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

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

January 2007

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 2006

Five of the legislative proposals submitted by the Committee in 2006, as well as a part of a sixth proposal, were enacted into law during the 2006 legislative session. These include:

1. Amendments to child welfare permanency legislation (Laws of 2006, ch. 437): This measure contains corrections and clarifications proposed by the Family Court Advisory and Rules Committee to improve the comprehensive permanency legislation enacted in 2005 [Laws of 2005, ch. 3]. In addition to provisions recommended by the New York State Office of Children and Family Services, the statute includes the following elements of the Committee's proposal:

- clarification of the right to appointed counsel at the trial level and to a law guardian on appeal;
- use of the prior-scheduled permanency hearing date certain in cases in which suspended judgments in permanent neglect cases have been extended or deemed satisfied;
- amplification of the requirements for dispositional placement orders under Family Court Act §1055 to include several of the elements addressed in permanency hearings, including, among others, descriptions of visiting plans, notification of the next permanency hearing date, notification to parents of planning conferences and of their right to attend the conferences, and warnings that termination of parental rights petitions may be filed if children remain in care for 15 out of 22 months; ;
- simplification of the procedures for violations of orders of suspended judgments and supervision in child protective proceedings to permit motions or orders to show cause, in lieu of petitions;
- repeal of the anachronistic provisions regarding petitions by agencies to be relieved of responsibility for children in their care;
- clarification that permanency hearing dates certain must be set upon the approval of voluntary placement instruments under Social Services Law §358-a;
- clarification of Family Court Act §1089 to specify that the permanency hearing report must be submitted to the Family Court but should not be sent to a birth parent, if the child had been freed for adoption, and to provide that the Family Court may dispense with notice to former foster parents either *sua sponte* or upon motion;
- restoration of the automatic stay provision (Family Court Act §1112) for children in abuse or neglect proceedings who are returned home as a result of permanency hearings under Article 10-A of the Family Court Act; and
- clarification of the post-adoption contact provisions to provide that a judge in an adoption case would not be permitted to incorporate a post-adoption contact agreement into an adoption unless the judge who approved the surrender had approved the agreement as being in the child's best interests.

2. "One Family/One Judge": Continuity of court and judge in termination of parental rights, surrender and adoption proceedings (Laws of 2006, ch. 185): Impelled by the 2005 permanency legislation and consistent with national recommendations implemented in New York's "Model Permanency Planning Parts," this measure is designed to reduce a significant source of delay in children's achievement of a permanent home by promoting continuity of the court and the judge. Where a child is under the jurisdiction of the Family Court as a result of a Family Court child protective, foster care, surrender or termination of parental rights proceeding, the measure provides a preference for filing an adoption proceeding in the same court and a procedure for ensuring that the case will be heard, to the extent practicable, before the same judge presiding over the pending proceeding. If filed in a different court, the court in which the case is filed must ascertain promptly whether the child is under the jurisdiction of a Family Court and, if so, which Court. The Court in which the adoption is pending is required to communicate promptly with the judge who presided over the Family Court litigation and to defer to that judge's determination as to the exercise of jurisdiction over the adoption. Factors to be considered in the determination include, among others, the relative familiarity of each court with the facts and circumstances of the case, the convenience of each court to the residence of the adoptive parents, the ability of the law guardian to continue to represent the child and the relative ability of each court to determine the adoption proceeding expeditiously. A similar procedure is required for termination of parental rights proceedings.

3. . Termination of Parental Rights Upon a Conviction for Homicide (Laws of 2006, ch. 460): This legislation expanded the parental rights termination ground of "severe abuse," contained in Social Services Law §384-b(8), to include a criminal conviction for homicide (murder in the 1st or 2nd degree or manslaughter in the 1st or 2nd degree) or attempted homicide of a child in the home for whom the offender is or was legally responsible, including cases in which the murdered child is not a birth sibling of the surviving child. The "severe abuse" definition includes homicide or attempted homicide of the child's other parent, unless the homicide or attempt was committed by a victim of domestic violence where the violence was a contributing factor to the homicide or attempt. A criminal conviction enumerated in the severe abuse definition compels immediate filing of a termination of parental rights petition, unless one of the enumerated factors in Social Services Law §384-b(3)(l)(i) exists. Those factors include the following: the child is cared for by a relative, the agency has documented a compelling reason that the filing would not be in the child's best interests or the agency has not provided necessary reunification services, unless such services were not legally required.

4. Child Support: Disposition of Penalties in Child Support Proceedings(Laws of 2006, ch. 335): This legislation amends sections 5241 and 5252 of the Civil Practice Law and Rules to require that a civil financial penalty imposed by a Family Court against an employer or income payor for noncompliance with an income deduction order or for discrimination against an employee subject to such an order is payable to the creditor, that is, to the custodial parent or, in the case of a public assistance recipient whose rights have been assigned to the local social services commissioner, to the commissioner. These sections both authorize imposition of civil penalties against employers or other income payors of up to $500 for the first instance and up to $1000 for subsequent instances of non-compliance or discrimination, but had been silent as to who would receive the penalties. These penalties are enforceable by the custodial parent or agency in the same manner as a civil judgment or in any other matter permitted by law.

5. Service by Mail and Inter-court Communication in *Uniform Child Custody Jurisdiction and Enforcement Act* [*UCCJEA*] Cases; Technical Amendment to Personal Jurisdiction Provision of the Civil Practice Law and Rules [CPLR] (Laws of 2006, ch. 184): This statute amends the *UCCJEA* in order to:

• restore language from the former *Uniform Child Custody Jurisdiction Act* that permits service of process outside New York State by means of mail that includes a return receipt, by means specified in CPLR 313, or by other means directed by court, including publication;

• provide that proof of service outside the State may be provided by affidavit, by other means directed by the Court, by submission of a receipt signed by the addressee or other evidence of delivery to the addressee in the case of service by mail, or in any manner prescribed by the law of the State in which service was made;

• require telephone testimony or depositions to be recorded and preserved for transcription; and

• clarify that communications between courts are mandatory in certain circumstances.

Additionally, the legislation amends the provision regarding the Family Court's exercise of personal jurisdiction over a non-resident respondent [Civil Practice Law and Rules 302(b)] to add cross-references to the *Uniform Interstate Family Support Act* [Art. 5-B of the Family Court Act] and the *UCCJEA* [Art. 5-A of the Domestic Relations Law].

6. National Criminal History Screening of Prospective Foster and Adoptive Parents (Laws of 2006, ch. 668): Similar to a provision in the Committee's proposal regarding criminal history screening, this measure statute amends Social Services Law §378-a to authorize the NYS Division of Criminal Justice Services, when screening prospective foster and adoptive parents and persons over 18 in their homes, to submit fingerprints to the Federal Bureau of Investigation in order to obtain nation-wide criminal histories. Such national screening is also a requirement of the new federal law, the *Adam Walsh Child Protection and Safety Act of 2006* [Public Law 109-248].

B. New and Modified Legislative Proposals

The Committee is proposing a comprehensive legislative agenda, including 18 new and modified proposals and 15 proposals previously recommended. The new and modified proposals address child neglect and abuse, adoption, surrender, termination of parental rights, child support, family offense and juvenile justice proceedings, thereby providing needed clarification and enhancing the Unified Court System's ability to handle these cases effectively. In its agenda of new and modified proposals, the Committee is recommending the following:

1. 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. Laws of 1980, ch. 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.

2. Adjournments in contemplation of dismissal and suspended judgments in child abuse and neglect proceedings: Long-standing disputes regarding the consequences of adjournments in contemplation of dismissal and suspended judgments in child protective proceedings, in particular, the consequences of violations, compel modifications in the statutory structure governing these widely-used mechanisms for resolving these cases. At the same time, confusion regarding whether more than one dispositional alternative enumerated for child protective proceedings may be ordered at one time warrants clarification. The Family Court Advisory and Rules Committee is submitting a proposal to make clear that a child protective proceeding may be adjourned in contemplation of dismissal at any time prior to the entry of a fact-finding order. During the period of the adjournment, the child may not be placed 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 where an imminent risk arises with respect to the child's life or health, the child may not be removed from home during the adjournment period, pursuant to part two of Article 10 of the Family Court Act. Sixty days prior to the expiration of the adjournment, the child protective agency must submit a report to the Family Court, parties and law guardian regarding compliance with the conditions. If a violation of the conditions of the adjournment is alleged, the adjournment period is tolled pending resolution. Since an adjournment in contemplation of dismissal provides a means of disposing of a child protective proceeding without a finding, the measure would repeal the dispositional alternative of suspended judgment as unnecessary. Finally, by eliminating the disjunctive term "or" between each dispositional alternative in Family Court Act §1052, the measure would make clear that more than one disposition may be ordered at a time – a critical feature, since many cases involve more than one child and/or more than one respondent parent with different dispositional needs.

