reasonable, unambiguous and objective" criteria for notice and consent, the 1980 statute fulfills none of those intentions. *See* Sponsor's Memorandum, 1980 NYS Leg. Ann. 242-243. The Family Court Advisory and Rules Committee is proposing a measure to expand and objectify the criteria for putative fathers to consent to adoptions of children who were more than six months of age at the time of the filing of the petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever filing is earliest. Those criteria would include, *inter alia*, those named on a child's birth certificate or acknowledgment of paternity, those adjudicated as fathers in New York or another state or territory, those who maintained substantial and continuous or repeated contact with the child through visits at least twice per month or through regular communication, and those who lived with the child for six months during the year prior to the child's placement in foster care or for adoption. Criteria for putative fathers entitled to notice would be expanded to include those who filed and appeared on a custody petition and those identified in an acknowledgment or order of paternity in another country that is entitled to comity in New York State.

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

stage. During the period both of an adjournment in contemplation of dismissal and of a suspended judgment, the child would not be permitted to be placed, except on a temporary basis under Family Court Act §1024 or 1027.

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

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

7. Orders of protection in termination of parental rights, child protective and permanency proceedings: While permanency for children in foster care is often achieved with the understanding, agreed-upon by everyone involved, that some contact will continue with the child's birth family, there have been instances in which continuing contact with a birth parent – for example, threatening or stalking behavior by a disturbed birth parent at the child's home or school – 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. These orders of protection, as well as those issued in child protective proceedings, must be entered on the statewide registry of orders of protection and Family Courts must inquire whether other orders have been issued regarding the parties. Additionally, the proposal would permit orders of protection in child protective proceedings to require the respondent parent to stay away, *inter alia*, from a "person with whom the child has been paroled, remanded, placed or released by the court..." Finally, the proposal would permit orders of protection against respondent parents in child protective proceedings to last for up to two years or, upon a finding of aggravating circumstances or violation of an order of protection, up to five years. These orders would then be able to be extended in conjunction with permanency hearings under Article 10-A of the Family Court Act or, for child protective proceedings, other post-dispositional proceedings under Article 10 of the Family Court Act. This parallels the permissible duration of orders of protection in family offense

cases and would reduce the burden imposed upon domestic violence victims to request frequent extensions of protective orders. Further, orders of protection in termination of parental rights cases would be permitted for up to five years or the date on which the youngest child turns eighteen, whichever is earlier.

8. Stays of administrative fair hearings regarding child abuse and neglect reports: The parallel judicial and administrative systems for determining the validity of reports of child abuse and maltreatment at times operate at cross-purposes, under different time constraints and, in an escalating pattern, have produced inconsistent results. Although Social Services Law §422(8)(b) provides that a Family Court finding of abuse or neglect creates an "irrebuttable presumption," binding in the administrative fair hearing process, that a fair preponderance of the evidence supports an abuse or maltreatment report, sometimes the fair hearing process proceeds to a conclusion prior to the outcome of Family Court child protective proceeding. The Committee is proposing legislation to ensure that in cases in which parallel Family Court and administrative proceedings are in progress, the administrative fair hearing process would not precipitously advance without awaiting the results of the Family Court matter. It would also require local social services districts to notify the New York State Office of Children and Family Services of the outcomes of the Family Court proceedings. The proposal 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.

9. Conditions of orders of protection in matrimonial proceedings and remedies and procedures for violations of orders of protection in Family Court and matrimonial proceedings: In light of ambiguities, gaps and discrepancies in the language of the current statutes, the Committee is submitting a proposal designed to provide guidance for civil enforcement of orders of protection in Family and Supreme Courts, to remedy a disparity in the duration of probation in family offense cases and to incorporate all of the permissible conditions of orders of protection in family offense cases into the provisions regarding orders of protection in matrimonial proceedings. 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. The proposal makes clear 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. Finally, the proposal would authorize the Family Court to place a respondent in a family offense proceeding 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, thus equalizing the periods of probation with the duration of orders of protection, as extended by the legislature in 2003. *See* L.2003, ch. 579.

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

appropriate amount of child support as of the earlier of the date the noncompliance had been asserted in a pleading or a motion or the date of the Court's finding of noncompliance. The proposal would preclude noncompliance with the *CSSA* from being raised as a defense to non-payment of child support in violation of an agreement or stipulation for a period prior to the assertion of noncompliance in a motion or pleading. Curing the problem noted by the Supreme Court, Appellate Division, Second Department in Matter of Savini v. Burgaleta, 34 A.D.3d 686 (2d Dept., 2006), the proposal would provide that, unless precluded by the Supreme Court, the Family Court should be considered a court of competent jurisdiction that would have subject matter jurisdiction to review, determine and, where necessary, vacate or modify, not simply enforce, child support in cases in which a divorce judgment did not conform to the *Child Support Standards Act*.

11. Authority of the Family and Supreme Courts to direct establishment of trusts to benefit children in child support proceedings: The Committee is submitting a proposal to address the not infrequent circumstance in which a non-custodial parent, such as a professional athlete, performer or award winner, receives an economic windfall or exceptionally high income during a short period of time, a windfall unlikely to recur or an income that is not likely to remain at that high level in the future. The proposal would 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.

12. Access by probation to the order of protection registry and penalties for unauthorized disclosure: 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 in family offense, proceedings. Further, the proposal would 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. Further, since the statewide automated registry of orders of protection and warrants has grown into a substantial database containing well over two million orders of protection, the need to ensure its security and integrity grows ever more compelling. The proposal thus also delineates civil and criminal penalties for unauthorized release of data from the statewide automated registry of orders of protection and warrants.

13. Penalties for violations and 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, *i.e.*, 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 proposal 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. Additionally, upon making a finding of a willful failure to pay child support, the Court would be authorized to combine either a probation sanction or a requirement to participate in a rehabilitative program with a sentence of incarceration, since such a combination may present the most promise in remediating the violation and ensuring consistent, future provision of child support to the family.

14. 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.

* * *

In addition to its legislative efforts, the Committee recommended amendments to the *Uniform Rules of the Family Court* including, *inter alia*, rules regarding transfers of juvenile delinquency cases for disposition. The Committee also developed and revised over 240 official Family Court forms for pleadings, process and orders. The forms and court rules have been placed on the Internet for easy access by attorneys, litigants and the public. *See* http://www.nycourts.gov.

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. Monica Drinane and Peter Passidomo, Esq., 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. Roles, rights and responsibilities of non-respondent parents in child abuse and neglect proceedings in Family Court [F.C.A. §§1012, 1017, 1022-a, 1027, 1035, 1052, 1054, 1055-b]

In recent years, there has been a sea-change in attitudes and policies concerning the role of non-respondent parents in child abuse and neglect proceedings under Article 10 of the Family Court Act. While child protective officials once ignored or discouraged non-respondent parents (most frequently, although not exclusively, non-respondent fathers) from participating in child protective proceedings concerning their children, officials, bolstered by substantial statutory changes during the past decade, now reach out to such parents to engage them in planning for their children's care.

As a statute initially drafted before these changes in attitude and policy, Article 10, not surprisingly, contains a number of gaps and anomalies with respect to the treatment of non-respondent parents. This measure seeks to rectify some of the more obvious shortcomings in Article 10 with respect to non-respondent parents. It inserts statutory provisions to explicitly encourage greater participation by non-respondent parents in abuse or neglect proceedings concerning their children. It also expands the options available to Family Court judges so they can craft appropriate orders that respect the rights of non-respondent parents while assuring the safety and well being of the children who are the subjects of such proceedings.

First, the proposal would add definitions of "parent," "alleged parent" and "relative" to Family Court Act §1012 in an effort to clarify the range of persons who may assert a parent's superior rights to care and custody of a child and to define a class of "alleged parents" who would be entitled to notice of child protective proceedings concerning their children.

The proposed definition of "parent" thus provides that only those persons who are recognized to be the child's legal parent may assert the enhanced rights to care and custody recognized under State and Federal law. *See, e.g.*, Bennett *v.* Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976)(state may not deprive parent of custody of child absent extraordinary circumstances); Prince *v*. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944)("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . "). Recognizing that the legal standards for parenthood are currently evolving, the proposal adopts a flexible approach, providing a list of persons who "may" be considered a parent under New York law: the birth mother, the spouse of the parent of a child born in wedlock, an adoptive parent, the father as established through a acknowledgment of paternity or father as established through a court order declaring his paternity. As the case law on parenthood develops, persons in other relationships to the child may be legally recognized, and the draft amendment allows for this possibility.

The proposed definition of "alleged parent" includes those persons who are not recognized to be the child's legal parent, but who are listed on the putative father registry, have a pending paternity petition, were married to the child's parent within six months after the child's birth, or have been identified by the child's parent in a written sworn statement or by the child as a parent. Concomitantly, amendments to Family Court Act §1017 include "alleged parents" in the list of persons that social services officials are obliged to inform of the pendency of child protective proceedings and to advise of the opportunity to seek custody and care of the child. The addition of

this proposed definition would establish a structure in Article 10 of the Family Court Act consistent with the framework applicable to adoption proceedings under the Domestic Relations Law, that is, "consent" fathers, whose consent is required for an adoption, and "notice" fathers, who merely have a right to be heard as to the child's best interests. *See* Domestic Relations Law §§111, 111-a. By doing so, it would also expand the scope of potential resources for children who have been removed from their homes, and encourage non-respondent birth fathers to establish their paternity and plan for their children.

The measure further defines "relative" as a person who is related to the child by blood, marriage or adoption, but who is not a parent or alleged parent of the child. This distinction between "parents" and "relatives" will clarify the rights of each to the care and custody of a child in later sections of Article 10 of the Family Court Act.

Second, the measure amends section 1017 of the Family Court Act, which governs placement of a child who is the subject of an abuse or neglect case, both at the outset and at disposition. It would add "non-respondent alleged parents" and "other suitable persons identified by a child over the age of five who plays or has played a significant positive role in his or her life" to the list of persons that the local commissioner of social services must seek to locate and inform of the pendency of the proceeding and of the opportunity to seek to care for the child. As in the definitional sections of Family Court Act §1012, the intent of the proposed amendment to Family Court Act §1017 is to expand the universe of persons who could potentially provide care for a child who is otherwise facing the prospect of a foster care placement with strangers. To ensure uniformity in the information provided to those persons entitled to notice, the proposal provides that the content of the notice will be set by court rule.

The proposal also deletes the definition of "non-respondent parent" currently contained in Family Court Act §1017(1) in light of the proposed addition of a definition of "parent" in Family Court Act §1012. It clarifies the language of that subdivision by referring specifically to "non-respondent parent, relative, or other suitable person" as the potential resources a court may consider after determining that a child must be removed from his or her home. Likewise, Family Court Act §1017(2)(a)(i) would specify that a court may grant a temporary order of custody or guardianship to a non-respondent parent, relative, or other suitable person prior to disposition, or may grant a final order of custody or guardianship to such persons pursuant to Family Court Act §1055-b at the dispositional stage.

The measure would also modify Family Court Act §1017(2)(a)(ii), which currently states that upon a determination that the child may reside with a suitable non-respondent parent or other relative or suitable person, the court may place the child directly in the "care" of such person pursuant to Article 10. The proposal would substitute the word "care" for "custody" to highlight the difference between an order of custody under Article 6 of the Family Court Act as provided in section 1017(2)(a)(i) and an order of direct placement of the child under section 1017(2)(a)(ii).

Moreover, subdivision three of section 1017 would be amended to require that non-respondent parents, as well as relatives or other suitable persons, must consent to the court's jurisdiction if a child is placed in their care under §1017. It would replace the current authorization for the court to place "the person" with whom a child has been directly placed under the supervision of social services officials with language providing that the court may order officials to supervise

"the child" during the pendency of the proceeding. By requiring all persons in whose care a child is placed pursuant to section 1017 to consent to the jurisdiction of the court, the court will be able to tailor orders, *inter alia*, to enlist the cooperation of the caretaker to ensure that the child receives appropriate services, is produced by the caretaker for regular visitation by the respondent parent, siblings or others and is made available for interviews with the child's attorney. By providing that the court may order the agency to supervise the child, the proposal strikes a proper balance between intervention to ensure the child's well-being and respect for the non-respondent parent's or other caretaker's interests in minimal interference in their everyday child-rearing decisions. Toward this end, any order of supervision issued pursuant to Family Court Act §1017 would be required to specify the terms and conditions that the non-respondent parent, relative or other suitable person must meet, as well as to specify the actions that the social services agency must take.[2] These changes are intended to provide the court with authority to issue appropriate orders to ensure the well-being of the child during the pendency of the proceeding while giving all parties notice of what actions will be required of them in order to facilitate effective implementation.

Third, the proposal contains several amendments to sections of Article 10 of the Family Court Act relating to preliminary orders. It would amend Family Court Act §1022-a to clarify that non-respondent parents who qualify for assignment of counsel under section 262 of the Family Court Act are eligible for such assignments at pre-petition hearings held pursuant to Family Court Act §1022. Family Court Act §1027(d) would be amended to provide that a court may release a child to the "care" (as opposed to custody) of his or her parent pending a final order of disposition. It further deletes the reference to Family Court Act §1054 as the source of the court's authority to do this, since that section only addresses dispositional orders, and instead substitutes a reference to Family Court Act §1017, which pertains to pre-dispositional orders. Additionally, with the aim of facilitating and encouraging the participation of non-respondent parents in proceedings regarding their children, Family Court Act §1035 would be modified to require that notices of pendency of child protective proceedings that are sent to non-respondent parents must also advise them that they have a right to counsel, including assigned counsel, if they are indigent. *See* Matter of Sasha S., 256 A.D.2d 468 (2nd Dept., 1998)(required notice to non-respondent father of the right to counsel, including the right to appointment of counsel if he is indigent).

Fourth, with respect to dispositional proceedings, the proposal makes several changes to Family Court Act §1054, which authorizes the release of children at disposition to a parent's care and is applicable to releases of children both to respondent and non-respondent parents. As currently drafted, section 1054 is unclear as to the court's ability to place a non-respondent parent under the supervision of a child protective agency, and also as to whether the scope of that supervision must be specified in the court order. The statute currently provides that if the order of disposition releases a child to his or her "parent," the court may place "the person" to whose custody the child is released under the supervision of a child protective agency, social services official or duly authorized agency. The current statute then provides, however, that an order of supervision entered under this section shall set forth, *inter alia*, the terms and conditions of such supervision that the "respondent" must meet. Read literally, the statute thus suggests that if the court releases a child to a non-respondent or

[2] This is consistent with the holding in Doe *v.* Mattingly, 2006 WL 3498564 (E.D.N.Y., 2006)(Unpub.), which required a court order, absent an emergency, as a prerequisite to a caseworker entering the home of a non-respondent parent and conducting a body search of the baby in her care.

a respondent parent at disposition, it may place that parent under supervision at disposition, but only need specify the terms and conditions of that supervision in the case of a respondent parent. Therefore, the measure would amend §1054 to parallel the proposed amendment of §1017 by providing that when the court releases a child to a parent as a disposition, it may order a child protective agency to supervise the child for a specified time period.[3] It would also require the parent to consent to the jurisdiction of the court for the period of such supervision, which may initially be ordered for up to one year.

Family Court Act §1054 would also specifically authorize the court to release the child to the care of a non-respondent parent while, at the same time, ordering that the respondent parent be placed under supervision under Family Court Act §1057. This amendment would thus address the situation where the child's interests would best be served by residing with a non-respondent parent while the respondent parent receives the services that would promote the child's eventual return to that parent. Such an arrangement would by its terms be of limited duration, since any orders for supervision of a child released to a non-respondent parent under section 1054 may last only up to one year, with a one year extension granted only for good cause shown and further extensions only upon a showing of extraordinary circumstances. If during the period of the dispositional order, the respondent parent successfully completes the services or programs ordered, the court may, if appropriate, utilize Family Court Act §1061 to modify the order releasing the child to the non-respondent parent to provide for release of the child to the respondent parent. Such an order may provide for continuing supervision of the respondent parent pursuant to Family Court Act §1057. Conforming amendments to the dispositional alternatives would also be made to Family Court Act §1052.

Finally, the measure amends Family Court Act §1055-b to clarify the procedures for considering parents' requests for custody under article 6 of the Family Court Act at the dispositional stage of a child protective proceeding. It would resolve a serious inconsistency between Family Court Act §1055-b and §1017. Family Court Act §1017(2)(a)(i) currently provides that when a court determines that a child may reside with a suitable non-respondent parent, it may "grant an order of custody or guardianship to such non-respondent parent . . . pursuant to section one thousand fifty-five-b." However, as currently drafted, Family Court Act §1055-b only pertains to "[c]ustody or guardianship with relatives or suitable persons pursuant to article six of [the Family Court Act]" and does not mention non-respondent parents; nor does it specify the standard by which to determine parents' requests for custody in this context. The measure would thus insert "parents" into the list of persons who may be granted article 6 custody pursuant to Family Court Act §1055-b. It further makes clear that if a third party, that is, someone other than the child's parents, contests the custody petition, the court must grant the order of custody to the parents in the absence of a showing of extraordinary circumstances pursuant to Bennett *v.* Jeffreys, *supra*. It also provides that, as in custody proceedings generally, if the respondent parent contests the non-respondent parent's request for

[3] Although not challenged or at issue in the appeals, several appellate decisions have upheld child protective orders in which the subject children had been released to non-respondent parents, who were placed under supervision. *See* Matter of Stephanie S., 70 A.D.3d 519 (1st Dept., 2010); Matter of Deivi R., 68 A.D.3d 498 (1st Dept., 2009); Matter of Davion A., 68 A.D.3d 406 (1st Dept., 2009). The Committee's proposal specifies that such supervision must relate to the child and must include specification of any conditions to be met by both the parent and supervising agency.

custody, the standard by which to determine the custody application is the best interests of the child.

Proposal

AN ACT to amend the family court act, in relation to non-respondent parents in child protective and permanency proceedings in family court

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

Section 1. Section 1012 of the family court act is amended by adding subdivisions (l), (m) and (n) to read as follows:

(l) "Parent" means a person who is recognized under the laws of the state of New York to be the child's legal parent, which may include (i) the birth mother of the child, (ii) the spouse of the parent of any child born in wedlock; (iii) a parent listed on the birth certificate, (iv) an adoptive parent of the child, (v) the father of the child as established through a validly executed acknowledgment of paternity, or (vi) the father of the child as established through a court order declaring his paternity.

(m) "Alleged parent" means any person who is not recognized to be the child's legal parent under the laws of the state of New York but who (i) has filed with a putative father registry, (ii) has a pending paternity petition, (iii) was married to the child's parent within six months after the child's birth, or (iv) has been identified by the child's parent in a written sworn statement or by the child as a parent.

(n) "Relative" means any person who is related to the child by blood, marriage or adoption and who is not a parent or alleged parent of the child.

§2. Subdivision 1, paragraph (a) of subdivision 2 and subdivision 3 of section 1017 of the family court act, subdivision 1 as amended by chapters 3 and 671 of the laws of 2005 and subdivisions 2 and 3 as amended by chapter 519 of the laws of 2008, 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 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 or non-respondent alleged parent of the child and any relatives of the child, including all of the child's grandparents, all suitable relatives identified by any respondent parent or any non-respondent parent and any relative or other

suitable person identified by a child over the age of five as a [relative] person who plays or has played a significant positive role in his or her life[, and]. The local commissioner shall inform them of the pendency of the proceeding and of the opportunity [for becoming foster parents or for seeking] to seek custody or care of the child and, in the case of relatives and other suitable persons, the opportunity to become foster parents, who may seek, [and that] to adopt the child [may be adopted by foster parents] if attempts at reunification with the birth parent are not required or are unsuccessful. Rules of court shall specify the contents of the notice. The local commissioner of social services shall record the results of such investigation, including, but not limited to, the name, last known address, social security number, employer's address and any other identifying information to the extent known regarding any non-respondent parent, in the uniform case record maintained pursuant to section four hundred nine-f of the social services law. [For the purpose of this section, "non-respondent parent" shall include a person entitled to notice of the 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 non-custodial 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], relative or other suitable person with whom such child may appropriately reside; and

(b) in the case of a relative or other suitable person, whether such [relative] individual 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 relative or other suitable person, either:

(i) grant [an] a temporary order of custody or guardianship to such non-respondent parent, [other] relative or other suitable person pursuant to a petition filed under article six of this act pending further order of the court, or at disposition of the proceeding, grant a final order of custody or guardianship to such non-respondent parent, other relative or other suitable person pursuant to section one thousand fifty-five-b of this article; or

(ii) place the child directly in the [custody] care of such non-respondent parent, other relative or other suitable person pursuant to this article during the pendency of the proceeding or until further order of the court, whichever is earlier and conduct such other and further investigations as the court deems necessary; or

(iii) remand or place the child, as applicable, with the local commissioner of social services and direct such commissioner to have the child reside with such relative or other suitable person and further direct such commissioner pursuant to regulations of the office of children and family services, to commence an investigation of the home of such relative or other suitable person within twenty-four hours and thereafter approve such relative or other suitable person, 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.

3. An order placing a child [with] in the care of a non-respondent parent, relative or other suitable person pursuant to this section may not be granted unless the non-respondent parent, relative or other suitable person consents to the jurisdiction of the court. The court may [place the person with whom the child has been directly placed under supervision during the pendency of the proceeding. Such supervision shall be provided by] order that a child protective agency, social services official or duly authorized agency supervise the child during the pendency of the proceeding. [The court also may issue a temporary order of protection under subdivision (f) of section one thousand twenty-two, section one thousand twenty-three or section one thousand twenty-nine of this article.] An order of supervision issued pursuant to this subdivision shall set forth the terms and conditions that the non-respondent parent, relative or other suitable person must meet and the actions that the child protective agency, social services official or duly authorized agency must take to exercise such supervision. The court also may issue a temporary order of protection under subdivision (f) of section one thousand twenty-two, section one thousand twenty-three or section one thousand twenty-nine of this article.

§4. Section 1022-a of the family court act, as added by chapter 336 of the laws of 1990, is amended to read as follows:

§1022-a. Preliminary orders; notice and appointment of counsel. At a hearing held pursuant to section [ten hundred] one thousand twenty-two of this act at which the respondent or non-respondent parent is present, the court shall advise the respondent of the allegations in the application and shall appoint counsel for the respondent or non-respondent parent pursuant to section

two hundred sixty-two of this act where the respondent or non-respondent parent is indigent.

§5. Subdivision (d) of section 1027 of the family court act, as added by chapter 962 of the laws of 1970, is amended to read as follows:

(d) Upon such hearing, the court may, for good cause shown, release the child to the [custody] care of his or her parent or other person legally responsible for his or her care, pending a final order of disposition, in accord with section one thousand [~~fifty-four~~] seventeen of this article.

§6. The opening paragraph of subdivision (d) of section 1035 of the family court act, as amended by chapter 525 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 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] care of the child during fact-finding proceedings, and in all phases of dispositional proceedings. The notice shall also advise the parent or parents of the right to counsel, including assigned counsel if indigent, and also indicate that:

§7. Paragraphs (ii) and (vi) of subdivision (a) of section 1052 of the family court act, as amended by chapter 519 of the laws of 2008, is amended to read as follows:

(ii) releasing the child to the [custody] care of [his parents ~~or other person legally responsible~~] a parent or parents or legal custodian or guardian in accord with section one thousand fifty-four of this part; or

(vi) granting custody of the child to a parent or parents, relatives or suitable persons pursuant to section one thousand fifty-five-b of this part.

§8. Section 1054 of the family court act, subdivision (a) as amended by chapter 41 of the laws of 2010 and subdivision (b) as amended by chapter 1039 of the laws of 1973, is amended to read as follows:

§1054 Release to [custody] care of parent or [other person responsible for care] legal custodian or guardian; supervision or order of protection. (a) If the order of disposition releases the child to the [custody] care of his or her parent or [other person legally responsible for his or her care]

legal custodian or guardian at the time of the filing of the petition, the court may [place] require the [person to whose custody the child is released under] parent or legal custodian or guardian to consent to the jurisdiction of the court for the period in which the court orders supervision of the child by a child protective agency or [of] a social services official or duly authorized agency[,] in accordance with subdivision (b) of this section. The court may also enter an order of supervision of a respondent parent under section one thousand fifty seven or may enter an order of protection under section one thousand fifty six, or both, in conjunction with the issuance of an order under this section. An order of supervision of the child entered under this section shall set forth the terms and conditions [of such supervision] that the [respondent] non-respondent parent, legal custodian or guardian must meet and the actions that child protective agency, social services official or duly authorized agency must take to exercise such supervision. Except as provided for herein, in any order issued pursuant to this section, the court may require the child protective agency to make progress reports to the court, the parties, and the child's attorney on the implementation of such order. Where the order of disposition is issued upon the consent of the parties and the child's attorney, such agency shall report to the court, the parties and the child's attorney no later than ninety days after the issuance of the order, unless the court determines that the facts and circumstances of the case do not require such report to be made.

(b) Rules of court shall define permissible terms and conditions of the supervision of the child under this section. The duration of any period of supervision of the child shall be for an initial period of no more than one year and the court may, at the expiration of that period, upon a hearing and for good cause shown, [make successive extensions of] extend such supervision for a period of up to one year [each] and may make successive extensions of such supervision for periods of up to one year each upon a showing of extraordinary circumstances.

§9. The title and subdivision (a) of section 1055-b of the family court act, as amended by chapter 58 of the laws of 2010, is amended to read as follows:

§1055-b. Custody or guardianship with a parent or parents, relatives or suitable persons pursuant to article six of this act or guardianship with [such a person] relatives or suitable persons pursuant to article seventeen of the surrogate's court procedure act. (a) At the conclusion of the dispositional hearing under this article, the court may enter an order of disposition granting custody or guardianship of the child to a parent, relative or other suitable person under article six of this act or an order of guardianship of the child to [such] a relative or suitable person under article seventeen

of the surrogate's court procedure act if:

(i) the parent, relative or suitable person has filed a petition for custody or guardianship of the child pursuant to article six of this act or, in the case of a relative or suitable person, a petition for guardianship of the child under article seventeen of the surrogate's court procedure act; and

(ii) the court finds that granting custody or guardianship of the child to the parent, relative or suitable person is in the best interests of the child and that the safety of the child will not be jeopardized if the respondent or respondents under the child protective proceeding are no longer under supervision or receiving services. In determining whether the best interests of the child will be promoted by the granting of guardianship of the child to a relative who has cared for the child as a foster parent, the court shall give due consideration to the permanency goal of the child, the relationship between the child and the relative, and whether the relative and the social services district have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under title ten of article six of the social services law, and, if so, whether the fact-finding hearing pursuant to section one thousand fifty-one of this part and a permanency hearing pursuant to section one thousand eighty-nine of this chapter [has] have occurred and whether compelling reasons exist for determining that the return home of the child and the adoption of the child are not in the best interests of the child and are, therefore, not appropriate permanency options; and

(iii) the court finds that granting custody or guardianship of the child to the parent, relative or suitable person under article six of this act or granting guardianship of the child to the relative or other suitable person under article seventeen of the surrogate's court procedure act will provide the child with a safe and permanent home; and

(iv) all parties to the child protective proceeding consent to the granting of custody or guardianship under article six of this act or the granting of guardianship under article seventeen of the surrogate's court procedure act; or

(v) after a consolidated dispositional hearing on the child protective petition and the petition under article six of this act or under article seventeen of the surrogate's court procedure act[;] where not all parties consent to the granting of custody or guardianship:

(A) if a parent or parents [fail] fails to consent to the granting of custody or guardianship to the relative or other suitable person under article six of this act or the granting of guardianship under article seventeen of the surrogate's court procedure act, the court finds that extraordinary

circumstances exist that support granting an order of custody or guardianship to the relative or other suitable person and that the granting of the order will serve the child's best interests; or

(B) if a party other than the parent or parents [fail] fails to consent to the granting of custody or guardianship to the relative or other suitable person under article six of this act or the granting of guardianship under article seventeen of the surrogate's court procedure act, the court finds that granting custody or guardianship of the child to the relative or suitable person is in the best interests of the child; or

(C) where a parent is petitioning for custody under article six of this act, if a party other than the other parent fails to consent to the granting of custody, the court finds either that the objecting party failed to establish extraordinary circumstances, or, if extraordinary circumstances were established, that granting custody to the petitioning parent would nonetheless be in the child's best interests; or

(D) where a parent is petitioning for custody under article six of this act, if the other parent fails to consent to the granting of custody to the petitioning parent, the court finds that granting custody to one or the other of the parents is in the child's best interests.

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

2. Child abuse and termination of parental rights proceedings based upon severe or repeated child abuse [F.C.A. §1051(e); Soc. Serv. L. §384-b(8)]

In 1981, the State Legislature added subdivision 8 to Social Services Law §384-b to create two additional grounds to support terminations of parental rights: severe or repeated child abuse. *See* L. 981, c. 739. These grounds, however, were almost never utilized because of difficulties of proof. In light of the lower quantum of proof required for a child abuse finding under Article 10 of the Family Court Act as compared to that which is required for termination of parental rights – a preponderance of the evidence as compared to clear and convincing evidence – the Article 10 child abuse findings that precipitated a child's entry into foster care could not be used as proof of severe or repeated child abuse in a subsequent termination of parental rights proceeding. The original child abuse allegations would thus need to be retried, often long after the fact, utilizing the higher standard of proof. In an attempt to obviate the need to retry the child abuse charges, the Legislature amended Family Court Act §1051 regarding fact-finding orders as part of the State statute implementing the Federal *Adoption and Safe Families Act* [Public Law 105-89]. The Family Court was thereby authorized to render an additional finding of severe or repeated child abuse as part of its fact-finding order in a child abuse proceeding so long as the requisite proof by clear and convincing evidence had been adduced. *See* L. 1999, c. 7.

Although the 1999 statute facilitated greater utilization of the severe or repeated child abuse grounds for terminations of parental rights, the Family Courts encountered a significant obstacle to making the additional findings at the stage of the initial child abuse proceedings. Moreover, the definition of severe abuse has not been updated since its enactment 30 years ago to incorporate two serious sexual offenses that were added to the Penal Law in 2006. The Family Court Advisory and Rules Committee is submitting a proposal to address these problems.

First, the measure would eliminate the need for the Family Court to include a finding regarding provision of diligent efforts in order for the additional findings that may be rendered in a child protective proceeding under Article 10 of the Family Court Act to be admissible in a proceeding to terminate parental rights. Family Court Act §1051 would be amended to provide that, in addition to child abuse findings by a preponderance of evidence, the Family Court may make findings in a child abuse proceeding by clear and convincing evidence regarding the acts of abuse or the crimes that comprise the definitions of severe or repeated child abuse, that is, subparagraphs (i), (ii) and (iii) of paragraph (a) or subparagraphs (i) and (ii) of paragraph (b), respectively, of Social Services Law §384-b(8). While these findings would supply the requisite proof regarding the substantive allegations of abuse or crimes in a later termination of parental rights proceeding brought on the grounds of severe or repeated child abuse, the agency would nonetheless retain its obligation to prove the additional element of diligent efforts – that is, Social Services Law §384-b(8)(a)(iv) or §384-b(8)(b)(iii), respectively -- as part of its case in chief in the termination proceeding.

The additional findings rendered at the child abuse stage would obviate the need for the agency to retry the abuse allegations in the subsequent termination of parental rights proceeding, but diligent efforts would nonetheless need to be proven at that later stage, unless excused by the Family Court. In a particularly egregious case, a child protective agency may move pursuant to Family Court Act §1039-b for an order terminating its obligation to provide reasonable efforts to enable a

child's return home, thus allowing the Family Court to render additional findings that cover all of the elements of the severe or repeated child abuse definition, including diligent efforts. However, such motions are rare and more often it would be premature for the Family Court to render a finding regarding diligent efforts to reunite the family at the early stage of the fact-finding hearing in a child abuse case. Several appellate cases have reversed severe abuse findings that had been made in child abuse proceedings where findings regarding diligent efforts had not been included. *See, e.g.,* Matter of Leon K., 63 A.D.3d 1069 (2nd Dept., 2011); Matter of Candace S., 38 A.D. 2d 786 (2nd Dept., 2007), *lve. app. denied*, 9 N.Y.3d 805 (2007); Matter of Latifah C., 34 A.D.3d 798 (2nd Dept., 2006). Without altering the agency's obligation to meet its burden of proving diligent efforts as part of its termination of parental rights *prima facie* case, the Committee's measure would eliminate duplication by permitting the findings from the initial child abuse case regarding the alleged act or acts of severe or repeated child abuse to be used in a subsequent termination of parental rights proceeding.

Second, the proposal would add sections 130.95 and 130.96 of the Penal Law to the list of sexual offenses and other felonies that constitute severe abuse, as defined in Social Services Law §384-b(8)(a). These offenses, both Class A-II felonies, carry criminal penalties for first offenders of a minimum of 10 to 25 years and a maximum of life imprisonment, with longer sentences required for repeat and persistent offenders. The two offenses add aggravating factors to -- and are therefore more serious than – the crimes already listed in Social Services Law §384-b(8), specifically, rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree and course of sexual conduct against a child in the first degree. Predatory sexual assault, as defined in Penal Law §130.95, enhances the penalties for these crimes where the offender: causes serious physical injury to the victim, uses or threatens the immediate use of a dangerous instrument, commits the crime against one or more additional persons or has a prior conviction for a felony sex offense, incest or use of a child in a sexual performance. Predatory sexual assault against a child, as defined in Penal Law §130.96, enhances the penalties where the offender is 18 years of age or older and commits one of the enumerated crimes against a victim under the age of 13 years old. Both of these predatory crimes, among the most serious crimes in the Penal Law, warrant inclusion in the definition of "severe abuse," both as grounds for termination of parental rights and as bases for enhanced findings in child abuse proceedings under Article 10 of the Family Court Act.

Enactment of this proposal would make the promise of permanency a reality for a group of children in out-of-home care who are most in need of new, safe and stable families, that is, those who have been removed from the care of parents who have been found to have committed the most serious forms of child abuse.

Proposal

AN ACT to amend the family court act and the social services law, in relation to severe or repeated child abuse in child protective 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. Subdivision (e) of section 1051 of the family court act, as amended by chapter 7 of the law of 1999, is amended to read as follows:

(e) If the court makes a finding of abuse, it shall specify the paragraph or paragraphs of subdivision (e) of section one thousand twelve of this act which it finds have been established. If the court makes a finding of abuse as defined in paragraph (iii) of subdivision (e) of section one thousand twelve of this act, it shall make a further finding of the specific sex offense as defined in article one hundred thirty of the penal law. In addition to a finding of abuse, the court may enter a finding of severe abuse or repeated abuse, as defined in [paragraphs] subparagraphs (i), (ii) and (iii) of paragraph (a) [and] or subparagraphs (i) and (ii) of paragraph (b) of subdivision eight of section three hundred eighty-four-b of the social services law, which shall be admissible in a proceeding to terminate parental rights pursuant to paragraph (e) of subdivision four of section three hundred eighty-four-b of the social services law. If the court makes such additional finding of severe abuse or repeated abuse, the court shall state the grounds for its determination, which shall be based upon clear and convincing evidence.

§2. Subparagraph (ii) of paragraph (a) and subparagraph (i) of paragraph (b) of subdivision 8 of section 384-b of the social services law, as amended by chapter 739 of the laws of 1981 , are amended to read as follows:

(a) For the purposes of this section a child is "severely abused" by his or her parent if

* * *

(ii) the child has been found to be an abused child, as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; provided, however, the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70, 130.75 [and], 130.80, 130.95 and 130.96 of the penal law and, for the purposes of this section the corroboration requirements contained in the penal law shall not apply to proceedings under this section; or

(b) For the purposes of this section a child is "repeatedly abused" by his or her parent if:

(i) the child has been found to be an abused child, (A) as defined in paragraph (i) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; or (B) as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; provided, however, the respondent must have committed

or knowingly allowed to be committed a felony sex offense as defined in sections 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70, 130.75 [and], 130.80, 130.95 and 130.96 of the penal law; and

§3. This act shall take effect immediately.

3. Transfers of probation supervision in child support, family offense, persons in need of supervision and juvenile delinquency proceedings in Family Court [F.C.A. §§175, 176]

Chapter 97 of the Laws of 2011 made far-reaching changes to the provisions of Family Court Act §176 regarding orders of probation in family offense, child support, juvenile delinquency and Persons in Need of Supervision (PINS) proceedings. Family Court Act §176, originally enacted in 1933 and incorporated into the Family Court Act in 1962, had "[t]hrough almost eighty years of experience...proven useful and uncontroversial." Sobie, Practice Commentaries, Family Court Act §176 (McKinney's, 2011). Unfortunately, the changes made by chapter 97 have created significant controversy. They contradict other venue provisions of the Family Court Act and have imposed substantial burdens upon the adults and juveniles subject to orders of probation, as well as upon the Family Court. The Family Court Advisory and Rules Committee is submitting a measure designed to ameliorate these problems, while nonetheless furthering the legislative goals of the 2011 enactment.

First, the measure would repeal Family Court Act §175, since it is directly contradicted by chapter 97. Family Court Act §175 provides that where an alleged violation of an order of probation supervision occurs in a county other than the county in which the order of probation had originally been issued, either county would be a proper venue in which the probation violation may be heard. However, Family Court Act §176, as modified by chapter 97, requires venue for violations of probation to be the county in which the probationer, adult or juvenile, is under probation supervision, which must be the county where the probationer resides, regardless of where the alleged violation occurred. In the case of a probationer who resides in, or relocates to, a county other than the county in which the order of probation had been issued, probation supervision must be transferred to the county of the probationer's residence and that county must be the sole venue for violation proceedings. In determining venue for probation violations, there is no rationale to distinguish between cases in which probation supervision has been transferred and cases in which probation supervision remains in the county that issued the original order, limiting venue in the former to the county of supervision, while retaining an option in the latter of either the county that issued the order or the county where the alleged violation occurred.

Second, the proposal requires the Family Court to transfer probation supervision to the probation department in the county where the probationer resides, including in cases in which the probationer's relocation occurs subsequent to the issuance of the order of probation. Importantly, the proposal eliminates the provision in the 2011 statute that placed the responsibility upon probationers, whether adult or juvenile, to request permission from the Family Court to relocate their residences and gave the Family Court authority to rule upon such requests. That provision is over-broad in the context of an adult probationer in a child support or family offense case and is particularly inappropriate when applied to a juvenile delinquency or PINS case, where the probationer's parents, not the juvenile probationer, control decisions regarding where the family resides.

Third, the measure provides that a transfer of probation supervision to the county in which the probationer resides creates a rebuttable presumption that subsequent proceedings regarding the probation order, including proceedings for a probation violation or proceedings to extend the duration or modify the conditions of probation, would be heard in the county providing the supervision. The presumption would be rebuttable if the Family Court in the county providing the

supervision "determines that there is a compelling reason to return the proceeding" to the Family Court that issued the order of probation. Danger to a victim of domestic violence, for example, might be such a compelling reason. While not a probation matter, the decision of the Family Court, Albany County in Jeanne E.M. *v.* Lindey M.M., 189 Misc.2d 669 (Fam. Ct., Alb. Co., 2001), is illustrative. The Court held that the threat to the safety of the family offense petitioner justified the denial of the respondent's motion to change venue from the county to which the petitioner had fled to the county in which the family had resided.

Significantly, the presumption would not apply to the wide range of other post-dispositional proceedings that are unrelated to the order of probation, since petitioners and the Family Courts in such cases retain discretion to exercise other venue options. Family Court Act §818, for example, provides that a petitioner in a family offense case may file in the county where the offense allegedly occurred or in any county where any of the parties reside, which may include a domestic violence shelter to which a petitioner has fled for safety. Venue in child support proceedings, pursuant to Family Court Act §419, may be in any county in which a party resides and may be transferred by the Family Court, upon application, in accordance with Article Five of the Civil Practice Law and Rules. Family Court Act §174 provides that the Family Court, upon good cause, may transfer venue to any county in which a proceeding may have been filed and must transfer venue if it had been improperly lodged. The fact that a respondent in a family offense proceeding has been placed on probation should not mean that the petitioner, adjudicated as a victim of domestic violence, must bear the potentially hazardous burden of traveling to the respondent's county to file and adjudicate a motion to extend or modify an order of protection. Nor should a custodial parent (or child support agency to whom rights were assigned in a public assistance case) be required to file all post-dispositional modification or other proceedings in the support obligor's county of residence, simply because the support obligor was receiving probation supervision there. The Committee's measure thus resolves the conflicting venue provisions by applying the presumption in favor of the probationer's county of residence only to those proceedings that pertain directly to the order of probation.

Analogously, Criminal Procedure Law §410.80(2), upon which the 2011 amendments to Family Court Act §176 were based, provides that once probation supervision over a criminal defendant has been transferred, the court in the probationer's county of residence "shall assume all powers and duties of the sentencing court and shall have sole jurisdiction in the case..." However, the Court of Appeals held, in People *v.* Mitchell, 15 N.Y.3d 93 (2010), that, while seemingly divesting the sentencing court of jurisdiction over all post-dispositional proceedings, the Legislature intended to transfer "the full range of powers and duties necessary for the judiciary to carry out its responsibilities to enforce the terms and conditions of probationers, and to deal with forfeitures and disabilities," but did not intend to deprive the sentencing court of jurisdiction to rule upon post-judgment motions under Article 440 of the Criminal Procedure Law.

Third, the Committee's measure eliminates the unnecessary burden imposed upon the Family Courts of transferring all court records immediately upon a transfer of probation supervision, even when there has been no probation violation or other probation-related post-dispositional proceeding pending in the county that is providing probation supervision and even when the records may include years of litigation entirely unrelated to the order of probation. The proposal requires that once a probation violation, modification or extension proceeding has been filed, the Family Court in the county in which the action has been filed must request the record from the court that issued the order

of probation and that court must transmit a copy of the record that pertains to the order of probation immediately "by electronic or other means." The measure thus targets the particular records that would be relevant to the post-dispositional proceeding, requires transmittal only at such time as the records are actually needed by the court and parties and recognizes that an increasing number of Family Courts are minimizing the use of paper records through electronic scanning.

Finally, the measure treats New York City as one jurisdiction, rather than as five individual counties, with respect to Family Court Act §176. The New York City Department of Probation covers all five counties and is thus able to transfer probation supervision internally without court orders. Transfers of proceedings and records within the five courts that comprise the New York City Family Court are likewise accomplished easily. .

Proposal

AN ACT to amend the family court act, in relation to transfers of child support, juvenile delinquency, persons in need of supervision and family offense proceedings

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

Section 1. Section 175 of the family court act is REPEALED.

§2. Section 176 of the family court act, as amended by chapter 97 of the laws of 2011, is amended to read as follows:

§176. Inter-county probation. 1. Where a person placed on probation resides in another jurisdiction within the state at the time of the order of disposition, the family court which placed him or her on probation shall transfer supervision to the probation department in the jurisdiction in which the person resides. Where, after a probation disposition is pronounced, a probationer relocates to [requests to reside in] another jurisdiction within the state, the family court which placed him or her on probation [may, in its discretion, approve a change in residency and, upon approval,] shall transfer supervision to the probation department in [serving] the county of the probationer's [proposed] new residence. Upon completion of a transfer of probation supervision pursuant to this subdivision, the probation department in the receiving jurisdiction shall assume all powers and duties of the probation department in the jurisdiction of the family court which placed the probationer on probation. Any transfer under the subdivision must be in accordance with rules adopted by the commissioner of the division of criminal justice services.

2. (a) Upon completion of a transfer of probation supervision as authorized pursuant to subdivision one of this section, the family court [within] in the receiving jurisdiction [of the

receiving probation department] shall assume all powers and duties of the family court which placed the probationer on probation [and shall have sole jurisdiction in] with respect to the [case. The family court which placed the probationer on] order of probation [shall immediately forward its entire case record to], including proceedings for violations of probation and applications to modify the [receiving] conditions or extend the term of probation, unless the receiving family court determines that there is a compelling reason to return the proceeding to the sending family court for adjudication, in which case the proceeding shall be returned to the sending family court for adjudication.

(b) If the probation department in the receiving jurisdiction originates a proceeding requesting that the probationer be found in violation of the order of probation or requesting a modification of the conditions or extension of the term of probation, the family court in the receiving jurisdiction shall request that the sending family court immediately transmit a complete copy of its file with respect to the order of probation by electronic or other means.

3.[Upon completion of a transfer as authorized pursuant to subdivision one of this section, the probation department in the receiving jurisdiction shall assume all powers and duties of the probation department in the jurisdiction of the family court which placed the probationer on probation.] For the purpose of this section "jurisdiction" shall mean a county or the city of New York.

§3. This act shall take effect immediately.

REPEAL NOTE: Section 175, proposed to be repealed by this Act, provides that, where an alleged violation of probation occurs in a county other than the county in which the respondent had been placed on probation, the court in either county may hear the violation. This provision contradicted chapter 97 of the laws of 2011, which amended Family Court Act §176 to provide that where probation supervision has been transferred to the county in which the probationer resides, violation proceedings must be heard in the latter county. This act would add an exception to that mandate where the court in that county determines that there is a compelling reason for the violation proceeding to be heard by the court that issued the order placing the probationer on probation.

4. Authority of support magistrates in Family Court to adjudicate paternity and child support license suspension proceedings [F.C.A. §§439, 454]

Under current law, a support magistrate presented with a paternity case involving the issue of equitable estoppel must refer that case to a Family Court judge. The judge then decides the issue of equitable estoppel and makes an appropriate ruling on the paternity petition. If issuing an order of filiation, the judge then must refer the case back to the support magistrate to determine support. This transfer of the case between parts causes unnecessary fragmentation of the proceeding and creates an unnecessary burden on litigants and court personnel. Litigants must navigate from courtroom to courtroom, first appearing before a Support Magistrate, then appearing before a Family Court judge and then returning back to the Support Magistrate for the support hearing. Resolution of paternity and support issues is needlessly delayed, a problem exacerbated by the difficulties experienced by parties who must take additional days off from work, often thereby jeopardizing their employment and thus their capacity to support their children. This movement of litigants and files between court parts places an extra burden on court clerks, court assistants and court officers. The prohibition against Support Magistrates deciding equitable estoppel cases thus impedes the Family Court's mission to provide effective and efficient adjudication of paternity so that child support can be provided to families on a timely basis.

Similarly, current law provides that a child support obligor, who owes more than four months of arrears on child support payments, may have his or her driver's license suspended administratively. The support obligor may request a fair hearing on the suspension and, if unsucessful, may then challenge the outcome of the fair hearing in Family Court. However, the Family Court challenge must be heard by a Family Court judge, not the Support Magistrate who issued the child support order being violated and who is likely to be familiar with the case and circumstances of the parties. Again, this restriction upon the Support Magistrate's authority fragments the proceedings and impedes timely and effective resolution of the driver's license suspension issue, as well as enforcement of the child support obligation.

The Family Court Advisory and Rules Committee, therefore, is proposing a measure that would end the unnecessary restrictions upon the authority of the Support Magistrates in Family Court in these two circumstances. According to data furnished by the Office of Court Administration, the numbers of cases affected in both instances are relatively small:

• Assuming that an appearance before a Family Court judge is a reliable indicator of a paternity case involving equitable estoppel, 7.7% (3,077 cases) of the total of 39,064 paternity cases filed statewide in calendar year 2010 involved at least one appearance before a Family Court or Integrated Domestic Violence Court judge; and

• Of the total number of supplemental petitions filed in paternity cases statewide in calendar year 2010 (175, 259 cases), .05% (85 cases) involved an objection to a license suspension.
Yet for these cases, the courts would be able to resolve the matters more expeditiously, litigant appearances in court would be reduced and work hours by court personnel would be lowered.

First, all issues regarding paternity, including issues involving claims of equitable estoppel,

would be determined by Support Magistrates. These jurists are highly trained legal specialists, knowledgeable and experienced in adjudicating paternity and child support proceedings and able to recognize the implications of equitable estoppel in cases before them. The estoppel determination, like all determinations of a Support Magistrate, would be subject to the objection process set forth in Article Four of the Family Court Act, so that litigants would have a quick and easy avenue of review in any contested proceedings. Significantly, one appellate court has held that in paternity proceedings in which child support has not been sought or ordered, the determination regarding equitable estoppel may be the subject of a direct appeal to the Appellate Division. *See* Matter of Stephen W. *v.* Christina X., 80 SA.D.3d 1083 (3rd Dept., 2011), *lve. app. denied*, 16 N.Y.3d 712 (2011).

Second, Support Magistrates would be authorized to resolve challenges to administrative suspensions of driver's licenses after the support obligors have exhausted administrative remedies through the support agency's fair hearing process. Under section 111-b(12) of the Social Services Law, the Support Collection Unit (SCU) of a local Department of Social Services (or in New York City, the Human Resources Administration) is required to notify an allegedly delinquent child support obligor of its intent to notify the Department of Motor Vehicles to suspend the obligor's driver's license, after which the obligor may obtain an administrative fair hearing. Subdivision five of section 454 of the Family Court Act requires any challenge by a support obligor to the fair hearing to be referred to a Family Court judge, thus preventing the proceeding from being heard by the same jurist who issued the underlying child support order. However, there is no substantive reason why this narrow aspect of child support litigation should not be determined by Support Magistrates who already determine virtually every other aspect of child support litigation, with the exception of incarceration, and who are well-versed in the highly specialized, often arcane paternity and support areas of law. Again, the determination of the Support Magistrate would be subject to the objection process contained in Article Four of the Family Court Act.

Significantly, the measure is in keeping with the enhanced role of Family Court Support Magistrates reflecting increasing recognition of their importance. Support Magistrates are vital to New York State's efforts to adjudicate and enforce child support obligations in conformity with Title IV-D of the Federal *Social Security Act*, which provides funding for 2/3 of New York's child support program. According to the New York State Office of Disability Assistance, total child support collections comprise well over one billion dollars annually.[4] The original Family Court Act, enacted in 1962, did not contain any provision for paternity or child support cases to be heard by any official other than a Family Court judge. The Act was amended in 1977 to create the position of Hearing Examiner and to authorize a hearing examiner only to hear and report on child support cases. In 1985, the Act was again amended to grant Hearing Examiners the authority to hear and determine child support cases, but it did not permit them to decide cases involving contested paternity. When the Act was amended in 2003 and 2004**,** the title of Hearing Examiner was changed to Support Magistrate and subject matter jurisdiction was extended to contested paternity cases. However, equitable estoppel issues were excluded from the Support Magistrate's authority in paternity cases and the driver's license suspension provisions remained unchanged. This proposal would complete

[4] The NYS OTDA Annual Report for 2008, the most recent report available, indicated that $1.7 billion had been collected in New York State in 2008, reflecting a steady increase from 2003, when collections totalled $1.3 billion.

the evolution of the Support Magistrate's authority in recognition of their essential role and substantial expertise in the adjudication and enforcement of child support obligations for the benefit of children in New York State.

Proposal

AN ACT to amend the family court act, in relation to the authority of support magistrates in family court to adjudicate paternity and child support license suspension proceedings

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

Section 1. Subdivision (a) of section 439 of the family court act, as amended by section 1 of chapter 576 of the laws of 2005, is amended to read as follows:

(a) The chief administrator of the courts shall provide, in accordance with subdivision (f) of this section, for the appointment of a sufficient number of support magistrates to hear and determine support proceedings. Except as hereinafter provided, support magistrates shall be empowered to hear, determine and grant any relief within the powers of the court in any proceeding under this article, articles five, five-A, and five-B and sections two hundred thirty-four and two hundred thirty-five of this act, and objections raised pursuant to section five thousand two hundred forty-one of the civil practice law and rules. Support magistrates shall not be empowered to hear, determine and grant any relief with respect to issues specified in [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 be authorized to immediately make a temporary or final order of support, as applicable. A support magistrate shall have the authority to hear and decide motions and issue summonses and subpoenas to produce persons pursuant to section one hundred fifty-three of this act, hear and decide proceedings and issue any order authorized by subdivision (g) of section five thousand two hundred forty-one of the civil practice law and rules, issue subpoenas to produce prisoners pursuant to section two thousand three hundred two of the civil practice law and rules and make a determination that any person before the support magistrate is in violation of an order of the court as authorized by section one hundred fifty-six of this act subject to confirmation by a judge of the court who shall impose any punishment for

such violation as provided by law. A determination by a support magistrate that a person is in willful violation of an order under subdivision three of section four hundred fifty-four of this article and that recommends commitment shall be transmitted to the parties, accompanied by findings of fact, but the determination shall have no force and effect until confirmed by a judge of the court.

§2. Subdivision (a) of section 439 of the family court act, as amended by section 2 of chapter 576 of the laws of 2005, is amended to read as follows

(a) The chief administrator of the courts shall provide, in accordance with subdivision (f) of this section, for the appointment of a sufficient number of support magistrates to hear and determine support proceedings. Except as hereinafter provided, support magistrates shall be empowered to hear, determine and grant any relief within the powers of the court in any proceeding under this article, articles five, five-A, and five-B and sections two hundred thirty-four and two hundred thirty-five of this act, and objections raised pursuant to section five thousand two hundred forty-one of the civil practice law and rules. Support magistrates shall not be empowered to hear, determine and grant any relief with respect to issues specified in section four hundred fifty-five of this 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 be authorized to immediately make a temporary or final order of support, as applicable. A support magistrate shall have the authority to hear and decide motions and issue summonses and subpoenas to produce persons pursuant to section one hundred fifty-three of this act, hear and decide proceedings and issue any order authorized by subdivision (g) of section five thousand two hundred forty-one of the civil practice law and rules, issue subpoenas to produce prisoners pursuant to section two thousand three hundred two of the civil practice law and rules and make a determination that any person before the support magistrate is in violation of an order of the court as authorized by section one hundred fifty-six of this act subject to confirmation by a judge of the court who shall impose any punishment for such violation as provided by law. A determination by a support magistrate that a person is in willful violation of an order under subdivision three of section four hundred fifty-four of this article and that recommends commitment shall be transmitted to the parties, accompanied by findings of fact, but the determination shall have no force and effect until confirmed by a judge of the court.

§3. Subdivisions (b) and (c) of section 439 of the family court act, as amended by chapter 576 of the laws of 2005, are amended to read as follows:

(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 of the issue of paternity]. Where an order of filiation is issued by a judge in a paternity <u>or other</u> proceeding and child support is in issue, the judge, or support magistrate upon referral from the judge, shall be authorized to immediately make a temporary or final order of support, as applicable. Whenever an order of filiation 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 to a support magistrate for further proceedings regarding child support or other matters within the authority of the support magistrate.

§4. Subdivision 5 of section 454 of the family court act, as amended by chapter 81 of the laws of 1995, is amended to read as follows:

5. The court may review a support collection unit's denial of a challenge made by a support obligor pursuant to paragraph (d) of subdivision twelve of section one hundred eleven-b of the social services law if objections thereto are filed by a support obligor who has received notice that the office of temporary and disability assistance intends to notify the department of motor vehicles that the support obligor's driving privileges are to be suspended. Specific written objections to a support

collection unit's denial may be filed by the support obligor within thirty-five days of the mailing of the notice of the support collection unit's denial. A support obligor who files such objections shall serve a copy of the objections upon the support collection unit, which shall have ten days from such service to file a written rebuttal to such objections and a copy of the record upon which the support collection unit's denial was made, including all documentation submitted by the support obligor. Proof of service shall be filed with the court at the time of filing of objections and any rebuttal. The court's review shall be based upon the record and submissions of the support obligor and the support collection unit upon which the support collection unit's denial was made. Within forty-five days after the rebuttal, if any, is filed, the [~~family~~] court [~~judge~~] shall (i) deny the objections and remand to the support collection unit or (ii) affirm the objections if the court finds the determination of the support collection unit is based upon a clearly erroneous determination of fact or error of law, whereupon the court shall direct the support collection unit not to notify the department of motor vehicles to suspend the support obligor's driving privileges. Provisions set forth herein relating to procedures for appeal to the family court by individuals subject to suspension of driving privileges for failure to pay child support shall apply solely to such cases and not affect or modify any other procedure for review or appeal of administrative enforcement of child support requirements.

§5. This act shall take effect on the ninetieth day after it shall have become a law; provided, however, that the amendments to subdivision (a) of section 439 of the family court act made by section 1 of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 246 of chapter 81 of the laws of 1995, as amended, when upon such date the provisions of section 2 of this act shall take effect, and the amendments to subdivision 5 of section 454 of the family court act made by section 4 of this act shall be subject to the expiration of such subdivision pursuant to section 246 of chapter 81 of the laws of 1995, as amended .

5. Child support obligations of indigent and near-indigent support obligors in Family and Supreme Court proceedings [D.R.L. §240(1-b)(d); F.C.A. §413(1)(d)]

Chapter 436 of the Laws of 2011 conformed New York's child support statutes to the Federal *Child Support Enforcement Act* [Social Security Act, Title IV-D §467(b)(2), as amended, 42 USCA §667(b)(2)] by incorporating a rebuttable presumption, rather than a mandate, that the child support obligation of a non-custodial parent, whose income is below the Federal poverty level, would be a minimum of $25 per month ($300 per year). The new statute thus codified the decision of the Court of Appeals in Rose *v.* Moody, 83 N.Y.2d 65 (1993), *cert. denied*, 511 U.S. 1084 (1994), by incorporating the same factors that may justify a departure from the State's *Child Support Standards Act* percentages, *i.e.*, the factors enumerated in Family Court Act §413(1)(f) and Domestic Relations Law §240(1-b)(f). At the same time, Chapter 436 authorized the courts to include child care, medical and educational expenses in determining the support obligation of non-custodial parents whose incomes exceeded the Federal poverty level but were less than the self-support reserve for a single individual, an amount set and published by the New York State Office of Temporary and Disability Assistance.

However, the new statute failed to correct a long-standing anomaly in the interpretation of New York's child support statutes with respect to non-custodial parents whose child support obligation would reduce their incomes to a level below the self-support reserve. Ironically, a literal reading of the current statutory language has led to the conclusion that the more children a non-custodial parent is obligated to support the less the child support obligation would be. The Family Court Advisory and Rules Committee is, therefore, proposing a measure to prevent this unintended consequence.

Family Court Act §413(1)(d) and Domestic Relations Law §240(1-b)(d) both provide that "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 United States 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." Where such a calculation reduces the non-custodial parent's income below the Federal poverty level, the child support obligation would be a minimum of $25 per month, which would be rebuttable, as noted above. These provisions were intended to provide a floor for child support orders, which would generally be $50 per month ($600 per year) if the non-custodial parent's income is above the self-support reserve level, between $25 and $50 per month if the non-custodial parent's income is above the Federal poverty level but below the self-support reserve level and a rebuttable presumption of $25 per month if the non-custodial parent's income is below the Federal poverty level.

However, these provisions have been interpreted to require an obligation of less than $50 per month in situations where the income is above the self-support reserve but would be reduced to an amount below the poverty level simply because the non-custodial parent has multiple children with the custodial parent to support. For example, if a non-custodial parent with one child has an annual income at the self-support reserve ($14,702 for 2011), the basic child support obligation (17% of income) of $2,499 would reduce his or her income to $12,203. Since this amount is above the

poverty level ($10,890 in 2011), then the support obligation would be $50 per month ($600 per year). However, if the same non-custodial parent had five children, the basic child support obligations (35% of income) would be $5,146, which would reduce the income to $9,556 annually. Since that amount is below the poverty level, the non-custodial parent would be deemed obligated to pay $25 per month, an amount that would be rebuttable. Surely the Legislature did not intend that a custodial parent struggling to raise five children would receive less support from the non-custodial parent than a custodial parent raising only one child.

The Committee's proposal expands the applicability of the rebuttable presumption regarding the support obligation of indigent non-custodial parents to those whose income is above the poverty level but below the self-support reserve. It expresses the child support obligation as an annual, rather than a monthly, amount so as to be consistent with both the poverty and self-support reserve levels as published by the New York State Office of Temporary and Disability Assistance. Most significantly, it corrects the unintended and unfair consequence of the interpretation of current law by eliminating the disparity between the support obligations of non-custodial parents with one child as compared to those with multiple children. Under the example given above, the proposal provides that a non-custodial parent with an income at the self-support level of $14, 702 would have a child support obligation of $600 per year regardless of whether he or she was supporting one or five children. No longer would the non-custodial parent with five children pay just half of the amount paid by the parent with one child. Enactment of this measure would, therefore, replace an anomalous result with one that takes into account the circumstances of both the non-custodial parent and his or her children.

Proposal

AN ACT to amend the domestic relations law and the family court act, in relation to the child support obligations of indigent and near-indigent support obligors

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

Section 1. Subparagraph (1) of paragraph (b) of subdivision 1-b of section 240 of the domestic relations law, as amended by chapter 567 of the laws of 1989, is amended to read as follows:

(b) For purposes of this subdivision, the following definitions shall be used:

(1) (i) "Base calculation" shall mean the sum derived by adding the amounts determined by the application of subparagraphs one, two, and three of paragraph (c) of this subdivision.

(ii) "Basic child support obligation" shall mean the [sum derived by adding the amounts determined by the application of subparagraphs two and three of paragraph (c) of this subdivision] base calculation except as increased pursuant to subparagraphs four, five, six and seven of [such]

paragraph (c) of this subdivision.

§2. Paragraph (d) of subdivision (1-b) of section 240 of the domestic relations law, as amended by chapter 436 of the laws of 2011, is amended to read as follows:

(d) Notwithstanding the provisions of paragraph (c) of this subdivision[,where the annual amount]:

(i) If the support obligor's income is above the self-support reserve, but the application of the base calculation to the obligor's income would reduce such income below the self-support reserve, the basic child support obligation [would reduce the non-custodial parent's] shall be six hundred dollars per year or the difference between the support obligor's income and the self-support reserve, whichever is greater. In addition, the court may, in its discretion, order amounts in accordance with subparagraphs four, five, six and seven of paragraph (c) of this subdivision.

(ii) If the obligor's income is equal to or below the self-support reserve, but above 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] six hundred dollars per [month] year[; provided, however, that if the court finds that] unless such [basic child support] an obligation would reduce the support obligor's income below the poverty income amount, in which case the basic child support obligation shall be three hundred dollars per year or the difference between the support obligor's income and the poverty level, whichever is greater.

(iii) If the obligor's income is equal to or below the poverty guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be three hundred dollars per year.

(iv) Notwithstanding the foregoing, if the court finds that any amount determined pursuant to (i), (ii), or (iii) is unjust or inappropriate, which finding shall be based upon considerations of the factors set forth in paragraph (f) of this subdivision, then the court shall order the [non-custodial parent] child support obligor 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.]

§3. Subparagraph (1) of paragraph (b) of subdivision 1 of section 413 of the family court act, as amended by chapter 567 of the laws of 1989, is amended to read as follows:

(b) For purposes of this subdivision, the following definitions shall be used:

(1)(i) "Base calculation" shall mean the sum derived by adding the amounts determined by the application of subparagraphs one, two, and three of paragraph (c) of this subdivision.

(ii) "Basic child support obligation" shall mean the [sum derived by adding the amounts determined by the application of subparagraphs two and three of paragraph (c) of this subdivision] base calculation except as increased pursuant to subparagraphs four, five, six and seven of [such] paragraph (c) of this subdivision.

§4. Paragraph (d) of subdivision 1 of section 413 of the family court act, as amended by chapter 436 of the laws of 2011, is amended to read as follows:

(d) Notwithstanding the provisions of paragraph (c) of this subdivision[, where the annual amount]: (i) If the support obligor's income is above the self-support reserve, but the application of the base calculation to the obligor's income would reduce such income below the self-support reserve, the basic child support obligation [would reduce the non-custodial parent's] shall be six hundred dollars per year or the difference between the support obligor's income and the self-support reserve, whichever is greater. In addition, the court may, in its discretion, order amounts in accordance with subparagraphs four, five, six and seven of paragraph (c) of this subdivision.

(ii) If the obligor's income is equal to or below the self-support reserve, but above 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] six hundred dollars per [month] year[; provided, however, that if the court finds that] unless such [basic child support] an obligation would reduce the support obligor's income below the poverty income amount, in which case the basic child support obligation shall be three hundred dollars per year or the difference between the support obligor's income and the poverty level, whichever is greater.

(iii) If the obligor's income is equal to or below the poverty guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be three hundred dollars per year.

(iv) Notwithstanding the foregoing, if the court finds that any amount (i), (ii), or (iii) is unjust

or inappropriate, which finding shall be based upon considerations of the factors set forth in paragraph (f) of this subdivision, then the court shall order the [non-custodial parent] child support obligor 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.]

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

6. Orders for participation in work-related programs in Family Court proceedings to modify or enforce child support
[F.C.A. §§437-a, 454; Soc. Serv. L. §111-h(20)]

In chapter 592 of the Laws of 2011, the Legislature enacted salutary amendments to chapter 182 of the Laws of 2010, which authorized the Family Court to direct individuals who are obligated to pay child support to take steps to seek employment or to participate in job training, employment counseling or other available programs designed to lead to employment.The amendments made clear that such directions could be made in a proceeding seeking a downward modification of a child support order or in a proceeding to enforce or remedy a violation of a child support order, in addition to a proceeding to establish a child support order in the first instance. However, in conjunction with the Governor's office and New York State Office of Temporary and Disability Assistance, the Family Court Advisory and Rules Committee is submitting a proposal that makes a few technical revisions and harmonizes the new statute with earlier enactments in order to eliminate any possible doubt as to New York State's compliance with Federal child support laws and regulations.

First, the proposal would amend section 437-a of the Family Court Act to permit work program orders in any proceeding for a modification, not simply a proceeding denominated one to decrease a child support order. While perhaps more common in a proceeding for a downward modification, a work program directive may be also appropriate in a modification proceeding that may have originated as an upward modification but in which a cross-motion for a reduction in the child support obligation has been made. Elsewhere in Article 4, most particularly, in Family Court Act §451, the term "modify" is used without limitation as to whether an increase or decrease in the child support obligation is sought. This change, therefore, is consistent with the language in other child support provisions in the Family Court Act.

Second, the proposal would eliminate any possible ambiguity as to New York's continued compliance with the Federal requirements of Title IV-D of the *Social Security Act*, a condition of eligibility for funding of the State's child support enforcement program and the Temporary Assistance for Needy Families (TANF) block grant. New York State receives Federal reimbursement for its child support program at a rate of 66%. *See* 42 U.S.C.A §655(a)(2)(C). Federal regulations delineate the severe penalties that may be imposed for noncompliance with the provisions of an approved State child support plan. *See* 45 C.F.R. § 305.66. One of the requirements for all State child support plans is that, with respect to children receiving public assistance, the adjudicator must be authorized to address problems of overdue child support by directing child support obligors to participate in "work activities," as defined in 42 U.S.C. §607(d), unless they are "incapacitated." *See* 42 U.S.C. §666(a)(15). That authorization, contained in Family Court Act §454(2)(h), was enacted in chapter 214 of the Laws of 1998 and is a component of New York State's Federally approved child support plan. Specifications regarding the required "work activities" are delineated in title nine-b of article five of the Social Services Law, including the exemption for individuals determined to be "incapacitated." *See* Soc. Serv. L. §§332, 332-b.

Family Court Act §437-a, as enacted in chapter 182 of the Laws of 2010, contains an exemption for child support obligors who are "in receipt of supplemental security income or social security disability payments," an exemption that may apply to individuals who would not necessarily be deemed "incapacitated" under Family Court Act §454(2)(h). Incapacitation requires an

individualized determination, as not all individuals receiving supplemental security income or social security disability benefits are automatically unable to participate in any work-related activities. Indeed, some employment training and job placement programs are specifically geared toward disabled individuals. Thus, the addition of the reference to "enforcement" of child support obligations in Family Court Act §437-a in chapter 592 of the Laws of 2011 raises the question of whether the exemption for obligors receiving supplemental security income or social security disability payments would apply to all orders for work-related activities under Family Court Act §454.

To eliminate any possible confusion, the Committee's proposal deletes the term "enforce" from Family Court Act §437-a, thus addressing work-related directives in enforcement or violation proceedings solely in Family Court Act §454(2). The proposal further simplifies subdivision two of section 454 of the Family Court Act by incorporating paragraph (i) into paragraph (h). The existing language of paragraph (h), which conforms to the requirements of New York's Federally approved child support plan, would be retained, thus ensuring New York State's full compliance with Federal law. A sentence would be added that specifically applies to only to cases involving children who are not applicants for, or in receipt of, public assistance and thus are not subject to the Federal work activity requirements. That sentence would, in essence, apply the provisions of Family Court Act §437-a to such cases, that is, it would authorize orders for work programs "provided such programs are available and provided the respondent is unemployed and not in receipt of supplemental security income or social security disability benefits."

Finally, although a support obligor who may be subject to a work program order may sometimes be the petitioner in the Family Court proceeding, e.g., a petitioner for a downward modification of a child support order, the proposal substitutes the term "respondent" in Social Services Law §111-h(20), since "respondent" is the term used elsewhere in that statute.

Proposal

AN ACT to amend the family court act and the social services law, in relation to orders for child support obligors to seek employment, and to repeal paragraph (i) of subdivision 2 of section 454 of the family court act relating thereto

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

Section 1. Section 437-a of the family court act, as amended by chapter 592 of the laws of 2011, is amended to read as follows:

§437-a. Referral to work programs. In any proceeding to establish[, decrease] or [enforce] modify an order of support, if the support obligor is unemployed, the court may require the support obligor to seek employment, or to participate in job training, employment counseling or other programs designed to lead to employment provided such programs are available. The court shall not

require the support obligor to seek employment or to participate in job training, employment counseling, or other programs designed to lead to employment under this section if the support obligor is in receipt of supplemental security income or social security disability benefits.

§2. Paragraph (i) of subdivision 2 of section 454 of the family court act is REPEALED.

§3. Paragraph (h) of subdivision 2 of section 454 of the family court act, as added by chapter 214 of the laws of 1998, is amended to read as follows:

(h) the court may require the respondent, if the persons for whom the respondent has failed to pay support are applicants for or recipients of public assistance, to participate in work activities as defined in title nine-B of article five of the social services law. Those respondents ordered to participate in work activities need not be applicants for or recipients of public assistance. <u>If the persons for whom the respondent has failed to pay support are not applicants for or recipients of public assistance, the court may require the respondent to seek employment or to participate in job training, employment counseling or other programs designed to lead to employment, provided such programs are available and provided the respondent is unemployed and not in receipt of supplemental security income or social security disability benefits.</u>

§4. Subdivision 20 of section 111-h of the social services law, as amended by chapter 592 of the laws of 2011, is amended to read as follows:

20. If the [support obligor] <u>respondent</u> is required to participate in work programs pursuant to section four hundred thirty-seven-a of the family court act, and the court enters an order of support on behalf of the persons in receipt of public assistance, the support collection unit shall not file a petition to increase the support obligation for twelve months from the date of entry of the order of support if the [support obligor's] <u>respondent's</u> income is derived from participation in such programs.

§5. This act shall take effect on the same date as chapter 592 of the laws of 2011.

7. Orders for recoupment of over-payments of child support in Family and Supreme Court proceedings
[F.C.A. §451; D.R.L. §240]

Neither the Family Court Act nor the Domestic Relations Law address an issue that is frequently presented in both Family and Supreme Court proceedings, that is, the question of whether a support obligor who has overpaid on a child support order may recoup all or part of those payments. New York's statutory framework is silent as to whether recoupment should be available at all and, if so, what court, if any, should entertain such applications, what the standard should be, whether recoupment should be credited toward future support or arrearages and over what period of time payments should be made or credited. Since the equities favor court intervention to provide redress to a party who has overpaid in particular cases in which the recipient of the payments has been unjustly enriched, the Family Court Advisory and Rules Committee is proposing a measure to fill this substantive and procedural void.

First, the Committee's proposal provides that the court that issued or modified the child support order for which an overpayment is alleged possesses continuing jurisdiction over an application for recoupment. This would make clear that such applications may not be made in a local small claims, civil, district, city, town or village court, but must be made in the court that issued or modified the child support order in question. In the case of an order issued by a Supreme Court without a reservation of exclusive jurisdiction, the Family Court would also be authorized to adjudicate a recoupment application. The proposal also precludes an application for recoupment of payments made to cover a period prior to the existence of a child support order, which had been the ground for denial of recoupment in the Appellate Division, Second Department, case of Foxx *v.* Foxx, 114 A.D.2d 605, 494 N.Y.S.2d 446 (3d Dept., 1985).