3. Vacatur of orders terminating parental rights: Similar to legislation enacted in California in 2005 (Chapter 634; Assembly Bill 519), the Committee is recommending that a provision be added to the statutes regarding termination of parental rights to allow the Family Court, in narrowly defined circumstances, to vacate orders committing guardianship and custody of children and to reinstate parental rights. A petition to vacate an order terminating parental rights would be permitted to be filed upon the consent of the petitioner and respondent, as well as the child, in the original termination of parental rights proceeding. The termination of parental rights would have to have occurred more than two years prior and the child would be required to be is 14 years of age or older, to remain under the jurisdiction of the Family Court and to have a permanency goal other than adoption. The Family Court

would be authorized to grant the vacatur petition where clear and convincing proof established that the vacatur would be in the child's best interests.

4. Child protective proceedings regarding destitute children: Prior to enactment of the permanency legislation [Laws of 2005, ch. 3], proceedings to review the placement of destitute children in foster care were commenced by a petition pursuant to Social Services Law §392. The repeal of that statute left destitute children without any procedural vehicle for placement into foster care where necessary and for periodic review of that placement. The Family Court Advisory and Rules Committee proposes that Article 10 of the Family Court Act be utilized as the vehicle. Recognizing that, as the definition of "destitute child" in Social Services Law §371 specifies, this condition arises through no fault of the parents, the measure would specify "destitute" child as a category distinct from "abused" or "neglected" child, but would authorize temporary placements upon the parents' consent, pursuant to Family Court Act §1021, as well as each of the dispositional alternatives available in Family Court Act §1052. Where a destitute child is placed, pursuant to Family Court Act §1055, the placement would be reviewed through permanency hearings under Article 10-A of the Family Court Act. Related amendments would be made to Social Services Law §398. Finally, the measure would repeal Family Court Act §1059, because it is anachronistic and conflicts with more recent legislation regarding abandoned children.

5. Criminal mischief as a family offense in Family Court and criminal proceedings: Experience with the concurrent jurisdiction provisions of the *Family Protection and Domestic Violence Intervention Act of 1994* [Laws of 1994, ch. 222] has revealed a significant gap in the enumerated family offenses. With regularity, the courts handling family offense cases are faced with situations in which an offender is alleged to have vandalized or destroyed property that is either owned by the victim or jointly owned by both parties. Yet criminal mischief is not enumerated as a family offense that may be prosecuted in Family Court and courts are sharply divided regarding whether it may be prosecuted as a crime if the property is jointly owned or owned in the offender's name. The Family Court Advisory and Rules Committee, therefore, proposes that criminal mischief involving property either owned by the victim (the petitioner in Family Court or complainant in criminal proceedings) or owned by both parties be added to the concurrent jurisdiction provisions in section 812 of the Family Court Act and section 530.11 of the Criminal Procedure Law.

6. Conditions of orders of protection in juvenile delinquency, child support, paternity, custody, child protective and matrimonial proceedings: In 1998, sections 530.12 and 530.13 of the Criminal Procedure Law were amended to authorize orders of protection to be issued to protect designated witnesses in criminal proceedings. However, no comparable provision was added to the juvenile delinquency article of the Family Court Act. The Committee is thus proposing to amend Section 352.3 to incorporate the language in Criminal Procedure Law §§530.12 and 530.13. Additionally, the measure provides the needed follow-up amendment to the 2006 statute authorizing orders of protection to protect pets [Laws of 2006, ch. 253]. That statute authorized conditions restraining individuals from intentionally injuring or killing companion animals or pets without justification to be added to all orders of protection, except matrimonial orders. The provisions amending the juvenile delinquency, child support, paternity, custody, Persons in Need of Supervision, family offense and child protective articles of the Family Court Act all refer to companion animals "owned, possessed, kept, leased or held by the petitioner or a minor child residing in the household." However, in all except family offense,

custody and parent-initiated PINS cases, the petitioner in these proceedings is a government entity, a prosecuting or presentment agency, not the alleged victim of family violence. The Committee's proposal substitutes the phrase "person protected by the order" for "petitioner" and adds similar protection order conditions for orders of protection issued in matrimonial cases, pursuant to Domestic Relations Law §§240, 252. .

7. Combined parental income maximum utilized to calculate child support: The *Child Support Standards Act* ('*CSSA*'), which became law on September 15, 1989, specified that the statutory percentages be applied to the first $80,000 of combined parental income. In cases involving combined parental incomes in excess of that threshold, the Court is required to consider the ten factors enumerated in Family Court Act §§413(1)(f) and Domestic Relations Law §240(1-b)(f) and determine whether application of the *CSSA* percentages to income in excess of that threshold would be "unjust or inappropriate." If so, the Court must issue a written child support order for a just and appropriate amount, articulate which factors were considered, calculate the *pro rata* share of each party's basic child support obligation (the amount using the statutory percentages) and the reasons that the Court did not order the basic child support obligation. *See* F.C.A. §413(1)(g); D.R.L. §240(1-b)(g). Now 16 years old, the $80,000 threshold (often referred to as a "cap") no longer represents a meaningful benchmark denoting higher-income families, who may warrant exceptions to application of the statutory child support percentages. Instead, with significant increases in both incomes and the cost of living, it covers a much broader spectrum of the families before the Courts and is more the rule than the exception. The Family Court Advisory and Rules Committee thus proposes that the threshold be raised to $130,000 and that it be re-calculated every two years to reflect changes in the Consumer Price Index.

8. Agreements and stipulations for child support in Family Court and matrimonial proceedings: Family Court Act §413(h) and Domestic Relations Law §240(1-b)(h) set forth requirements for agreements and stipulations in order to comply with the *Child Support Standards Act (CSSA)*, but the statutes fail to address the consequences of violations. Consistent with the approach of the Appellate Division, Third Department, in Clark *v.* Liska, 263 A.D.2d 640, 692 N.Y.S.2d 825 (3rd Dept., 1999), the Committee is proposing amendments to both statutes to 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 measure 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 measure provides that 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.

9. Representation of Family Court judges in habeas corpus proceedings: Section 7009 of the Civil Practice Law and Rules requires that notification of a habeas corpus proceeding be served upon the Family Court that ordered the challenged detention or upon the Family Court in which the underlying proceeding is pending, even where another court ordered the detention. In language added in 1963, the statute requires that the Family Court judge be represented by the county attorney or, in New York City, by the Corporation Counsel. Laws of 1963, ch. 532, §46. Since, in juvenile delinquency and child protective proceedings in Family Court, the county attorney or corporation counsel generally represents the petitioner in the underlying proceeding, this representation creates an

obvious conflict of interest. In other types of proceedings in Family Court in which a habeas corpus proceeding may be brought, representation of State court judges by county attorneys or by the corporation counsel is anomalous and inappropriate. Similar to the practice in Article 78 proceedings, the Committee is, therefore, proposing to modify CPLR 7009 by requiring the Family Court to be represented by the New York State Attorney General in habeas corpus proceedings.

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

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

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

• incorporation 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;"

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

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

11. Criminal history and child abuse screening of individuals with whom children are placed: Spurred on by the 2005 permanency and kinship statutes [Laws of 2005, ch. 3 and 671], by the earlier amendments to Family Court Act §1017 [Laws of 2003, ch. 657] and by the New York State statute

implementing the federal *Adoption and Safe Families Act of 1997* [Public Law 105-89], more and more children are the beneficiaries of the State's increasing reliance upon alternatives to foster care, including direct placements of children with "suitable persons" and appointment of non-parent guardians and custodians. However, unlike the provisions requiring criminal records and child maltreatment screening of prospective foster and adoptive parents, pursuant to Social Services Law §378-a, comprehensive screening is not required for these direct placement, custody and guardianship resources. The Committee is thus proposing legislation to remedy these gaps. The proposal would require courts to direct criminal records and child abuse screening of individuals accepting direct placements of children into their homes and of non-parents applying for custody or guardianship. Further, it would authorize the courts to direct that national criminal history checks regarding these individuals be performed and it would authorize criminal history screening of individuals over the age of 18 residing in the homes of custodial and guardianship resources.

12. Stays of administrative fair hearings regarding child abuse and neglect reports: The parallel judicial and administrative systems for determining the validity of reports of child abuse and maltreatment at times operate at cross-purposes, under different time constraints and, in an escalating pattern, have produced inconsistent results. Although Social Services Law §422(8)(b) provides that a Family Court finding of abuse or neglect creates an "irrebuttable presumption," binding in the administrative fair hearing process, that credible evidence supports an abuse or maltreatment report, 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 measure would require that, in a case in which a Family Court child protective proceeding is pending regarding a child named in a child abuse or maltreatment report, the time frames for requesting an administrative amendment of the report or fair hearing, as well as the time frame for the administrative agency to resolve the fair hearing, would not begin to run until the disposition or the conclusion of a period of adjournment in contemplation of dismissal in the Family Court matter.

13. Warrants and orders of protection in persons in need of supervision proceedings: The comprehensive reform of the PINS statute enacted in 2005 [Laws of 2005, chapter 57, Part E] has inured to the benefit of many children and families by ensuring the provision of diversion services, in lieu of PINS prosecutions, on a more uniform basis. However, the 2005 statute curtailed the ability of parents to secure vital emergency relief in some cases in which harm to the children or their families is imminent. The Committee is, therefore, proposing restoration of two provisions to Article 7 of the Family Court Act that would constitute narrow exceptions to the diversion requirements of the statute. The measure 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.