Second, the measure provides a standard for determining whether recoupment of all or part of an alleged overpayment would be appropriate, that is, "where the interests of justice require," as well as specification of the proof required. The applicant would need to provide proof of the overpayment, as well as proof "that the amount of the recoupment and the method and rate of its collection will not substantially impair the custodial parent's ability to meet the financial needs of the child or children." Finally, the court would be required to state its reasons on the record for any order granting or denying recoupment.

While some appellate courts have permitted recoupment of support overpayments in certain circumstances, recoupment has frequently been denied on the basis of a long-standing public policy against recoupment. *See, e.g.,* Mairs *v.* Mairs, 61 A.D.3d 1204 (3rd Dept., 2009); Taddonio *v.* Wasserman-Taddonio, 51 A.D.3d 935, 858 N.Y.S.2d 721 (2d Dept., 2008); Matter of Annette M.R. *v.* John W.R., 45 A.D.3d 1306, 845 N.Y.S.2d 616 (4th Dept., 2007); Colicci v. Ruhm, 20 A.D.3d 891, 798 N.Y.S.2d 280 (4th Dept., 2005); Niewadowski *v.* Dower, 286 A.D.2d 948, 731 N.Y.S.2d 420 (4th Dept., 2001); Baraby *v.* Baraby, 250 A.D.2d 201, 205, 681 N.Y.S.2d 826 (3d Dept., 1998). While none of these cases explain the rationale or roots of this public policy, it is safe to assume that, consistent with the underpinnings of the Family Court Act, the Domestic Relations Law and specifically the *Child Support Standards Act*, the public policy disfavoring recoupment must be rooted in a concern for the best interests of the children involved.

Assuming this is the case, the Committee's proposal is carefully tailored to incorporate this public policy while at the same time permitting the courts, where justice warrants, to provide a fair result to a support obligor in circumstances in which the child or children will not be harmed. The measure is not suggesting a balancing of interests but, instead, includes lack of hardship to the children as an element of proof that the applicant for recoupment must demonstrate in addition to the overpayment itself. The Court would be authorized to order partial recoupment in order to obviate any hardship to the children. Inclusion of the requirement for proof that the amount of the recoupment itself, as well as both the method and rate of its collection, will not create a financial hardship for the custodial parent in meeting the child's or children's financial needs is, in fact, consistent with case law in several other states that have required lack of hardship to the children as a prerequisite for recoupment.[5]

The circumstances that give rise to overpayments of child support are varied. Notably, where a mother obtained a child support order in New York after a Connecticut order of support had expired upon the child's eighteenth birthday, the Court of Appeals, in Spencer *v.* Spencer, 10 N.Y.3d 60, 853 N.Y.S.2d 274 (2008), reversed the New York order on the ground that Connecticut possessed exclusive, continuing jurisdiction under the *Uniform Interstate Family Support Act*. The Court remanded the matter, *inter alia*, for a determination regarding recoupment. Perhaps the most common situation where recoupment has been approved by courts has been where a court has ordered a downward modification of a child support order, but the Support Collection Unit of the county Department of Social Services has not immediately reduced the previously applicable automatic income deduction order. *See, e.g.,* Francis *v.* Francis, 156 A.D.2d 637, 548 N.Y.S.2d 816 (2d Dep't 1989). Recoupment has also been approved where an appellate court reversed a lower court order for child support on the ground that it involved a misapplication of, or faulty mathematical calculation under, the *Child Support Standards Act* . *See*, *e.g.*, People *ex rel*. Breitstein *f.k.a.*. Aaronson *v*. Aaronson, 3 A.D. 3d 588, 771 N.Y.S. 2d 159 (2d Dep't 2004). It has also been permitted where a parent prepaid child support for a period in which the child no longer lived with the recipient of the payments. *See*, e.g., Aulov *v.* Yukhananova, 31 Misc.3d 1226(A), 929 N.Y.S.2d 198, 2011 WL 1833263, 2011 N.Y. Slip Op. 50853(U) (Sup. Ct., Queens Co., 2011). Finally, recoupment may be justified where a support obligor, who is making payments pursuant to a child support order, or a support obligor's employer, who is automatically deducting child support payments from the support obligor's paycheck, is unaware that the child, who is the beneficiary of the order, has become emancipated through marriage.

For each of these situations, as well as others that may arise, the interests of justice may be shown to warrant recoupment of all or a portion of the overpayments, with the rate and mode of recoupment dictated by the particular facts of the case and needs, if any, of the child. The Committee's proposal would provide a needed clarification that courts issuing or modifying child

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[5] *See, e.g.,* Griess *v.* Griess, 9 Neb. App. 105, 608 N.W.2d 217 (2000); In re Marriage of DiFatta, 306 Ill. App. 3d 656, 239 Ill. Dec. 795, 714 N.E.2d 1092 (2d Dist. 1999); In re Marriage of Olsen, 229 Ill. App. 3d 107, 171 Ill. Dec. 39, 593 N.E.2d 859 (1st Dist. 1992); Zofcak *v.* Zofcak, 8 Conn. L. Rptr. 18, 1992 WL 360591 (Conn. Super. Ct. 1992); Pellar *v.* Pellar, 178 Mich. App. 29, 443 N.W.2d 427 (1989); Topper *v.* Topper, 553 A.2d 639 (Del. 1988). *See generally,* "Right to Credit on Child Support for Previous Overpayment to Custodial Parent for Minor Child While a Child is Not Living With Obligor Parent," 7 A.L.R.6th 411 (2005).

support orders have jurisdiction to vindicate those interests and would fill a long-standing procedural void in New York State's *Child Support Standards Act.*.

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to recoupment of overpayments of child support in family and supreme court

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 is amended by adding a new subdivision 3 to read as follows:

3. The court that issued a child support order or an order of modification under this act has continuing jurisdiction over motions seeking recoupment of overpayments of child support. Where an order was issued by the supreme court without a reservation of jurisdiction or was transferred or referred to the family court, the family court may exercise jurisdiction over an application for recoupment. Where the interests of justice require, the court may allow recoupment of all or part of the overpayment of a child support obligation upon proof of the overpayment and upon proof that the amount of the recoupment and the method and rate of its collection will not substantially impair the custodial parent's ability to meet the financial needs of the child or children. The court shall state its reasons on the record for any order issued under this subdivision.

§2. Section 240 of the domestic relations law is amended by adding a new subdivision 6 to read as follows:

6. The court that issued a child support order or an order of modification under this act has continuing jurisdiction over motions seeking recoupment of overpayments of child support. Where an order was issued by the supreme court without a reservation of jurisdiction or was transferred or referred to the family court, the family court may exercise jurisdiction over an application for recoupment. Where the interests of justice require, the court may allow recoupment of all or part of the overpayment of a child support obligation upon proof of the overpayment and upon proof that the amount of the recoupment and the method and rate of its collection will not substantially impair the custodial parent's ability to meet the financial needs of the child or children. The court shall state its reasons on the record for any order issued under this subdivision.

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

8. Permanency planning in juvenile delinquency and persons in need of supervision proceedings in Family Court [F.C.A. §§312.1, 320(2), 353.3, 355.5, 736, 741, 756, 756-a]

When the Legislature enacted chapter 3 of the Laws of 2005, the landmark child welfare permanency legislation, it deferred consideration of the significant constellation of issues relating to permanency planning and permanency hearings regarding juvenile delinquents and Persons in Need of Supervision (PINS). These issues, however, are critically important and should be addressed comprehensively. The permanency hearing provisions, including those regarding planning for return of the youth from out-of-home care, are vital for the successful resolution of these cases for the youth, their families and their communities, and are essential to New York State's compliance with the Federal *Adoption and Safe Families Act* [Public Law 105-89].

If the Family Court is to be able to exercise its critical monitoring functions and convene meaningful permanency hearings in juvenile delinquency and PINS proceedings, it must have the benefit of at least the same information that is required to be presented in child welfare proceedings. The Court must make determinations of specificity at least comparable to those in child welfare proceedings and the parties must have the benefit of continuity of legal representation.

To that end, the Family Court Advisory and Rules Committee has developed a proposal that incorporates essential elements of the child welfare permanency hearing article of the Family Court Act (Article 10-A) into the permanency hearing provisions of Articles 3 and 7 of the Act. It would provide greater specificity regarding the services that must be provided for youth and would expand the alternatives available to the Court both in dispositional and permanency hearings in juvenile delinquency and PINS cases. Briefly, the proposal contains the following provisions:

1. Notices to non-custodial parents: To ensure that all possible resources are engaged in the resolution of juvenile delinquency and PINS proceedings, the proposal would require that non-custodial parents, if any, be given notices of their children's cases in Family Court to enable them to appear. This supplements the existing requirement that a summons be issued for an accused juvenile's parent or other person legally responsible. The local probation department that generally interviews parties at the outset for adjustment purposes, as well as the presentment agency (prosecution), would be charged with the responsibility of asking the custodial parent for the necessary contact information for parents other than those already notified. In juvenile delinquency cases, the presentment agency must send the notice, along with a copy of the petition, to the non-custodial parent or parents at least five days before the appearance date. In PINS cases, where there is most often no presentment agency, the Family Court would be charged with sending the notice. Consistent with Family Court Act §§341.2(3) and 741(c), however, the absence of the parent who was sent the notice to appear in court would not be grounds to delay the proceedings.

As in child abuse, child neglect and PINS proceedings, so, too, in juvenile delinquency proceedings the child's non-custodial parent may be a critical participant in the dispositional process. Sometimes a non-custodial parent or his or her extended family may provide vitally-needed placement resources for a child, both temporarily during the pendency of the action and on a more extended basis at disposition. These family members may at the very least provide helpful participation that may positively influence the child's behavior. However, unlike the statutory

provisions applicable to child protective and PINS proceedings, the Family Court Act contains no mandate to even notify non-custodial parents of, let alone engage them in resolving, their children's juvenile delinquency proceedings. This proposal would fill that gap.

2. Continuity of counsel: The proposal provides necessary continuity in representation by attorneys for juveniles in both delinquency and PINS cases. Similar to the requirement in Family Court Act §1016 for the appointment of the attorney for the child in a child protective proceeding to continue during the life of a dispositional or post-dispositional order, Family Court Act §§320.2(2) and 741(a) would be amended to continue the appointment of the child's attorney in juvenile delinquency and PINS proceedings for the entire period of a dispositional order, an adjournment in contemplation of dismissal and any extensions of permanency hearings, violation hearings or other post-dispositional proceedings. As in child protective cases, the appointment would automatically continue unless the Family Court relieves the attorney or grants the attorney's application to be relieved, in which case the Court must appoint another attorney immediately. While the current practice of the attorney submitting a voucher for payment at the close of a proceeding would continue, the attorney would be able, as in child protective proceedings, to submit a separate application for compensation for post-dispositional services rendered.

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

3. Permanency planning: Where the dispositional order places the juvenile with a county department of social services or, in the case of juvenile delinquents, with the New York State Office of Children and Family Services, the dispositional order must contain or have annexed the same elements as child protective placement orders, including a description of the family visitation plan, the service plan if available (or if not yet available, then within 60 days of the disposition) and a directive that notice be given to the parents of any planning conferences. As in the child welfare permanency legislation, the proposal would require the Family Court to consider the services necessary to assist juveniles 14 and older, instead of 16 and older, to make the transition from foster care to independent living in juvenile delinquency and PINS cases. *See* Family Court Act §1089(d)(2)(vii)(G). Further, as in the permanency statute, for those juveniles who are neither returning home nor achieving permanence through adoption, the proposal would require that if the

permanency planning goal is "another planned permanent living arrangement," it must include "a significant connection to an adult willing to be a permanency resource for the child." *See* Family Court Act §1089(d)(2)(i)(E).

Unquestionably, these features of the permanency legislation, most specifically addressing the needs of adolescents in out-of-home care, are equally essential for the adolescents who comprise the juvenile delinquency and PINS caseloads of the Family Courts statewide. Planning for the juveniles' release to their families, the predominant permanency goal in juvenile delinquency and PINS cases, must begin early and, where their families will not be a resource, the identification of a suitable permanency resource is critically important. As recent reports regarding New York's placement system point out, youth exiting out-of-home care are especially vulnerable and have significant needs that must be met if they are to make a successful adjustment to the community.

7. Educational and vocational release planning in juvenile delinquency and PINS proceedings: Any finding that reasonable efforts, as required by both Federal and State law, have been made to further the permanency goals of juvenile delinquents and PINS, must include advance efforts to ensure their prompt enrollment in a school or vocational program upon release from out-of-home care. The proposal thus amends both the juvenile delinquency and PINS statutes for agencies in which youth are placed to notify the school districts in which the youth will be attending school upon release not less than 14 days in advance of their release, to promptly transfer records to the school districts and to try to coordinate release dates with school terms so as to minimize disruption to the youths' educational programs. The proposal further requires that local school districts enroll youth exiting placement in school within five business days of their release. Consistent with the school stability provisions of the Federal *Fostering Connections to Success and Adoption Improvement Act of 2008* [Public Law 110-351], school authorities would also be required to ensure that, where appropriate, students may remain in the schools they attended prior to their placement or remand into foster care.

It is most ironic that PINS, many, if not most, of whom had been adjudicated for truancy or other school difficulties, are the only category of juveniles before the Family Court who do not have specific statutory rights to school and vocational release planning. Therefore, the Committee's proposal conforms the PINS statute to the juvenile delinquency school and vocational release mandates of chapter 181 of the Laws of 2000 and to chapter 3 of the Laws of 2005, which added identical provisions for children in foster care. The proposal requires the agency with which a PINS is placed – the local Department of Social Services or an authorized child care agency operating under contract – to engage in constructive planning for the child's release, including arranging appropriate educational and/or vocational programs, and to report to the Family Court and to the parties on such efforts. Where an extension of placement is not being sought, the proposal requires a report regarding the child's release plan 30 days prior to the conclusion of the placement period. Where the agency is requesting an extension of placement and permanency hearing, the report must be annexed to the petition, which must be filed 60 days prior to the date on which the permanency hearing must be held.

The release plan mandated in the report must delineate the steps that the agency has taken or will be taking to ensure that the PINS would be enrolled in school promptly after release, that records would be promptly transferred and that special education services, if any, would continue until such

time as the new local education agency develops and implements a new Individual Education Plan, as necessary. As in juvenile delinquency and foster care cases, for a PINS not subject to the State compulsory education law who affirmatively elects not to continue in school, the agency must describe steps taken or planned to promptly ensure the juvenile's gainful employment or enrollment in a vocational program. In an extension of placement/ permanency hearing, this release plan would be reviewed by the Family Court in conjunction with its review of the permanency plan and the Court's order would include a determination of the adequacy of the release plan and would specify any necessary modifications. Recognizing that, of all children in out-of-home care, PINS children are among the most likely to have serious educational deficits and needs, these provisions would help to ameliorate the serious, pervasive deficiencies in agency referrals of youth to school and vocational programs upon release from foster care.[6]

The importance of increasing efforts to ensure that both juvenile delinquents and PINS are able to stay in, re-enroll in and succeed in school cannot be overstated. High school drop-outs are 3 ½ times as likely to be arrested as high school graduates and more than eight times more likely to be incarcerated in jails or prisons and even a 10% increase in graduation rates has been estimated to prevent approximately 180 murders and 9000 aggravated assaults in New York annually.[7]

8. Placement and permanency hearing orders: Both the Federal *Adoption and Safe Families Act* [Public Law 105-89] and the *Fostering Connections to Success and Adoption Improvement Act of 2008* [Public Law 110-351] significantly augment the responsibilities of the Family Court to monitor and shape the placements of youth in out-of-home care, including juvenile delinquents, since New York State receives Federal foster care reimbursement under Title IV-E of the *Social Security Act* for such youth when they are originally placed in or are "stepped down to" non-secure facilities housing 25 children or fewer or to foster homes. Thus, the Committee's proposal requires permanency hearings for juveniles placed with local Departments of Social Services and with the New York State Office of Children and Family Services for limited secure and non-secure facilities. Although New York State does not receive Federal Title IV-E foster care reimbursement for youth in limited secure facilities, these youth may well, during the course of placement, be transferred into IV-E- eligible non-secure facilities. Convening permanency hearings for such youth greatly facilitates the planning process and assures compliance with the Federally-required time-limits applicable once the youth are transferred. Such hearings are already generally the practice statewide, thus imposing no new burdens upon NYS OCFS, but should be made uniform through a statutory requirement. *See, e.g.*, Matter of Donovan Z., 6 Misc.3d 1023(A), 800 N.Y.S.2d 345, 2005 N.Y. Slip Op. 50160 (Fam. Ct., Monroe Co., 2005)(Unreported opinion).

Further, as in the child welfare permanency legislation, the proposal requires that permanency

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

[7] *See* Fight Crime, Invest in Kids, *Getting Juvenile Justice Right in New York: Proven Interventions Will Cut Crime and Save Money* (2007) at pages 4,6.

hearing orders in juvenile delinquency and PINS proceedings include: a description of the visiting plan between the juvenile and his or her parent or legally-responsible adult; a service plan designed to fulfill the permanency goal for the juvenile;[8] a direction that the parent or other person legally responsible be notified of, and be invited to be present at, any planning conferences convened by the placement agency with respect to the child; and a warning that if the juvenile remains in placement for 15 out of 22 months, the agency may be required to file a petition to terminate parental rights. A copy of the court order and service plan must be provided to the juvenile, his or her attorney and the juvenile's parent or other legally responsible individual. *Cf*., Family Court Act §§1089(d)(2)(vii)(A), 1089(e).

State and Federal law and regulations are unequivocal in their requirements that juvenile delinquency and PINS cases conform to the Federal *Adoption and Safe Families Act* ["*ASFA,"* Public Law 105-89]. The reauthorization of the Federal *Juvenile Justice and Delinquency Prevention Act* [Public Law 107-273] in 2002 made compliance with *ASFA* a requirement, not only for New York State to receive Federal foster care assistance pursuant to Title IV-E of the *Social Security Act* [42 U.S.C.], but also for eligibility for Federal juvenile justice funding from the Department of Justice. The enactment of amendments in 2000 to New York State legislation implementing the Federal *ASFA* underscored the Legislature's recognition that the reasonable efforts, permanency planning and permanency hearing requirements of *ASFA* are fully applicable to juvenile delinquency and PINS proceedings in Family Court and are critical aspects of the State's compliance with Federal foster care [*Social Security Act*, 42 U.S.C. Title IV-E] funding mandates. *See* L. 2000, ch. 145; Senate Memorandum in Support of S 7892-a.[9] That these amendments were compelled by Federal law is evident from the regulations promulgated on January 25, 2000 by the Children's Bureau of the United States Department of Health and Human Services. 45 *C.F.R.* Parts 1355-1357; 65 *Fed.Reg.* 4019-4093 (Jan. 25, 2000).

The Committee's proposal is vital to address the current conundrum faced by the Family Court: the Court is charged with the responsibility to conduct permanency hearings, monitor permanency planning and issue fact-specific permanency orders in juvenile delinquency and PINS proceedings, but it is not given the information or authority it requires to discharge that responsibility. If the Family Court and all parties are provided with specific service plans, if needed services are ordered, if representation by the juveniles' attorneys is continued without interruption and if the agencies' responsibilities to work with, and provide appropriate visitation to, the juveniles' parents and other legally responsible adults are clearly articulated, the likelihood of successful

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[8] If a service plan has not been prepared by the date of disposition, it must be disseminated to the Family Court, presentment agency, child's attorney and parent or person legally responsible for the child's care within 60 days of the issuance of the dispositional order.

[9] The 2000 amendments require case-specific, rather than categorical, exclusions of juvenile delinquency and PINS proceedings from the mandate to file termination of parental rights proceedings for juveniles who have been in care for 15 of the most recent 22 months. Particularized findings must be made at the earliest pre-trial detention hearings regarding whether reasonable efforts had been made to prevent detention or facilitate return home and whether detention is in the child's best interests. Significantly, the amendments clarify that permanency hearings must be held in juvenile delinquency proceedings within 30 days of a finding that reasonable efforts are not required or, if no such finding has been made, no later than 12 months after the child entered foster care and every 12 months thereafter. *Id.* McKinney's 2000 Session L. New York, Ch. 145.

permanency planning is significantly increased. This would benefit not only New York State in its efforts to demonstrate compliance with *ASFA*, but also the juveniles, their families and the communities to which the juveniles return.

In *Matter of Robin G.*, 20 Misc.3d 328 (Fam. Ct., Queens Co., 2008), for instance, at a combined permanency/extension of placement hearing, the Family Court made a finding of no reasonable efforts against NYS OCFS since neither it, nor the authorized agency having custody of the juvenile, made reasonable efforts to facilitate the juvenile's return to her mother's home; no services or counseling was provided to the mother, who was not involved in the child's transition planning, and no plan was in place to ensure that the child's mental health needs would be met upon her release. Concomitantly, *Matter of Donovan Z.*, 6 Misc.3d 1023(A) (Fam. Ct., Monroe Co., 2005)(Unreported opinion) provides a more positive example of a case where, at a combined permanency/extension of placement hearing, the Family Court was able to ascertain that both the juvenile's and his mother's needs to facilitate his ultimate release home were being met by OCFS.

The importance of these provisions is underscored as well in the nationally recognized guidelines approved by the National Council of Juvenile and Family Court Judges.[10] As one child welfare expert has written:[11]

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

Proposal

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

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

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

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

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 presentment agency shall notify any non-custodial parents of the respondent who had not been issued a summons in accordance with subdivision one of this section, provided that the addresses of any such parents have been provided. The probation department and presentment agency shall ask the custodial parent or person legally responsible for information regarding any other parent or parents of the respondent. The notice shall inform the parent or parents of the right to appear and participate in the proceeding and to seek temporary release or, upon disposition, direct placement of the respondent. The presentment agency shall send the notice to the non-custodial parent at least five days before the return date. The failure of a parent entitled to notice to appear shall not be cause for delay of the respondent's initial appearance, as defined by section 320.1 of this article.

§2. Subdivision 2 of section 320.2 of the family court act, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

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

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

4-a. Where the respondent is placed with the office of children and family services or the commissioner of social services pursuant to subdivision two, three or four of this section, the dispositional order or an attachment to the order incorporated by reference into the order shall include:

(a) a description of the plan to facilitate visitation between the respondent and his or her family;

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

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

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

§4. Paragraphs (a), (b) and (c) of subdivision 7 of section 353.3, as amended by chapter 181 of the laws of 2000, are amended to read as follows:

(a) Where the respondent is placed pursuant to subdivision two [or], three or four of this section and where the agency is not seeking an extension of the placement pursuant to section 355.3 of this part, such report shall be submitted not later than thirty days prior to the conclusion of the placement.

(b) Where the respondent is placed pursuant to subdivision two [or], three or four of this section and where the agency is seeking an extension of the placement pursuant to section 355.3 of this part and a permanency hearing pursuant to section 355.5 of this part, such report shall be submitted not later than sixty days prior to the date on which the permanency hearing must be held

and shall be annexed to the petition for a permanency hearing and extension of placement.

(c) Where the respondent is placed pursuant to subdivision two [or], three or four of this section, such report shall contain a plan for the release, or conditional release (pursuant to section five hundred ten-a of the executive law), of the respondent to the custody of his or her parent or other person legally responsible, to independent living or to another permanency alternative as provided in paragraph (d) of subdivision seven of section 355.5 of this part. For purposes of this paragraph, "placement agency" shall refer to the office of children and family services, the commissioner of social services or the authorized agency under contract with the office of children and family services or commissioner of social services with whom the respondent has been placed. The release or conditional release plan shall provide as follows:

(i) If the respondent is subject to article sixty-five of the education law or elects to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the respondent is placed has taken and will be taking in conjunction with the local education agency to [facilitate] ensure the immediate enrollment of the respondent in [a] an appropriate school or educational program leading to a high school diploma [following] within five days of release, or, if such release occurs during the summer recess, immediately upon the commencement of the next school term. The placement agency shall ascertain the school calendar from the school district and shall, to the extent possible, work with the school district so that the timing of respondent's release from the program and enrollment in school are minimally disruptive for the respondent and further his or her best interests. Not less than fourteen days prior to the respondent's release, the placement agency shall notify the school district where the respondent will be attending school and transfer all necessary records, including, but not limited to the respondent's course of study, credits earned and academic record.

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

(iii) If the respondent is not subject to article sixty-five of the education law and does not

elect to participate in an educational program leading to a high school diploma, such plan shall include, but not be limited to, the steps that the agency with which the respondent is placed has taken and will be taking to assist the respondent to become gainfully employed or enrolled in a vocational program following release.

§5. The opening paragraph of subdivision 2, the opening paragraph of subdivision 3, subdivision 5, subdivision 6 and paragraphs (b) and (d) of subdivision 7 of section 355.5 of the family court act, the opening paragraph of subdivision 2 and the opening paragraph of subdivision 3 as amended by chapter 145 of the laws of 2000, subdivision 5 and paragraph (b) of subdivision 7 as added by chapter 7 of the laws of 1999, subdivision 6 as amended by section 1 of part B of chapter 327 of the laws of 2007, and paragraph (d) of subdivision 7 as amended by chapter 181 of the laws of 2000, are amended and a new subdivision 10 is added to such section to read as follows:

Where a respondent is placed with a commissioner of social services or the office of children and family services pursuant to subdivision two, three or four of section 353.3 of this [article] part for a period of twelve or fewer months and resides in a foster home or in a non-secure or limited secure facility:

Where a respondent is placed with a commissioner of social services or the office of children and family services pursuant to subdivision two, three or four of section 353.3 of this [article] part for a period in excess of twelve months and resides in a foster home or in a non-secure or limited secure facility:

5. A petition for an initial or subsequent permanency hearing shall be filed by the office of children and family services or by the commissioner of social services with whom the respondent was placed. Such petition shall be filed no later than sixty days prior to the end of the month in which an initial or subsequent permanency hearing must be held, as directed in subdivision two of this section. The petition shall be accompanied by a permanency report that conforms to the requirements of subdivision (c) of section one thousand eighty-nine of this act.

6. The respondent and his or her attorney shall be shall be notified of the hearing and of the respondent's right to be heard and a copy of the permanency petition and accompanying report filed in accordance with subdivision five of this section shall be served on the respondent's attorney. The foster parent caring for the respondent or any pre-adoptive parent or relative providing care for the respondent shall be provided with notice of any permanency hearing held pursuant to this section by the office of children and family services or the commissioner of social services with whom the

respondent was placed. Such foster parent, pre-adoptive parent and relative shall have the right to be heard at any such hearing; provided, however, no such foster parent, pre-adoptive parent or relative shall be construed to be a party to the hearing solely on the basis of such notice and right to be heard. The failure of the foster parent, pre-adoptive parent, or relative caring for the [child] respondent to appear at a permanency hearing shall constitute a waiver of the right to be heard and such failure to appear shall not cause a delay of the permanency hearing nor shall such failure to appear be a ground for the invalidation of any order issued by the court pursuant to this section.

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

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

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

(a) a description of the plan to facilitate visitation between the respondent and his or her family;

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

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

Where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would further the respondent's needs and best interests and the need for protection of the community and would make it possible for the respondent to safely return home or to make the transition to independent living, the court may include in its order a direction for a local social services, mental health or probation official or an official of the office of children and family services or office of mental health, as applicable, to provide or arrange for the provision of services or assistance to the respondent and his or her family. Such order regarding a local social services official shall not include the provision of any service or assistance to the respondent and his or her family that is not authorized or required to be made available pursuant to the county child and family services plan then in effect. In any order issued pursuant to this section, the court may require the official to make periodic progress reports to the court on the implementation of such order. Violation of such order shall be subject to punishment pursuant to section seven hundred fifty-three of the judiciary law.

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

§6. Section 736 of the family court act is amended by adding a new subdivision (4) to read as follows:

(4) In any proceeding under this article, the court shall cause a copy of the petition and notice of the time and place to be heard to be served upon any non-custodial parent of the child, provided that the address of such parent is known to or is ascertainable by the court. Service shall be made by ordinary first class mail at such parent's last known residence. The failure of such parent to appear shall not be cause for delay of the proceedings.

§7. Subdivision (a) of section 741 of the family court act, as amended by chapter 41 of the laws of 2010, is amended and a new subdivision (d) is added to such section to read as follows:

(a) At the initial appearance of a respondent in a proceeding and at the commencement of any hearing under this article, the respondent and his or her parent or other person legally responsible for his or her care shall be advised of the respondent's right to remain silent and of the respondent's right

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

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

§8. 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 relative or suitable person with whom the respondent has been placed under this section shall submit a report to the court, the attorney for the respondent and the 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 the relative or suitable 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 part, such report shall be submitted not later than sixty days prior to the date on which the permanency

hearing must be held and shall be annexed to the petition.

(iv) The permanency hearing report submitted in accordance with paragraph (iii) of this subdivision shall conform to the requirements of subdivision (c) of section one thousand eighty-nine of this act and shall contain recommendations and such supporting data as is appropriate. The permanency hearing report, as well as the report submitted not later than thirty days prior to the conclusion of the placement shall include, but not be limited to, a plan for the release of the respondent to the custody of his or her parent or parents or other person or persons legally responsible for the respondent's care, or to another permanency alternative as provided in paragraph (iv) of subdivision (d) of section seven hundred fifty-six-a of this part. For purposes of this paragraph, "placement agency" shall refer to the commissioner of social services or an authorized agency under contract with the commissioner of social services with whom the respondent has been placed.. The release plan shall provide as follows:

(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 placement agency has taken and will be taking in conjunction with the local education agency to ensure the immediate enrollment of the respondent in an appropriate school or educational program leading to a high school diploma within five business days of release or, if such release occurs during the summer recess, immediately upon the commencement of the next school term. The placement agency shall ascertain the school calendar from the school district and shall, to the extent possible, work with the school district so that the timing of respondent's release from the program and enrollment in school are minimally disruptive for the respondent and further his or her best interests. Not less than fourteen days prior to the respondent's release, the placement agency shall notify the school district where the respondent will be attending school and transfer all necessary records, including, but not limited to the respondent's course of study, credits earned and academic record.

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

federal law.

(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 placement agency has taken and will be taking to assist the respondent to become gainfully employed or to be enrolled in a vocational program immediately upon release.

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

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

(i) a description of the visitation plan, including any plans for visits and/or contact with the respondent's siblings;

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

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

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

§10. Subdivision (a), subdivision (b) and the opening paragraph and paragraphs (ii), (iii) and (iv) of subdivision (d) of section 756-a of the family court act, subdivision (a) as amended by section 30 of chapter 309 of the laws of 1996, subdivision (b) and the opening paragraph and paragraphs (ii), (iii) and (iv) of subdivision (d) as amended by section 4 of part B of chapter 327 of the laws of 2007, are amended and a new paragraph (v) is added to such subdivision (d) to read as follows:

(a) In any case in which the [child] respondent has been placed pursuant to section seven hundred fifty-six, the [child] respondent, the person with whom the [child] respondent has been placed or the commissioner of social services may petition the court to extend such placement. Such petition shall be filed at least sixty days prior to the expiration of the period of placement, except for good cause shown, but in no event shall such petition be filed after the original expiration date. The petition shall be accompanied by a permanency report that conforms to the requirements of paragraph (iii) of subdivision (a) of section seven hundred fifty-six of this part.

(b) The court shall conduct a permanency hearing concerning the need for continuing the placement. The [child] respondent, the person with whom the [child] respondent has been placed and the commissioner of social services shall be notified of such hearing and shall have the right to be heard thereat. A copy of the petition and accompanying permanency report shall be served on the respondent's attorney.

At the conclusion of the permanency hearing, the court may, in its discretion, order an extension of the placement for not more than one year, which may include a period of post-release supervision and aftercare, or may direct that the respondent be placed on probation for not more than one year, pursuant to section seven hundred fifty-seven of this part, or may order that the petition for an extension of placement be dismissed. The court must consider and determine in its order:

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

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

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

appropriate in-state and out-of-state placements[.]; and

(v) with regard to the placement or extension of placement ordered by the court pursuant to section seven hundred fifty-six of this part, 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 such section, the adequacy of such plan and any modifications that should be made to such plan.

§11. Subdivisions (e) and (f) of section 756-a of the family court act are re-lettered subdivisions (f) and (g) and a new subdivision (e) is added 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, including any plans for visitation and/or contact with the respondent's siblings;

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

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

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

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

9. Services for youth in juvenile delinquency and persons in need of supervision proceedings in Family Court [F.C.A. §§352.2, 353.2, 355.3, 355.4, 754, 756, 756-a, 757; Ed. L. §112; Soc. Serv. L. §409-e; Exec. L. §243]

In both juvenile delinquency and Persons in Need of Supervision cases, youth in out-of-home care represent an ever-shrinking proportion of youth adjudicated in Family Courts in New York State, appropriately reflecting the increased trend toward utilization of effective evidence-based community alternatives. But for those youth who require placement – and there is a minority of youth in both categories who do – provision of adequate services, both in the facilities and in the youth's communities to aid in their reintegration upon release, is absolutely essential. Importantly, enhancement of the statutory provisions regarding services for youth would provide a crucial element of the comprehensive response needed to the ameliorate the disturbing picture of the New York State juvenile justice system conveyed in the reports of the Governor's Task Force on Transforming Juvenile Justice, the Citizen's Committee for Children, *Child Welfare Watch* and the United States Department of Justice.[12]

The Family Court Advisory and Rules Committee is, therefore, submitting a proposal to ensure necessary services and to increase the alternatives available to the Family Courts both at the dispositional stage and later when faced with applications for extensions of placement in juvenile delinquency and PINS proceedings. If the Family Court is to be able to meet its responsibilities to order the "least restrictive available alternative" that fulfills the needs and best interests of the juveniles and, in juvenile delinquency proceedings, that strikes an appropriate balance of these factors with the need for protection of the community, the Court must be able to order needed services and have a wide-range of dispositional and post-dispositional options available. Without these services and supports, New York State's investments in placement are lost. The proposal includes, *inter alia*:

• delineation of the responsibility for the Family Court not only to consider, but also to craft, a case-specific order, that meets the needs and best interests of the juveniles and, in juvenile delinquency cases, that balances these factors with the need for protection of the community;

• authorization for the Family Court to be able to order specific services that are necessary to facilitate the juveniles' successful return home;

• discretion for the Family Court to order intensive supervision, which may include participation in a community-based rehabilitative program, in conjunction with probation as a disposition for adjudicated juvenile delinquents and PINS who would otherwise be placed and, in juvenile delinquency cases, to include electronic monitoring as a condition of the order;

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[12] *See* Governor's Task Force on Transforming Juvenile Justice, *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State* (Dec., 2009); Citizens' Committee for Children of New York, *Inside Out: Youth's Experiences Inside New York State's Placement System* (Dec., 2009); *A Need for Correction: Reforming New York's Juvenile Justice System*, 18 *Child Welfare Watch* (Fall, 2009); U.S. Dept. of Justice, "Investigation of Lansing Residential Center, Lou Gossett, Jr. Residential Center, Tryon Residential Center and Tryon Girls Center" (Findings Letter, dated Aug. 14, 2009).

• authorization for the Family Court to order that, in lieu of extending placement in juvenile delinquency and PINS cases, juveniles may be placed on probation for up to one year or that, in juvenile delinquency cases, juveniles may be conditionally discharged;

• a requirement that "[r]outine, emergency or other mental health treatment, including administration of psychotropic medication, shall be provided by licensed mental health professionals as authorized by law;" and

• a requirement that the New York State Education Department develop and implement standards to promote school stability for youth in out-of-home care, to require that facility educational programs meet State standards and generate credits for youth that will be recognized by local school districts and to require local school districts to promptly enroll youth in school upon their release.

The critical elements of the proposal can be summarized as follows:

Responsibility of the Family Court at disposition: The proposal requires the Family Court not only to consider, but also to craft, a case-specific order that meets the needs and best interests of the juveniles and, in juvenile delinquency cases, that balances these factors with the need for protection of the community. Analogous to section 1015-a of the Family Court Act, if the Court determines that there are particular services that would facilitate the juveniles' successful return home, the Court would be empowered, as part of a disposition, extension of placement or permanency order, to direct that the appropriate agency arrange for or furnish them and provide the Court and parties with progress reports. As in Family Court Act §1015-a, the scope of these orders with respect to social services officials would be limited by the county child and family services plan then in effect. The order must further provide that youth under 21, who do not yet have high school diplomas, must be provided with educational services that comport with the Education Law and regulations so that credits achieved would be transferable and, further, that special education services must be provided if required by the youth's Individualized Education Plan. The juvenile, his or her attorney and his or her parent or guardian must be given a copy of the order. Clearly, as recent reports have demonstrated, if juveniles do not receive these supports, the community, not just the juveniles, will suffer.[13]

Expansion of alternatives to placement: Foremost among the recommendations in the recent reports on New York's juvenile justice system is the need to reduce the often ineffective and costly placements in favor of increased development and utilization of community-based alternatives.[14] Consistent with these recommendations, the Committee's proposal would authorize the Family Court to direct that an adjudicated juvenile delinquent or person in need of supervision, who would otherwise be placed, be required to participate in an intensive supervision program for all or part of the period of probation to the extent available in the county. Such a program may require participation in a community-based rehabilitative program, including, among others, the evidence-

[13] *Ibid*.

[14] *See* note 6, *supra*.

based programs, such as functional family therapy and multi-systemic therapy, that have proven successful in many parts of the State. Explicit inclusion of intensive supervision, including community-based programs, effectuates the mandate for both PINS and juvenile delinquency cases that the Family Court direct utilization of the "least restrictive available alternative" and that reasonable efforts be made to prevent placements. *See* Family Court Act §§352.2(2); 754(2)(a).

Further, in an effort to minimize unnecessary extensions of placement in both juvenile delinquency and PINS cases, the proposal would authorize the Family Court to order that juveniles may be placed on probation for up to one year or that, in juvenile delinquency cases, juveniles may be conditionally discharged in lieu of extending or continuing placement. These options may be useful where a local probation department, often in conjunction with a community-based agency, is able to provide aftercare or reentry services for a juvenile not available through the placement agency. No fiscal mandates are imposed by the provision. Local probation departments that do not have or do not elect to provide such services would not be required to do so. Nor would it relieve placement agencies from their responsibilities to engage the youth and his or her family in release planning early in the placement.

Intensive supervision, especially coupled with evidence-based community programs, is a critically-needed dispositional alternative. Enhanced State reimbursement has been available for several years for intensive probation supervision for adults, but far smaller amounts have been afforded to juvenile programs. That use of intensive probation and community programs can be an effective means of addressing juvenile justice cases, while at the same time saving considerable sums of money, has been clearly demonstrated in programs such as Esperanza, Enhanced Supervision and the Juvenile Justice Initiative in New York City, as well as a variety of programs in Erie County.[15] Nationally, such programs are recognized as providing cost-effective, safe alternatives to residential placement.[16] Evidenced-based programs, such as functional family therapy and multi-systemic therapy, which are increasingly in use throughout New York State, have been shown to be far more effective than costly placements in advancing constructive youth development and community safety[17] The alternative – placement in facilities operated by the New York State Office of Children and Family Services or contract agencies – has become increasingly expensive, averaging over $200,000 per juvenile per year, as compared to $3743 per child for Enhanced Supervision, $13,000

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[15] *See* Governor's Task Force on Transforming Juvenile Justice, *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State* (Dec., 2009) at 27; K. Hurley, "Homes for Teens, Not Lock-ups: New York City Experiments with Keeping Lawbreakers in the Community," in *A Need for Correction: Reforming New York's Juvenile Justice System*, 18 *Child Welfare Watch* 14, 18, 21 (Fall, 2009); "Alternative to Jail Programs for Juveniles Reduce City Costs," *Inside the Budget*, #148 (NYC Independent Budget Office; July 11, 2006).

[16] *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.

[17] *See, e.g.,* P. Greenwood, *Changing Lives: Crime Prevention as Crime Control Policy* (U.Chi. Press, 2006); *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (National Council of Juvenile and Family Court Judges, 2005).

for Esperanza and $17,000 for the Juvenile Justice Initiative.[18] The enormous investment in out-of-home placement has not paid off; a study of a large sample of youth released from NYS OCFS facilities from 1991 to 1995 revealed that 89% of the boys and 81% of the girls had been rearrested by the time they reached the age of 28, 85% of the boys and 69% of the girls had been convicted and 52% of the boys and 12% of the girls had been incarcerated by that age.[19] Community-based alternatives have demonstrated far lower recidivism.[20]

With respect to PINS, the need for this proposal is underscored by the conclusions reached by the Vera Institute of Justice in its two studies that were commissioned by the New York State Office of Children and Family Services in 2001 and 2004.[21] The earlier 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 –and the follow-up study highlighted the efficacy of the use of creative alternatives to detention and placement for PINS.

Significantly, not only does intensive 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 Office of Probation and Correctional Alternatives within the New York State Division of Criminal Justice Services 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 reimbursement 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].[22] 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 – *i.e.,* that the facilities are not secure detention centers or forestry camps or training schools housing over 25 juveniles. *See* 42 U.S.C. §672(c) [Social Security Act, Title IV-E].

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[18] *See* note 11, *supra*.

[19] *See* Governor's Task Force on Transforming Juvenile Justice, *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State* (Dec., 2009) at page 85, n. 5.

[20] *See, e.g.,* Fight Crime, Invest in Kids, *Getting Juvenile Justice Right in New York: Proven Interventions Will Cut Crime and Save Money (2007).*

[21] *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) at pages 34, 38; *Changing the Status Quo for Status Offenders: New York State's Efforts to Support Troubled Teens* (Vera Inst., Dec., 2004).

[22] 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]. 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.

With respect to juvenile delinquents, as is now authorized for pretrial detention [L. 2008, ch. 57], so, too, the Committee's proposal authorizes, but does not require, electronic monitoring as a dispositional condition of an intensive probation regimen. This would be an adjunct to, but not a replacement for, the in-person contacts so vital to the success of probation, particularly as applied to juveniles. In light of the requirement in section 303.1(a) of the Family Court Act that Criminal Procedure Law provisions be "specifically prescribed" in the Family Court 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* L.1996, ch. 653. Enactment of an authorization for electronic monitoring in New York is long overdue. Significantly, the New York State Office of Children and Family Services uses it in its aftercare supervision.[23] Several other states utilize this option as a vital component of a dispositional plan in juvenile delinquency cases[24] and the Appellate Division, Third Department has endorsed its use as a reasonable condition of probation in a PINS proceeding. *See* Matter of Kristian CC., 24 A.D.3d 930 (3d Dept., 2005), *lve. app. denied*, 6 N.Y.3d 710 (2006).

To ensure quality programs, the proposal requires the New York State Office of Probation and Correctional Alternatives to promulgate regulations permitting and guiding the operation by local probation departments of both electronic monitoring and intensive supervision programs, addressing such issues as: maximum probation officer caseloads; special training requirements for intensive supervision officers; nature and frequency of the contacts with the juveniles, schools and other agencies; and the level and type of supervision, treatment and other program components. Further, in order to allow adequate time for programs to be developed, the dispositional alternatives would not take effect until the following fiscal year.

Mental health services for juveniles in out-of-home care: The proposal would amend Family Court Act §§354 and 756 to require that "[r]outine, emergency or other mental health treatment, including administration of psychotropic medication, shall be provided by licensed mental health professionals as authorized by law." The recent investigation by the United States Department of Justice, as well as the Governor's Task Force and *Child Welfare Watch* reports, underscore the need for this provision. The Governor's Task Force Report noted that 48% of delinquent youth screened by the New York State Office of Children and Family Services upon admission are assessed to have mental health needs and estimates from national experts indicate that as many as two-thirds of juveniles in placement facilities nationwide have significant mental health needs.[25] As the Department of Justice findings letter indicated, all too often, professional diagnoses and treatments

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[23] *See* NYS OCFS, *Electronic Monitoring Program* (June, 2002)[www.ocfs.state.ny.us, accessed Jan. 7, 2010].

[24] *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).

[25] *See* Governor's Task Force on Transforming Juvenile Justice, *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State* (Dec., 2009) at 59, 85 n. 10 [citing S. Moore, "Mentally Ill Offenders Strain Juvenile Justice System," *NY Times*, Aug. 9, 2009.

are not provided and psychotropic medication is not professionally monitored.[26] The *Child Welfare Watch* report specifically recommended deployment of psychiatrists and psychiatric nurses to youth facilities.[27]

Educational services and release planning: To realize the goals of the release planning and educational services provisions for both PINS and juvenile delinquents and consistent with the recommendation of the Governor's Task Force,[28] the proposal amends section 112 of the Education Law to require the New York State Department of Education to establish and enforce standards to require educational programs in placement facilities to provide credits to juveniles that are then transferred to schools upon their release and that all school districts accept and recognize such credits.

Proposal

AN ACT to amend the family court act, the education law and the executive law, in relation to dispositional options and services for juvenile delinquents and persons in need of supervision

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

Section 1. Paragraphs (a) and (b) of subdivision 2 of section 352.2 of the family court act, paragraph (a) as amended by chapter 880 of the laws of 1985 and paragraph (b) as amended by chapter 145 of the laws of 2000, are amended to read as follows:

(a) In determining an appropriate order, the court shall consider and direct a disposition that specifically meets the needs and best interests of the respondent as well as the need for protection of the community. If the respondent has committed a designated felony act, the court shall determine the appropriate disposition in accord with section 353.5. In all other cases, the court shall order the least restrictive available alternative enumerated in subdivision one which is consistent with the needs and best interests of the respondent and the need for protection of the community. Where appropriate, the court shall include in its order a direction for a local social services, mental health,

[26] U.S. Dept. of Justice, "Investigation of Lansing Residential Center, Lou Gossett, Jr. Residential Center, Tryon Residential Center and Tryon Girls Center" (Findings Letter, dated Aug. 14, 2009), at pages 6.15 - 6.26.

[27] *A Need for Correction: Reforming New York's Juvenile Justice System*, 18 *Child Welfare Watch* (Fall, 2009), at p. 3. *See also,* Citizens' Committee for Children of New York, *Inside Out: Youth's Experiences Inside New York State's Placement System* (Dec., 2009) at p. 5.

[28] Governor's Task Force on Transforming Juvenile Justice, *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State* (Dec., 2009) at pages 62, 77.

developmental disabilities or probation official or an official of the office of children and family services, office of mental health or office of persons with developmental disabilities, as applicable, to provide or arrange for the provision of services or assistance to the respondent and his or her family to further the goals of this section. Such order regarding a local social services official shall not include the provision of any service or assistance to the respondent and his or her family that is not authorized or required to be made available pursuant to the county child and family services plan then in effect. In any order issued pursuant to this section, the court may require the official to make periodic progress reports to the court on the implementation of such order. Violation of such order shall be subject to punishment pursuant to section seven hundred fifty-three of the judiciary law.

(b) In an order of disposition entered pursuant to section 353.3 or 353.4 of this chapter, or where the court has determined pursuant to section 353.5 of this chapter that restrictive placement is not required, which order places the respondent with the commissioner of social services or with the office of children and family services for placement with an authorized agency or class of authorized agencies or in such facilities designated by the office of children and family services as are eligible for federal reimbursement pursuant to title IV-E of the social security act, the court in its order shall determine (i) that continuation in the respondent's home would be contrary to the best interests of the respondent; or in the case of a respondent for whom the court has determined that continuation in his or her home would not be contrary to the best interests of the respondent, that continuation in the respondent's home would be contrary to the need for protection of the community; (ii) that where appropriate, and where consistent with the need for protection of the community, reasonable efforts were made prior to the date of the dispositional hearing to prevent or eliminate the need for removal of the respondent from his or her home, or if the [child] respondent was removed from his or her home prior to the dispositional hearing, where appropriate and where consistent with the need for safety of the community, whether reasonable efforts were made to make it possible for the [child] respondent to safely return home. If the court determines that reasonable efforts to prevent or eliminate the need for removal of the [child] respondent from the home were not made but that the lack of such efforts was appropriate under the circumstances, or consistent with the need for protection of the community, or both, the court order shall include such a finding; and (iii) in the case of a [child] respondent who has attained the age of [sixteen] fourteen, the services needed, if any, to assist the [child] respondent to make the transition from foster care to independent living. Where the court determines that reasonable efforts in the form of services or assistance to the

respondent and his or her family would make it possible for the respondent to safely return home or to make the transition to independent living, the court may include in its order a direction for such services or assistance in accordance with paragraph (a) of this subdivision. Any order of placement pursuant to section 353.3 of this article shall provide that any respondent under twenty-one years of age, who has not received a high school diploma, be accorded educational services, including special educational services, if applicable, in accordance with the education law and regulations promulgated by the commissioner of education in order that any credits accrued shall be transferable to any school to which the respondent is transferred following the placement.

§2. Paragraphs (e) and (f) of subdivision 3 of section 353.2 of the family court act are re-lettered paragraphs (f) and (g) and a new paragraph (e) is added 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 community-based rehabilitative program and/or 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 920 of the laws of 1982, is amended to read as follows:

6. The maximum period of probation shall not exceed two years, which may include intensive supervision in cooperation with a community-based rehabilitative program, 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. Subdivisions 2 and 4 of section 355.3 of the family court act, subdivision 2 as added by chapter 920 of the laws of 1982 and subdivision 4 as amended by chapter 454 of the laws of 1995, are amended to read as follows:

2. The court shall conduct a hearing concerning the need for continuing the placement. The

respondent, the presentment agency and the agency with [whom] which the respondent has been placed shall be notified of such hearing and shall have the opportunity to be heard [thereat]. If the petition is filed within sixty days prior to the expiration of the period of placement, the court shall first determine at such hearing whether good cause has been shown. If good cause is not shown, the court shall dismiss the petition.

4. At the conclusion of the hearing, the court may, in its discretion, order an extension of the placement for not more than one year, which may include a period of post-release supervision and aftercare, or may direct that the respondent be placed on probation for not more than one year, pursuant to section 353.2 of this part, or may direct that that the respondent be conditionally discharged for not more than one year, pursuant to section 353.1 of this part, or may order that the petition for an extension of placement be dismissed. The court must consider and determine in its order:

(i) that where appropriate, and where consistent with the need for the protection of the community, reasonable efforts were made to make it possible for the respondent to safely return to his or her home;

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

(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.

Where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would further the respondent's needs and best interests and the need for protection of the community and would make it possible for the respondent to safely return home or to make the transition to independent living, the court may include in its order a direction for such services or assistance in accordance with paragraph (a) of subdivision two of section 352.2 of this part. Such order regarding a local social services official shall not include the provision of any service or assistance to the respondent and his or her family that is not authorized or required to be made available pursuant to the county child and family services plan then in effect. The order shall provide that any respondent under twenty-one years of age, who has not received a high school diploma, be accorded educational services, including special educational services, if applicable, in accordance with the education law and regulations promulgated by the commissioner of education in order that any credits accrued shall be transferable to any school to which the respondent is

transferred following the placement. Where the hearing on the extension of placement has been held in conjunction with a permanency hearing, pursuant to subdivision two of section 355.5 of this part, the court order shall include the requirements of subdivision seven of such section.

§5. Subdivision 3 of section 355.4 of the family court act is amended to read as follows:

3. Subject to regulations of the department of health, routine medical, dental and mental health services and treatment is defined for the purposes of this section to mean any routine diagnosis or treatment, including without limitation the administration of medications or nutrition, the extraction of bodily fluids for analysis, and dental care performed with a local anesthetic. Routine mental health treatment shall not include [psychiatric] administration of psychotropic medication unless it is part of an ongoing mental health plan or unless it is otherwise authorized by law. Routine, emergency or other mental health treatment, including administration of psychotropic medication, shall be provided by licensed mental health professionals as authorized by law.

§6. 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) In determining an appropriate order, the court shall consider and direct a disposition that specifically meets the needs and best interests of the respondent. The order shall state the court's reasons for the particular disposition. If the court places the [child] respondent 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] respondent's home would be contrary to the respondent's 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] respondent from his or her home and, if the [child] respondent was removed from his or her home prior to the date of such hearing, that such removal was in the [child's] respondent's best interest and, where appropriate, reasonable efforts were made to make it possible for the [child] respondent to return safely home. If the court determines that reasonable efforts to prevent or eliminate the need for removal of the [child] respondent 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] respondent who has attained the age of [sixteen] fourteen, the services needed, if any, to assist the [child] respondent to make the transition from foster care to independent living. Where appropriate, including, but not limited to, where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would

make it possible for the respondent to safely return home or to make the transition to independent living, the court shall include in its order a direction for a local social services, mental health, developmental disabilities or probation official or an official of the office of mental health or office of persons with developmental disabilities, as applicable, to provide or arrange for the provision of services or assistance to the respondent and his or her family to further the goals of this section. Such order regarding a local social services official shall not include the provision of any service or assistance to the respondent and his or her family that is not authorized or required to be made available pursuant to the county child and family services program plan then in effect. In any order issued pursuant to this section, the court may require the official to make periodic progress reports to the court on the implementation of such order. Violation of such order shall be subject to punishment pursuant to section seven hundred fifty-three of the judiciary law. 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.

§7. Subdivision (a) of section 756 of the family court act is amended by adding a new paragraph (iii) to read as follows:

(iii) The order shall provide that any respondent under the age of twenty-one be accorded educational services, including special educational services, if applicable, in accordance with the education law and regulations promulgated by the commissioner of education in order that any credits accrued shall be transferable to any school to which the respondent is transferred following the placement. The order shall further provide that any routine, emergency or other mental health treatment, including administration of psychotropic medication, if any, shall be provided by licensed mental health professionals as authorized by law.

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

(d-2)(i) The order shall provide that any respondent under the age of twenty-one years be accorded educational services, including special educational services, if applicable, in accordance with the education law and regulations promulgated by the commissioner of education in order that any credits accrued shall be transferable to any school to which the respondent is transferred following the placement. The order shall further provide that any routine, emergency or other mental health treatment, including administration of psychotropic medication, if any, shall be provided by licensed mental health professionals as authorized by law.

(ii) Where appropriate, including, but not limited to, where the court determines that reasonable efforts in the form of services or assistance to the respondent and his or her family would make it possible for the respondent to safely return home or to make the transition to independent living, the court shall include in its order a direction for a local social services, mental health, developmental disabilities or probation official or an official of the office of mental health or office of persons with developmental disabilities, as applicable, to provide or arrange for the provision of services or assistance to the respondent and his or her family to further the goals of this section. Such order regarding a local social services official shall not include the provision of any service or assistance to the respondent and his or her family that is not authorized or required to be made available pursuant to the county child and family services plan then in effect. In any order issued pursuant to this section, the court may require the official to make periodic progress reports to the court on the implementation of such order. Violation of such order shall be subject to punishment pursuant to section seven hundred fifty-three of the judiciary law.

§9. Subdivision (b) of section 757 of the family court act, as amended by chapter 920 of the laws of 1982, is amended and a new subdivision (e) is added to such section to read as follows:

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

(e) If the respondent has been found to be a person in need of supervision, and if the court further finds that, absent intensive supervision, the respondent would be placed pursuant to section seven hundred fifty-six of this part, the court may direct the respondent to cooperate with a program of intensive supervision, which may include compliance with a community-based rehabilitative program, during all or part of the term of probation. The local probation department may provide intensive 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.

§10. Subdivisions 1 and 2 of section 112 of the education law, as amended by section 62 of part A of chapter 3 of the laws of 2005, are amended to read as follows:

1. The department shall establish and enforce standards of instruction, personnel

qualifications and other requirements for education services or programs, as determined by rules of the regents and regulations of the commissioner, with respect to the individual requirements of children who are in full-time residential care in facilities or homes operated or supervised by any state department or agency or political subdivision and shall require that credits accrued by children in programs that conform to such standards shall be transferable to any school to which the child is transferred following the residential care. The regulations shall direct the school district to cooperate, to the extent possible, with the agency with which the child is placed to coordinate the timing of the child's release from the program with enrollment in school so as to be minimally disruptive for the child and further his or her best interests. 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 within no more than five business days of children who are released or conditionally released from residential facilities operated by or under contract with the office of children and family services, the department of mental hygiene and local departments of social services and in implementing plans for release or conditional release submitted to the family court pursuant to paragraph (c) of subdivision seven of section 353.3 and paragraphs (iii) and (iv) of subdivision (a) of section seven hundred fifty-six of the family court act and the educational components of permanency hearing reports submitted pursuant to section one thousand eighty-nine of the family court act. Such regulations regarding the educational components of permanency hearing reports submitted pursuant to section one thousand eighty-nine of the family court act shall be developed in conjunction with the office of children and family services. Such regulations shall facilitate the retention of children placed or remanded into foster care in their original schools and, if that is not feasible or determined to be in the child's best interests, require the enrollment of the children in school and transfer of necessary records within no more than five business days of receipt by the original school of notice of the child's placement into foster care. Nothing herein contained shall be deemed to apply to responsibility for the provision or payment of care, maintenance or other services subject to the provisions of the executive law, mental hygiene law, social services law or any other law.

2. The commissioner shall prepare a report and submit it to the governor, the speaker of the assembly and the temporary president of the senate by December thirty-first, nineteen hundred

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

§11. The opening paragraph of subdivision 1 of section 409-e of the social services law, as amended by section 60 of part A of chapter 3 of the laws of 2005, is amended to read as follows:

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

such uniform procedures and criteria as the office of children and family services shall by regulation prescribe. Such assessment shall include the following:

§12. Subdivision 1 of section 243 of the executive law, as amended by part A of chapter 56 of the laws of 2010, is amended to read as follows:

1. The office 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. The office 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, the office shall recommend to the commissioner 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 supervision for juveniles directed to receive such services pursuant to paragraph (e) of subdivision three of section 353.2 or subdivision (e) of section seven hundred fifty-seven of the family court act, which may require participation by the juveniles in community-based rehabilitative programs. Such rules 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 juveniles who are the subjects of juvenile delinquency petitions and 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. When duly adopted by the commissioner, 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. The office shall keep informed as to the work of all probation officers and shall from time to time inquire into and report upon their conduct and efficiency. The office may investigate the work of any probation bureau or probation officer and shall have access to all records and probation offices. The office may issue subpoenas to compel the attendance of witnesses or the production of books and papers. The office may administer oaths and examine persons under oath. The office may recommend to the appropriate authorities the removal of any probation officer. The office 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 the office may determine provided expenditures for such purpose are within amounts appropriated therefor.

§13. This act shall take effect on the first day of April after it shall have become a law; provided, however, that any regulations necessary for the implementation of this act shall be promulgated on or before such effective date.

10. Referrals for diversion services, warrants and orders of protection in persons in need of supervision proceedings [F.C.A. §§735, 742]

The landmark reform of the Persons in Need of Supervision (PINS) statute, enacted as part of the 2005 New York State budget, added statewide uniformity to the provisions regarding diversion of cases from the Family Court and furthered the salutary legislative goals of reducing unnecessary PINS prosecutions and placements and of ensuring that families in crisis would receive appropriate services. *See* L. 2005, c. 57, Part E. However, the statute is overly restrictive by permitting the Family Court to refer youth and families for diversion services only upon the youth's initial appearance, although diversion may also be effective at a later point and, indeed, the appropriateness of diversion services may only become clear at a later point. Further, the statute eliminates the ability of parents to obtain necessary emergency relief in the infrequent, but alarming, cases in which their children pose an imminent risk to themselves, their parents or their families. The Family Court Advisory and Rules Committee, therefore, is proposing a measure that would permit diversion referrals at any time. It would further carve out two narrowly-defined exceptions to the pre-petition diversion requirements, thus restoring essential emergency remedies that existed in the PINS statute prior to the 2005 reform.

First, the proposal would amend Family Court Act §742 to permit the Court to order the designated diversion agency to provide diversion services at any time during the pendency of a PINS proceeding, not simply upon the accused juvenile's first appearance. In some cases, the youth and family may become amenable to diversion services at a later point; in others, diversion services may not have been appropriate or available at the outset, but may subsequently be identified as needed and as appropriate. Family mediation and respite care are prominent examples of diversion services that should be afforded at any point that they may be appropriate.

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

Third, the proposal would permit a potential PINS petitioner to file a PINS petition in order

to request a temporary order of protection in the rare, but serious, circumstance in which a child poses an imminent risk to the petitioner and/or a member of his or her household. Again, this would provide emergency relief in cases in which the need for protection is immediate, *i.e.*, cases in which the requirement for the diversion agency to convene a conference with the child and potential petitioner would impede efforts to prevent injury. Once the emergency has abated and the child and petitioner are before the Court, the Court would then refer the parties to the diversion agency, pursuant to Family Court Act §742(b), unless the Court determines that the child continues to pose an imminent risk to the petitioner or a household member or that it would be contrary to the child's best interests. Again, if diversion efforts are successful, the designated diversion agency would so notify the Court, which would then dismiss the petition. Affording the petitioner the remedy of obtaining an order of protection is absolutely essential not only to prevent harm, but also to stem an increasingly disturbing trend that has become evident in Family Courts statewide. In the absence of a means of obtaining an immediate order of protection in cases of child-against-parent violence or threats of violence, all too often parents file family offense petitions, pursuant to Article 8 of the Family Court Act, as a means of evading the diversion requirements of the PINS statute. Article 8, however, affords none of the specialized services or due process protections guaranteed to juveniles under the PINS law. If meaningful relief were available under the PINS statute, the salutary purposes of the PINS law would be preserved while necessary protection would be provided.

Enactment of this proposal would strengthen the PINS statute by restoring much-needed remedies for emergency situations that existed prior to the 2005 enactment At the same time, it would encourage diversion by permitting the Family Courts to make referrals at any time and, in cases where petitions had been filed without prior diversion attempts, it would establish a rebuttable presumption in favor of post-petition referral for diversion services. By filling these gaps in the available relief with the narrowly-constructed exceptions contained in the Committee's proposal, the Legislature would ensure that the PINS statute would provide broader avenues of relief to resolve family problems.

Proposal

AN ACT to amend the family court act, in relation to warrants and orders of protection in persons in need of supervision cases in family court

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

Section 1. Paragraph (ii) of subdivision (g) and subdivision (h) of section 735 of the family court act, as added by section 7 of part E of chapter 57 of the laws of 2005, are amended to read as follows:

(ii) [The] Except as provided in paragraph (iii) of this subdivision, the clerk of the court shall accept a petition for filing only if it has attached thereto the following notices:

(A) if the potential petitioner is the parent or other person legally responsible for the youth, a

notice from the designated lead agency indicating that there is no bar to the filing of the petition as the potential petitioner consented to and actively participated in diversion services; and

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

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

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

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

(h) No statement made to the designated lead agency or to any agency or organization to which the potential respondent has been referred, prior to the filing of the petition, or if the petition has been filed, prior to the time the respondent has been notified that attempts at diversion will not be made or have been terminated, or prior to the commencement of a fact-finding hearing if attempts at diversion have not terminated previously, may be admitted into evidence at a fact-finding hearing or, if the proceeding is transferred to a criminal court, at any time prior to a conviction.

§2. Subdivision b of section 742 of the family court act, as amended by section 9 of part E of chapter 57 of the laws of 2005, is amended to read as follows:

(b) At the initial appearance of the respondent, the court shall review any termination of diversion services pursuant to such section, and the documentation of diligent attempts to provide appropriate services and determine whether such efforts or services provided are sufficient [and]. The court may, at any time, subject to the provisions of section seven hundred forty-eight of this article, order that additional diversion attempts be undertaken by the designated lead agency. The court may order the youth and the parent or other person legally responsible for the youth to participate in diversion services. At the initial appearance of the respondent on a petition filed in accordance with subparagraph (A) of paragraph (iii) of subdivision (g) of section seven hundred thirty-five of this article, the court shall refer the respondent and parent to the designated lead agency for diversion attempts, unless the court determines that there is a substantial likelihood that the child

would abscond or there is no substantial likelihood that the youth and his or her family would benefit from diversion attempts. At the initial appearance of the respondent on a petition filed in accordance with subparagraph (B) of paragraph (iii) of subdivision (g) of section seven hundred thirty-five of this article, the court shall refer the respondent and parent to the designated lead agency for diversion attempts, unless the court determines that the child continues to pose an imminent risk to the petitioner or a member of his or her family would benefit from diversion attempts. If the designated lead agency thereafter determines that [the] a case referred for diversion efforts under this section has been successfully resolved, it shall so notify the court, and the court shall dismiss the petition.

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

11. Conditional surrenders of parental rights in Family and Surrogate's Court [D.R.L. §112-b; F. C.A. §262; Soc. Serv. L. §§383-c, 384]

As noted by the Court of Appeals in Matter of Jacob, 86 N.Y.2d 651 (1995), the legislation enacted in 1990 authorizing surrenders of parental rights to contain conditions including, among others, designation of specific adoptive parents and delineation of post-adoption contact, reflected the first recognition of "open adoptions" under New York State Law. *See* L. 1990, c. 479. This legislation and its subsequent amendments created a framework to enable parents surrendering children to authorized child care agencies for the purposes of adoption to be able to seek judicial enforcement of agreed-upon conditions to the extent that the conditions comport with the children's best interests. With detailed provisions for the birth parents to receive notice of the consequences of their surrenders, sections 383-c and 384 of the Social Services Law were designed to ensure that birth parents would be fully aware of the ramifications of their surrenders and the remedies for enforcement of the conditions. Coupled with the provisions of Domestic Relations Law §112-b, which requires that agreements for post-adoption contact be approved by the court as being in the children's best interests in order to be enforceable, the statutes were designed to provide judicial oversight that would fulfill the children's best interests through procedures that are fair to birth parents, adoptive parents, authorized agencies and, most important, the children.

Unfortunately, two decades of experience have revealed all too many cases in which these legislative goals have not been met and in which what appeared to be plain terms of the statutes have not been followed. All too frequently, birth parents have been induced to execute surrenders, particularly extra-judicial surrenders, upon the assumption that informal agreements or side letters of understanding would be enforceable even though they were not presented to the Family or Surrogate's Court for approval and were not incorporated into any written court order. Although surrenders of children in foster care must contain notices in "conspicuous bold print on the first page" of the right to counsel, including the right to appointed counsel if indigent, many birth parents executing surrenders are unrepresented, particularly surrenders pursuant to Social Services Law §384 of children who are not in foster care, as well as extra-judicial surrenders of children both in and out of foster care that are executed by birth mothers while in the hospital immediately after the births. *See* Social Services Law §§383-c(5(b).[29]

In light of these deviations from the clear intent and letter of the statute, the Family Court Advisory and Rules Committee is submitting a proposal explicitly requiring that all conditions accompanying surrenders, both of children in and out of foster care, must be approved by the Family or Surrogate's Court as being in the child's best interests and must be incorporated into a court order

[29] Notwithstanding Social Services Law §§383-c(5(b), section 262 of the Family Court Act does not enumerate that statute in its list of categories of cases in which indigent parents have a right to counsel. Ironically, while Social Services Law §384 contains no reference to counsel, that section is included in Family Court Act §262(a)(iv). The Committee's proposal would correct both of these omissions. Significantly, in the case of extra-judicial surrenders, the right to appointed counsel for indigent parents is unevenly implemented because such surrenders do not need to approved by the Family or Surrogate's Court to be "valid" (or, in the case of surrenders of children in foster care, to trigger the time-limit for irrevocability), even if conditions contained within them must be court-approved in order to be enforceable. *See* Social Services Law §§383-c(6)(b); 384(4).

in order to be enforceable. To underscore the need for judicial oversight, the proposal prohibits extra-judicial surrenders executed on or after the effective date of the statute (January 1, 2013) from containing any conditions. Only judicial surrenders executed on or after that date, under the Committee's proposal, could contain enforceable conditions and birth parents executing surrenders would have to be so advised. Agreements for post-adoption contact between the surrendered child and birth siblings and half-siblings, where either the child and/or siblings or half-siblings are 14 years of age or older, would likewise require their written consent in order to be enforceable. A copy of the court order incorporating any post-adoption contact agreement or other conditions must be given to all parties to the agreement. The proposal would also correct the omissions in Family Court Act §262 and Social Services Law §384 with respect to the right to counsel for surrendering parents. Social Services Law §383-c would be added to the categories of cases for which there is a right to appointed counsel for indigent adults and the provision regarding notice of the right to counsel as well as notice of the right to supportive counseling contained in Social Services Law §383-c, would be added to Social Services Law §384(4).

The need for enactment of the Committee's proposal is illustrated by the case of Matter of the Adoption of Jack *ex rel.* David B., 18 Misc.3d 397 (Fam. Ct., Monroe Co., 2007). In that case, the Family Court deferred finalization of an adoption pending execution of new surrenders by the child's birth parents, because the original extra-judicial surrenders, executed by birth parents, referred to an agreement for post-adoption contact, but neither the extra-judicial surrenders, nor the agreement, had been presented to the Court for approval. The Court noted that the proposed adoptive parents and birth parents intended the post-adoption contact agreement "to be exempt from court review and not enforceable in court," which it found "particularly troubling, because the birth parents did not have counsel and because the terms of the agreement are not included in the surrender." With no judicial review of the agreement, no attorney for the child had been appointed, no best interests determination had been made and no clarity was offered as to the extent of post-adoption contact contemplated to occur following execution of the surrender but prior to the adoption finalization. The existence of this unenforceable "side agreement" was deemed to "cast[] a cloud over the surrenders themselves." The Court stated:

> ...Agreements made outside of the surrender instrument, especially made by birth parents unrepresented by counsel, leave the court with no way of knowing whether impermissible inducements contributed to the signing of the instrument and leave the surrender open for challenge in the future by the birth parents.
>
> It was precisely the need to avoid unenforceable or impermissibly induced side agreements in adoptions that led the legislature to amend Social Services Law §384 to provide a procedure for enforceable post-adoption agreements that balance the rights of the parents and proposed adoptive parents within the context of the child's best interest (*see* L. 2005, c. 3, eff. August 23, 2005). ...By defining the right to enforce post-adoption contact agreements and providing judicial oversight to assure that agreements promote the child's best interest, the statutory framework has reduced or avoided possible litigation.
>
> It is this court's view that the parties are not permitted to agree to terms that

> contradict the statutory requirements or the purpose of the statute, which is to clarify and protect the rights of birth parents, prospective adoptive parents and promote the best interests of the child.

Declining to accept the surrenders, the Court held:

> The existence of an unenforceable side agreement for post-adoption contact made by unrepresented parents, which has not been provided to the court or reviewed by any court, creates doubts as to whether the surrenders were knowingly and voluntarily executed by the birth parents. Moreover, the failure of the adoption agency to apply to Erie County Surrogate's Court for approval of the surrender means that there has been no best interest review of the surrender.

Matter of the Adoption of Jack *ex rel.* David B., regrettably, was not an isolated case. Apparently, side agreements never presented to any court for approval have become common practice statewide and clearly thwart the clear intent of the Legislature in enacting the conditional surrender provisions of Social Services Law §§383-c and 384, as well as the requirements for post-adoption contact agreements in Domestic Relations Law §112-b. Enactment of the Committee's proposal would ensure necessary judicial oversight, thereby protecting both the fairness of the surrender process for all parties and the best interests of the children involved.

Proposal

AN ACT to amend the domestic relations law and social services law, in relation to conditional surrenders of parental rights in family and surrogate's court

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

Section 1. Subdivision 1 of section 112-b of the domestic relations law, as amended by chapter 3 of the laws of 2005 and subdivision 2 of such section, as amended by chapter 41 of the laws of 2010, are amended to read as follows:

1. Nothing in this section shall be construed to prohibit the parties to a proceeding under this chapter from entering into an agreement regarding communication with or contact between an adoptive child, adoptive parent or parents and a birth parent or parents and/or the adoptive child's biological siblings or half-siblings, provided, however, that such an agreement shall not be legally enforceable unless the terms of the agreement have been incorporated into a written order that has been approved and entered by the court in accordance with subdivision two of this section.