14. Compliance with court orders in child welfare proceedings: The federal and State *Adoption and Safe Families Acts* accord the Family Court a significant tool with which to monitor and promote the timely achievement of permanency for children in foster care, that is, the requirement that the Court periodically determine whether agencies have made reasonable efforts, where appropriate, to further children's permanency plans. The Committee is proposing a measure to give necessary statutory guidance to the Family Court in making its determinations, identifying two areas in which the Court's exercise of its power to find that reasonable efforts have not been made would be a meaningful sanction short of contempt. First, the proposal would permit a finding that reasonable efforts had not been made where the agency has not complied with a specific court order for services, whether for reunification of the child with his or her family or for an alternate permanency plan. Second, with respect to cases in which adoption is the permanency plan, the proposal would require such a finding where the agency failed to comply with a court order to file a petition to terminate parental rights within 90 days of the order, unless it has returned to Court and obtained a stay, extension or modification of the order. Finally, building on successful results regarding cases of children freed for adoption, the Committee proposes that in all cases involving a foster care placement or permanency hearing, the Court would have discretion to recommend to the New York State Office of Children and Family Services that it investigate the facts and circumstances concerning the discharge of responsibilities by local social services districts and compliance with applicable statutes and regulations, pursuant to Social Services Law §395. While generally optional, this recommendation for a NYS OCFS investigation would be required in any case in which the Court has made a determination, pursuant to the federal and state *Adoption and Safe Families Act* [Public Law 103-89; Laws of 1999, ch.7], that reasonable efforts, where appropriate, should have been, but were not, made to prevent the child's placement in foster care or to facilitate reunification of the child with his or her family.

15. 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 measure designed to provide guidance for civil enforcement of orders of protection in Family and Supreme Courts and to remedy a disparity in the duration of probation in family offense cases. 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* Laws of 2003, ch. 579.

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

stalking behavior by a disturbed birth parent – has endangered the child and destabilized the child's new family. Since prospective adoptive or foster parents and birth parents do not meet the definition of family contained in Article 8 of the Family Court Act, the current statutory structure provides no vehicle to protect these children and their new families short of a criminal prosecution for a non-family offense. The Family Court Advisory and Rules Committee is proposing a measure to create a Family Court remedy for this problem by authorizing orders of protection to be issued in conjunction with the disposition of termination of parental rights cases and permanency hearings regarding children freed for adoption. These orders of protection, as well as those issued in child protective proceedings, would be entered on the statewide registry of orders of protection and Family Courts would be required to inquire whether other orders have been isued regarding the parties. Additionally, the measure would permit orders of protection in child protective proceedings to require the respondent parent to stay away, *inter alia*, from a "person with whom the child has been paroled, remanded, placed or released by the court..." Finally, the proposal would accord discretion to the Family Court, where "good cause" is demonstrated, to issue orders of protection in Article 10 cases that may continue until the 18th birthday of the youngest child for whom neglect or abuse has been found. This parallels the permissible duration of orders of protection in custody cases and would eliminate the burden imposed upon domestic violence victims and the courts to request extensions of protective orders annually.

17. Requirements for Notices of Indicated Child Maltreatment Reports and Changes in Foster Care Placements: Absolutely essential to the effort to expedite permanency for children in furtherance of the goals of the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch. 7] and recent permanency law [Laws of 2005, ch. 3], the Committee is resubmitting its proposal to assure that the Family Court, the parties and law guardians are promptly informed of any changes in placement that may warrant Court intervention. Equally critical, in an effort to effectuate the *ASFA* precept that safety of the child is paramount, the measure would also require prompt notice of any indicated child abuse or maltreatment reports. The proposal would amend Family Court Act §§1055 and 1089, as well as Social Services Law §§358-a, to require an agency with whom a child has been placed, either voluntarily or as a result of an abuse or neglect finding, or to whom guardianship and custody has been transferred as a result of the child being freed for adoption, to report any change in the child's placement status within 30 days to the Court, the parties and the law guardian, and to report any indicated reports of child abuse or maltreatment. Changes of placement would include, but not be limited to, cases in which the child has been moved from the foster or pre-adoptive home or program into which he or she has been placed, cases in which the foster or pre-adoptive parents move out of state with the child, and cases in which the child has been discharged from foster care on a trial or final basis.

18. Access by probation to 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 measure 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 over 1, 571, 061 orders of protection, as of December 12, 2006, the need to ensure its security and

integrity grows ever more critical. The measure thus has been modified to incorporate the Committee's proposal delineating civil and criminal penalties for unauthorized release of data from the statewide automated registry of orders of protection and warrants.

C. Previously Endorsed Measures

The Committee is recommending resubmission of the following 15 proposals:

1. Orders for genetic testing in proceedings to vacate acknowledgments of paternity: Consistent with the recognition accorded to the principle of equitable estoppel by the Court of Appeals in Matter of Shondel J. *v.* Mark D., 7 N.Y.3d 320, 820 N.Y.S.2d 199 (2006) and codifying a rapidly-increasing body of case law,[1] the Committee is proposing a measure to clarify the apparently contradictory statutory provisions applicable to proceedings regarding revocation of paternity acknowledgments. The Committee's proposal would amend Family Court Act §516-a to provide a two-step threshold test that must be met before a genetic marker or DNA test would be ordered in a proceeding to vacate a paternity acknowledgment. Where the revocation petition has been filed more than 60 days after execution of the acknowledgment, the measure would require a hearing to be held regarding whether there had been fraud, duress or a material mistake of fact. Assuming fraud, duress or material mistake of fact is proven and in all cases in which the petition has been filed less than 60 days after execution of the acknowledgment, the Court, consistent with Family Court Act §532, would then be required to determine whether ordering a genetic test would be in the child's best interests or, conversely, whether res judicata, equitable estoppel or the presumption of legitimacy attaching to a child born to a married woman militate against a testing order. Finally, if genetic testing is ordered and paternity is established, the Family Court would be required to enter an order of filiation.

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

3. Persons in Need of Supervision (PINS): intensive probation and procedures for admissions and violations of orders of probation and suspended judgment: Furthering the goals of recent PINS

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[1] *See* Matter of Demetrius H. *v.* Mikhaila C.M., -A.D.3d-, 2006 WL 3759707, 2006 N.Y. Slip Op. 09812 (4th Dept., Dec. 22, 2006); Matter of Westchester County Department of Social Services o/b/o/ Melissa B. *v.* Robert W.B., 25 A.D.3d 62, 803 N.Y.S.2d 672 (2d Dept., 2005); Matter of Oneida Co. Dept.of Social Services *v.* Joseph C., 289 A.D.2d 1077 (4th Dept., 2001), *lve. app. dismissed,* 98 N.Y.2d 647 (2002); Matter of Gina L. *v.* David W., 34 A.D.3d 810 (2d Dept., 2006).

enactments of averting unnecessary, costly out-of-home placements, the Committee is proposing that intensive probation supervision be included as one of the dispositional alternatives in PINS cases, to the extent available in a particular county. The proposal would also add a new Section 743 to the Family Court Act, establishing a judicial allocution procedure for accepting admissions in PINS cases, analogous to the allocution provision in juvenile delinquency cases [Family Court Act §321.3]. Finally, it would delineate the procedures for violations of suspended judgment and probation, drawing upon existing juvenile delinquency provisions. *See* F.C.A. §§360.2, 360.3.

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

5. Determinations of the Family Court regarding children in foster care: This proposal would amend Family Court Act §1039-b to provide that representatives of authorized agencies and law guardians, as well as social services officials, would have standing to initiate motions for orders to dispense with the requirement of reasonable efforts for the reunification of children with their families. Conforming the various provisions for such orders to the burden of proof required for termination of parental rights proceedings, it would clarify that the Family Court's determinations to dispense with reasonable efforts would have to be based upon clear and convincing evidence with respect to all "aggravated circumstances," not simply prolonged parental refusal of services. Finally, the proposal would incorporate the provision of the Social Services Law that defines "diligent efforts" into the reasonable efforts provisions. Consistent with Matter of Marino S., 100 N.Y.2d 361, 372 (2003), *cert. denied,* 124 S.Ct. 834 (2003), the measure provides that if the Family Court issues an order dispensing with the requirement of reasonable efforts, the order has the effect of dispensing as well with the element of proof of "diligent efforts" in termination of parental rights proceedings.

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

7. Duration of orders of probation in child support proceedings: Alone among probation

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

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

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

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

11. Child support and paternity: The Committee is again proposing a comprehensive set of amendments to the child support and paternity legislation enacted in 1997 [Laws of 1997, ch. 398]. The 1997 legislation, enacted in order to implement the federal *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* [Public Law 104-193], was ambiguous in several procedural

respects and failed to address the important question of what procedural safeguards are necessary in cases involving paternity acknowledgments by parents who are themselves under the age of 18. The proposal requires such acknowledgments to be executed before a judge or support magistrate and clarifies procedures applicable to "cost of living adjustment" proceedings and petitions to challenge administrative genetic testing directives.