2. Agreements regarding communication or contact between an adoptive child, adoptive parent or parents, and a birth parent or parents and/or biological siblings or half-siblings of an

adoptive child in an adoption from an authorized agency shall not be legally enforceable unless the terms of the agreement are incorporated into a written court order entered in accordance with the provisions of this section. An agreement for contact or communication between the child and his or her siblings or half-siblings where the child and/or siblings or half-siblings are fourteen years of age or older shall not be enforceable unless such child, sibling or half-sibling consents to the agreement in writing. The court shall not incorporate an agreement regarding communication or contact into an order unless the terms and conditions of the agreement have been set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the adoptive child. The court shall not enter a proposed order unless the court in which the surrender was executed or, with respect to extra-judicial surrenders executed before January 1, 2013, the court that approved the surrender of the child determined and stated in its order that the communication with or contact between the adoptive child, the prospective adoptive parent or parents and a birth parent or parents and/or biological siblings or half-siblings, as agreed upon and as set forth in the agreement, would be in the adoptive child's best interests. Notwithstanding any other provision of law, a copy of the order entered pursuant to this section incorporating the post-adoption contact agreement shall be given to all parties who have agreed to the terms and conditions of such order.

§2. Paragraph (iv) of subdivision (a) of section 262 of the family court act, as amended by chapter 437 of the laws of 2006, is amended to read as follows:

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

§3. Subdivision 2 of section 383-c of the social services law is amended to add a new paragraph (c) to read as follows:

(c) Where the parent executing a judicial surrender enters into an agreement containing conditions, including, but not limited to, identifying the prospective adoptive parent or parents or prescribing communication or contact with the child and the adoptive parent or parents and/or between the child and his or her biological siblings or half-siblings following the surrender and adoption of the child, the agreement shall not be legally enforceable unless:

(i) for surrenders executed on or after January 1, 2013, the surrender is executed before a judge;

(ii) the terms of the agreement are approved by the court and incorporated into a written court order entered in accordance with the provisions of this subdivision;

(iii).the terms and conditions of the agreement have been set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the child;

(iv) the court determined and stated in its order that the terms and conditions as agreed upon and as set forth in the agreement would be in the child's best interests;

(v) in the case of an agreement for contact or communication between the child and his or her siblings or half-siblings where the child and/or siblings or half-siblings are fourteen years of age or older, the child and sibling or half-sibling consents to the agreement in writing.

The written order approving the agreement shall be issued at the time the parent executes a judicial surrender or, with respect to extra-judicial surrenders executed before January 1, 2013, at the time the court approves the surrender. Notwithstanding any other provision of law, a copy of the order entered pursuant to this section incorporating the post-surrender and post-adoption contact agreement shall be given to all parties who have agreed to the terms and conditions of such order.

§4. Subparagraph (iii) of paragraph (b) of subdivision 4 of section 383-c of the social services law, as amended by chapter 3 of the laws of 2005, is amended and a new paragraph (g) is added to such section to read as follows:

(iii) that the surrender was read in full to the parent in his or her principal language and the parent was given an opportunity to ask questions and obtain answers regarding the nature and consequences of the surrender, including, with respect to surrenders executed before January 1, 2013, the consequences of, and procedures to be followed in, cases of a substantial failure of a material condition, if any, contained in the surrender instrument and the obligation to provide the authorized agency with a designated mailing address, as well as any subsequent changes in such address, at which the parent may receive notices regarding any substantial failure of a material condition, unless such notification is expressly waived by a statement written by the parent and appended to or included in such instrument; and

(g) An extra-judicial surrender may not be executed on or after January 1, 2013 in any case in which any agreement containing conditions is made with the surrendering parent or parents,

including, but not limited to, an agreement identifying the prospective adoptive parent or parents or prescribing communication or contact by the surrendering parent or parents with the child and the adoptive parent or parents and/or between the child and his or her biological siblings or half-siblings following the child's surrender and adoption. Any such agreement is only legally enforceable if approved by the court and incorporated into a written court order entered in conjunction with the execution of a judicial surrender pursuant to paragraph (c) of subdivision two of this section.

§5. Subparagraphs (ii) and (iii) of paragraph (b), the opening paragraph of paragraph (c) and the opening paragraph of subparagraph (iii) of paragraph (d) of subdivision 5 of section 383-c of the social services law, as amended by chapter 3 of the laws of 2005, are amended to read as follows:

(ii) that the parent is giving up all rights to have custody, visit with, speak with, write to or learn about the child, forever, unless, with respect to an extra-judicial surrender executed before January 1, 2013 or a judicial surrender, the parties have agreed to different terms pursuant to subdivision two of this section[,] and unless such terms are written in the surrender, or, if the parent registers with the adoption information register, as specified in section forty-one hundred thirty-eight-d of the public health law, that the parent may be contacted at anytime after the child reaches the age of eighteen years, but only if both the parent and the adult child so choose;

(iii) that the child will be adopted without the parent's consent and without further notice to the parent, and will be adopted by any person that the agency chooses, unless, with respect to an extra-judicial surrender executed before January 1, 2013 or a judicial surrender, the surrender paper contains the name of the person or persons who will be adopting the child; and

(c) A surrender instrument for a judicial surrender also shall state in plain language in conspicuous bold print at the beginning thereof that the surrender becomes final and irrevocable immediately upon execution and acknowledgement, and that the parent cannot bring a case in court to revoke the surrender or to regain custody of the child. [Where] With respect to an extra-judicial surrender executed before January 1, 2013 or a judicial surrender, where the parties have agreed that the surrender shall be subject to conditions pursuant to subdivision two of this section, the instrument shall further state in plain language that:

(iii) that a revocation of the surrender more than forty-five days after its signing will not be effective if the child has been placed in an adoptive home, and the surrender shall be final and irrevocable and the parent cannot revoke the surrender or bring a case in court to revoke the

surrender or regain custody of the child, and that the agency will not notify the parent when the child is placed in an adoptive home, and the parent may lose all rights at the end of the forty-five day period without further notice. [Where] With respect to a surrender executed before January 1, 2013, where the parties have agreed that the surrender shall be subject to conditions pursuant to subdivision two of this section, the instrument shall further state in plain language that:

§6. Subdivision 7 of section 383-c, as added by chapter 479 of the laws of 1990, is amended to read as follows:

7. Surrenders by persons in foster care and surrenders executed on or after January 1, 2013 in which an agreement containing condition has been made. Notwithstanding any other provision of law, a surrender for adoption executed by a parent, parents or guardian who is in foster care and a surrender executed on or after January 1, 2013 containing conditions shall be executed only before a judge of the family court.

§7. Paragraph (b) of subdivision 2 of section 384 of the social services law, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

(b) If a surrender instrument designates a particular person or persons who will adopt a child, such person or persons, the child's birth parent or parents, the authorized agency having care and custody of the child and the child's attorney, may enter into a written agreement providing for communication or contact between the child and the child's parent or parents on such terms and conditions as may be agreed to by the parties.

If a surrender instrument does not designate a particular person or persons who will adopt the child, then the child's birth parent or parents, the authorized agency having care and custody of the child and the child's attorney may enter into a written agreement providing for communication or contact, on such terms and conditions as may be agreed to by the parties. Such agreement also may provide terms and conditions for communication with or contact between the child and the child's biological sibling or half-sibling, if any. If the child or any such sibling or half-sibling is fourteen years of age or older, [such terms and conditions] an agreement for contact or communication between the child and his or her siblings or half-siblings shall not be enforceable unless such child, sibling or half-sibling consents to the agreement in writing. Any provision in a surrender instrument identifying a prospective adoptive parent or parents or any agreement under this section containing any conditions, including, but not limited to, identifying the prospective adoptive parent or parents or

prescribing communication or contact shall not be legally enforceable unless the terms and conditions are approved by the court and incorporated into a written court order entered in accordance with the provisions of this paragraph and, with respect to surrenders executed on or after January 1, 2013, unless the surrender is executed before a judge. The court shall not incorporate an agreement under this section into an order unless the terms and conditions of the agreement have been set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the child. If the court before which the surrender instrument is presented for execution or, if, with respect to an extra-judicial surrender executed before January 1, 2013, approval, determines that the agreement [concerning communication and contact] is in the child's best interests, the court shall so state in its order and shall approve the agreement. Notwithstanding any other provision of law, a copy of the order entered pursuant to this section incorporating the agreement shall be given to all parties who have agreed to the terms and conditions of such order. If the court does not approve the agreement, the court may nonetheless approve the surrender; provided, however, that the birth parent or parents executing the surrender instrument shall be given the opportunity at that time to withdraw such instrument. Enforcement of any agreement prior to the adoption of the child shall be in accordance with subdivision (b) of section one thousand fifty-five-a of the family court act. Subsequent to the adoption of the child, enforcement of any agreement shall be in accordance with section one hundred twelve-b of the domestic relations law.

§8. Subdivision 3 of section 384 of the social services law, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

3. Instrument and intervention. (a) The instrument herein provided shall be executed and acknowledged [(a)](i) before any judge or surrogate in this state having jurisdiction over adoption proceedings, except that if the child is being surrendered as a result of, or in connection with, a proceeding before the family court pursuant to article ten or ten-A of the family court act, the instrument shall be executed and acknowledged in the family court that exercised jurisdiction over such proceeding and shall be assigned, wherever practicable, to the judge who last presided over such proceeding; or [(b)](ii) 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.

(b) Such record shall be subject to inspection and examination only as provided in subdivisions three and four of section three hundred seventy-two of this title.

(c) Notwithstanding any other provision of law, if the parent surrendering the child for adoption is in foster care or if the surrender is executed on or after January 1, 2013 and contains conditions, the instrument shall be executed before a judge of the family court.

(d) Whenever the term surrender or surrender instrument is used in any law relating to the adoption of children who are not in foster care, it shall mean and refer exclusively to the instrument [hereinabove] described in this subdivision for the commitment of the guardianship of the person and the custody of a child to an authorized agency by his or her parents, parent or guardian; and in no case shall it be deemed to apply to any instrument purporting to commit the guardianship of the person and the custody of a child to any person other than an authorized agency, nor shall such term or the provisions of this section be deemed to apply to any instrument transferring the care and custody of a child to an authorized agency pursuant to section three hundred eighty-four-a of this chapter.

(e) (i) Any person or persons having custody of a child for the purpose of adoption through an authorized agency shall be permitted as a matter of right, as an interested party, to intervene in any proceeding commenced to set aside a surrender purporting to commit a guardianship of the person or custody of a child executed under the provisions of this section. Such intervention may be made anonymously or in the true name of said person.

(ii) Any person or persons having custody for more than twelve months through an authorized agency for the purpose of foster care shall be permitted as a matter of right, as an interested party, to intervene in any proceeding commenced to set aside a surrender purporting to commit the guardianship of the person and custody of a child executed under the provisions of this section. Such intervention may be made anonymously or in the true name of said person or persons having custody of the child for the purpose of foster care.

(f) A copy of such surrender shall be given to [such] the surrendering parent upon the execution thereof. The surrender shall include the following statement: "I, (name of surrendering parent), this ___ day of _____, _____, have received a copy of this surrender. (Signature of surrendering parent)". Such surrendering parent shall so acknowledge the delivery and the date of the

delivery in writing on the surrender.

[Where] (g) With respect to an extra-judicial surrender executed before January 1, 2013 or a judicial surrender, where the parties have agreed that the surrender shall be subject to conditions pursuant to subdivision two of this section, the instrument shall further state in plain language that: (i) the authorized agency shall notify the parent, unless such notice is expressly waived by a statement written by the parent and appended to or included in such instrument, the attorney for the child and the court that approved the surrender within twenty days of any substantial failure of a material condition of the surrender prior to the finalization of the adoption of the child; and

(ii) except for good cause shown, the authorized agency shall file a petition on notice to the parent unless notice is expressly waived by a statement written by the parent and appended to or included in such instrument and the child's attorney in accordance with section one thousand fifty-five-a of the family court act within thirty days of such failure, in order for the court to review such failure and, where necessary, to hold a hearing; provided, however, that, in the absence of such filing, the parent and/or attorney for the child may file such a petition at any time up to sixty days after notification of such failure. Such petition filed by a parent or attorney for the child must be filed prior to the adoption of the child; and

(iii) the parent is obligated to provide the authorized agency with a designated mailing address, as well as any subsequent changes in such address, at which the parent may receive notices regarding any substantial failure of a material condition, unless such notification is expressly waived by a statement written by the parent and appended to or included in such instrument.

Nothing in this paragraph shall limit the notice on the instrument with respect to a failure to comply with a material condition of a surrender subsequent to the finalization of the adoption of the child.

§9. Subdivision 4 of section 384 of the social services law, as amended by chapter 185 of the laws of 2006, is amended to read as follows:

4. Upon petition by an authorized agency, a judge of the family court, or a surrogate, may approve such surrender, on such notice to such persons as the surrogate or judge may in his or her discretion prescribe. If the child is being surrendered as a result of, or in connection with, a proceeding before the family court pursuant to article ten or ten-A of the family court act, the petition shall be filed in the family court that exercised jurisdiction over such proceeding and shall be

assigned, wherever practicable, to the judge who last presided over 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 of this title, 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. At the time that a parent appears before a judge or surrogate to execute and acknowledge a surrender or for the judge to approve the surrender, the judge or surrogate shall inform such parent of the right to be represented by legal counsel of the parent's own choosing and of the right to obtain supportive counseling and of any right to have counsel assigned pursuant to section two hundred sixty-two of the family court act, section four hundred seven of the surrogate's court procedure act, or section thirty-five of the judiciary law. 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.

§10. This act shall take effect on the first of January after it shall have become a law.

12. Procedures for violations of adjournments in contemplation of dismissal, probation, placements and conditional discharges in juvenile delinquency cases and procedures for allocutions and for violations of probation and suspended judgments in persons in need of supervision cases
[F.C.A. §§315.3, 353.3, 360.2, 735, 743, 776, 779, 779-a]

Significant gaps exist in the procedural framework governing juvenile delinquency and persons in need of supervision (PINS) cases, each in the area of violations of court orders. Further, a procedural gap is evident in the PINS statutory framework, as has repeatedly been identified by appellate courts. The Family Court Advisory and Rules Committee is proposing legislation to eliminate these gaps by clarifying applicable procedures in cases of alleged violations of adjournments in contemplation of dismissal (ACD's), orders of probation, orders of placement and orders of conditional discharge in juvenile delinquency proceedings and with respect to allocutions for admissions and violations of suspended judgments and orders of probation in PINS cases.

First, Article 3 of the Family Court Act is silent as to the procedures to be followed and the threshold showing required to establish a violation of the conditions of an ACD sufficient to restore the case to the calendar. It is likewise silent regarding whether an ACD violation should trigger either a fact-finding or dispositional hearing. 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.

8 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. Consistent with Matter of R.D., 13 Misc.3d 1224(A), 2006 WL 2969649 (Fam. Ct., Nassau Co., 2006)(Unreported Opinion), the proposal codifies the direction in Matter of Edwin L. that hearsay evidence should be admissible.[30] If the petition to restore the matter to the calendar is sustained, the case would be set down for a fact-finding or dispositional hearing, depending upon whether the matter had been adjourned in contemplation of dismissal before or after entry of a fact-finding order. Similar to the provision regarding probation violations [Family Court Act §§360.2(4), (5)], the proposal further provides that the period of the ACD would be tolled during the pendency of the petition, and that, if the petition to restore the matter to the calendar is dismissed, the period during which the petition was pending would be credited to the period of the adjournment in contemplation of dismissal.

Second, the proposal clearly specifies that hearsay may be included in violation petition allegations. Because the violations often concern a juvenile's compliance or lack of compliance with orders to cooperate with particular programs, it should be possible for probation violation petitions to be based upon allegations supported by letters, reports and other documents from the programs in question. In Matter of Markim Q, 7 N.Y.3d 406 (2006), the Court of Appeals held that a facial deficiency in the petition is not jurisdictional and is thus not reviewable on appeal unless an objection is preserved, thus reversing the Appellate Division decision that found hearsay allegations to be insufficient. *See* Matter of Markim Q, 22 A.D.3d 498 (2d Dept., 2005).[31] The proposal thus specifies that petition allegations may include hearsay, although the current requirement for the evidence of proof of the petition to be relevant, material and competent would be retained.

Third, the Committee's proposal effectuates the apparent intention of the Legislature to provide identical provisions to toll orders of probation and conditional discharge while violation proceedings are pending. While sections 360.2 and 360.3 articulate a procedure governing violations of both probation and conditional discharge, references to conditional discharge appear to have been inadvertently omitted from two subdivisions of those sections. In Matter of Donald MM, 231 A.D.2d 810, 647 N.Y.S. 2d 312 (3rd Dept., 1996), *lve. app. denied*, 89 N.Y.2d 804 (1996), the Appellate Division, Third Department, read into section 360.2(4) of the Family Court Act a requirement that the period of a conditional discharge be tolled during the pendency of a violation petition, as in probation violation cases. The Court held that the omission of the requirement was unintentional, as "it is apparent from a reading of all provisions of this statute that the Legislature did not intend for probationary periods and conditional discharges to be treated differently." The Committee's proposal incorporates this tolling requirement into subdivision four of section 360.2 of the Family Court Act.

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

[31] Like the Appellate Division in Matter of Markim Q., *supra,* the Appellate Division, Third Department, has applied strict juvenile delinquency pleading requirements for non-hearsay allegations to probation violation petitions. *See* Matter of Whitney Z., 12 A.D.3d 971 (3d Dept., 2004); Matter of Todd D., 288 A.D.2d 740 (3d Dept., 2001).

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.

Fourth, the proposal remedies an anomaly in the juvenile delinquency placement statute. While a placement with the New York State Office of Children and Family Services is tolled when a child is absent without leave and a warrant is outstanding [Exec. Law §510-b(7)], no comparable provision exists with respect to a placement of a child with a county Department of Social Services. Placements with DSS are often for the very same facilities as those with NYS OCFS – residential treatment facilities operated by authorized agencies under contract. Disparate treatment of placed delinquent youth should not arise out of the happenstance of who the agency contracts with for payment of the child's placement. The Committee's proposal, therefore, would incorporate Executive Law §510-b(7) into Article 3 of the Family Court Act and would apply it both to placements with local Departments of Social Services and with the NYS Office of Children and Family Services.

With respect to PINS proceedings, 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 would require the Family Court, before accepting an admission in a PINS case, to ascertain that the juvenile respondent committed the act or acts to which an admission is being entered, is voluntarily waiving his or her right to a hearing and is aware of the dispositional alternatives that may be ordered as a result of the adjudication that is the likely consequence of the admission. Additionally, the proposal corrects an apparently inadvertent omission of a phrase in subdivision (h) of section 735 of the Family Court Act.

The absence of an explicit allocution procedure in the PINS statute has generated extensive appellate litigation. 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 Ashley R., 42 A.D.3d 689 (3d Dept., 2007); Matter of Marquis S., 26 A.D.3d 757 (4th Dept., 2006); Matter of Steven Z., 19 A.D.3d 783 (3d Dept., 2005); Matter of Matthew RR, 9 A.D.3d 514 (3d Dept., 2004); Matter of Nichole A., 300 A.D.2d 947 (3rd Dept., 2002); Matter of Jodi VV., 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.

The final two amendments to the PINS statutes would delineate procedures for violations of orders of suspended judgment and violations of probation, drawing upon existing juvenile delinquency procedures. *See* Family Court Act §§360.2, 360.3. Violations of both orders of probation and suspended judgment would 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 would be tolled during the pendency of the violation petition. The juvenile must be advised of his or her rights. *See, e.g.*, Matter of Jessica GG., 19 A.D.3d 765 (3d Dept., 2005); Matter of Ashley A., 296 A.D.2d 627 (3rd Dept., 2002).

Upon a finding of a violation, the Family Court would be authorized to 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 would be permitted to 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), to state the reasons for its determination and to make the findings required by section 754(b) of the Family Court Act. *See* Matter of Nathaniel JJ, 265 A.D.2d 660 (3rd Dept., 1999), *after remittitur*, 270 A.D.2d 783 (3rd Dept., 2000) (PINS probation violation matter remanded twice for specific findings, first with respect to the reasons for the disposition and second as to the 16-year old respondent's needs, if any, for independent living services).[32] In matters, such as Nathaniel J.J., in which the juvenile was placed pursuant to Family Court Act §756, these findings would be mandated as well by the Federal and State *Adoption and Safe Families Acts* [Public Law 105-89; L. 1999, ch.7; L.2000, ch. 145].

Proposal

AN ACT to amend the family court act, in relation to adjudication, dispositional and violation procedures 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 1 of section 315.3 of the family court act, as amended by chapter 535 of the laws of 2011, is amended to read as follows:

1. Except where the petition alleges that the respondent has committed a designated felony act, the court may at any time prior to the entering of a finding under section 352.1 and with the consent of the respondent order that the proceeding be "adjourned in contemplation of dismissal." An adjournment in contemplation of dismissal is an adjournment of the proceeding, for a period not to exceed six months, with a view to ultimate dismissal of the petition in furtherance of justice. Upon issuing such an order, providing such terms and conditions as the court deems appropriate, the court

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

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 [of] subdivision (a) of section [19.07] 19.25 of the mental hygiene law. The court may, as a condition of an adjournment in contemplation of dismissal order, in cases where the record indicates that the respondent is an eligible person as defined in section four hundred fifty-eight-l of the social services law and has allegedly committed an eligible offense as defined in such section, direct the respondent to attend and complete an education reform program established pursuant to section four hundred fifty-eight-l of the social services law. [Upon *ex parte* motion by the presentment agency, or upon the court's own motion, made at the time the order is issued or at] At any time during [its] the duration of an order issued pursuant to this section, the court may restore the matter to the calendar in accordance with subdivision four of this section. If the proceeding is not restored, the petition is, at the expiration of the order, deemed to have been dismissed by the court in furtherance of justice.

§2. Section 315.3 of the family court act is amended by adding a new subdivision 4 to read as follows:

4. An application to restore the matter to the calendar in accordance with subdivision one of this section shall be in the form of a verified petition which shall be served on the respondent, who shall have an opportunity to be heard with respect thereto. The petition shall state the factual basis for the restoration, including the condition or conditions alleged to have been violated and the time, place and manner in which such violation occurred. The respondent is entitled to counsel at all stages of a proceeding under this section, and the court shall advise the respondent of such right at the initial appearance on any petition filed hereunder. Upon request, the court shall grant a reasonable adjournment to the respondent in order to respond to the petition and, if the factual allegations of the petition are contested, to prepare for a hearing. If the court determines that the respondent should be detained in accordance with the criteria in subdivision three of section 320.5, the court shall hear and determine the petition within three days; provided, however, that for good cause shown, the court may adjourn the matter for not more than three additional days. If, after hearing the petition, the court finds that the presentment agency has demonstrated by relevant and material evidence that one or more conditions of the order have been violated, the court shall state on the record the reasons for

such determination, grant the petition, restore the matter to the calendar and schedule the proceeding for a fact-finding hearing or dispositional hearing, as applicable. Upon filing the petition, the period of the adjournment in contemplation of dismissal shall be interrupted. Such interruption shall continue until such time as the court determines the petition. If the court denies the petition, the period during which the petition was pending shall be credited to the period of the adjournment in contemplation of dismissal.

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

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

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

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

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

5. If the court determines that there was no violation of probation or conditional discharge by

the respondent, the period of interruption shall be credited to the period of probation or conditional discharge, as applicable.

§5. Subdivision (h) of section 735 of the family court act, as added by part E of chapter 57 of the laws of 2005, is amended to read as follows:

(h) No statement made to the designated lead agency or to any agency or organization to which the potential respondent has been referred, prior to the filing of the petition, or if the petition has been filed, prior to the time the respondent has been notified that attempts at diversion will not be made or have been terminated, or prior to the commencement of a fact-finding hearing if attempts at diversion have not terminated previously, may be admitted into evidence at a fact-finding hearing or, if the proceeding is transferred to a criminal court, at any time prior to a conviction.

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

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

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

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

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

The provisions of this subdivision shall not be waived.

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

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

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

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

(e) Hearing on violation. (i) The court may not revoke an order of probation or suspended judgment unless the court has found by competent proof that the respondent has violated a condition of such order without just cause and that the respondent has had an opportunity to be heard. The respondent is entitled to a hearing promptly after a violation petition has been filed. The respondent is entitled to counsel at all stages of the proceeding and may not waive representation by counsel 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 an attorney 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 attorney who represented the respondent in the original proceedings under this article;

(C) determine whether the respondent should be released or detained pursuant to section seven hundred twenty 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. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to orders of adjournment in contemplation of dismissal issued and petitions for violations of probation, conditional discharge and suspended judgment filed on or after such effective date.

III. Previously Endorsed Measures

1. Truancy allegations in child protective and persons in need of supervision (PINS) proceedings in Family Court
[F.C.A.§§735, 742, 1012, 1035]

The enactment of a statutory presumption for diversion of Persons in Need of Supervision (PINS) proceedings in 2005 has succeeded in linking troubled youth and their families to services without the need for court intervention in many cases statewide. In cases alleging truancy and school misbehavior, the legislation contained an important requirement for the designated lead county PINS diversion agency to "review the steps taken by the school district or local educational agency to improve the youth's attendance and/or conduct in school and attempt to engage the school district or local educational agency in further diversion attempts, if it appears from review that such attempts will be beneficial to the youth." [Family Court Act §735(e)(iii)]. This requirement has had the salutary effect of engaging school officials in the process of resolving school problems, thus obviating unnecessary court involvement. Neither diversion agencies nor ultimately the Family Court can be expected to resolve educational problems without the involvement of educators.

However, the mandate only applies to cases in which the potential petitioner is a school district or local educational agency and thus has had no applicability in New York City, where parents, not school officials, initiate PINS proceedings. As the Vera Institute noted, in its report, *Rethinking Educational Neglect for Teenagers: New Strategies for New York State* (Nov., 2009) at p. 20, "Only 405 attendance officers and 3,004 guidance counselors serve more than one million school children in the city." *See also, Getting Teenagers Back to School*: *Rethinking New York State's response to Chronic Absence* (Vera Inst.,Oct., 2010) at p. 6. Parents, working with the local PINS diversion agency, bear the burden of addressing their children's truancy or school misbehavior without any responsibility on the part of professional educators to make prior efforts to alleviate the problems. Parents who fail to act or whose attempts are unsuccessful all too often find themselves the subject of educational neglect petitions. The Vera Institute report, in fact, documented that educational neglect petitions are more prevalent in New York City. Nineteen percent of children reported to the state child abuse and maltreatment hotline in New York City in 2008 included an allegation of educational neglect, compared to ten percent statewide. *Rethinking Educational Neglect for Teenagers*, *supra,* p. 4. Child protective agencies, like PINS diversion agencies, cannot resolve school-related problems without the engagement of educators. Clearly, a comprehensive response to both education-related PINS and educational neglect cases statewide is warranted that will bring educators to the table as part of the solution.

The Family Court Advisory and Rules Committee is proposing a measure to amend both Article 7 and Article 10 of the Family Court Act. With respect to PINS proceedings, the proposal first amends Family Court Act §735 to require designated lead PINS diversion agencies to review efforts by school districts to resolve truancy or school misbehavior in all PINS proceedings containing such allegations. Since this would apply regardless of who is the potential petitioner, the 2005 statutory requirement would become applicable statewide. Second, again regardless of who is the potential petitioner, the measure requires the diversion agency to notify the local school district or educational agency of conferences, so that educators can assist in resolving the problems, whether

through school transfers, evaluations or other efforts. Third, just as diversion agencies must include documentation of their efforts to avoid court involvement as a prerequisite to the filing of PINS petitions generally, the measure would include a similar requirement specifically addressing efforts in the education area where educational problems are alleged. The measure would further amend Family Court Act §742 to permit the Family Court to refer PINS proceedings to diversion agencies not simply upon the initial court appearance but at any stage in the proceeding. Finally, where a PINS petition has been filed that alleges truancy or another school-related problem, Family Court Act §736 would be amended to require that the school district or local educational agency must be notified of the proceeding, joined as a necessary party and enlisted to provide assistance "where the court determines that such participation and /or assistance would aid in the resolution of the petition."

Similar provisions would be added with respect to educational neglect proceedings in Article 10 of the Family Court Act in order to engage education officials in resolving educational neglect problems without the need of court intervention and, if court intervention is nonetheless required, to engage them in the process of resolving the petitions. First, a presumption in favor of out-of-court diversion of educational neglect cases – or at least, educational neglect allegations – would be added. The definition of educational neglect in Family Court Act §1012(f) would be amended to require proof of parental failure to provide educational services to the child "notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition." Second, Family Court Act §1031 would require that these efforts be recited in the petition, along with "the grounds for concluding that the educational problems could not be resolved absent the filing of a petition." As allegations in the petition, they would, therefore, need to be proven by a preponderance of the evidence in accordance with Family Court Act §1046(b). Finally, a notice of pendency of the petition in accordance with Family Court Act §1035 would have to be sent to the local educational agency or school district identified by the child protective agency. As in proposed Family Court Act §736, in order that the education agency or school district would be enlisted to provide necessary assistance, Family Court Act §1035 would be amended to require that the school district or local educational agency must be joined as a necessary party "where the court determines that such participation and /or assistance would aid in the resolution of the petition."

The 2009 Vera Institute report provides encouraging evidence of success in addressing school-related problems in jurisdictions in which the professional educational community takes an active role. Public School 55 in Bronx County was cited as an example where a comprehensive approach taken by a school principal has resulted in an impressive 94% attendance rate. *Id*. at pages 20-21. Likewise, where PINS, neglect and juvenile delinquency petitions have been filed, Erie County Family Court has a dedicated judge who, with a team comprised of representatives of the school system and the departments of probation, mental health and social services, as well as treatment providers, has had success in improving children's school attendance and grades, while sharply minimizing out-of-home placements. *Id*. at pages 14-15.

At the same time, the report, as well as the October, 2010 follow-up report, document the ineffectiveness of placing the burden upon child protective agencies and parents to address children's educational problems through the Family Court. Child protective workers generally lack "specialized skills, relationships, or experience required to navigate the education system, diagnose learning

needs, and advocate for the educational rights of youth." Further, "only a few counties have preventive services programs that focus on engaging teenagers in school; where these services exist, the need far exceeds the programs' capacities." *Getting Teenagers Back to School, supra,* p. 2.

While both Vera Institute reports suggest that the educational neglect statute should be repealed as it applies to youth 13 and older, the Committee is concerned that such a step would simply result in the youth being relabelled as PINS without necessarily providing professional assistance in resolving their educational problems. In recommending blended funding among social services and education agencies to address teen truancy, the Vera follow-up report suggests that the mechanism "should be flexible and avoid involving the family in the child protective or PINS systems." *Id.* at p.6. Concomitantly, as the case of Nixzmary Brown demonstrated, educational problems reported to the State child abuse and maltreatment hotline sometimes reflect just the "tip of the iceberg," thus warranting investigation and possible intervention by the child protective system and, if necessary, the Family Court where the initial school-related complaint turns out to be more complex.

A far more comprehensive approach amending both the education PINS and educational neglect statutes is needed. Educators must play a vital role in both the PINS and child protective processes and must be available to be called upon to assist in diverting both categories of cases from the court system where possible. Where petitions are filed in Family Court, education officials must be notified and made parties so that they may be enlisted to participate in resolving education issues in the cases. The Committee's proposal, which would enhance both the diversion and the Family Court processes on a statewide basis for education-related PINS and educational neglect proceedings, would be enormously helpful in ensuring that professional educators become part of the solution for educational problems.

Proposal

AN ACT to amend the family court act, in relation to truancy allegations in persons in need of supervision and child protective proceedings in family court

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

Section 1. Paragraph (iii) of subdivision (d), paragraph (ii) of subdivision (g) and paragraph (h) of section 735 of the family court act, as amended by chapter 57 of the laws of 2005, are amended to read as follows:

(d)(iii) where the entity seeking to file a petition is a school district or local educational agency or where the parent or other potential petitioner indicates that the proposed petition will include truancy and/or conduct in school as an allegation, the designated lead agency shall review the steps taken by the school district or local educational agency to improve the youth's attendance and/or conduct in school and attempt to engage the school district or local educational agency in

further diversion attempts, if it appears from review that such attempts will be beneficial to the youth. Where the school district or local educational agency is not the potential petitioner, the designated lead agency shall provide notice to it of any conference with the potential petitioner in order for the school district or local educational agency to work with the designated lead agency to resolve the truancy or school behavioral problems of the youth so as to obviate the need to file a petition or, at minimum, to resolve the education-related allegations of the proposed petition.

(g) (ii) The clerk of the court shall accept a petition for filing only if it has attached thereto the following:

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

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

(C) where the proposed petition contains allegations of truancy and/or school misbehavior, whether or not the school district or local education agency is the proposed petitioner, a notice from the designated lead agency regarding the diversion efforts undertaken and/or services provided by the designated lead agency and/or by the school district or local educational agency to the youth and grounds for concluding that the educational problems could not be resolved absent the filing of a petition under this article.

(h) No statement made to the designated lead agency or to any agency or organization to which the potential respondent has been referred, prior to the filing of the petition, or if the petition has been filed, prior to the time the respondent has been notified that attempts at diversion will not be made or have been terminated, or prior to the commencement of a fact-finding hearing if attempts at diversion have not terminated previously, may be admitted into evidence at a fact-finding hearing or, if the proceeding is transferred to a criminal court, at any time prior to a conviction.

§2. Section 736 of the family court act is amended by adding a new subdivision 4 to read as follows:

(4) Where the petition contains allegations of truancy and/or school misbehavior and where

the school district or local educational agency is not the petitioner, the court shall cause a copy of the petition and notice of the time and place to be heard to be sent to the school district or local educational agency identified by the designated lead agency in its notice pursuant to subparagraph (C) of paragraph (ii) of subdivision (g) of section seven hundred thirty-five of this article. Such school district or local educational agency shall be joined by the court as a necessary party and may be asked to provide assistance in accordance with section two hundred fifty-five of this act where the court determines that such participation and /or assistance would aid in the resolution of the petition.

§3. Subdivision (b) of section 742 of the family court act, as amended by chapter 57 of the laws of 2005, is amended to read as follows:

(b) At the initial appearance of the respondent, the court shall review any termination of diversion services pursuant to such section, and the documentation of diligent attempts to provide appropriate services and determine whether such efforts or services provided are sufficient [and]. The court may, at any time, subject to the provisions of section seven hundred forty-eight of this article, order that additional diversion attempts be undertaken by the designated lead agency. The court may order the youth and the parent or other person legally responsible for the youth to participate in diversion services. If the designated lead agency thereafter determines that [the] a case referred for diversion efforts under this section has been successfully resolved, it shall so notify the court, and the court shall dismiss the petition.

§4. Subparagraph (A) of paragraph (i) of subdivision (f) of section 1012 of the family court act, as amended by chapter 469 of the laws of 1971, is amended to read as follows:

(A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so, or, in the case of an alleged failure of the respondent to provide education to the child, notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition; or

§5. Section 1031 of the family court act is amended by adding a new subdivision (g) to read as follows:

(g) Where a petition under this article contains an allegation of a failure by the respondent to provide education to the child in accordance with article sixty-five of the education law, regardless of

whether such allegation is the sole allegation of the petition, the petition shall recite the efforts undertaken by the petitioner and the school district or local educational agency to ameliorate such alleged failure prior to the filing of the petition and the grounds for concluding that the educational problems could not be resolved absent the filing of a petition under this article.

§6. Section 1035 of the family court act is amended by adding a new subdivision (g) to read as follows:

(g) Where the petition filed under this article contains an allegation of a failure by the respondent to provide education to the child in accordance with article sixty-five of the education law, the court shall cause a copy of the petition and notice of the time and place to be heard to be sent to the school district or local educational agency identified by the petitioner in the petition in accordance with subdivision (g) of section one thousand thirty-one of this article, Such school district or local educational agency shall be joined by the court as a necessary party and may be asked to provide assistance in accordance with section two hundred fifty-five of this act where the court determines that such participation and /or assistance would aid in the resolution of the petition.

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

2. Orders for genetic testing in child protective proceedings
[F.C.A. §§532, 564, 1035, 1089]

Family Court Act §564 permits the Family Court, in proceedings other than paternity proceedings, such as child abuse, child neglect and permanency proceedings, to adjudicate paternity where both parents are before the court, the putative father waives the right to the filing of a separate paternity petition and the right to a hearing and the court is satisfied as to the child's paternity based upon sworn statements or testimony. Where these conditions are not met, the court may direct either party, the child, the child's guardian or other person authorized under Family Court Act §522 to file a separate verified paternity petition. However, the statute is silent regarding any authority for the Family Court to direct genetic testing of any party or the child. This gap in the law has created a roadblock for permanency planning for many children in child protective and permanency proceedings by impeding the early identification both of children's fathers and of paternal grandparents and other relatives who may be suitable resources for the children. The impending April 1, 2011 effective date of the new kinship guardianship program in New York State underscores the importance of the identification of paternal relatives.