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

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

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.

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

* * *

In addition to its legislative efforts, the Committee recommended comprehensive amendments to the *Uniform Rules of the Family Court* to implement the comprehensive permanency legislation enacted in 2005 and the "one family/one judge" and other federal and state legislation enacted in 2006,

as well as to establish standards for Court-appointed Special Advocates (CASA's) working in Family Courts. The Committee continued to assist the New York State Judicial Institute in providing training regarding the new laws and to spur compliance with court-related federal foster care eligibility requirements. These efforts contributed to New York State's recent successful foster care audit by the federal Department of Health and Human Services. The Committee also developed and revised 138 of the 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. Finally, building upon the success of its earlier roundtables regarding child welfare, in June, 2006, the Committee convened a roundtable at the New York State Bar Association on the educational needs of children in out-of-home care. The roundtable, which drew a wide array of experts, professionals and advocates in the education and child welfare communities, resulted in an unprecedented collaboration that continues actively to date.

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

Hon. Sara Schechter and Peter Passidomo, Co-Chairs
Janet R. Fink, Counsel
Family Court Advisory and Rules Committee
New York State Office of Court Administration
25 Beaver Street, Suite 1170
New York, New York 10004

II. New or Modified Measures

1. Putative fathers entitled consent to adoptions and to notice of adoption, surrender and termination of parental proceedings (D.R.L. §§111, 111-a; S.S.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. Laws of 1980, ch. 575. Notwithstanding the Legislature's goals of providing "reasonable, unambiguous and objective" criteria for notice and consent, [2] 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."[3]

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 of whether a person is a "consent father" is a "threshold issue" that must generally be determined well in advance of the signing of an adoptive placement

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

[3] 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.

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. [4] 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.[5] 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 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).[6] 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 measure 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 "substantial and continuous or repeated contact with the child." This may be demonstrated by payment of child support, visiting the

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

[5] 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.

[6] 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.

child, regularly communicating with the child or living with the child for a six-month period.. The measure 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."[7]

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 [Laws of 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.[8] 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 bill 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 weigh in regarding their children's best interests. The measure 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 limited "notice-only" status.[9]

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[7] 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.

[8] *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).

[9] 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.

The first new category of "notice-only fathers" would include individuals who have filed, served upon the agency and thereafter appeared in court on 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 to be entitled to comity in New York State. With respect to the second category, the Court must determine whether the foreign paternity adjudication or acknowledgment warrants treatment of the non-marital father as a "notice-only father," pursuant to Domestic Relations Law §111-a or Social Services Law §384-c, or whether he should be entitled to consent to his child's adoption, pursuant to Domestic Relations Law §111.

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. Paragraph (d) and the opening sentence of paragraph (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:

(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) maintained substantial and continuous or repeated contact with the child [out-of-wedlock and placed with the adoptive parents more than six months after birth] 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.

(vi) 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:

§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 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 custody petition upon the agency having care and custody of the child 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 to be entitled to comity in this state, provided that in such case, the court shall determine whether such person is entitled to consent to the adoption pursuant to section 111 of this chapter or is solely entitled to 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 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 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 custody petition upon the agency having care and custody of the child 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 to be entitled to comity in this state, provided that in such case, the court shall determine whether such person is entitled to consent to the adoption pursuant to section 111 of the domestic relations law or is solely entitled to notice pursuant to this section and 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.

2. Adjournments in contemplation of dismissal and suspended judgments in child abuse and neglect proceedings (F.C.A. §§1039, 1052, 1052-a, 1053, 1058, 1071, 1075)

Long-standing disputes regarding the consequences of adjournments in contemplation of dismissal and suspended judgments in child protective proceedings, in particular, the consequences of violations, compel modifications in the statutory structure governing these widely-used mechanisms for resolving child protective cases. At the same time, because Family Court Act §1052 enumerates the dispositional alternatives for child protective proceedings in the disjunctive, separating each alternative with "or," confusion has arisen regarding whether more than one dispositional alternative may be ordered in a proceeding at one time, particularly in cases involving more than one child and more than one respondent, each of whom may have different dispositional needs.

Instead of the confusing phrase "[p]rior to or upon a fact-finding hearing," the Family Court Advisory and Rules Committee is submitting a proposal to make clear that a child protective proceeding may be adjourned in contemplation of dismissal at any time prior to the entry of a fact-finding order. If the Family Court restores the matter to the calendar because of a violation, the case would then proceed to fact-finding and, if there is a finding, to disposition. *See* Matter of Marie B., 62 N.Y.2d 352 (1984). If a violation of the conditions of the adjournment is alleged, the adjournment period is tolled pending a determination regarding the alleged violation. Sixty days prior to the expiration of the adjournment, the child protective agency must submit a report to the Family Court, parties and law guardian regarding compliance with the conditions. If there has been no violation of the adjournment in contemplation of dismissal, the petition would be deemed dismissed.

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 where an imminent risk arises with respect to the child's life or health, the child would not able to be removed from home during the adjournment period, pursuant to part two of Article 10 of the Family Court Act. 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.

The Family Court Advisory and Rules Committee's proposal would also repeal Family Court Act §1053, the disposition of "suspended judgment," as well as Family Court Act §1071, the provision regarding violations of suspended judgments. An adjournment in contemplation of dismissal provides an effective means of disposing of a child protective proceeding without a finding and a release of a child to his or her parents with an order of supervision and/or an order of protection provides an effective post-finding disposition. In light of these alternatives, the dispositional alternative of suspended judgment is unnecessary and redundant.

Suspended judgments in child protective cases have long generated confusion and have

resulted in questionable placements of children, similar to the problem noted with respect to adjournments in contemplation of dismissal. The statute is silent regarding the consequences of a suspended judgment and does not address the placement issue at all. Does a successful completion of a period of suspended judgment result in a dismissal of the action, similar to an adjournment in contemplation of dismissal? Or does it result in retention of the finding but simply a suspension of the imposition of any more drastic dispositional alternative, such as placement, thus rendering it no different in consequence than a finding with an order of release of the child to the parent under supervision? Moreover, although children placed in foster care in conjunction with a suspended judgment would not be eligible for federal foster care reimbursement, for the same reasons that were noted regarding adjournments in contemplation of dismissal, such placements are not uncommon. The Committee's proposal reflects its conclusion that the most efficacious means of eliminating the confusion surrounding suspended judgments would be to repeal the provisions altogether.

Finally, by eliminating the disjunctive term "or" between each dispositional alternative in Family Court Act §1052, the measure would make clear that more than one disposition may be ordered at a time in the discretion of the Family Court. Clearly, a case may involve placement of one child and release of another to a parent under supervision, or release of a child to one parent with an order of protection issued against the other, or placement of a child while a parent remains under agency supervision. The inclusion of "or" between each dispositional alternative has caused undue confusion. The elimination of these disjunctives would clarify the broad spectrum of dispositional options available to the Family Court to fulfill its statutory obligation to tailor its orders to the best interests of each of the children before the Court and to the particular needs of their parents.

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. Subdivisions (a), (c), (e), (f) and (g) of section 1039 of the family court act, as amended by chapter 323 of the laws of 1990, are amended to read as follows:

(a) 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 the child's attorney or law guardian or upon [its own] motion of the respondent with the consent of the petitioner[, the respondent] and the child's attorney or law guardian, order that the proceeding be "adjourned in contemplation of dismissal." Under no circumstances shall the court order any party or the child's attorney or law guardian to consent to an order under this section. The court may make such order 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.

* * *

(c) Such order may include terms and conditions agreeable to the parties, the child's attorney or law guardian and to the court, provided that such terms and conditions shall include 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), an order pursuant to section one thousand seventeen, part two of this article 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 to be placed voluntarily pursuant to section three hundred eighty-four-a of the social services law. In any order issued pursuant to this section, such agency shall be directed to make a progress report to the court, the parties and the child's law guardian on the implementation of such order, no later than [ninety] sixty days [after] before the [issuance] expiration of such order[, unless the court determines that the facts and circumstances of the case do not require such reports to be made]. The child protective agency shall make further reports to the court, the parties and the law guardian in such manner and at such times as the court may direct.

* * *

(e) [Upon application of] If, prior to the expiration of the period of adjournment, a motion or order to show cause is filed by the petitioner or the child's attorney or law guardian that alleges a violation of the terms and conditions of the adjournment, [or upon the court's own motion, made at any time during the duration of the order], the period of the adjournment in contemplation of dismissal is tolled 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, if the court finds after a hearing 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, unless the parties consent to an order pursuant to section one thousand fifty-one of this act or unless the petition is dismissed upon the consent of the petitioner, the court shall thereupon proceed to a factfinding hearing under this article no later than sixty days after such application unless such period is extended by the court for good cause shown.