The Family Court Advisory and Rules Committee is therefore proposing a measure that would address this problem. It would amend sections 532 and 564 of the Family Court Act to authorize the court to order genetic testing in non-paternity proceedings upon the consent of both parents. Where consent is not obtained, the court would be permitted to direct any party to file a verified paternity petition. Where the mother's consent is not forthcoming by reason of her absence from the court, the court would be authorized to direct genetic testing so long as she had received notice and an opportunity to be heard. DNA testing can now be performed with a high degree of scientific accuracy with samples taken solely from the child and putative father, a procedure commonly known as a "motherless calculation." As in paternity cases, no test would be ordered in cases where the court has made a written finding that testing would not be in the child's best interests by reason of res judicata, equitable estoppel or the presumption of legitimacy. Further, Family Court Act §564 would be amended to permit the Family Court to adjudicate paternity on the basis of genetic testing, not simply on the basis of sworn statements or testimony. Corresponding amendments would be made to child protective and permanency provisions of the Family Court Act [Family Court Act §§1035, 1089].

Enactment of a procedural vehicle for the expeditious establishment of paternity of children who are the subjects of child protective and permanency proceedings is of the utmost importance. It would further the legislative goal of early identification of non-respondent fathers and of the pool of paternal grandparents and other relatives who may provide far better alternatives for children than stranger foster care. The legislature's passage of the *Adoption and Safe Families Act* in 1999, the permanency legislation in 2005 and the various amendments to Family Court Act §1017, 1035 and related provisions all reflect an acknowledgment of the vital role that can and should be played by fathers and their kin in furthering permanency for children, particularly those who would otherwise require stranger foster care. Where neglect or abuse petitions have been filed or where voluntary placement instruments have been executed, the Family Court Act and Social Services Law require social service agencies to attempt to identify, locate and notify non-respondent parents and relatives. Facilitating adjudications of paternity would substantially assist in the fulfillment of these

mandates.

The issue of paternity arises frequently in child protective and permanency proceedings in light of the large number of children before the Family Court who come from non-marital families and who may be the products of transitory or intermittent relationships. Often a person believing himself to be the father or a paternal grandparent or another paternal relative comes to court and seeks to care for or plan for an allegedly abused or neglected child. Sometimes more than one possible father appears. If paternity has not already been legally established through execution of an acknowledgment of paternity or through a judicial order of filiation, the court entertaining the child protective case must resolve the issue as soon as possible so that the child can be placed with the father or other family members and so that permanency planning for the child can proceed with dispatch. If the requirements of current Family Court Act §564 are not met – if, for example, the mother is not before the court or the court doubts the veracity of the mother's statement concerning paternity – the court's only alternative is to direct one of the parents to file a paternity petition. All too often this direction is not followed or the alleged father is unable to serve the petition on the mother whose whereabouts may be unknown. In such situations, the child's paternity may remain undetermined while the child lingers in foster care even though genetic testing, including the "motherless calculation" that can be performed in the mother's absence, could have swiftly resolved the issue.

Permitting the court to order genetic testing in the context of a child protective or permanency proceeding would provide a quick answer to questions regarding a child's paternity and would thus eliminate a significant roadblock on the child's path to a safe, healthy and permanent home. Identification of a child's parentage would not only permit location of relatives who may be resources for the child, but may also serve to identify siblings who may be able to develop significant relationships with the child. Equally significant, establishment of paternity would benefit the child by widening the availability of medical and other genetic information and by establishing the child's right to child support, medical and other insurance and inheritance from the father. Significant benefits to children, their immediate and extended families, social services agencies and the Family Court would thus result from enactment of the Committee's proposal.

Proposal

AN ACT to amend the family court act, in relation to paternity testing and adjudications in child protective proceedings in the family court

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

Section 1. Section 532 of the family court act is amended by adding a new subdivision (d) to read as follows:

(d) In any proceeding in the family court, whether under this act or under any other law, if there is an allegation or statement in a petition that a person is the father of a child, who is a subject

of the proceeding but paternity has not been established, the court may, upon the consent of the alleged father and mother, make an order for the alleged father, mother and child to submit to one or more genetic marker or DNA tests, in accordance with the provisions of this section. Where the mother or alleged father of the child does not consent to the testing, the court may direct any party empowered under section five hundred twenty-two of this article to file a verified petition under section five hundred twenty-three of this article to establish paternity. If the mother is not before the court, the court may nonetheless make an order for genetic marker or DNA testing if the court finds that she has been given notice and an opportunity to be heard, No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman.

§2. Subdivisions (b) and (c) of section 564 of the family court act, as added by chapter 440 of the laws of 1978, are amended to read as follows:

(b) The court may make such an order of filiation if:

(1) both parents are before the court, and

(2) the father waives both the filing of a petition under section five hundred twenty-three of this act and the right to a hearing under section five hundred [thirty-three] thirty-one of this act, and

(3) the court is satisfied as to the paternity of the child from the testimony or sworn statements of the parents or from the results of genetic testing performed in accordance with section five hundred thirty-two of this act. If the mother is not before the court, the court may make an order of filiation based upon the results of genetic testing ordered pursuant to subdivision (d) of section five hundred thirty-two of this act.

(c) The court may in any such proceeding in its discretion direct either the mother or any other person empowered under section five hundred twenty-two of this act to file a verified petition under section five hundred twenty-three of this act. The court may in any such proceeding, upon its own motion or upon the motion of either parent or alleged parent or the child, direct the alleged father, mother and child to submit to one or more genetic marker or DNA tests, in accordance with the provisions of section five hundred thirty-two of this act. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman.

§3. Section 1035 of the family court act is amended by adding a new subdivision (g) to read as follows:

(g) In any case in which paternity has not been established regarding a child who is the subject of a petition under this article and an alleged father is before the court, the court may direct genetic testing in accordance with section five hundred thirty-two of this act, may direct the filing of a paternity petition in accordance with section five hundred twenty-three of this act or may adjudicate paternity pursuant to section five hundred sixty-four of this act.

§4. Subparagraph (viii) of paragraph (2) of subdivision (d) of section 1089 of the family court act is amended by adding a new clause (I) to read as follows:

(I) In any case in which paternity has not been established regarding a child who is the subject of a hearing under this article and an alleged father is before the court, the court may direct genetic testing in accordance with section five hundred thirty-two of this act, may direct the filing of a paternity petition in accordance with section five hundred twenty-three of this act or may adjudicate paternity pursuant to section five hundred sixty-four of this act.

§5. 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 [F.C.A. §§1017, 1055, 1089; Soc. Serv. L.. §§358-a]

Reflecting a pronounced legislative trend at both Federal and State levels, the ongoing oversight responsibility of the Family Court with respect to children in foster care has increased sharply in the past two decades, culminating in the passage of the Federal *Adoption and Safe Families Act of 1997* [Public Law 105-89], its state implementing legislation [L.1999, ch. 7] and the landmark permanency law [L.2005, ch. 3]. Both the Federal and State *Adoption and Safe Families Acts* emphasize that the safety of the child is paramount, compelling the conclusion that the Court and parties must be informed promptly 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, *i.e.*, the States' ability to reach Federally-established targets for timely achievement of permanency for children. The second "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) in 2008, concluded that New York State again ranked among the lowest scores in the nation and demonstrated how far New York State has to go to achieving the Federal targets.[33] Legislative action is thus compelled in order to ensure that the Family Courts can exercise their important monitoring functions on the basis of complete, timely information. The 2005 permanency legislation, with its salutary provisions for continuing jurisdiction, was an important step, but further legislation is necessary to ensure that information regarding the most compelling of circumstances is conveyed to the Court, the child's attorney and the parties on a timely basis in order to bring New York State into compliance with *ASFA*.

Recognizing that "time is of the essence" where children are concerned, the Family Court Advisory and Rules Committee is submitting a proposal to ensure that the parties and children's attorneys are informed promptly of any changes in placement and of any indicated reports of maltreatment that may warrant Court intervention. The Committee's proposal would amend sections 1055 and 1089 of the Family Court Act, as well as section 358-a of the Social Services Law, to require an agency with which a child has been placed, either voluntarily or as a result of an abuse or neglect finding, or to whom guardianship and custody has been transferred as a result of the child being freed for adoption, to report to the attorney for the child not later than ten days in advance of any change in the child's placement status and not later than the next business day in any case in which an emergency placement change has been made. These provisions are consistent with the recently issued policy directives of the New York State Office of Children and Family Services and the New York City Administration for Children's Services, but would have the stronger force of

[33] As in 2001, New York State scored poorly in the time for children to achieve permanency. *See Final Report of the Child and Family Services Review of New York State: Executive Summary*, p. 2 (March, 2009)(available at http://www.acf.hhs.gov/programs/cb/cwrp/executive/ny/html) .

statute.[34]

The proposal adds two important requirements not contained in the new agency policies. First, the measure requires a report within five days of the date that any report of abuse or maltreatment is found to be indicated. Second, recognizing that fairness also compels such notifications to be made to the attorneys for all parties, not simply the attorneys for the children, the proposal requires that both notices of changes in placement and indicated child maltreatment reports be conveyed to attorneys for the birth parents except in cases involving children freed for adoption. 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. Indeed, there have been instances in which the existence of indicated child abuse reports has not come to light until the point of finalization of adoptions.

Significantly, the Committee's new proposal is fully responsive to the concerns raised in the Governor's Veto Message regarding A 8418, a bill requiring notification to children's attorneys of changes in placement that passed both houses of the Legislature in 2010. First, by explicitly authorizing electronic transmittal of the notices, the measure minimizes the burden imposed upon the placement agencies. Second, since the notifications are sent to the attorneys but not to the courts, the measure insures that court intervention would only occur in the rare cases in which an application is made by one of the attorneys.

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 attorneys for children 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.

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 of a change in placement must provide enough information for the litigants and the Family Court to assess whether further judicial intervention may be warranted. It must state the reasons for the change, as well as the grounds for the

[34] N.Y.S. Office of Children and Family Services, "Notice of Placement Change to Attorneys for Children," Administrative Directive #10-OCFS-ADM-16 (Dec. 14, 2010); Memorandum of John B. Mattingly, Commissioner, N.Y.C. Administration for Children's Services, entitled "Notice of Placement Change to Attorneys for Children," dated Aug. 30, 2010.

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.

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

Proposal

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

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

Section 1. Section 1017 of the Family Court Act is amended by adding a new subdivision 5 to read as follows:

5. In any case in which an order has been issued pursuant to this article remanding or placing a child in the custody of the local social services district, the social services official or authorized agency charged with custody of the child shall report any anticipated change in placement to the attorneys for the parties and the attorney for the child not later than ten days prior to 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; provided, however, that where an immediate change of placement on an emergency basis is required, the report shall be transmitted no later than the next business day after such change in placement has been made. Each report shall state the anticipated date of the change, the grounds for the official's or agency's conclusion that such change is in the best interests of the child and contact information for a social services or agency official who may be contacted for additional information. The social services official or authorized agency shall also submit a report to the attorneys for the parties and the attorney for the child 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. The official or agency may protect the confidentiality of identifying or address information regarding the foster or prospective adoptive parents. Reports under this paragraph may be transmitted in writing, by electronic means or on the record during proceedings in family court.

§2. Section 67 of chapter 41 of the laws of 2010, is REPEALED.

§3. Section 1055 of the family court act is amended by adding a new subdivision (j) to read as follows:

(j) In any case in which an order has been issued pursuant to this section placing a child in the custody of the commissioner of social services, the social services official or authorized agency charged with custody of the child shall report any anticipated change in placement to the attorneys for the parties and the attorney for the child not later than ten days prior to 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; provided, however, that where an immediate change of placement on an emergency basis is required, the report shall be transmitted no later than the next business day after such change in placement has been made. Each report shall state the anticipated date of the change, the grounds for the official's or agency's conclusion that such change is in the best interests of the child and contact information for a social services or agency official who may be contacted for additional information. The social services official or authorized agency shall also submit a report to the attorneys for the parties and the attorney for the child 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. The official or agency may protect the confidentiality of identifying or address information regarding the foster or prospective adoptive parents. Reports under this paragraph may be transmitted in writing, by electronic means or on the record during proceedings in family court.

§4. Subparagraph (vii) of paragraph 2 of subdivision (d) of section 1089 of the family court act is amended by adding a new clause (H) to read as follows:

(H) a direction that the social services official or authorized agency charged with care and custody or guardianship and custody of the child, as applicable, report any anticipated change in placement to the attorneys for the parties and the attorney for the child not later than ten days prior to 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; provided, however, that where an immediate change of placement on an emergency basis is required, the report shall be transmitted no later than the next business day after such change in placement has been made. Each report shall state the anticipated date of the change, the grounds for the official's or agency's conclusion that such change is in the best interests of the child and contact information for a social services or agency official who may be contacted for additional information. The social services official or authorized agency shall also submit a report to the attorneys for the parties and the attorney for the child 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. The official or agency may protect the confidentiality of identifying or address information regarding the foster or prospective adoptive parents. Reports under this paragraph shall not be sent to attorneys for birth parents whose parental rights have been terminated or who have surrendered their child or children. Reports under this paragraph may be transmitted in writing, by electronic means or on the record during proceedings in family court; and.

§5. 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 case in which an order has been issued pursuant to this section approving a foster care placement instrument, the social services official or authorized agency charged with custody of the child shall report any anticipated change in placement to the attorneys for the parties and the attorney for the child not later than ten days prior to 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; provided, however, that where an immediate change of placement on an emergency basis is required, the report shall be transmitted no later than the next business day after such change in placement has been made. Each report shall state the anticipated date of the change, the grounds for the official's or agency's conclusion that such change is in the best interests of the child and contact information for a social services or agency official who may be contacted for additional information. The social services official or authorized agency shall also submit a report to the attorneys for the parties and the attorney for the child 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. The official or agency may protect the confidentiality of

identifying or address information regarding the foster or prospective adoptive parents. Reports under this paragraph may be transmitted in writing, by electronic means or on the record during proceedings in family court.

§6. This act shall take effect on the sixtieth day after it shall have become a law; provided, however, that section 2 shall take effect immediately and shall be deemed to have been in full force and effect since the effective date of chapter 342 of the laws of 2010 and, effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be completed on or before such effective date.

REPEAL NOTE: Section 67 of chapter 41 of the laws of 2010 contains language inconsistent with language in chapter 342 of the laws of 2010.

4. Putative fathers entitled consent to adoptions and to notice of adoption, surrender and termination of parental proceedings [D.R.L. §§111, 111-a; Soc. Serv. L. §384-c]

In 1979, the United States Supreme Court, in Caban *v.* Mohammed, 441 US 388 (1979), held a statute unconstitutional that failed to afford a birth father the right to consent to his child's adoption, where he had lived with the mother, admitted paternity and had a substantial relationship with, and provided support to, the child. Following Caban, the Legislature enacted new criteria defining those putative or non-marital fathers who are entitled to consent to adoptions ("consent fathers") and those who are entitled simply to notice of termination of parental rights, surrender and adoption proceedings ("notice-only fathers"). Those entitled to notice only may be heard regarding the children's best interests but do not have veto power over their adoptions. L.1980, ch. 575. Notwithstanding the Legislature's goals of providing "reasonable, unambiguous and objective" criteria for notice and consent,[35] experience with the 1980 statute has demonstrated that it fulfills none of those intentions. The Family Court Advisory and Rules Committee is, therefore, proposing a measure to expand and objectify both the criteria for non-marital fathers to consent to adoptions and the criteria for those entitled to notice of, but not veto power over, adoptions.

1. Consent fathers [Domestic Relations Law §111]:

The Committee's proposal establishes a new, objective benchmark for determining the applicable criteria for assessing whether a putative father should be accorded the status of a "consent father." Current law establishes different criteria for determining whether a non-marital father is a "consent father," depending upon whether a child was less than or more than six months old when the child was "placed with the adoptive parents." *See* Domestic Relations Law §§111(1)(d), 111(1)(e). The Committee's proposal would substitute the "time of the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earliest" for the phrases "placed with the adoptive parents" and "placed for adoption."[36]

The phrase "placed with the adoptive parents" has generated decades of confusion over whether it denotes the original placement with the particular adoptive family at a point where their status was not yet "adoptive" or the later point at which the adoptive parents signed an adoptive placement agreement or, alternatively, the hard-to-pinpoint moment at which foster parents were identified by the child care agency as the adoptive resources for the child. Interpretation of the phrase to connote the point at which the adoptive parents signed an adoptive placement agreement has been problematic, since it, in effect, has rendered the six-month distinction inapplicable to the vast majority of foster children, virtually all of whom are over six months old at the point where the agreement has been signed. As the Appellate Division, First Department, recognized in dicta in Matter of Tasha M., 33 A.D.3d 387 (1st Dept., 2006), such an interpretation is not meaningful, since the determination whether a person is a "consent father" is a "threshold issue" that must generally be

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

[36] Inclusion of the filing of the adoption petition as one of the criteria addresses situations, more common in private adoptions, in which a child is freed for adoption within the adoption proceeding, with no prior actions filed.

determined well in advance of the signing of an adoptive placement agreement. In fact, statutes and regulations preclude the signing of the adoptive placement agreement until the child has already been freed for adoption, but the Family or Surrogate's Court is required to make a determination regarding "consent fathers" as a part of a termination of parental rights proceeding.[37] The Committee's proposal would instead articulate a far more readily-identifiable point in time for determining whether to apply the over-six-months or under-six-months criteria.

Using the new benchmark for those children who were over six months old, the Committee's proposal recognizes additional categories of non-marital fathers who should be accorded the right to consent to adoptions of their children.[38] Those criteria would include, *inter alia*, those named on a child's birth certificate or acknowledgment of paternity, those adjudicated as fathers in New York or another state or territory, those whose acknowledgment of paternity or order of filiation in another country is determined to be entitled to comity, those who maintained substantial and continuous or repeated contact with the child through visits at least twice per month or through regular communication, and those who lived with the child for six months immediately prior to the earlier point of the child's placement in foster care or placement for adoption.

Affording non-marital fathers named on the child's birth certificate or acknowledgment of paternity, or adjudicated as fathers in New York or another state or territory, the right to consent to the adoption of their children reflects the increasing recognition and utilization of these means of establishing fatherhood. The Federal *Personal Responsibility and Work Opportunities Recognition Act* [Public Law 104-193] required states, as a condition of receiving Federal child support funding under Title IV-D of the Social Security Act, to implement simple means of legally establishing paternity through voluntary acknowledgments, including hospital-based programs to encourage their use, and to accord full faith and credit to acknowledgments from other states – requirements that have sharply increased the use and recognition of acknowledgments nationally. Further, the Act required genetic testing to be admissible in paternity proceedings and to be presumptive proof of paternity, changes that have increased paternity adjudications and have reduced contested cases. *See* 42 U.S.C.A. §666(a)(5).[39] Taken together, these changes, accompanied by parallel increases in societal perceptions of the status of fathers of out-of-wedlock children, militate in favor of recognizing fathers whose paternity has been established through these means as "consent fathers."

Additionally, the Committee's proposal retains but, again, clarifies the alternative behavioral criteria for establishing the status of a "consent father." Apart from legally establishing paternity, non-marital fathers may demonstrate their entitlement to be "consent fathers" through maintaining

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[37] *See* Social Services Law §§384-b(12); 18 N.Y.C.R.R. §§421.1(d), 421.18(3)(1).

[38] The Committee's proposal does not address the "consent father" criteria applicable to children under six months old, the subject of a Committee proposal in prior years. *See* D.R.L. §111(1)(e). Since the Court of Appeals, in Matter of Racquel Marie X., 76 N.Y.2d 387(1990), *cert. denied,* 498 U.S. 984 (1991), ruled unconstitutional the criterion requiring the putative father to have lived with the mother for six months prior to the child's birth, criteria articulated in that decision, rather than the statutory criteria, have been applied to putative fathers of those children.

[39] Voluntary paternity acknowledgment procedures and full faith and credit requirements in New York are delineated in Public Health Law §4135-b, Social Services Law §111-k and Family Court Act §516-a.

"substantial and continuous or repeated contact with the child." This may be demonstrated by payment of child support, visiting the child, regularly communicating with the child or living with the child for a six-month period. The proposal would modify the visiting criterion to require visits twice per month, the standard for foster care visiting contained in the regulations of the New York State Office of Children and Family Services. *See* 18 N.Y.C.R.R. §430.12(c)(4)(ii)(d)(1)(i). Further, with respect to the living-together criterion, it would substitute a six-month period "immediately preceding the earlier of the placement of the child for adoption or placement of the child in foster care" for the existing requirement of "six months within the one year period immediately preceding the placement of the child for adoption."[40]

Elevation of legally adjudicated and acknowledged fathers to "consent fathers" from their current status as "notice only" fathers is consistent with the mandates in the recently-enacted permanency legislation for early identification of suitable non-respondent parents, as well as relatives (both paternal and maternal), with whom children who are the subjects of child protective proceedings might reside. *See* Family Court Act §1017 [L.2005, ch. 3]. Non-respondent parents must be given notice of the pendency of child protective proceedings and permanency hearings , information regarding where their children have been placed and how they can enforce their rights to visitation, and a warning that they are subject to possible termination of parental rights if they don't involve themselves in planning for their children on a timely basis. *See* Family Court Act §1035, 1089(b)(1)(i). Child protective and child care agencies' continuing obligations to identify and plan with the fathers of children in their care and to document those efforts are clear from the inception of children's placement in foster care – part of a salutary national trend to spur early identification and involvement of fathers.[41] Fathers who come forward promptly, cooperate in permanency planning efforts, maintain regular contact with their children and fulfill their roles as fathers clearly merit the entitlement afforded by the Committee's proposal to consent to the adoption of their children.

2. Notice-only fathers [Domestic Relations Law §111-a; Social Services Law §384-c]: In addition to augmenting the alternatives for establishing status as a "consent father," the Committee's proposal would add two categories of individuals who would be entitled to notice of termination of parental rights, surrender and adoption proceedings and the opportunity in those proceedings to be heard regarding their children's best interests. The proposal would retain as "notice-only" fathers those named by mothers in written sworn statements and those who have merely filed an intent to claim paternity with the putative father registry. Both of those are unilateral actions, do not carry a support obligation, and are revocable at will, thus warranting retention of the more

[40] Read literally, the existing six-month criterion could only apply to the father of a foster child if the child were surrendered for adoption virtually immediately upon placement in foster care. The minimum thresholds of time in foster care for involuntary termination of parental rights are six months for abandonment and one year for all other grounds, except severe or repeated child abuse.

[41] *See* NYS Office of Children and Family Services, *Locating Absent Fathers and Extended Family Guidance Paper* (Informational Letter 05-OCFS-INF-05, Sept., 2005); *What About the Dads? Child Welfare Agencies' Efforts to Identify, Locate and Involve Nonresident Fathers* (US HHS ACYF Children's Bureau, 2006).

limited "notice-only" status.[42]

The first new category of "notice-only fathers" would include individuals who have filed, served upon the mother or agency and thereafter appeared in court on paternity or custody petitions during their children's most recent stays in foster care. This category reflects concern for the right to be heard of a non-marital father, whose attempts to assert his status as father may have been frustrated by the mother's unavailability or the child care agency's unresponsiveness, but who nonetheless has taken some concrete action. The second new category would be comprised of individuals identified in an acknowledgment or order of paternity in another country that has been determined by the Family or Surrogate's Court not to be entitled to comity in New York State but for whom the Court has determined that notice should be given.

Advances in establishment of paternity and enhanced expectations concerning the role of non-marital fathers in their children's lives warrant a realignment both of the requirements for consent to adoption by fathers of children born out of wedlock and for notice to fathers of termination, surrender and adoption proceedings. The Family Court Advisory and Rules Committee's proposal provides that necessary realignment and in so doing will enhance the effectiveness of the permanency planning process for children before the Court.

Proposal

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

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

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

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

[42] They thus stand in sharp contrast to paternity acknowledgments, pursuant to Public Health Law §4135-b, which must be signed by both parents and have strict Federal time-limits and criteria that must be met before they can be revoked. *See* 42 U.S.C.A. §666(a)(5)(D)(ii). *See also* Family Court Act §516-a(b); Social Services Law §111-k.

(i) been named as the father on the child's birth certificate; or

(ii) been adjudicated as the father by a court in the state of New York; or

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

(iv) acknowledged paternity in a form duly executed pursuant to section four thousand one hundred thirty-five-b of the public health law or in a form recognized by the state or territory of the United States in which it was executed to have the force and effect of an order of paternity or filiation; or

(v) been identified as the father in an order of paternity or filiation or an acknowledgment of paternity in another country that has been determined by the court to be entitled to comity in this state; or

(vi) maintained substantial and continuous or repeated contact with the child as manifested by [:(i)] the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either

[(ii)]A. the father's visiting the child at least [monthly] twice per month when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or

[(iii)] B. the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child. [The] For purposes of this subparagraph, the subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph.

(vii) A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months [within the one year period] immediately preceding the earlier of the placement of the child for adoption or placement of the child in foster care and who during such period openly held himself out to be the father of such child shall be deemed to have maintained

substantial and continuous contact with the child for the purpose of this [subdivision] paragraph.

(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months [at the time he is placed for adoption] old at the time of the filing of a petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption or petition for adoption, whichever is earliest, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

§2. Subdivisions 1 and 2 of section 111-a of the domestic relations law, as amended by chapter 575 of the laws of 1980, are amended to read as follows:

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given to any person who previously has been given notice of any [proceeding] petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption involving the child[, pursuant to section three hundred eighty-four-c of the social services law,] and provided further that notice in an adoption proceeding[,] pursuant to this section shall not be required to be given to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b. In addition to such other requirements as may be applicable to the petition in any proceeding in which notice must be given pursuant to this section, the petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice. For the purpose of determining persons entitled to notice of adoption proceedings initiated pursuant to this article,

persons specified in subdivision two of this section shall not include any person who has been convicted of rape in the first degree involving forcible compulsion, under subdivision one of section 130.35 of the penal law, when the child who is the subject of the proceeding was conceived as a result of such rape.

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

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

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

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

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

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

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

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

(h) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law] (e) any person who, subsequent to the child's most recent entry into foster care, has filed and served a paternity or a custody petition upon the mother or upon the agency having care and custody of the child, who has stated in the petition that he is the child's father and who appeared in court on that petition on the date for return of process; and

(f) any person identified as the father in an order of paternity or filiation or an acknowledgment of paternity in another country that has been determined by the court not to be entitled to comity in this state, but for whom the court determines that such person should be provided with notice pursuant to this section.

§3. Subdivisions 1 and 2 of section 384-c of the social services law, as amended by chapter

575 of the laws of 1980, are amended to read as follows:

1. Notwithstanding any inconsistent provision of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any [proceeding initiated pursuant to sections three hundred fifty-eight-a, three hundred eighty-four, and three hundred eighty-four-b of this chapter,] petition to terminate parental rights, application to execute a judicial surrender, petition for approval of an extra-judicial surrender or extra-judicial consent to adoption involving [a] the child if the child was born out-of-wedlock. Persons specified in subdivision two of this section shall not include any person who has been convicted of rape in the first degree involving forcible compulsion, under subdivision one of section 130.35 of the penal law, when the child who is the subject of the proceeding was conceived as a result of such rape.

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

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

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

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

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

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

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

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

(h) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law] (e) any person

who, subsequent to the child's most recent entry into foster care, has filed and served a paternity or custody petition upon the mother or upon the agency having care and custody of the child, who stated in the petition that he is the child's father and who appeared in court on that petition on the date for return of process; and

(f) any person identified as the father in an order of paternity or filiation or an acknowledgment of paternity in another country that has been determined by the court not to be entitled to comity in this state, but for whom the court determines that such person should be provided with notice pursuant to section 111-a of the domestic relations law.

§4. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to petitions for adoption, termination of parental rights, approvals of extra-judicial surrenders or extra-judicial consents to adoption or applications to execute judicial surrenders filed on or after such effective date; provided, however, that this law shall not apply to cases in which judicial determinations had been made prior to such effective date regarding putative fathers entitled to consent to adopt or to notice of adoption, termination of parental rights, approvals of extra-judicial surrenders or extra-judicial consents to adoption or applications to execute judicial surrenders.

5. Adjournments in contemplation of dismissal and suspended judgments in child abuse and neglect proceedings [F.C.A. §§1039, 1053, 1071]

Long-standing uncertainty regarding the consequences of adjournments in contemplation of dismissal and suspended judgments in child protective proceedings has hindered the ability of the Family Courts to utilize these important mechanisms for resolving child protective cases without the need for more drastic alternatives, such as out-of-home foster care placements. The Family Court Advisory and Rules Committee is, therefore, submitting a proposal to clarify and fill gaps in the statutory framework with respect to both of these options.

The proposal would make clear that an adjournment in contemplation of dismissal may be ordered either before the entry of a fact-finding order or before the entry of a final disposition. It would maintain the current law permitting an adjournment in contemplation of dismissal to be ordered upon the consent of the parties and child's attorney prior to the entry of a fact-finding order. Preserving the 1990 amendment to Family Court Act §1039(e) that followed from the Court of Appeals decision in Matter of Marie B., 62 N.Y.2d 352 (1984), if the Family Court finds a violation of the conditions of the adjournment and restores the matter to the Family Court calendar, the parent would be entitled to a fact-finding hearing on the original child abuse or neglect petition prior to the case advancing to the dispositional stage. Eliminating the confusing and overly limiting phrase "upon a fact-finding hearing," the proposal makes clear that an adjournment in contemplation of dismissal may instead be ordered '[a]fter the entry of a fact-finding order but prior to the entry of a dispositional order" also upon motion by any party or the child's attorney. In such a case, the consent of the petitioner child protective agency and child's attorney would not be required but both would have a right to be heard regarding their positions. In the event the matter is restored to the Family Court calendar as a result of a violation of the conditions of the adjournment, the matter would proceed to disposition no later than thirty days after the application to restore the matter to the calendar, unless an extension for "good cause" is granted by the Court. In all cases, the Family Court would have to state reasons on the record for adjourning a case in contemplation of dismissal.

The proposal also clarifies that an adjournment in contemplation of dismissal may be extended for up to one year, either upon consent of the parties and child's attorney (if prior to fact-finding) or for good cause upon the respondent's consent (if after fact-finding and prior to disposition). If a violation of the conditions of the adjournment is alleged, the adjournment period is tolled pending a determination regarding the alleged violation. Additionally, sixty days prior to the expiration of the adjournment, the child protective agency must submit a report to the Family Court, parties and child's attorney regarding compliance with the conditions. If there has been no violation of the adjournment in contemplation of dismissal and the adjournment in contemplation of dismissal has not been extended, the petition would be deemed dismissed and, in the case of a post-fact-finding ACOD, the fact-finding itself would be deemed vacated. If the court finds a violation, the Family Court may extend the ACOD, possibly with new or different conditions, or may restore the matter to the calendar for fact-finding (for pre-fact-finding ACOD's) or for disposition (for post-fact-finding ACOD's).

During the period of the adjournment, the Family Court would not be authorized to place the child pursuant to Family Court Act §1055 and the adjournment may not be conditioned upon the child's voluntary placement pursuant to Social Services Law §358-a. Except as necessary under sections 1024 or 1027 of the Family Court Act, the child could not be removed from home during the adjournment period. These amendments are necessary in light of the fact that children remanded or placed in foster care, notwithstanding the adjournment in contemplation of dismissal of the underlying proceeding, are not eligible for Federal foster care reimbursement under Title IV-E of the *Social Security Act*. It goes without saying that if the case warrants dismissal following a period of adjournment, the Court would not be able to find that retention in the home would be contrary to the child's best interests, as is required by the New York State and Federal *Adoption and Safe Families Act*s for Federal foster care eligibility. *See* Family Court Act §1027(b); Social Services Law §358-a(3); Public Law 105-89.

Like the provisions regarding adjournments in contemplation of dismissal, the dispositional alternative of suspended judgment in child protective cases has long generated confusion, because the Family Court Act is largely silent regarding procedures for its issuance, as well as its ultimate consequences. Similar to the amendments made in 2005 and 2006 to Family Court Act §633,[43] the suspended judgment provisions applicable to permanent neglect cases, the proposal would amend Family Court Act §1053 to require that the order suspending judgment contain the duration, terms and conditions of the order. The order would also require a warning in conspicuous print that failure to comply may lead to its revocation and to issuance of any other order of disposition that might have been made under Family Court Act §1052 at the time the judgment was suspended. A copy of the order must be furnished to the respondent.

The proposal would add clarity regarding procedures applicable when a parent has successfully complied with the conditions of a suspended judgment. The order suspending judgment must include a date for a review by the Court and parties of the parent's compliance no later than 30 days prior to the expiration of the suspended judgment period. In addition to the existing requirements for progress reports 90 days after issuance of the order and as ordered by the Court, the proposal would require a report no later than 60 days prior to the suspended judgment's expiration.

Consistent with the observation of the Supreme Court, Appellate Division, Third Department, in Matter of Baby Girl W., 245 A.D.2d 830 (3rd Dept., 1997), the Committee's proposal provides that at the end of a successful period of a suspended judgment, the underlying order of fact-finding would not automatically be vacated; nor would the report on the Statewide Central Register of Child Abuse and Maltreatment automatically be sealed or expunged. Rather, as in Matter of Makynli N., 17 Misc.3d 1127(A), 2007 N.Y.Slip Op. 52162 (Fam. Ct., Monroe Co., 2007) (Unreported), the parent could apply to the Family Court, pursuant to Family Court Act §1061, for an order vacating the order of fact-finding and dismissing the proceeding in accordance with subdivision (c) of section 1051 of the Family Court Act on the ground that the aid of the Court is no longer required and that the dismissal would be in the children's best interests. *See also* Matter of Crystal S., 74 A.D.3d 823 (2nd Dept., 2010). Such a dismissal would then provide the parent with grounds to seek administrative relief in terms of sealing or expungement of the State Central Register report. As the Family Court,

[43] *See* L. 2005, c. 3; L. 2006, c. 437.

Monroe County, noted in its earlier opinion in the case,

> [A] suspended judgment neither condones Respondent's neglectful action, nor does it necessarily eradicate the finding. [Citation omitted].

Matter of MN, 16 Misc.3d 499, 506 (Fam. Ct., Monroe Co., 2007). Significantly, it is the requirement of this procedural step, *i.e.*, the motion under Family Court Act §1061, that distinguishes the outcome of a successful suspended judgment from that of an adjournment in contemplation of dismissal. A suspended judgment may thus be an appropriate disposition in cases in which the Court determines that a full dismissal of the proceedings, including vacatur of the fact-finding, should not be automatic.

Concomitantly, the Committee's proposal amends the procedures to be followed in the event that the parent does not comply with the conditions of a suspended judgment.While chapter 519 of the Laws of 2008 amended Family Court Act §1052(a) to clarify that a disposition of suspended judgment may not be combined with that of placement of a child, there may be cases where a temporary removal of a child may be necessary pending the outcome of a motion or order to show cause alleging a violation of a suspended judgment. Thus, just as a Family Court may remove a child from home if necessary for the child's protection pending disposition of a child protective proceeding, pursuant to Family Court Act §1027(a)(iii), so, too, the Committee's proposal would permit the convening of a hearing and, if needed, the temporary removal of child from his or her home pending the resolution of a violation proceeding.

The Committee's proposal provides needed clarity to both the provisions regarding adjournments in contemplation of dismissal and the disposition of suspended judgment, thus enhancing the usefulness of these options for the resolution of child abuse and neglect proceedings in Family Court. Both of these options are critically important to promote and preserve the well-being of children and their families by providing opportunities for families to access services in order to repair the problems that precipitated court action without the disruption and, all too often, the trauma of out-of-home placement.

Proposal

AN ACT to amend the family court act, in relation to adjournments in contemplation of dismissal and suspended judgments in child protective proceedings in the family court

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

Section 1. Section 1039 of the family court act, as amended chapter 707 of the laws of 1975, subdivisions (a), (b), (c), (d) and (e) as amended by chapter 41 of the laws of 2010 and subdivision (f) as amended by chapter 601of the laws of 1985, is amended to read as follows:

§1039. Adjournment in contemplation of dismissal. (a) (i) Prior to [or upon] the entry of a fact-finding [hearing] order, the court may, upon a motion by [the petitioner with the consent of the

respondent and] any party or the child's attorney with the consent of all parties and the child's attorney, or upon its own motion with the consent of [the petitioner, the respondent] all parties and the child's attorney, order that the proceeding be ["]adjourned in contemplation of dismissal.[" Under no circumstances shall the court order any party to consent to an order under this section]

(ii) After entry of a fact-finding order but prior to the entry of a dispositional order, the court may, with consent of the respondent and upon motion of any party or the child's attorney or upon its own motion without requiring the consent of the petitioner or attorney for the child, order that the proceeding be adjourned in contemplation of dismissal. The petitioner, respondent and attorney for the child have a right to be heard with respect to the motion.

(iii) The court may make [such] an order under this section only after it has apprised the respondent of the provisions of this section and it is satisfied that the respondent understands the effect of such provisions. Under no circumstances shall the court order any party to consent to an order under this section. The court shall state its reasons on the record for ordering an adjournment in contemplation of dismissal under this section.

(b) An adjournment in contemplation of dismissal is an adjournment of the proceeding for a period not to exceed one year with a view to ultimate dismissal of the petition in furtherance of justice. In the case of an adjournment in contemplation of dismissal after the entry of a fact-finding order, such dismissal includes vacatur of the fact-finding order.

(i) Upon the consent of the petitioner, the respondent and the child's attorney, the court may issue an order extending [such] the period of an adjournment in contemplation of dismissal issued pursuant to paragraph (i) of subdivision (a) of this section prior to the entry of a fact-finding order for such time and upon such conditions as may be agreeable to the parties.

(ii) For good cause shown and with the consent of the respondent, the court may, on its own motion or on motion of any party or the attorney for the child and after providing notice and an opportunity to be heard to all parties and the attorney for the child, issue an order extending an adjournment in contemplation of dismissal issued pursuant to paragraph (ii) of subdivision (a) of this section after entry of a fact-finding order for such time and upon such conditions as may be in the best interests of the child or children who are the subjects of the proceeding.

(iii) The court shall state its reasons on the record for extending an adjournment in contemplation of dismissal under this subdivision, including its reasons for changes in the terms and

conditions, if any.

(c) [Such] The order [may] shall include terms and conditions [agreeable to the parties and to the court, provided that such terms and conditions] in furtherance of the best interests of the child or children who are the subjects of the proceeding and shall include, but not be limited to, a requirement that the child and the respondent be under the supervision of a child protective agency during the adjournment period. Except as provided in subdivision (g) of this section, an order pursuant to section one thousand seventeen, or section one thousand fifty-five of this article shall not be made in any case adjourned under this section; nor shall an order under this section contain a condition requiring the child or children to be placed voluntarily pursuant to sections three hundred fifty-eight and three hundred eighty-four-a of the social services law. In any order issued pursuant to this section, [such agency] the petitioner shall be directed to make a progress report to the court, the parties and the child's attorney on the implementation of such order, no later than ninety days after the issuance of such order[, unless the court determines that the facts and circumstances of the case do not require such reports to be made] and shall submit a report pursuant to section one thousand fifty-eight of this article no later than sixty days prior to the expiration of the order. The [child protective agency] petitioner shall make further reports to the court, the parties and the child's attorney in such manner and at such times as the court may direct.

(d) Upon application of the respondent, the petitioner[,] or the child's attorney or upon the court's own motion, made at any time during the duration of the order, if the child protective agency has failed substantially to provide the respondent with adequate supervision or to observe the terms and conditions of the order, the court may direct the child protective agency to observe such terms and conditions and provide adequate supervision or may make any order authorized pursuant to section two hundred fifty-five or one thousand fifteen-a of this act.

(e) [Upon application of] If, prior to the expiration of the period of an adjournment in contemplation of dismissal, a motion or order to show cause is filed by the petitioner or the child's attorney or upon the court's own motion, made at any time during the duration of the order, [the] that alleges a violation of the terms and conditions of the adjournment, the period of the adjournment in contemplation of dismissal is tolled as of the date of such filing until the entry of an order disposing of the motion or order to show cause. The court may revoke the adjournment in contemplation of dismissal and restore the matter to the calendar or the court may extend the period of the adjournment

in contemplation of dismissal pursuant to subdivision (b) of this section, if the court finds after a hearing on the alleged violation that the respondent has failed substantially to observe the terms and conditions of the order or to cooperate with the supervising child protective agency. [In such event] Where the court has revoked the adjournment in contemplation of dismissal and restored the matter to the calendar:

(i) in the case of an adjournment in contemplation of dismissal issued prior to the entry of a fact-finding order, unless the parties consent to an order pursuant to section one thousand fifty-one of this [act] article or unless the petition is dismissed upon the consent of the petitioner, the court shall thereupon proceed to a fact-finding hearing under this article no later than sixty days after [such] the application to restore the matter to the calendar, unless such period is extended by the court for good cause shown; or

(ii) in the case of an adjournment in contemplation of dismissal issued after the entry of a fact-finding order, the court shall thereupon proceed to a dispositional hearing under this article no later than thirty days after the application to restore the matter to the calendar, unless such period is extended by the court for good cause shown.

(iii) The court shall state its reasons on the record for revoking an adjournment in contemplation of dismissal and restoring the matter to the calendar under this subdivision.

(f) If the proceeding is not [so] restored to the calendar as a result of a finding of an alleged violation pursuant to subdivision (e) of this section and if the adjournment in contemplation of dismissal is not extended pursuant to subdivision (b) of this section, the petition is, at the expiration of the adjournment in contemplation of dismissal period, deemed to have been dismissed by the court in furtherance of justice [unless an application is pending pursuant to subdivision (e) of this section]. If [such application is granted] the court finds a violation pursuant to subdivision (e) of this section, the petition shall not be dismissed and shall proceed in accordance with the provisions of such subdivision (e).

(g) Notwithstanding the provisions of this section, if a motion or order to show cause is filed alleging a violation pursuant to subdivision (e) of this section and the court finds that removal of the child from the home is necessary pursuant to section one thousand twenty-seven of this article during the pendency of the violation motion or order to show cause, the court[,] may, at any time prior to dismissal of the petition pursuant to subdivision (f), issue an order authorized pursuant to section one

thousand twenty-seven of this article. Nothing in this section shall preclude the child protective agency from taking emergency action pursuant to section one thousand twenty-four of this article where compelled by the terms of that section. If the violation is found and the matter is restored to the calendar, the court may make further orders in accordance with subdivision (e) of this section.

§2. Section 1053 of the family court act, as added by chapter 962 of the laws of 1970 and subdivision (c) as amended by chapter 41 of the laws of 2010, is amended to read as follows:

§1053. Suspended judgment. (a) Rules of court shall define permissible terms and conditions of a suspended judgment. These terms and conditions shall relate to the acts or omissions of the parent or other person legally responsible for the care of the child.

(b) The maximum duration of any term or condition of a suspended judgment is one year, unless the court finds at the conclusion of that period, upon a hearing, that exceptional circumstances require an extension thereof for a period of up to an additional year. The court shall state its reasons on the record for extending a period of suspended judgment under this subdivision, including its reasons for changes in the terms and conditions, if any.

(c) Except as provided for herein, in any order issued pursuant to this section, the court may require the child protective agency to make progress reports to the court, the parties, and the child's attorney on the implementation of such order. Where the order of disposition is issued upon the consent of the parties and the child's attorney, such agency shall report to the court, the parties and the child's attorney no later than ninety days after the issuance of the order, unless the court determines that the facts and circumstances of the case do not require such report to be made.

(d) The order of suspended judgment must set forth the duration, terms and conditions of the suspended judgment, and must contain a date certain for a court review not later than thirty days prior to the expiration of the period of suspended judgment. The order of suspended judgment also must state in conspicuous print that a failure to obey the order may lead to its revocation and to the issuance of any order that might have been made at the time judgment was suspended. A copy of the order of suspended judgment must be furnished to the respondent.

(e) Not later than sixty days before the expiration of the period of suspended judgment, the petitioner shall file a report, pursuant to section one thousand fifty-eight of this article, with the family court and all parties, including the respondent and his or her attorney, the attorney for the child and intervenors, if any, regarding the respondent's compliance with the terms of the suspended

judgment. The report shall be reviewed by the court on the scheduled court date. Unless a motion or order to show cause has been filed prior to the expiration of the period of suspended judgment alleging a violation or seeking an extension of the period of the suspended judgment, the terms of the disposition of suspended judgment shall be deemed satisfied. In such event, the court's jurisdiction over the proceeding shall be terminated. However, the order of fact-finding and the presumptive effect of such finding upon retention of the report of suspected abuse and neglect on the state central register in accordance with paragraph (b) of subdivision eight of section four hundred twenty-two of the social services law shall remain in effect unless the court grants a motion by the respondent to vacate the fact-finding pursuant to section one thousand sixty-one of this article.

§3. Section 1071 of the family court act, as amended by chapter 437 of the laws of 2006, is amended to read as follows:

§1071. Failure to comply with terms and conditions of suspended judgment. If, prior to the expiration of the period of the suspended judgment, a motion or order to show cause is filed that alleges that a parent or other person legally responsible for a child's care violated the terms and conditions of a suspended judgment issued under section one thousand fifty-three of this article, the period of the suspended judgment shall be tolled as of the date of such filing pending disposition of the motion or order to show cause. If a motion or order to show cause alleging a violation has been filed and the court finds that removal of the child from the home pending disposition of the motion or order to show cause is necessary pursuant to section one thousand twenty-seven of this article, the court may issue an order pursuant to such section one thousand twenty-seven. Nothing in this section shall preclude the child protective agency from taking emergency action pursuant to section one thousand twenty-four of this article where compelled by the terms of that section. If, after a hearing on the alleged violation, the court is satisfied by competent proof that the parent or other person violated the order of suspended judgment, the court may revoke the suspension of judgment and enter any order that might have been made at the time judgment was suspended or may extend the period of suspended judgment pursuant to subdivision (b) of section one thousand fifty-three of this article. The court shall state its reasons for revoking or extending a period of suspended judgment under this section.

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

6. Family offenses committed by juveniles under the age of eighteen [F.C.A. §812(1)]

As part of the 2005 New York State budget, the Legislature enacted landmark legislation significantly expanding the requirements for services to be provided to children and families as a means of preventing unnecessary prosecutions and costly out-of-home placements of Persons in Need of Supervision (PINS). *See* L.2005, ch. 57. Unfortunately, all too often, prosecutions of juveniles by their parents under the family offense provisions of Criminal Procedure Law §530.11 et seq., and Article 8 of the Family Court Act are becoming a rapidly escalating means of evading the clear requirements and protections for youth, as well as the family services available, under the 2005 PINS legislation. *See* People *v*. Simmey R., 12 Misc.3d 1189(A), 824 N.Y.S.2d 765, 2006 WL 2135579, 2006 N.Y.Slip Op. 51500 (Unreported opinion) (Crim. Ct., Kings Co., July 5, 2006). The increase in the PINS age ceiling to 18, thus expanding the jurisdiction of the Family Court to address family dysfunction involving older adolescents, was not accompanied by any change in the statutes according the Family Court exclusive jurisdiction over family offenses involving juveniles not criminally responsible by reason of age, generally juveniles under the age of 16 or, in the case of juvenile offenses prosecuted in criminal courts, 13, 14 or 15. *See* Crim. Proc. Law §530.11(1); Penal Law §§10.00(18), 30; Fam. Ct. Act §812(1).

The Committee is proposing legislation, therefore, to close that loophole by specifying that family offenses alleged to have been committed by juveniles under the age of 18 against their parents or guardians should be dealt with as Persons in Need of Supervision (PINS) proceedings in accordance with Article 7 of the Family Court Act, rather than as family offense proceedings pursuant to the Criminal Procedure Law or Article 8 of the Family Court Act. The extension of PINS jurisdiction to juveniles up to the age of 18 and the delineation of diversion requirements that must be followed in such cases collectively reflect the clear legislative intent that intra-familial problems arising between parents and children in such cases should be addressed through utilization of the comprehensive statutory framework of Article 7.

Article 8 of the Family Court Act is an inappropriate vehicle for proceeding against juveniles as it lacks important statutory protections, some constitutionally required and some required by Federal law, applicable to juveniles, including, inter alia, the right to an attorney, 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 legal 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, legal representation in juvenile delinquency and PINS cases is presumptively non-waivable. *See* Family Court Act §249-a.

The remedies of exclusion and incarceration available for family offense proceedings under both the Criminal Procedure Law and Article 8 are wholly inappropriate when applied in the context

of dependent children prosecuted by their parents or guardians. *See* People *v.* Simmey R., supra; Paula S. *v.* Steven S., 154 Misc.2d 567 (Fam. Ct., Ulster Co., 1992). In Paula S., the Family Court, Ulster County, substituted a PINS petition for a family offense petition on the ground that PINS proceedings offer more appropriate dispositional alternatives, including placement in treatment, rather than jail, facilities. Parents have a responsibility to support their children until the age of 21 and may be charged with abusing or neglecting them until the children reach the age of 18. *See* Family Court Act §§413(1), 1012; Social Services Law §101. Unmarried minors may not obtain public assistance independent of their parents until they reach the age of 18. *See* Social Services Law §131(6). Thus, orders of protection excluding respondents from their homes, a common remedy in family offense cases, should not be permitted in cases involving juveniles under the age of 18, as this remedy would relegate children to the streets with no means of support. Further, incarceration in jail for violations of orders of protection, authorized under Article 8 for up to six months per violation, contravenes Federal law when applied to juvenile respondents. The proscription against confinement of juveniles in adult jails, lock-ups and prisons, contained in New York law [Family Court Act §§ 304.1(2), 720(1)], is required as a condition of State funding under the Federal *Juvenile Justice and Delinquency Prevention Act of 1974*, 42 U.S.C. §5633(a)(13). No authority exists under Article 8 or under the Executive Law to detain or place children charged with family offenses in juvenile facilities.

The PINS statute provides full protection for victims of family offenses committed by juveniles against parents and guardians, while, at the same time, furthering the special needs of juveniles and retaining the constitutional and statutory protections applicable to them. PINS cases may be initiated by petitions filed, inter alia, by peace or police officers, parents or legal guardians or "any person who has suffered injury as a result of the alleged activity of a person alleged to be in need of supervision, or a witness to such activity." *See* Family Court Act §733. Article 7 authorizes issuance of orders of protection and temporary orders of protection, permits detention in juvenile non-secure detention and foster care facilities in appropriate cases, permits orders of restitution, and provides for dispositions in juvenile programs tailored specifically to the juveniles' needs and their presenting problems. *See* Family Court Act §§ 720, 740, 754, 758-a, 759. Since Article 7 contains each of these remedies, the Family Court Act should be amended to prohibit adjudication of a juvenile both for a family offense and as a PINS. The dual adjudications of 15-year old Latoya D. under both Articles 7 and 8 of the Family Court Act should have been deemed both inappropriate and unnecessary. *See* Marsha C. *v.* Latoya D., 224 A.D.2d 522, 638 N.Y.S.2d 129 (2d Dept., 1996), *leave to app. denied*, 88 N.Y.2d 804 (1996), and Matter of Latoya D., 224 A.D.2d 524, 638 N.Y.S.2d 128 (2d Dept., 1996), *leave to app. denied*, 88 N.Y.2d 804 (1996).

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

Proposal

AN ACT to amend the family court act, in relation to warrants and orders of protection in persons in

need of supervision cases and family offenses committed by juveniles

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 separately amended by chapters 341 and 405 of the laws of 2010, 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, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Family offenses alleged to have been committed by a child under the age of eighteen against a parent or guardian shall be addressed in accordance with article seven, rather than this article, of this act. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. In any proceeding pursuant to this article, a court shall not deny an order of protection, or dismiss a petition, solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition, the conclusion of the fact-finding or the conclusion of the dispositional hearing. 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. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to petitions filed on or after such effective date.

7. Orders of protection in termination of parental rights proceedings, child protective proceedings and permanency hearings regarding children freed for adoption
[F.C.A. §§634, 1029; 1056, 1089; Soc. Serv. L.. §384-b; Exec. L. §221-a]

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 should 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 his or her 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 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 children and their new families short of a criminal prosecution for a non-family offense.

An additional problem confronting victims of family violence, both adults and children, in child protective cases is the heavy burden created by the extremely short duration of orders of protection against family members, a period far shorter than applicable periods for orders in family offense, custody, visitation, child support and paternity proceedings. Subdivision one of 1056 of the Family Court Act authorizes an order of protection against respondent parents, persons legally responsible for a child's care and such persons' spouses in child neglect and abuse proceedings to last only as long as a child protective dispositional order. *See* Matter of Kole HH, 84 A.D.3d 1518 (3rd Dept., 2011); Matter of Patricia B., 61 A.D.3d 861 (2d Dept., 2009), *lve. app. denied*, 13 N.Y.3d 713 (2009); Matter of Andrew Y., 44 A.D.3d 1063 (2d Dept., 2007); Matter of Candace S., 38 A.D.3d 786 (2d Dept., 2007), *lve. app. denied*, 9 N.Y.3d 805 (2007); Matter of Amanda WW., 43 A.D.3d 1256 (3rd Dept., 2007); Matter of Collin H., 28 A.D.3d 806 (3rd Dept., 2006). Dispositions in child protective cases include, *inter alia*, release of a child under supervision for one year, subject to a one-year extension, or placement of a child until the next permanency hearing. Permanency hearings must be convened for children in foster care, as well as children directly placed with relatives and other individuals, once they have been in care for eight months and then every six months thereafter. *See* Family Court Act §§1052, 1054, 1055, 1057, 1089. These time limits stand in sharp contrast to the duration limits of family offense orders of protection, which were extended by the Legislature in 2003 to up to two years or, if aggravating circumstances or a violation of an order of protection are found, up to five years. *See* Family Court Act §842 [L. 2003, ch. 579]. Orders of protection in custody, visitation and other civil proceedings in Supreme and Family Court may last for specified periods until the youngest child reaches majority.

The Family Court Advisory and Rules Committee is proposing a measure to create a Family Court remedy for these deficiencies. 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 may, among other conditions, prohibit the birth parent from contact with the child and the child's foster or pre-adoptive parent and may last for a period of up to five years or until the date on which the youngest child turns eighteen, whichever is earlier. Second, the proposal would amend Family Court Act §1089 to authorize such an order to be issued as part of the disposition of a permanency hearing. Third, the proposal 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..."

That children and their new families are sometimes in critical need of these protections is clear from experience in numerous cases. The Family Courts have had cases in which disturbed birth parents, whose rights had been terminated, have contacted children at their schools, followed them home from school, accosted them when playing outside their homes, called them repeatedly on their cell-phones and scared them at home upon having a third party knock on their door on a pretext. While not frequent, such instances cry out for legal remedies. Families in such situations should not be forced to pursue criminal prosecutions as their only means of obtaining relief to keep their children and families safe.

Fourth, similar to orders of protection in family offense cases, orders of protection issued in child protective proceedings against individuals who are related by blood or marriage to the child or who were members of the child's household at the time of the disposition would be authorized to last up to two years or, or, upon findings of aggravating circumstances or a violation of an order of protection, up to five years. Such orders could be extended upon judicial review, with notice to all affected parties, in the context of a permanency hearing under Article 10-A of the Family Court Act or other post-dispositional proceeding under Article 10. The duration of orders against non-parents and former members of the household, pursuant to subdivision four of section 1056 of the Family Court Act would be unchanged, but the proposal would explicitly permit the restrained party to return to court for modification or vacatur of the order of protection upon a showing of a substantial change of circumstances. Concomitantly, orders of protection in permanent neglect and other termination of parental rights proceedings would be authorized for periods of up to five years. These provisions for time-limited orders would, therefore, meet the criticisms voiced by the Court of Appeals in Matter of Sheena D., 8 N.Y.3d 136 (2007), regarding lengthy orders of protection not subject to judicial scrutiny.

Finally, to optimize their effectiveness, the proposal would require all of these orders of protection to be entered onto the statewide registry of orders of protection and warrants. The registry, established pursuant to the *Family Protection and Domestic Violence Intervention Act of 1994* [L. 1994, ch. 222, 224], has become an invaluable tool both for law enforcement and the courts. With well over two million orders of protection in the database,[44] and with the database connected to the comprehensive national "Protection Order File" maintained by the National Crime Information Center (Federal Bureau of Investigation), the registry helps to assure informed judgments at all stages of domestic violence cases. Significantly, legislation enacted in 2008 and amended in 2009 requires

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

the registry to be checked in all Family and Supreme Court cases of child custody and visitation, thus making the registry a critically important resource in these cases as well. *See* L.2008, ch. 595; L.2009, ch. 295. All orders, including those in child protective, permanency, permanent neglect and other termination of parental rights proceedings, must be entered onto the registry in order for it to provide the protection necessary for all victims of family violence. Law enforcement and courts need to have confidence in the completeness and accuracy of the responses to their inquiries regarding both the existence of outstanding orders, including possibly conflicting orders, and the parties' histories of orders of protection.

The importance of inclusion of these orders on the registry cannot be overemphasized. Domestic violence is often inextricably linked with child abuse and victims of domestic violence in child abuse and neglect cases, including victims who may be respondents in these proceedings, require as much protection from their abusers as in other proceedings .[45] 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%.[46] 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.[47] Significantly, child sexual abuse has also been closely correlated with domestic violence.[48] Therefore, inclusion of orders of protection in such cases on the registry will significantly advance the Legislature's goal of providing an integrated response in all family violence cases and of protecting all victims of domestic abuse, both parents and children, from suffering further violence.

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[45] 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. Nicholson *v.* Scoppetta, 3 N.Y.3d 357 (2004). However, there are respondents in neglect and abuse proceedings, who are themselves also victims of family offenses, who should be able to obtain protection for themselves and their children without the burden of initiating separate family offense proceedings in order to obtain this relief.

[46] *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)].

[47] "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)].

[48] 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].

Enactment of this proposal would fill significant gaps 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*, *i.e.*, that "the health and safety of children is of paramount importance." *See* Social Services Law §384-b(1); 42 U.S.C. §§629b(a)(9), 670, 671(a).

Proposal

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

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

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

§634. Commitment of guardianship and custody; further orders. The court may enter an order under section six hundred thirty-one committing the guardianship and custody of the child to the petitioner on such conditions, if any, as it deems proper. For good cause shown, the court may issue a temporary order of protection or, upon disposition, an order of protection to protect the child and the child's foster or pre-adoptive parent or parents and other designated members of the household in which the child resides. The order may direct the respondent to observe reasonable conditions that may include, among others, that the respondent stay away from the child and from the home, school, business or place of employment of the child or the child's foster or pre-adoptive parent or parents or other designated members of the household in which the child resides. Prior to issuing the order, the court shall inquire as to the existence of any other orders of protection involving the parties and shall give the respondent notice and an opportunity to be heard. The court shall state its reasons on the record for issuing the order. An order of protection issued under this section may remain in effect for a period of up to five years or until the youngest child reaches the age of eighteen years of age, whichever is earlier. A violation of an order issued under this section may be addressed in accordance with subdivision two of section one thousand seventy-two of this chapter.

§2. Subdivision (a) of section 1029 of the family court act, as amended by chapter 41 of the laws of 2010, 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 one thousand fifty-six of this article and must conform to all of the requirements of that section. 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 an attorney for the child has been appointed, such attorney may make application for a temporary order of protection pursuant to the provisions of this section.

§3. The opening unlettered paragraph and paragraph (a) of subdivision 1, subdivisions 2 and 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 [shall] issued under this section may remain in effect [concurrently with, shall expire no later than the expiration date of, and] for a period of up to two years or, if the court finds aggravating circumstances as defined in paragraph (vii) of subdivision (a) of section eight hundred twenty-seven of this act or if the court finds that the respondent has violated an order of protection, a period of up to five years. The order of protection may be extended concurrently with, [such other] another order [made] issued under this [part] article or article ten-A of this act, except as provided in subdivision four of this section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by a person who is before the court and is a parent or a person legally responsible for the child's care or the spouse of the parent or other person legally responsible for the child's care, or both. Such an order may require any such person:

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

2. [The] Where the court [may also] has determined, in accordance with the requirements of section one thousand seventeen, part two or, as applicable, sections one thousand fifty-two and one

thousand fifty-five of this article, to award custody of the child, during the term of the temporary order of protection or order of protection, as applicable, to [either] a suitable non-respondent parent[,] or [to an] other appropriate relative [within the second degree] or suitable person, this award of custody may be included in the order of protection or temporary order of protection, as applicable. Nothing in this section gives the court power to place or board out any child or to commit a child to an institution or agency. In making orders of protection, the court shall so act as to insure that in the care, protection, discipline and guardianship of the child his or her religious faith shall be preserved and protected.

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 for the child's care as defined in section one thousand twelve of this [chapter] article, 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 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. The person restrained by the order of protection may, upon a showing of a substantial change of circumstances, move for modification or vacatur of the order.

§4. Section 1072 of the family court act, as amended by chapter 437 of the laws of 2006, is amended to read as follows:

§1072. Failure to comply with terms and conditions of supervision or order of protection. 1. If, prior to the expiration of the period of an order of supervision pursuant to section one thousand fifty-four or one thousand fifty-seven of this article, a motion or order to show cause is filed that alleges that a parent or other person legally responsible for a child's care violated the terms and conditions of an order of supervision issued under section one thousand fifty-four or one thousand fifty-seven of this article, the period of the order of supervision shall be tolled pending disposition of the motion or order to show cause. If, after hearing, the court is satisfied by competent proof that the parent or other person violated the order of supervision willfully and without just cause, the court may:

(a) revoke the order of supervision [or of protection] and enter any order that might have been

made at the time the order of supervision or of protection was made, or

(b) commit the parent or other person who willfully and without just cause violated the order to jail for a term not to exceed six months.

2. Prior to the expiration of the period of an order of protection or temporary order of protection issued pursuant to section six hundred thirty-four, one thousand twenty-nine, one thousand fifty-six or one thousand eighty-nine of this article or subdivision thirteen of section three hundred eighty-four-b of the social services law, a motion or order to show cause may be filed that alleges that a parent or other person legally responsible for a child's care violated the terms and conditions of such order willfully and without just cause. If, after hearing, the court is satisfied by competent proof that the parent or other person violated the order of protection or temporary order of protection willfully and without just cause, the court may:

(a) revoke or modify the order of protection or temporary order of protection and enter any order that might have been made at the time such order had been issued, or

(b) issue an order in accordance with sections eight hundred forty-two-a or eight hundred forty-six-a of this act.

§5. Clause (D) of subparagraph (viii) of paragraph 2 of subdivision (d) of section 1089 of the family court, as added by chapter 3 of the laws of 2005, is amended to read as follows:

D. [The] In the case of a child who has not been freed for adoption, the court may make an order of protection in the manner specified by section one thousand fifty-six of this [act] chapter in assistance or as a condition of any other order made under this section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified period of time by a person before the court for the protection of the child and the child's foster or pre-adoptive parent or parents and other designated members of the household in which the child resides. Prior to issuing an order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties and the child. In the case of a child freed for adoption, the court, for good cause shown, may issue an order of protection directing a person whose parental rights had been terminated or surrendered to observe reasonable conditions enumerated therein in order to protect the child and the child's foster or pre-adoptive parent or parents and other designated members of the household in which the child resides. The conditions may include, among others, that such person shall stay away from the child and from the home, school, business or place of employment of the

child or the child's foster or pre-adoptive parent or parents or other designated members of the household in which the child resides. The order may only be issued after the person or persons restrained by the order have been given notice and an opportunity to be heard. The court shall state its reasons on the record for issuing the order. In the case of a child freed for adoption or for whom a termination of parental rights proceeding is pending, the court may issue an order of protection or temporary order of protection, as applicable, in accordance with subdivision thirteen of section three hundred eighty-four-b of the social services law. A violation of an order issued under this section may be addressed in accordance with subdivision two of section one thousand seventy-two of this chapter.

§6. Section 384-b of the social services law is amended by adding a new subdivision 14 to read as follows:

14. For good cause shown, the court may issue a temporary order of protection or, upon disposition, an order of protection to protect the child and the child's foster or pre-adoptive parent or parents and other designated members of the household in which the child resides. The order may direct the respondent to observe reasonable conditions that may include, among others, that the respondent stay away from the child and from the home, school, business or place of employment of the child or the child's foster or pre-adoptive parent or parents or other designated members of the household in which the child resides. Prior to issuing the order, the court shall inquire as to the existence of any other orders of protection involving the parties and shall give the respondent notice and an opportunity to be heard. The court shall state its reasons on the record for issuing the order. An order of protection issued under this section may remain in effect for a period of up to five years or until the youngest child reaches the age of eighteen years of age, whichever is earlier. A violation of an order issued under this section may be addressed in accordance with subdivision two of section one thousand seventy-two of the family court act.

§7. Subdivision 1 of section 221-a of the executive law, as amended by sections 14 and 67 of part A of chapter 56 of the laws of 2010, is amended to read as follows:

1. The superintendent, in consultation with the division of criminal justice services, office of court administration, the state office for the prevention of domestic violence and the division for women, shall develop a comprehensive plan for the establishment and maintenance of a statewide computerized registry of all orders of protection issued pursuant to articles four, five, six [and], eight, ten and ten-a of the family court act, section 384-b of the social services law, 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, special orders of conditions issued pursuant to subparagraph (i) or (ii) of paragraph (o) of subdivision one of section 330.20 of the criminal procedure law insofar as they involve a victim or victims of domestic violence as defined by subdivision one of section four hundred fifty-nine-a of the social services law or a designated witness or witnesses to such domestic violence, 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 or temporary orders of protection; provided, however, that warrants issued pursuant to section one hundred fifty-three of the family court act pertaining to articles three[,] and seven [and ten] of such act and section 530.13 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, warrants and special orders of conditions, and for enforcing the provisions of paragraph (b) of subdivision four of section 140.10 of the criminal procedure law.

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

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

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

Under existing law, a report of suspected child abuse or maltreatment that is determined upon investigation to be supported by some 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 Family Court 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.

Existing law permits individuals, who are the subjects of reports of suspected child abuse or maltreatment, to challenge those reports administratively by requesting that the findings be amended, even while Family Court proceedings are pending. In fact, the subjects of reports 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 (OCFS) 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 reviewed and determined by OCFS not to be indicated by a fair preponderance of the evidence 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 a fair preponderance of the 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, if not most, 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 a fair preponderance of the evidence supports the allegation. A Family Court finding is thus conclusive proof by statute of the fact that a report is "indicated" and, as noted, is dispositive as well of whether an allegation of abuse or neglect against the subject of the report (the "Respondent" in the Family Court proceeding) has been proven by a preponderance of the evidence or, in cases of severe or repeated child abuse, by the higher level of clear and convincing evidence. The conclusive effect of a Family Court finding was recognized by the Supreme Court, Appellate Division, First Department in McReynolds *v.* City of New York, 18 A.D.3d 316 (1st Dept., 2005), *lve. app. denied,* 5 N.Y.3d 707 (2005), *cert. dismissed sub nom* McReynolds *v.* Office of Children and Family Services, 546 U.S. 1027 (2005). (Family Court abuse finding supports retention of maltreatment reports on State Central Register).

However, in some cases the Family Court proceeding is still pending when the statutory 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 substantiated ("indicated").

The Committee is proposing a simple solution to this conundrum that is designed to harmonize the administrative and judicial processes. The proposal 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 amendments and for requesting and resolving fair hearings should not begin to run until the Family Court matter has been concluded. The administrative process must, therefore, await a disposition of the Family Court proceeding or the conclusion of a period of an adjournment in contemplation of dismissal of the Family Court case, whichever occurs later. Further, where a Family Court proceeding is pending, the local child protection agency (the Petitioner in the Family Court matter) must provide the NYS OCFS with copies of pleadings and court orders and must report the status of the action. NYS OCFS would then be required to defer its administrative review and determination until the conclusion of the Family Court case. Additionally, conforming amendments are made to Social Services Law §§422(8) and 424-a to incorporate the "fair preponderance of the evidence" standard of Social Services Law §424-

a(1)(e)(iv) enacted by chapter 323 of the Laws of 2008.

These requirements for an automatic stay, transfer of necessary records and status reports will prevent the administrative and judicial processes from operating at cross-purposes and will avoid 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 proposal will significantly further the goals of justice and accuracy in both the administrative and judicial realms.

Proposal

AN ACT to amend the family court act and 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. Section 1039 of the family court act is amended by adding a new subdivision (h) to read as follows:

(h) The petitioner shall notify the office of children and family services, in accordance with sections 422 and 424-a of the social services law, of the outcome of an adjournment in contemplation of dismissal pursuant to this section, including dismissal of the petition upon expiration of the adjournment or, where the proceeding has been restored to the calendar, of any proceedings under this article following such restoration.

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

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

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

(a) Except as provided in paragraph (c) of subdivision two of section four hundred twenty-four-a of this chapter and in paragraph (b) of this subdivision, any appeal pursuant to this section must be requested within sixty days after the date of the action or failure to act complained of. However, where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in a child abuse or maltreatment report that is the subject of an appeal

pursuant to sections four hundred twenty-two or four hundred twenty-four-a of this chapter, the period to request an appeal shall not commence, any pending appeal shall be stayed and the appeal shall not be determined until the disposition of such family court proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later.

§4. Paragraphs (a) and (b) of subdivision 8 of section 422 of the social services law, paragraph (a) as amended by chapter 323 of the laws of 2008 and paragraph (b) as amended by chapter 12 of the laws of 1996, are amended to read as follows:

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

(ii) Upon receipt of a request to amend the record of a child abuse and maltreatment report the office of children and family services 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 office of children and family services, including a copy of any petition and court order or orders with respect to a proceeding pursuant to article ten of the family court act either pending or disposed of regarding such

report. Where a proceeding pursuant to article ten of the family court act is pending regarding a child named in the child abuse or maltreatment report that is the subject of a request to amend under this section, the child protective service or state agency, as applicable, shall report the status of the family court proceeding to the office of children and family services, which shall defer its review and determination pending the disposition of the proceeding or conclusion of any period of adjournment of the proceeding in contemplation of dismissal, whichever is later. Immediately upon the disposition of the proceeding or conclusion of any adjournment in contemplation of dismissal, the child protective service or state agency, as applicable, shall report the disposition of the proceeding or outcome of the adjournment in contemplation of dismissal, to the office of children and family services. The office of children and family services 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 a fair preponderance of the 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 office of children and family services 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. In determining whether there is a fair preponderance of the evidence that the subject committed the act or acts of child abuse or maltreatment giving rise to the indicated report, 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 the allegation is substantiated by a fair preponderance of the evidence.

(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] office of children and family services 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] a fair preponderance of the 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] office of children and family services shall be precluded from informing a provider or licensing agency which makes an inquiry to the [department] office of children and family services 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] office of children and family services 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] a fair preponderance of the 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] a fair preponderance of the 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] office of children and family services 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] office of children and family services, 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] office of children and family services shall schedule a fair hearing and shall provide notice of the scheduled hearing date to the subject, the statewide central register and, as appropriate, to the child protective service or the state agency which

investigated the report. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in a child abuse or maltreatment report that is the subject of a request to amend under this section, the period to schedule the fair hearing regarding the failure to amend shall not commence, any pending fair hearing shall be stayed and the fair hearing shall not be determined until the disposition of such family court proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later. Where a proceeding pursuant to article ten of the family court act is pending, the child protective service or state agency, as applicable, shall report the status of the family court proceeding to the office of children and family services. Immediately upon the disposition of the proceeding or conclusion of any adjournment in contemplation of dismissal, whichever is later, the child protective service or state agency, as applicable, shall report the disposition of the proceeding or outcome of the adjournment in contemplation of dismissal, to the office of children and family services.

(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] a fair preponderance of the evidence. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in the child abuse or maltreatment report that is the subject of a fair hearing under this section, the office of children and family services shall defer its determination until the disposition of such family court proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later.