(f) If the proceeding is not [so] restored to the calendar as a result of an alleged violation pursuant to subdivision (e) of this section, the petition is, at the expiration of the adjournment period and review of the report by the court, the parties and the attorney for the child or law guardian, 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 the court finds that removal of the child from the home is necessary to avoid imminent risk to the child's life or health during the period of the adjournment, 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.

§2. Subdivision (a) of section 1052 of the family court act, as amended by chapter 198 of the laws of 1991, is amended to read as follows:

(i) [suspending judgment in accord with section one thousand fifty-three; or (ii)] releasing the child to the custody of his or her parents or other persons legally responsible in accord with section one thousand fifty-four; [or

(iii)] (ii) placing the child in accord with section one thousand fifty-five; [or

(iv) making] (iii) issuing an order of protection in accord with section one thousand fifty-six; [or

(v)] (iv) placing the respondent under supervision in accord with section one thousand fifty-seven.

§3. Section 1052-a of the family court act, as amended by chapter 69 of the laws of 1991, is amended to read as follows:

§ 1052-a. Post-dispositional procedures. The local child protective service shall notify the child's law guardian of an indicated report of child abuse or maltreatment in which the respondent is a subject of the report or another person named in the report, as such terms are defined in section four hundred twelve of the social services law, while any order issued pursuant to [paragraph (i), (iii), (iv) or (v) of subdivision (a) of] section [ten hundred] one thousand fifty-two remains in effect [against the respondent].

§4. Section 1053 of the family court act is REPEALED.

§5. Section 1058 of the family court act, as amended by chapter 3 of the laws of 2005, is amended to read as follows:

§ 1058. Expiration of orders. No later than sixty days prior to the expiration of an order issued pursuant to paragraph (i), [(ii),] (iii) or (iv)[, or (v)] of subdivision (a) of section one thousand fifty-two of this part or prior to the conclusion of the period of an adjournment in contemplation of dismissal pursuant to section one thousand thirty-nine of this article, where no application has been made seeking extension of such orders or adjournments and, with respect to an adjournment in contemplation of dismissal, no violations of the court's order are before the court, the child protective agency shall, whether or not the child has been or will be returned to the family, report to the court, the parties, including any non-respondent parent and the child's law guardian on the status and circumstances of the child and family and any actions taken or contemplated by such agency with respect to such child and family.

§5. Section 1071 of the family court act is REPEALED.

§6. Section 1075 of the family court act, as added by chapter 316 of the laws of 1990, is amended to read as follows:

§ 1075. Special duties of law guardian. In addition to all other duties and responsibilities necessary to the representation of a child who is the subject of a proceeding under this article, a law guardian shall upon receipt of a report from a child protective agency pursuant to sections [ten hundred] one thousand thirty-nine, [ten hundred] one thousand thirty-nine-a, [ten hundred] one thousand fifty-two-a, [ten hundred fifty-three, ten hundred] one thousand fifty-four, [ten hundred] one thousand fifty-five, [ten hundred] one thousand fifty-seven and [ten hundred] one thousand fifty-eight, review the information contained therein and make a determination as to whether there is reasonable cause to suspect that the child is at risk of further abuse or neglect or that there has been a substantive violation of a court order. Where the law guardian makes such a determination, the law guardian shall apply to the court for appropriate relief pursuant to section [ten hundred] one thousand sixty-one. Nothing contained in this section shall relieve a child protective agency or social services official of its duties pursuant to this act or the social services law.

§7. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to

adjournments in contemplation of dismissal and orders of disposition issued on or after such effective date.

REPEAL NOTE: Section 1053 of the Family Court Act, proposed to be repealed by this act, provides for a suspended judgment as a disposition of a child protective proceeding. Section 1071 of the Family Court Act, proposed to be repealed by this act, provides procedures for addressing an alleged violation of a suspended judgment ordered as a disposition of a child protective proceeding.

3. Vacatur of orders terminating parental rights
(F.C.A. §635, 636, 637, 1089; S.S.L. §384-b(13))

New York State has progressed far from the days when adolescents were not deemed candidates for either meaningful permanency planning, foster care or adoption, when many were simply relegated to congregate care settings and, when they reached 18, released to "independent living," an unrealistic status that for too many meant homelessness. The permanency legislation, enacted in 2005, reflected a recognition that teens in out-of-home care require services to start preparing them for independence in adulthood starting at age 14, but, at the same time, that if they are neither living with their own families, nor adopted, they need to have a "significant connection to an adult willing to be a permanency resource for the child." *See* Laws of 2005, ch. 3; Family Court Act §1089. Not infrequently, that "significant connection" turns out to be the child's birth parent, even if parental rights had been terminated. However, New York State law does not provide any procedural vehicle to recognize that reality.

Similar to legislation enacted in California in 2005 (Chapter 634; Assembly Bill 519), the Committee is recommending that a provision be added to the termination of parental rights statutes to authorize the Family Court, in narrowly defined circumstances, to vacate orders committing guardianship and custody of children and to reinstate their birth parents' parental rights. Under the Committee's proposal, a petition to vacate an order terminating parental rights would be permitted to be filed upon the consent of the petitioner and respondent in the original termination of parental rights proceeding, as well as the child. The termination of parental rights would have to have occurred more than two years prior to the filing of the petition to vacate and the child would need to be 14 years of age or older, to remain under the jurisdiction of the family Court and to have a permanency goal other than adoption. The Family Court would be authorized to grant the vacatur petition where clear and convincing proof established that the vacatur would be in the child's best interests. A clause would also be added to the permanency hearing order provision permitting the Court to recommend the filing of a vacatur petition.

Even without a statute, child welfare professionals in New York have reported cases in which facts mirroring the criteria contained in the Committee's proposal have spurred all parties and the adolescents themselves to prevail upon the Family Court to vacate orders terminating parental rights. *See* D. Riggs, "Permanence Can Mean Going Home," *Adoptalk* (North American Council on Adoptable Children; Spring, 2006). In fact, the guidelines for adolescent cases issued by the New York City Administration for Children's Services in 2003 recognize that "the best permanency resource for a young person who has been freed for adoption may be a member of the child's birth family, including a parent from whom the child has been freed."[10] Judges have reported that, notwithstanding termination of parental rights, teens aging out of foster care often return to their birth families, and, as one child welfare professional was quoted as saying:

The way families are drawn together against all odds whatever the circumstances I think is

[10] N.Y.C. Admin. for Children's Services, "Implementation of the *Adoption and Safe Families Act*, Part V: Family-based Concurrent Planning for Youth with Goals of Independent Living" (2003)(on-line at www.nyc.gov/html/acs/pdf/asfa_5.pdf). *See also,* A. Lowe, "Families for Teens Overview," *Eighth Annual Children's Law Institute* 197, 199 (Practicing Law Institute, 2005).

> exemplified by just how many kids do we see aging out of the foster care system and where do they go? They go home. ...even kids whose parents' rights have been terminated... The bonds that hold families together are powerful and often the system works to strain or shatter or destroy them rather than build on them.

M. Freundlich, *Time Running Out: Teens in Foster Care* (Children's Rights, Legal Aid Society Juvenile Rights Division & Lawyers for Children, Nov., 2003), p. 67. As one commentator noted, 'It is never too late for reunification." J. Jensen, "Fostering Interdependence: A Family-Centered Approach to Help Youth Aging Out of Foster Care," 3 *Whittier J. Of Child and Family Advocacy* 329 (Spring, 2004).

Although several Family Court judges in New York State have vacated termination of parental rights orders upon consent, the only reported decision in this area was one in which the Family Court denied standing to a birth parent, whose rights had been terminated, to seek custody of her child. *See* Matter of Tiffany A. *v.* Margaret H., 171 Misc.2d 786, 656 N.Y.S.2d 792 (Fam. Ct., Kings Co., 1996). Clearly the legislative vacuum must be filled so that the Courts will have specific authority to fulfill their statutory duty to find permanent homes for children, including authority in prescribed circumstances to vacate orders terminating parental rights.

Proposal

AN ACT to amend the family court act and the social services law, in relation to reinstatement of parental rights and vacatur of commitment of guardianship and custody of children

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

Section 1. Article 6 of the family court act is amended by adding a new part 1-A to read as follows:

Part 1-A. Vacatur of commitment of guardianship and custody; reinstatement of parental rights.

§635. Petition to vacate a commitment of guardianship and custody. A petition to vacate the commitment of guardianship and custody of a child may be filed in accordance with this part where the following conditions are met:

(a) guardianship and custody of the child had been committed more than two years prior to the date of filing of the petition upon an adjudication of any ground enumerated in subdivision four of section 384-b of the social services law; and

(b) the petitioner or petitioners and respondent or respondents in the proceeding in which guardianship and custody had been committed consent to the filing of the petition; and

(c) the child is fourteen years of age or older, remains under the jurisdiction of the family court, has not been adopted, does not have a permanency goal of adoption and consents to the filing of the petition.

§636. Originating a proceeding to vacate a commitment of guardianship and custody; service and venue.

(a) A proceeding to vacate the commitment of guardianship and custody may be originated by the filing of

a petition by the child's law guardian, by the social services district or agency to which the child was committed or by the respondent or respondents in the termination of parental rights proceeding. The petition shall be served upon the child's law guardian, the social services district or agency to which the child was committed and, in cases in which reinstatement of parental rights is sought, the respondent or respondents in the termination of parental rights proceeding, as well as the attorney or attorneys who represented the such respondent or respondents in the termination of parental rights proceeding. A certified copy of the order committing guardianship and custody and an affidavit or affidavits containing the consents required by section 635 of this chapter shall be attached to the petition.

(b) Upon the filing of a petition under this part, the court may cause a summons to be issued to the child, the social services district or agency to which the child was committed and, in cases in which reinstatement of parental rights is sought, the respondent or respondents in the termination of parental rights proceeding. The summons shall be served in accordance with section 617 of this chapter, accompanied by a copy of the petition, the order of commitment and affidavit or affidavits of consents.

(c) The petition shall be filed before the court that exercised jurisdiction over the most recent permanency proceeding involving the child and shall be assigned, wherever practicable, to the family court judge who presided over that proceeding or the proceeding to terminate parental rights.

(d) Wherever practicable, the child shall be represented by the same law guardian that represented the child in the most recent permanency proceeding and the parent or parents shall be represented by the same attorney or attorneys who represented the parent or parents in the termination of parental rights proceeding. Where this is not practicable, or where the court grants a request by the law guardian or attorney or attorneys to be relieved, the court shall immediately assign a new law guardian, attorney or attorneys, as applicable.

§637. Burden of proof and findings. The petitioner shall have the burden of proof by clear and convincing evidence that vacatur of the commitment of guardianship and custody is in the child's best interests, that the parties and child have consented to such vacatur as required by section 635 of this chapter and, in cases in which reinstatement of parental rights of the child's birth parent or parents is sought, that such reinstatement of parental rights is in the child's best interests. The court shall state the reasons on the record or in writing for any findings under this part.

§2. Clause B of subparagraph viii of paragraph 2 of subdivision (d) of section 1089 of the family court act is amended by adding a new item IV as follows:

(IV) recommend that the law guardian, local social services district or agency file a petition pursuant to part 1-A of article six of this act to revoke the commitment of guardianship and custody of a child who has been freed for adoption.

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

§384-b. Guardianship and custody of destitute and dependent children; commitment by court order; vacatur of commitment.

* * *

13. A petition to revoke the commitment of guardianship and custody may be brought in accordance with part 1-A of article six of the family court act. Such a petition may be brought where guardianship and custody of a child has been committed in excess of two years upon an adjudication of any ground enumerated in subdivision four of this section; where the child is 14 years of age or older, remains under the jurisdiction of the family court, has not been adopted and does not have a permanency goal of adoption; and where the petitioner or petitioners and respondent or respondents, as well as the child, in the proceeding in which guardianship and custody had been committed consent to the filing of a proceeding to revoke the commitment.

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

4. Child protective proceedings regarding destitute children
(F.C.A. §§115 (c), 1012(f), 1013(a), 1016, 1021, 1051, 1059)

Prior to enactment of the permanency legislation [Laws of 2005, ch. 3], proceedings to initiate and review the placement of destitute children in foster care were commenced by petitions pursuant to Social Services Law §392. The repeal of that statute left destitute children without any procedural vehicle for placement into foster care, where necessary, and for periodic review of that placement. The Family Court Advisory and Rules Committee proposes that Article 10 of the Family Court Act be utilized as that vehicle. Recognizing that, as the definition of "destitute child" in Social Services Law §371 specifies, this condition arises through no fault of the parents, the measure would specify "destitute" child as a category of child in need of protection as distinct from "abused" or "neglected" child. In so doing, the measure would provide the procedural vehicle for fulfilling the New York State Constitutional mandate to provide care and assistance to the needy. *See* N.Y. Constitution, Art. XVII.

The measure would establish "destitute child," as the term is defined in section 371 of the Social Services Law, as a discrete category of child protective proceeding, with the attendant due process protections for parents and children that apply in all proceedings brought under Article 10 of the family Court Act. It would specifically authorize temporary placements upon the parents' consent, pursuant to Family Court Act §1021, as well as each of the dispositional alternatives available in Family Court Act §1052. Family Court Act §1051 would be amended to include a discrete finding that a child is "destitute," as distinct from "abused" or "neglected." Where a destitute child is placed, pursuant to Family Court Act §1055, the placement would be reviewed, as are all other placements, through permanency hearings under Article 10-A of the Family Court Act. Similar amendments would be made to section 398 of the Social Services Law to delineate the responsibility of local social services departments to provide care and support for destitute children and, in appropriate cases, to petition the Family Court..

Finally, the measure would repeal Family Court Act §1059, as it is anachronistic and conflicts with more recent legislation regarding abandoned children. That section provides that children found to be abandoned are to be "discharged" to the custody of the local commissioner of social services, who must care for them as "destitute" children or "as otherwise provided by law" and requires the Family Court to direct the local commissioner to institute proceedings to terminate parental rights. The term "discharged" appears misplaced in this context, since all of the dispositions enumerated in Family Court Act §1052(a) are available for children found to be abandoned under the definition in Family Court Act §1012(f)(ii); these include "placement" pursuant to Family Court Act §1055, but not "discharge to" the local commissioner of social services. Moreover, Family Court Act §1055(b)(ii) contains specific provisions regarding notices, diligent searches and termination of parental rights proceedings regarding abandoned children under one year old, and Social Services Law §384-b(5) defines abandonment for the purposes of termination of parental rights. However, contrary to the language in Family Court Act §1059, termination of parental rights proceedings should not be mandatory either for abandoned or destitute children, as alternatives, including provision of preventive services or placements with relatives or other suitable persons, may well be more appropriate to the children's best interests in particular cases. Thus, section 1059 of the Family Court Act should be repealed.

<u>Proposal</u>

AN ACT to amend the family court act and social services law, in relation to destitute children in child protective and permanency proceedings in the family court

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

Section 1. Subdivision (c) of section 115 of the family court act, as amended by chapter 3 of the laws of 2005, is amended to read as follows:

(c) The family court has such other jurisdiction as is provided by law, including but not limited to: proceedings concerning adoption and custody of children, as set forth in parts two and three of article six of this act; proceedings concerning the uniform interstate family support act, as set forth in article five-B of this act; proceedings concerning children in foster care and care and custody of children, as set forth in sections three hundred fifty-eight-a and three hundred eighty-four-a of the social services law and article ten-A of this act; proceedings concerning destitute children, as set forth in articles ten and ten-a of this act; proceedings concerning guardianship and custody of children by reason of the death of, or abandonment or surrender by, the parent or parents, as set forth in sections three hundred eighty-three-c, three hundred eighty-four and paragraphs (a) and (b) of subdivision four of section three hundred eighty-four-b of the social services law; proceedings concerning standby guardianship and guardianship of the person as set forth in part four of article six of this act and article seventeen of the surrogate's court procedure act; and proceedings concerning the interstate compact on juveniles as set forth in chapter one hundred fifty-five of the laws of nineteen hundred fifty-five, as amended, the interstate compact on the placement of children, as set forth in section three hundred seventy-four-a of the social services law, and the uniform child custody jurisdiction and enforcement act, as set forth in article five-A of the domestic relations law.

§2. Subdivision (f) of section 1012 of the family court act, is amended to add a new paragraph (iii) to read as follows:

(iii) who is destitute, as defined in subdivision three of section three hundred seventy-one of the social services law.

§3. Subdivision (a) of section 1013 of the family court act, as added by chapter 962 of the laws of 1970, is amended to read as follows:

(a) The family court has exclusive original jurisdiction over proceedings under this article alleging [the abuse or neglect of] that a child is abused, neglected or destitute.

§4. The opening paragraph of section 1016 of the family court act, as added by chapter 319 of the laws of 1990, is amended to read as follows:

§ 1016. Appointment of law guardian. The court shall appoint a law guardian to represent a child who has been allegedly abused or neglected or is alleged to be destitute upon the earliest occurrence of any of the following: (i) the court receiving notice, pursuant to paragraph (iv) of subdivision (b) of section [ten hundred] one thousand

twenty-four of this act, of the emergency removal of the child; (ii) an application for an order for removal of the child prior to the filing of a petition, pursuant to section one thousand twenty-two of this act; or (iii) the filing of a petition alleging [abuse or neglect] that the child is abused, neglected or destitute pursuant to this article.