§5. Subparagraphs (i), (ii) and (iii) and (v) 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, are amended to read as follows:

(i) Subject to the provisions of subparagraph (ii) of this paragraph, the [department] office of children and family services shall inform the provider or licensing agency, or child care resource and referral programs pursuant to subdivision six of this section, whether or not the person is the subject of an indicated child abuse and maltreatment report only if: (a) the time for the subject of the report to request an amendment of the record of the report pursuant to subdivision eight of section four hundred twenty-two has expired without any such request having been made; or (b) such request was

made within such time and a fair hearing regarding the request has been finally determined by the commissioner and the record of the report has not been amended to unfound the report or delete the person as a subject of the report. Where a request for an amendment of the record and/or a fair hearing has been made regarding an indicated report, but action on such request has been deferred because of the pendency of a proceeding pursuant to article ten of the family court act, the office of children and family services shall inform the provider or licensing agency or child care resource and referral program that there is an indicated report that is the subject of a pending family court proceeding. Once the office of children and family services is informed by the child protective service or state agency, as applicable, that a disposition of the Family Court proceeding has been ordered or a period of any adjournment of such proceeding in contemplation of dismissal has concluded, whichever is later, and the office of children and family services has taken action regarding the request to amend or the fair hearing, the office of children and family services shall inform the provider or licensing agency or child care resource and referral program of its action regarding the indicated report.

(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] office of children and family services pursuant to this subdivision concerning the subject of the report or where a request for an amendment of the record and/or a fair hearing has been made regarding an indicated report, but action on such request has been deferred because of the pendency of proceeding pursuant to article ten of the family court act, the [department] office of children and family services 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] office of children and family services 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] office of children and family services, including a copy of any petition and court order or orders with respect to a proceeding pursuant to article ten of the family court act either pending or disposed of regarding such report. The [department] office of children and family services 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] a fair preponderance of the evidence to find that the subject had committed the act or acts of child abuse or maltreatment giving rise to the indicated report. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in the child abuse or maltreatment report, the child protective service or state agency, as applicable, shall report the status of the proceeding to the office of children and family services, which shall defer its review and determination until the disposition of such proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later. Immediately upon the disposition of the proceeding or conclusion of any adjournment in contemplation of dismissal, the child protective service or state agency, as applicable, shall report the disposition of the proceeding or outcome of the adjournment in contemplation of dismissal, to the office of children and family services.

(iii) If it is determined, after affording such service or state agency a reasonable opportunity to present its views, that there is [no credible] not a fair preponderance of the evidence in the record to find that the subject committed such act or acts, the [department] office of children and family services shall amend the record to indicate that the report was unfounded and notify the inquiring party that the person about whom the inquiry is made is not the subject of an indicated report. In determining whether there is a fair preponderance of the evidence that the subject committed the act or acts of child abuse or maltreatment giving rise to the indicated report, 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 the allegation is substantiated by a fair preponderance of the evidence. If the subject of the report had a fair hearing pursuant to subdivision eight of section four hundred twenty-two of this title prior to January first, nineteen hundred eighty-six and the fair hearing had been finally determined by the commissioner and the record of the report had not been amended to unfound the report or delete the person as a subject of the report, then the [department]

office of children and family services shall determine that there is [some credible] a fair preponderance of the evidence to find that the subject had committed the act or acts of child abuse or maltreatment giving rise to the indicated report.

(v) If it is determined after a review by the [department] office of children and family services of all records, reports and information in its possession concerning the subject of the report that there is [some credible] a fair preponderance of the evidence to prove that the subject committed the act or acts of abuse or maltreatment giving rise to the indicated report and that such act or acts are relevant and reasonably related to issues concerning 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 has been submitted by the subject to a licensing agency, the [department] office of children and family services shall inform the inquiring party that the person about whom the inquiry is made is the subject of an indicated report of child abuse and maltreatment; the [department] office of children and family services shall also notify the subject of the inquiry of his or her fair hearing rights granted pursuant to paragraph (c) of subdivision two of this section.

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

9. Conditions of orders of protection in matrimonial proceedings and procedures and remedies for violations of orders of protection, including probation, in Family Court and matrimonial proceedings [F.C.A. §§430, 446, 550, 551, 655, 656, 841, 846-a; D.R.L. §§240, 252]

The *Family Protection and Domestic Violence Intervention Act of 1994* was accompanied by a legislative finding 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 the civil and criminal laws." L.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., L.1996, ch. 644; L.1999, ch. 606, 635. However, fragmentation and gaps in the civil enforcement provisions of both the Family Court Act and the 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 ensure equity and provide a clear road map for civil enforcement of orders of protection in both Family and Supreme Courts. The proposal clarifies that the violation procedures and consequences contained in Article 8 of the Family Court Act govern all orders of protection and temporary orders of protection issued in family offense, child support, paternity, child custody, visitation, divorce and other matrimonial proceedings. Significantly, it would incorporate conditions of orders of protection contained in the Family Court family offense and custody provisions that had been omitted from the conditions enumerated for orders of protection in matrimonial orders of protection, specifically, conditions regarding participation in batterers' education programs and compensation for medical care and treatment.

Additionally, consistent with chapter 579 of the Laws of 2003, 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, consistency in the law dictates that the duration of both orders should be the same. Indeed, when the Family Court Act was first enacted in 1962, both the duration of probation and of orders of protection were set at one year. See L.1962, ch. 686. 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, i.e., 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.

Violation procedures would be clarified by the incorporation by reference in sections 430, 446, 550, 551 and 655 and 656 of the Family Court Act of the following:

• the procedures contained in Family Court Act §846 for filing a violation petition, serving notice upon, 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 §§842-a and 846-a that are available to the Family Court once a willful violation of an order of protection or temporary order of protection has been found;[49] 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,[50] as well as to file a new family offense petition or a violation petition.

Further, section 846-a of the Family Court Act would be amended to more clearly delineate the powers of the Family Court to impose sanctions upon a finding of a willful violation of an order of protection or temporary order of protection and to modify or issue a new order of protection or temporary order of protection. The Court's authority to place a violator on probation and to require, as a condition of probation, inter alia, that the violator participate and pay the costs of a batterer's education program would be articulated – a recommendation consistent with the statutorily-required evaluation of the 1994 legislation by the New York State Office for the Prevention of Domestic Violence and Division of Criminal Justice Services.[51] Where a violator is already on probation, the Court would be authorized to revoke or modify the order of probation and order any other remedy. Additionally, the proposal would clarify the Court's power to compel payment of the protected party's legal fees and costs, fees and costs for the child's attorney, restitution and medical expenses, as well as 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, 2004 WL 2334311 (Sup. Ct., N.Y. Co., 2004)(Unrep.) (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 per violation,[52] revoke or suspend a firearms license and direct the surrender of firearms. Significantly, the proposal would conform the firearms provision [Family Court Act §842-a] to the 2007 amendment that was made to its Criminal Procedure Law counterpart [L.2007, ch. 198, amending CPL §530.14] by requiring suspension or revocation of a firearms license, ineligibility for a license and mandatory surrender of firearms where the court has good cause to believe that the respondent has a prior finding for a violation of an order of protection involving infliction of physical injury. The sponsors' justification for that amendment holds no less true for orders of protection issued in Family Court and matrimonial proceedings:

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[49] 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.

[50] 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 L. 1999, a complainant's election to proceed in Family Court does not divest a criminal court of jurisdiction to proceed.

[51] *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.

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

> Orders of protection are intended to prevent violent crimes from occurring and are commonly issued in cases involving domestic violence. However, individuals against whom such orders are issued often ignore the restrictions contained in such orders and, when they possess a firearm, the consequences can be tragic. This bill seeks to minimize the risk that a person who has violated a previous or current order of protection will subsequently injure someone with a firearm despite the existence of a current order of protection prohibiting such conduct.

McKinney's 2007 New York Laws, Ch. 198, Senate Memorandum in Support of Senate Bill S 4066, p. 1716.

Finally, similar enforcement remedies would be 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 delineate the additional options available to the Supreme Court upon a finding of a willful violation, *i.e.*, probation, imposition of legal and medical fees and costs, suspension of visitation or a direction that visitation be supervised, and commitment to jail. *See* L. 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 enumerate the 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.

By prescribing the procedures and remedies for violations of orders of protection and by authorizing Family Court probation periods to be coextensive with the duration of family offense orders of protection, this proposal will significantly enhance the capacity of Family and Supreme Courts to provide strong civil remedies – meaningful alternatives to criminal prosecutions – for victims of domestic violence.

Proposal

AN ACT to amend the family court act and the domestic relations law, in relation to conditions of orders of protection in matrimonial proceedings and violations of orders of protection and temporary orders of protection and probation in matrimonial and Family Court proceedings

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

Section 1. Section 430 of the family court act is amended by adding a new subdivision (d) to read as follows:

(d) If a respondent is brought before the court for failure to obey a temporary order of protection issued pursuant to this section, such alleged violation shall be governed by sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act; provided, however, that an alleged violation consisting of nonpayment of support in violation of an order issued under this article shall be governed by parts five and seven of this article.

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

If a respondent is brought before the court for failure to obey an order of protection issued pursuant to this section, such alleged violation shall be governed by sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act; provided, however, that an alleged violation consisting of nonpayment of support in violation of an order issued under this article shall be governed by parts five and seven of this article.

§3. Section 550 of the family court act is amended by adding a new subdivision (d) to read as follows:

(d) If a respondent is brought before the court for failure to obey a temporary order of protection issued pursuant to this section, such alleged violation shall be governed by sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act; provided, however, that an alleged violation consisting of nonpayment of support in violation of an order issued under this article or article four of this act shall be governed by parts five and seven of article four of this act.

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

If a respondent is brought before the court for failure to obey an order of protection issued pursuant to this section, such alleged violation shall be subject to sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act; provided, however, that an alleged violation consisting of nonpayment of support in violation of an order issued under this article or article four of this act shall be governed by parts five and seven of article four of this act.

§5. Section 655 of the family court act is amended by adding a new subdivision (e) to read as follows:

(e) If a respondent is brought before the court for failure to obey a temporary order of protection issued pursuant to this section, such alleged violation shall be governed by sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act.

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

If a respondent is brought before the court for failure to obey an order of protection issued pursuant to this section, such alleged violation shall be governed by sections eight hundred forty-two-a, eight hundred forty-six, eight hundred forty-six-a and eight hundred forty-seven of this act.

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

(c) placing the respondent on probation for a period not exceeding [one year], two years or, if an order of protection has been issued for five years pursuant to section eight hundred forty-two of this article, a period not exceeding five years, and requiring 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

§8. The opening paragraph and paragraph (a) of subdivisions 1, 2 and 3 of section 842-a of the family court act, as amended by chapter 597 of the laws of 1998 and chapter 635 of the laws of 1999, are amended to read as follows:

1. Mandatory and permissive suspension of firearms license and ineligibility for such a license upon the issuance of a temporary order of protection. Whenever a temporary order of protection is issued pursuant to section four hundred thirty, five hundred fifty, six hundred fifty-five or eight hundred twenty-eight of this article:

(a) the court shall suspend any such existing license possessed by the respondent, order the respondent ineligible for such a license, and order the immediate surrender of any or all firearms owned or possessed where the court receives information that gives the court good cause to believe

that: (i) the respondent has a prior conviction of any violent felony offense as defined in section 70.02 of the penal law; (ii) the respondent has previously been found to have willfully failed to obey a prior order of protection and such willful failure involved (A) the infliction of [serious] physical injury, as defined in subdivision ten of section 10.00 of the penal law, (B) 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, or (C) behavior constituting any violent felony offense as defined in section 70.02 of the penal law; or (iii) the respondent has a prior conviction for stalking in the first degree as defined in section 120.60 of the penal law, stalking in the second degree as defined in section 120.55 of the penal law, stalking in the third degree as defined in section 120.50 of the penal law or stalking in the fourth degree as defined in section 120.45 of such law; and

2. Mandatory and permissive revocation or suspension of firearms license and ineligibility for such a license upon the issuance of an order of protection. Whenever an order of protection is issued pursuant to section four hundred forty-six, five hundred fifty-one, six hundred fifty-six or eight hundred forty-one of this part:

(a) the court shall revoke any such existing license possessed by the respondent, order the respondent ineligible for such a license, and order the immediate surrender of any or all firearms owned or possessed where the court finds that the conduct which resulted in the issuance of the order of protection involved (i) the infliction of [serious] physical injury, as defined in subdivision ten of section 10.00 of the penal law, (ii) 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, or (iii) behavior constituting any violent felony offense as defined in section 70.02 of the penal law; and

3. Mandatory and permissive revocation or suspension of firearms license and ineligibility for such a license upon a finding of a willful failure to obey an order of protection or temporary order of protection. Whenever a respondent has been found, pursuant to section eight hundred forty-six-a of this part, to have willfully failed to obey an order of protection or temporary order of protection issued by [this] the court or [an order of protection issued] by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, in addition to any other remedies available pursuant to section eight hundred forty-six-a of this part:

(a) the court shall revoke any such existing license possessed by the respondent, order the

respondent ineligible for such a license, and order the immediate surrender of any or all firearms owned or possessed where the willful failure to obey such order involves (i) the infliction of [serious] physical injury, as defined in subdivision ten of section 10.00 of the penal law, (ii) 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, or (iii) behavior constituting any violent felony offense as defined in section 70.02 of the penal law; or (iv) behavior constituting stalking in the first degree as defined in section 120.60 of the penal law, stalking in the second degree as defined in section 120.55 of the penal law, stalking in the third degree as defined in section 120.50 of the penal law or stalking in the fourth degree as defined in section 120.45 of such law; and

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

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

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, modify the conditions of such probation and/or order any other remedy under this section, 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 violated such order, modify such order of restitution and/or order any other remedy under this section;

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 child's attorney 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 or modify 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 the court determines that the willful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, assault or attempted assault and if such a respondent is licensed to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law, the court may also immediately revoke such license and may arrange for the immediate surrender and disposal of any firearm such respondent owns or possesses. If the willful failure to obey such order involves the infliction of serious physical injury as defined in subdivision ten of section 10.00 of the penal law or the use or threatened use of a deadly weapon or dangerous instrument, as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, such revocation and immediate surrender and disposal of any firearm owned or possessed by respondent shall be mandatory, pursuant to subdivision eleven of section 400.00 of the penal law]; and

9. in accordance with subdivision three of section eight hundred forty-two-a of this article, revoke or 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 order the immediate surrender and disposal of any firearm such respondent owns or possesses.

§10. Subparagraphs 7 and 8 of paragraph (a) of subdivision 3 of section 240 of the domestic relations law are renumbered 9 and 10 and new subparagraphs 7 and 8 are added to such paragraph to read as follows:

(7) to require the respondent to participate in a batterer's education program designed to help end violent behavior, which may include referral to drug and alcohol counselling, and to pay the costs thereof if the person has the means to do so, provided however that nothing contained herein shall be deemed to require payment of the costs of any such program by the party or parties protected by the order, the state or any political subdivision thereof;

(8) 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;

§11. 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:

g. 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.

h. Upon issuance of an order of protection or temporary order of protection [or upon a violation of such order], the court [may] shall, where applicable, 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 shall 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 and if, after hearing, the court is satisfied by competent proof that such party has willfully failed to obey such order, the court shall 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, modify the conditions of such probation and/or order any other remedy under this subdivision, 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 h of subdivision three of this section or, if such party has already been so ordered and has violated such order, modify such order and/or order any other remedy under this subdivision;

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 child's attorney 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 or modify 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 three of section eight hundred forty-two-a of the family court act, suspend or revoke any license of the party found to have violated the order to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law immediately, and order the immediate surrender and disposal of any firearm such respondent owns or possesses.

§12. Paragraphs (g) and (h) of subdivision 1 of section 252 of the domestic relations law are relettered (i) and (j) and two new paragraphs (g) and (h) are added to such subdivision to read as follows:

(g) to require the respondent to participate in a batterer's education program designed to help end violent behavior, which may include referral to drug and alcohol counselling, and to pay the costs thereof if the person has the means to do so, provided however that nothing contained herein shall be deemed to require payment of the costs of any such program by the party or parties protected by the order, the state or any political subdivision thereof;

(h) to provide, either directly or by means of medical and health insurance, for expenses incurred for medical care and treatment arising from the incident or incidents forming the basis for the issuance of the order;

§13. Subdivision 9 of section 252 of the domestic relations law, as added by chapter 606 of the laws of 1999, is amended 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] shall, where applicable, 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 shall make an order in accordance with subdivision three-d of section two hundred forty of this chapter.

§14. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to violations of orders of protection and temporary orders of protection committed on or after such date.

10. Stipulations and agreements for child support in Family Court and matrimonial proceedings [F.C.A. §413(1)(h); D.R.L. §240(1-b)(h)]

Section 413(1)(h) of the Family Court Act and section 240(1-b)(h) of the Domestic Relations Law provide three important protections for children when their parents enter into agreements and stipulations for the payment and receipt of child support. Validly executed agreements and stipulations entered into by the parties and presented to the Supreme or Family Court for incorporation into orders or judgments must include a statement that the parties were advised of the provisions of the *Child Support Standards Act (CSSA),* as well as a statement that the "basic child support obligation" (application of the *CSSA* percentages to the parties' combined parental income) would "presumptively result in the correct amount of child support to be awarded." Where the agreement or stipulation is at variance with the "basic child support obligation," a statement must also be included of what the presumptive amount would have been and why the deviation from that amount is appropriate. These protections are not waivable by the parties or their attorneys and render agreements not in compliance with these requirements void, not simply voidable. *See* Scheinberg, "Inconsistent Appellate Enforcement of the Recital Requirements in DRL §240(1-b)(h)," 39 *Fam. Law Rev.* #3:3 (NYS Bar Assoc., Summer/Fall, 2007). However, the law is silent regarding the procedures to be followed and the remedies for noncompliance with these mandates, which has led to disparate interpretations in different parts of New York State. The Family Court Advisory and Rules Committee is proposing legislation to supply necessary clarity to this area.

The Committee's proposal would amend both Family Court Act §413(1)(h) and Domestic Relations Law §240(1-b)(h) to provide that if an agreement or stipulation fails to comply with any of the three provisions, it must be deemed void as of the earlier of the date that one of the parties alleged the noncompliance in a pleading or motion or the date the Court made a finding of noncompliance. This approach is consistent with that of the Appellate Division, Third Department, which, in Clark *v.* Liska, 263 A.D.2d 640, 692 N.Y.S.2d 825 (3d Dept., 1999), treated a motion to vacate a stipulation on the ground of noncompliance with these requirements as a prospective modification of the parties' obligations. Noting that retroactive vacatur of the agreement would negatively affect the accumulated child support arrears owed by defendant, the cancellation of which is generally prohibited,[53] the Court affirmed the modification date as the date of the application. *See also* Luisi *v.* Luisi, 6 A.D.3d 398 (2d Dept., 2004). *Cf.,* Jefferson *v.* Jefferson, 21 A.D.3d 879, 800N.Y.S.2d 612 (2d Dept., 2005)(noncompliance with *CSSA* rendered agreement invalid and unenforceable; matter remitted for new determination of child support retroactive to the original date of the agreement).

Further, the Committee's proposal requires that upon a finding of noncompliance, the Court must hold a hearing to determine an appropriate amount of child support as of the earlier of the date the noncompliance had been asserted in a pleading or a motion or the date of the Court's finding of noncompliance. Concomitantly, the proposal provides that the noncompliance with the *CSSA* may not be asserted as a defense to non-payment of child support in violation of an agreement or stipulation for a period prior to the assertion of noncompliance in a motion or pleading or judicial determination of

[53] *See, e.g.,* Matter of Dox *v.* Tynon, 90 N.Y. 2d 166, 659 N.Y.S.2d 231 (1997).

noncompliance, whichever was earlier.

Additionally, the proposal would remedy the gap noted by the Appellate Division, Second Department in Matter of Savini v. Burgaleta, 34 A.D.3d 686 (2d Dept., 2006), *i.e.*, that, unless precluded by the Supreme Court, the Family Court should be considered a court of competent jurisdiction that would have subject matter jurisdiction to review, determine and, where necessary, vacate or modify, not simply enforce, child support in cases in which a divorce judgment did not conform to the *Child Support Standards Act*. *See* Schub, "Outside Counsel: Family Court: Challenging Illegal Child Support Facts?," *N.Y. Law Journal*, Apr. 2, 2007, p.4, col. 4; Scheinberg, *supra*, at 5-6.

In light of the ambiguity surrounding the law in this area and, in particular, the varying approaches taken by the courts regarding the treatment of agreements and stipulations deemed not to comply with the *Child Support Standards Act*, the Committee's proposal will provide needed clarification. In so doing, it will spur greater compliance with the *CSSA*, thus fulfilling the legislative intent of providing appropriate support for children.

Proposal

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

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

Section 1. Paragraph (h) of subdivision 1 of section 413 of the family court act, as added by chapter 41 of the laws of 1992, is amended to read as follows:

(h) (1) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include the following:

(i) a provision stating that the parties have been advised of the provisions of this subdivision, and

(ii) a provision stating that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded.

(2) In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount.

(3) Such provision may not be waived by either party or counsel.

(4) Nothing contained in this subdivision shall be construed to alter the rights of the parties to

voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section.

(5) Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(6) An agreement, stipulation or court order which a court finds fails to comply with any of the provisions of this paragraph shall be deemed void as of the date that any of the parties raises the failure to comply in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(7) If a court of competent jurisdiction finds that an agreement, stipulation or court order fails to comply with any of the provisions of this paragraph, the court shall hold a hearing and determine the child support obligations of the parties pursuant to this section de novo from the date that any of the parties raises the failure to comply in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier. For the purposes of this section, a court of competent jurisdiction shall be either the family court or the supreme court, notwithstanding the court in which the agreement, stipulation or order was initiated, unless the supreme court has retained exclusive jurisdiction to enforce or modify the agreement, stipulation or order.

(8) The provisions of this paragraph shall not constitute a defense to non-payment of a child support obligation prior to the date that any of the parties raises the failure to comply in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

§2. Paragraph (h) of subdivision 1-b of section 240 of the domestic relations law, as added by chapter 41 of the laws of 1992, is amended to read as follows:

(h) (1) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include the following:

(i) a provision stating that the parties have been advised of the provisions of this subdivision, and

(ii) a provision stating that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded.

(2) In the event that such agreement or stipulation deviates from the basic child support obligation,

the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount.

(3) Such provision may not be waived by either party or counsel.

(4) Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section.

(5) Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(6) An agreement, stipulation or court order which fails to comply with any of the provisions of this paragraph shall be deemed void as of the date that any of the parties raises the failure to comply in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

(7) If a court of competent jurisdiction finds that an agreement, stipulation or court order fails to comply with any of the provisions of this paragraph, the court shall hold a hearing and determine the child support obligations of the parties pursuant to this section de novo from the date that any of the parties raises the failure to comply in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier. For the purposes of this section, a court of competent jurisdiction shall be either the family court or the supreme court, notwithstanding the court in which the agreement, stipulation or order was initiated, unless the supreme court has retained exclusive jurisdiction to enforce or modify the agreement, stipulation or order.

(8) The provisions of this paragraph shall not constitute a defense to non-payment of a child support obligation for any period prior to the date that any of the parties raises the failure to comply in a pleading or motion or a court of competent jurisdiction makes a finding of the failure to comply, whichever is earlier.

§3. This act shall take effect on the ninetieth day after it shall become a law and shall apply to agreements and stipulations entered into on or after that date.

11. Authority of Supreme and Family Courts to direct establishment of trusts to benefit children in matrimonial, child support and paternity cases [D.R.L. §240(1-b); F.C.A. §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 specify the parameters of the account, including, as applicable, the particular 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.

12. Probation access to the statewide automated order of protection and warrant registry and penalties for unauthorized access to the registry
[Exec. L. §221-a; F.C.A. §835; CPL §§390.20, 390.30]

In enacting the *Family Protection and Domestic Violence Intervention Act of 1994* [L. 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.

One of the most important features of the statute was its establishment of an automated statewide registry of orders of protection and warrants. The registry, which commenced operations on October 1, 1995, ensures 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; according to the Office of Court Administration, well over two million orders of protection have been entered onto the registry since its inception in 1995. However, two significant gaps undermine the statutory framework governing the registry: first, that probation departments are not authorized to utilize the registry in conducting investigations, and, second, that the registry lacks critical safeguards to prevent unauthorized access to the sensitive information contained in its database.

The Committee is proposing legislation expressly authorizing local probation departments to obtain access to necessary information on the statewide registry and imposing penalties for unauthorized access. 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 proposal 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." Fourth, 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; L. 1996, ch. 644.

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; L. 1996, ch. 644; L. 1993, ch. 498.

Finally, 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. Enactment of penalties is compelled by 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. It is also consistent with the confidentiality requirements of the 2005 amendments to the Federal *Violence Against Women Act* [Public Law 109-162; 18 U.S.C. §2265(d) and Subtitle K, §41102], which, *inter alia*, restrict use of registry information to "protection order enforcement purposes."

Much of the information to be contained in the registry is derived from records that would otherwise be shielded from such disclosure. Various forms of confidential, identifying information regarding the parties must be included, particularly where, for example, in matrimonial and Family Court cases, fingerprint identification is not available. 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, and requires that all statutes governing confidentiality of court records apply equally to information on the registry. *See* Executive Law §221-a. Subdivision one of section 235 of the Domestic Relations Law provides that 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."[54] However, while requiring these provisions to be followed with respect to information on the registry, the Legislature provided no sanction against unauthorized disclosure.

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

[54] Section 205.5 of the *Uniform Rules for the Family Court* gives definition to this statute by 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.

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.

The Committee's proposal would amend section 221-a of the Executive Law to create criminal and civil penalties for unauthorized disclosure of data from the registry.[55] 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 statewide child abuse registry and confidential HIV-related information. *See* Social Services Law §422(12); Public Health Law §2783(2). Such violators 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.

Enactment of this proposal will significantly enhance the ability of courts, both civil and criminal, to make informed decisions in cases involving domestic violence and will, at the same time, enhance the protection of victims of that violence by protecting the integrity of the statewide order of protection database.

Proposal

AN ACT to amend the executive law, the family court act and the criminal procedure law, in relation to the statewide automated registry of orders of protection and pre-dispositional and pre-sentence investigations in criminal and family courts

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

Section 1. Subdivisions 4 and 5 of section 221-a of the executive law, subdivision 4 as amended by section 7 of part D of chapter 56 of the laws of 2008 and subdivision 5 as amended by chapter 107 of the laws of 2004, are amended and such section is amended by adding a new subdivision 7 to read as follows:

4. Courts and law enforcement officials, including probation officers, shall have the ability to

[55] 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]. However, 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, notwithstanding the new Federal statutory mandates.

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 criminal procedure law concerning the confidentiality, sealing and expungement of records. Designated representatives of a local probation department 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.

5. [In] Except as provided in subdivision seven of this section, in no case shall the state or any state or local law enforcement official or court official be held liable for any violations of rules and regulations promulgated under this section, or for damages for any delay or failure to file an order of protection or special order of conditions, or to transmit information to the law enforcement communication network pertaining to such orders or related family court arrest warrants, or for acting in reliance upon such information. For purposes of this subdivision law enforcement official shall include but not be limited to an employee of a sheriff's office, or a municipal police department or a peace officer acting pursuant to his or her special duties.

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.

§2. The section heading 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:

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 department. 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, as added by chapter 652 of the laws of 1974, 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 56 of the laws of 2010, 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 of this section, 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 commissioner of the division of criminal justice services 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.

13. Duration of the term of probation and procedures for violations of probation in child support proceedings [F.C.A. §§454, 456]

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, are all useful tools in particular cases. See Family Court Act §454, *et seq*. However, in particularly intractable cases of willful violations of court orders for child support, 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 for willful violations, 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. Moreover, there is no authorization in the Family Court Act to combine either a probation sanction or a requirement to participate in a rehabilitative program with a sentence of incarceration, even though such a combination may present the most promise in some cases to compel the change of an offender's behavior necessary to correct the violation and ensure consistent, future provision of child support to the offender's family. 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 proposal 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, *i.e.*, 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 – *i.e.*, 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, the proposal would provide the needed flexibility to the menu of sanctions available for willful violations of child support orders by adding an authorization to combine a sentence of probation or a sentence of participation in a rehabilitative program with a sentence of incarceration. Family Court Act §454(3)(a) already permits a sentence of intermittent incarceration to be imposed, including, for example, weekend incarceration so that an offender may work or seek gainful employment during the week. The effectiveness of this sanction, as well as sanctions of short periods of incarceration, would be significantly enhanced if the Family Court had the ability to combine it with probation supervision

Finally, 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. As in criminal, juvenile delinquency and PINS proceedings, the proposal would provide that the period of probation would be tolled as of the date of filing of the violation petition. See Penal Law §65.15(2); Family Court Act §§360.2(4), 779-a. Further, 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 proposal would afford the Family Court essential, flexible tools with which to address willful violation of its child support orders so as to spur offenders to modify their behavior and live up to their child support obligations. It would make probation a viable alternative for probation departments by defining the contours of its duration and delineating procedures to be utilized in the event of a violation of its terms and conditions. Further, the proposal would augment the effectiveness of both probation and the requirement for the respondent to participate in a rehabilitative program by authorizing these sanctions to be combined with a sentence or suspended sentence of incarceration. In so doing, the proposed statute 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 serious instances of willful violations of child support that are so detrimental to children in New York State.

Proposal

AN ACT to amend the family court act, in relation to sanctions for willful failure to comply with court orders for child support

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 and a new paragraph (d) is added to such subdivision to read as follows:

(c) place the respondent 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

(d) combine a sentence or a suspended sentence of incarceration pursuant to paragraph (a) of this subdivision with a requirement that the respondent participate in a rehabilitative program or be placed on probation pursuant to paragraph (b) or (c) of this subdivision, respectively.

§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 a period not to exceed 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 the attorney for the child, 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 subscribed to by the probation service or the appropriate government agency has been filed and duly served upon the parties. The petition must stipulate the condition or conditions of the order violated and a reasonable description of the time, place, and manner in which the violation occurred. Non-hearsay allegations or allegations made upon information and belief of the factual part of the petition or of any supporting deposition must establish, if true, every violation charged. 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. Compensation of guardians *ad litem* appointed for children and adults in civil proceedings out of public funds [CPLR §1204]

While attorneys for children 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 impaired adults in civil proceedings pursuant to section 1204 of the Civil Practice Law and Rules (CPLR). 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. An adult may require appointment of a guardian *ad litem* if his or her mental capacity is challenged, for instance, in termination of parental rights proceedings based on the parental mental illness or developmental disability. Additionally, a guardian *ad litem* is occasionally appointed in matrimonial proceedings in Supreme Court in lieu of a an attorney for a child.

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 CPLR 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 compensate the guardian *ad litem*.

This proposal would authorize 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 attorneys for children 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 could to 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.

IV. Future Matters:

Under the leadership of the Committee's co-chairs, Hon. Monica Drinane, Supervising Judge of the Family Court, Bronx County, and Peter Passidomo, Chief Clerk of the New York City Family Court, the Family Court Advisory and Rules Committee had a remarkably productive year in 2011. Additionally, the Committee recommended significant rules revisions that were promulgated, as well as numerous 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).

Most important among its anticipated activities in 2012, the Committee will again actively support efforts by the Unified Court System to persuade the Legislature to meet the pressing need of the Family Court statewide for additional judges in order to fulfill the demands of its ever-increasing and ever-more complex workload. Recognizing that only New York and North Carolina automatically consider juveniles to be adults as soon as they reach the age of sixteen, the Committee will support the efforts of the Permanent Judicial Commission on Sentencing to submit a proposal implementing Chief Judge Lippman's initiative to raise the age of criminal responsibility in New York State to eighteen. In addition to reviewing legislative proposals, the Committee will also continue its comprehensive review of the Family Court rules with a view towards recommending possible revisions. In addition to these efforts, the Committee's five subcommittees are expected to be actively engaged in the following projects, among others, during the coming year:

• Child Welfare: The Subcommittee will continue to monitor implementation of significant recent legislation in the child welfare area, including, *inter alia*, subsidized kinship guardianship, destitute children, reentry into foster care, restoration of parental rights and the "Family Assessment Response" (differential case management) pilot projects. In light of new Federal legislative requirements, the Subcommittee hopes to collaborate with the New York State Office of Children and Family Services, the New York chapter of the American Academy of Pediatrics and the Family Court community in the development of guidelines regarding psychotropic medication of youth in in out-of-home care. The Subcommittee will also assist the New York State Judicial Institute in planning follow-up training regarding engagement of youth in court proceedings, psychotropic medication and other issues. Further, the Subcommittee will be examining issues that have arisen regarding guardianship cases, including, *inter alia,* "Special Immigrant Juvenile Status" judicial findings.

• Juvenile Justice: In addition to the issue noted above regarding the age of criminal responsibility, the Subcommittee will monitor the implementation of the new *Interstate Compact on Juveniles*, as well as the requirements enacted in 2011 regarding use of risk assessment instruments in detention and placement decisions. The Subcommittee will continue to work with the Legislature to enhance the effectiveness of responses to truancy both as persons in need of supervision and as educational neglect proceedings. With continued focus upon the recommendations of the Governor's Task Force on Transforming Juvenile Justice and the ongoing efforts to realign the juvenile justice system at both the State and New York City levels so that more youth are served in their communities, the Subcommittee is expecting an active year in 2012 and will continue its advocacy for greater support for Family Court probation and community-based alternatives to detention and placement.

• Child Support and Paternity: The Subcommittee, in collaboration with the New York State

Office of Temporary and Disability Assistance, will continue its consideration of the myriad recommendations in the recent quadrennial review of the *Child Support Standards Act*. It will also consider approaches to provide protections to teenage parents with respect to the signing of paternity acknowledgments. Further, building upon its initiative to have the Family Court's Universal Case Management System programmed to print out solely the last four digits of social security numbers, the Subcommittee will continue to explore the competing considerations of confidentiality and information-sharing of litigants' sensitive financial and other information, with particular attention to the problem of identity theft. The Subcommittee will also consider implementation issues regarding recent Federal requirements reagrding income deduction orders and possible court rules regarding judicial review of support magistrates' determinations of wilful violations, filing dates, inter-county transfers of cases and expedited support procedures.

• Custody, Visitation and Domestic Violence: The Subcommittee will review and comment upon ongoing efforts by the Legislature to address issues regarding standing of third parties (non-parents) to seek custody or visitation. It will also continue its consideration of possible statutory changes in terminology for parental access arrangements, instead of visitation and custody, as well as recommendations regarding use and access to forensic reports, both issues that were addressed in the report of the Matrimonial Commission in 2006. The Subcommittee will also continue to monitor service and other issues regarding orders of protection.

• Forms and Technology: The Subcommittee will continue its revisions of uniform forms as necessitated by new legislation, including, *inter alia*, legislation regarding destitute children expected to take effect in 2012. It will continue its efforts to simplify the current forms to enhance access to justice for self-represented litigants and will be adding detailed provisions to the forms to facilitate New York State's implementation of the Federal *Indian Child Welfare Act*.

The Committee, which includes experienced judges, Support Magistrates, court attorney referees, Family Court clerks and practitioners drawn from throughout New York State, brings a variety of valuable perspectives to the task of addressing the crushing workload and complex problems facing the Family Court. The substantial expertise of the Committee's active and diverse membership contributed to significant accomplishments in 2011 and with the substantial agenda described above, in 2012, 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 its continuing deep dedication in 2012 to improving the functioning of the Family Court and the quality of justice it delivers to children and families in New York State.

Respectfully submitted,

Hon. Monica Drinane, *Co-chair*
Peter Passidomo, Esq., *Co-chair*
John Aman, Esq.
Hon. Michele Pirro Bailey
Hon. Stacey Bennett

Frank Boccio, Esq.
Hon. David Brockway
Hon. Paul Buchanan
Margaret Burt, Esq.
Hon. Judith Claire
Hon. Kathie Davidson
Hon. Catherine DiDomenico
Hon. Lee Elkins
Hon. Marjory D. Fields
Barbara E. Handschu, Esq.
Christine Kiesel, Esq.
Hon. Susan Knipps
Hon. Joan Kohout
Hon. Joseph Lauria
Michael McLoughlin
Hon. Nicolette M. Pach
Hon. Jane Pearl
Hon. Stanley Pritzker
Craig Ramseur, Esq
Hon. Edwina Richardson-Mendelson.
Hon. Jeanette Ruiz
Hon. Sara P. Schechter
Hon. Sharon Townsend
Hon. Stewart Weinstein
Hon. Ruth Jane Zuckerman
Janet R. Fink, Esq., *Counsel*

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