§5. Section 1021 of the family court act, as amended by chapter 3 of the laws of 2005, is amended to read as follows:

§ 1021. Temporary removal with consent. A peace officer, acting pursuant to his or her special duties, or a police officer or an agent of a duly authorized agency, association, society or institution may temporarily remove a child from the place where he or she is residing with the written consent of his or her parent or other person legally responsible for his or her care, if the child is suspected to be an abused [or], neglected or destitute child under this article. The officer or agent shall, coincident with consent or removal, give written notice to the parent or other person legally responsible for the child's care of the right to apply to the family court for the return of the child pursuant to section one thousand twenty-eight of this article, and of the right to be represented by counsel and the procedures for those who are indigent to obtain counsel in proceedings brought pursuant to this article. Such notice shall also include the name, title, organization, address and telephone number of the person removing the child; the name, address and telephone number of the authorized agency to which the child will be taken, if available; and the telephone number of the person to be contacted for visits with the child. A copy of the instrument whereby the parent or legally responsible person has given such consent to such removal shall be appended to the petition alleging [abuse or neglect of] that the removed child is abused, neglected or destitute and made a part of the permanent court record of the proceeding. A copy of such instrument and notice of the telephone number of the child protective agency to contact to ascertain the date, time and place of the filing of the petition and of the hearing that will be held pursuant to section one thousand twenty-seven of this article shall be given to the parent or legally responsible person. Unless the child is returned sooner, a petition shall be filed within three court days from the date of removal. In such a case, a hearing shall be held no later than the next court day after the petition is filed and findings shall be made as required pursuant to section one thousand twenty-seven of this article.

§6. Subdivision (a) of section 1051 of the family court act, as added by chapter 962 of the laws of 1970, is amended to read as follows:

(a) If facts sufficient to sustain the petition are established in accord with part four of this article, or if all parties and the law guardian consent, the court shall, subject to the provisions of subdivision (c) of this section, enter an order finding that the child is an abused child [or], a neglected child or a destitute child and shall state the grounds for the finding.

§7. Subdivision (c) of section 1051 of the family court act, as amended by chapter 187 of the laws of 1990, is amended to read as follows:

(c) If facts sufficient to sustain the petition under this article are not established or if, in the case of a child alleged [neglect] to be neglected or destitute, the court concludes that its aid is not required on the record before it, the court shall dismiss the petition and shall state on the record the grounds for its dismissal.

§8. Subdivision (d) of section 1051 of the family court act, as amended by chapter 478 of the laws of 1988, is amended to read as follows:

(d) If the court makes a finding [of abuse or neglect] that a child has been abused or neglected or is destitute, it shall determine, based upon the facts adduced during the fact-finding hearing and any other additional facts presented to it, whether a preliminary order pursuant to section one thousand twenty-seven is required to protect the child's interests pending a final order of disposition. The court shall state the grounds for its determination. In addition, a child found to be abused [or], neglected or destitute may be removed and remanded to a place approved for such purpose by the local social service department or be placed in the custody of a suitable person, pending a final order of disposition, if the court finds that there is a substantial probability that the final order of disposition will be an order of placement under section one thousand fifty-five of this article. In determining whether substantial probability exists, the court shall consider the requirements of subdivision (b) of section one thousand fifty-two of this article.

§9. Section 1059 of the Family Court Act is REPEALED.

§10. Subdivision 1 of section 398 of the social services law is amended to read as follows:

1. As to destitute children: Assume charge of and provide care and support for any destitute child who cannot be properly cared for in his or her home, as provided in subdivision two of this section and as ordered by the family court pursuant to articles ten and ten-a of the family court act.

§ 11. The opening paragraph and paragraph (a) of subdivision 2 of section 398 of the social services law, as amended by chapter 880 of the laws of 1976, are amended to read as follows:

As to neglected, abused, [~~or~~] abandoned or destitute children:

(a) Investigate [~~the~~] any alleged neglect, abuse, destitution or abandonment of a child, offer protective social services to prevent injury to the child, to safeguard his or her welfare[,] and to preserve and stabilize family life wherever possible, and, if necessary, [bring the case before] promptly petition the family court for adjudication and care for the child [until the court acts in the matter and, in the case of an abandoned child, shall promptly petition the family court to obtain custody of such child].

§ 12. Paragraph (b) of subdivision 2 of section 398 of the social services law, as amended by chapter 555 of the laws of 1978, is amended to read as follows:

(b) Receive and care for any child alleged to be neglected, abused [~~or~~], abandoned or destitute, who is

temporarily placed in [~~his~~] the care of the local commissioner by the family court pending adjudication by such court of the alleged neglect, abuse [~~or~~], abandonment or finding that the child is a destitute child, including the authority to establish, operate, maintain and approve facilities for such purpose in accordance with the regulations of the [~~department~~] office of children and family services; and receive and care for any neglected, abused [~~or~~], abandoned or destitute child placed [or discharged to ~~his~~] in the care of the local commissioner by the family court.

§13. This act shall take effect immediately.

REPEAL NOTE: Section 1059, proposed to be repealed by this act, provides that children found to be abandoned are to be discharged to the custody of the local commissioner of social services, who shall care for them as destitute children and institute proceedings to terminate parental rights.

5. Criminal mischief as a family offense in Family Court and criminal proceedings (C.P.L. §530.11; F.C.A. §812)

Experience with the concurrent jurisdiction provisions of the *Family Protection and Domestic Violence Intervention Act of 1994* [Laws of 1994, ch. 222] has revealed a significant gap in the enumerated family offenses. With regularity, the courts handling family offense cases are faced with situations in which an offender is alleged to have vandalized or destroyed property that is either owned by the victim or jointly owned by both parties. Yet criminal mischief is not enumerated as a family offense that may be prosecuted in Family Court, and courts are sharply divided regarding whether it may be prosecuted as a crime if the property is jointly owned or owned in the offender's name. The Family Court Advisory and Rules Committee, therefore, proposes that criminal mischief involving property either owned by the victim (the petitioner in Family Court or complainant in criminal proceedings) or owned by both parties be added to the concurrent jurisdiction provisions in section 812 of the Family Court Act and section 530.11 of the Criminal Procedure Law.

In permitting an offender to be prosecuted for a family offense for destroying property, notwithstanding the fact that he or she may have an ownership interest, this measure would bring New York State in line with the law nationally. In the only appellate holding in New York on the issue to date, in 1997, the Appellate Division, Second Department, in People *v.* Person, 239 A.D.2d 612, 658 N.Y.S.2d 372 (2d Dept., 1997), *app. denied*, 91 N.Y.2d 878 (1997), reversed a criminal mischief conviction on the ground that the defendant had an equitable interest in the damaged property. While following the holding in Person, the Supreme Court, Kings County, in People *v.* Khyfets, 174 Misc. 2d 516, 522, 665 N.Y.S.2d 802, 806 (Sup. Ct., Kings Co., 1997), cited contrary cases in Arizona, Illinois, California, Iowa and Washington. The Court called upon the Legislature to bring New York law "in tune with the spirit of the recent federal and state domestic violence legislation" by permitting criminal mischief to be charged regarding "marital or jointly owned property." Further, also citing contrary cases nationally, the Criminal Court, Bronx County, in People *v.* Brown, 185 Misc.2d 326, 334, 711 N.Y.S.2d 707, 713 (Crim. Ct., Bronx Co., 2000), criticized Person as "wrongly decided" on the ground that the proscription against charging a person with larceny for stealing jointly owned property [Penal Law §155.00(5)] was improperly applied to the criminal mischief statute. The holding in Brown was recently bolstered by the statement by the Court of Appeals, in People *v.* Hernandez, 98 N.Y.2d 175, 181 (2002), that:

> In instances where a word is not defined in a Penal Law provision under review, we have cautioned against reliance upon a definition of that term found in another Penal law statute absent legislative authority for doing so.

That the prohibition against prosecuting offenders for vandalism of jointly owned property in Person is a minority rule that fails to consider the unique circumstances present in domestic violence cases is clear from reference to authorities nationally. *See* "Malicious Mischief," 52 *Am.Jur.2d* §1 (May, 2006). In People *v.* Wallace, 123 Cal.App.4th 144, 19 Cal.Rptr.3d 790 (Ct.App., 5th Dist., Cal., 2004), the California Court of Appeals, Fifth District, "embrace[d] the emerging rule imposing criminal liability on a spouse for intentionally causing harm to property in which the other spouse has an interest. ..." The Court in Wallace, citing case law from Wisconsin, Iowa, Illinois, Arizona, Washington, Alaska, Georgia and the District of Columbia, specifically rejected the holding in Person. Similarly, the District of Columbia Court

of Appeals, in Jackson *v.* United States, 819 A.2d 963 (D.C.App., 2003), noted that Person "appears to be an anomaly and has been widely criticized, even in New York [citing Brown, *supra*]." Commentators in New York have likewise advocated for the law in New York to be changed to permit such prosecutions. *See, e.g.,* V. Lutz & C. Bonomolo, "My Husband Just Trashed Our Home: What Do You Mean That';s Not a Crime?," 48 S.C. Law Rev. 641 (Spring, 1997); J. Leventhal, "Spousal Rights or Spousal Crimes: Where and When are the Lines to be Drawn?," 2006 *Utah Law Rev* 351 (2006).

In including criminal mischief involving damage to property owned or jointly owned by the petitioner or complainant in the list of crimes for which courts of family and criminal jurisdiction may exercise concurrent jurisdiction, the Committee's measure will enhance the effectiveness of New York's domestic violence statutes. Recognizing that damage to property is often a means that an abuser uses to exercise power and control over his or her victim,[11] the addition of criminal mischief to the enumerated family offenses will further fulfillment of the Legislature's finding, in enacting the *Family Protection and Domestic Violence Intervention Act*, that "[t]he victims of family offenses must be entitled to the fullest protections of the civil and criminal laws." Laws of 1994, ch. 222, §1.

Proposal

AN ACT to amend the family court act and the criminal procedure law, in relation to family offense proceedings in family and criminal courts

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

Section 1. The opening paragraph of subdivision 1 of section 812 of the family court act, as amended by chapter 635 of the laws of 1999, is amended to read as follows:

§ 812. Procedures for family offense proceedings.

1. Jurisdiction. The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief involving property owned or jointly owned by the petitioner, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason

[11] *See, e.g.,* C.Klein & L.Orloff, "Providing Legal Protection for battered Women: An Analysis of State Statutes and Case Law," 21 *Hofstra L. Rev.* 801, 873 (1993); Leventhal, *supra;* Lutz & Bonomolo*, supra.*

of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this article, "members of the same family or household" shall mean the following:

§2. The opening paragraph of subdivision 1 of section 530.11 of the criminal procedure law, as amended by chapter 635 of the laws of 1999, is amended to read as follows:

§ 530.11 Procedures for family offense matters.

1. Jurisdiction. The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, <u>criminal mischief involving property owned or jointly owned by the complainant,</u> menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this section, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this section, "members of the same family or household" with respect to a proceeding in the criminal courts shall mean the following:

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

6. Conditions of orders of protection in juvenile delinquency, child support, paternity, custody, child protective and matrimonial proceedings
(F.C.A. §§352.3(1), 446(h), 551(i), 759(h), 1056(1); D.R.L. §§240(3), 252(1))

In 1998, sections 530.12 and 530.13 of the Criminal Procedure Law were amended to authorize orders of protection to be issued to protect designated witnesses in criminal proceedings. However, no comparable provision was added to the juvenile delinquency article of the Family Court Act. Without an explicit provision or incorporation by reference of the criminal provision, it is inapplicable to juvenile delinquency proceedings, even though those cases are quasi-criminal in nature and may involve similar needs to protect witnesses. Family Court Act §303.1(1) prohibits application of the Criminal Procedure Law unless "specifically prescribed" by the Family Court Act. The Committee is, therefore, proposing an amendment to Section 352.3 that is identical to the language in Criminal Procedure Law §§530.12 and 530.13.

Additionally, the measure provides the needed follow-up amendment to the 2006 statute authorizing orders of protection to protect pets. [Laws of 2006, ch. 253]. That statute authorized conditions restraining individuals from intentionally injuring or killing companion animals or pets[12] without justification to be added to orders of protection in criminal, juvenile delinquency, child support, paternity, custody, Persons in Need of Supervision, family offense and child protective proceedings. The provisions amending the juvenile delinquency, child support, paternity, custody, Persons in Need of Supervision, family offense and child protective articles of the Family Court Act all refer to companion animals "owned, possessed, kept, leased or held by the petitioner or a minor child residing in the household." However, in all except family offense, custody and parent-initiated PINS cases, the petitioner in these proceedings is a government entity, a prosecuting or presentment agency, not the alleged victim of family violence who requires protection. Additionally, no amendment was made to the provisions regarding orders of protection in matrimonial cases pursuant to Domestic Relations Law §§240 and 252. The Committee's proposal substitutes the phrase "person protected by the order" for "petitioner" and adds similar provisions to protect pets to sections 240 and 252 of the Domestic Relations Law.

Proposal

AN ACT to amend the family court act and domestic relations law, in relation to orders of protection in juvenile delinquency, child support, paternity, persons in need of supervision, custody and matrimonial proceedings

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

Section 1. Subdivision 1 of section 352.3 of the family court act, as amended by chapter 253 of

[12] Companion animals or pets are defined in section 350(5) of the Agriculture and Markets Law to include "any dog or cat, and ... any other domesticated animal normally maintained in or near the household of the owner or person who cares for such other domesticated animal," as distinguished from a "farm animal."

the laws of 2006, is amended to read as follows:

(1) Upon the issuance of an order pursuant to section 315.3 or the entry of an order of disposition pursuant to section 352.2, a court may enter an order of protection against any respondent for good cause shown. The order may require that the respondent: (a) stay away from the home, school, business or place of employment of the victims of, or designated witnesses to, the alleged offense; or (b) refrain from harassing, intimidating, threatening or otherwise interfering with the victim or victims of, or designated witnesses to, the alleged offense and such members of the family or household of such victim or victims or of designated witnesses as shall be specifically named by the court in its order; or (c) refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the [petitioner] person protected by the order or a minor child residing in [the] such person's household. "Companion animal," as used in this subdivision, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law.

§2. Paragraph 1 of subdivision (h) of section 446 of the family court act, as added by chapter 253 of the laws of 2006, is amended to read as follows:

1. to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the [petitioner] person protected by the order or a minor child residing in [the] such person's household.

§3. Paragraph 1 of subdivision (i) of section 551 of the family court act, as added by chapter 253 of the laws of 2006, is amended to read as follows:

1. to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the [petitioner] person protected by the order or a minor child residing in [the] such person's household.

§4. Paragraph 1 of subdivision (h) of section 759 of the family court act, as added by chapter 253 of the laws of 2006, is amended to read as follows:

1. to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the [petitioner] person protected by the order or a minor child residing in [the] such person's household.

§5. Subparagraph 1 of paragraph (g) of subdivision (1) of section 1056 of the family court act, as

added by chapter 253 of the laws of 2006, is amended to read as follows:

1. to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the [petitioner] person protected by the order or a minor child residing in [the] such person's household.

§6. Subparagraph 7 of paragraph (a) of subdivision 3 of section 240 of the domestic relations law, as amended by chapter 222 of the laws of 1994, is renumbered subparagraph 8 and a new subparagraph 7 is added to read as follows:

(7) to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the person protected by the order or a minor child residing in such person's household. "Companion animal," as used in this section, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law.

§7. Paragraph (g) of subdivision 1 of section 252 of the domestic relations law, as amended by chapter 222 of the laws of 1994, is relettered paragraph (h) and a new paragraph (g) is added to read as follows:

(g) to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the person protected by the order or a minor child residing in such person's household. "Companion animal," as used in this section, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law.

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

7. Combined parental income maximum utilized to calculate child support
(F.C.A. §413(1)(c)(2); D.R.L. §240(1-b)(c)(2))

The *Child Support Standards Act* ('*CSSA*'), which became law on September 15, 1989, specified that the *CSSA* percentages (17% of combined parental income for families with one child, 25% of combined income for families with two children, 29% for three children, 31% for four children and not less than 35% of income for five or more children) be applied to the first $80,000 of combined parental income. In cases involving combined parental incomes in excess of that threshold, the Supreme or Family Court is required to consider the ten factors enumerated in Family Court Act §§413(1)(f) and Domestic Relations Law §240(1-b)(f) and determine whether application of the *CSSA* percentages to income in excess of that threshold would be "unjust or inappropriate." If so, the Court must issue a written child support order for a just and appropriate amount, articulate which factors were considered, calculate the *pro rata* share of each party's basic child support obligation (the amount using the statutory percentages) and enumerate the reasons that the Court did not order the basic child support obligation. *See* F.C.A. §413(1)(g); D.R.L. §240(1-b)(g). Now 16 years old, the $80,000 threshold (often referred to as a "cap") no longer represents a meaningful benchmark denoting higher-income families, who may warrant exceptions to application of the statutory child support percentages. Instead, with significant increases in both incomes and the cost of living, it covers a much broader spectrum of the families before the Courts and is more the rule than the exception. The Family Court Advisory and Rules Committee thus proposes that the threshold be raised to $130,000 and that it be re-calculated every two years to reflect changes in the Consumer Price Index.

Since the cost of living – and , in particular, the cost of raising children – has risen at least 50% since enactment of the original statute, setting the combined parental income maximum at $130,000 would be appropriate. [13] The Appellate Division, Second Department, in Clerkin *v.* Clerkin, 304 A.D.2d 784 (2d Dept., 2003), summarized the problem well:

> [T]he statutory limit on basic child support does not reflect current economic reality. The current basic child support cap was adopted by the Legislature in 1989. Since that time, the consumer price index, which represents the average monthly change in the prices paid by urban consumers for a representative basket of goods and services, has increased significantly. In 1989, the consumer index for the New York metropolitan area, including Westchester County, was $130.60; it is now $196.90, an increase of 51%. At the same time, family income has increased by 31%.

In short, when Clerkin was decided three years ago, a one dollar expense in 1989 dollars would cost over $1.50. Continuing to utilize a figure set in 1989 as a basis for calculating child support significantly shortchanges children and their families.

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[13] At the other end of the income spectrum, the "self-support reserve" has risen 64% since 1989 and is recalculated annually by statute. Indeed, if the exact percentage that the "self-support reserve" has risen since 1989 were applied to the "combined parental income maximum," the latter figure would be almost identical to the Committee's proposal, that is, $131,200. The "self-support reserve," which must be published by the New York State Office of Temporary and Disability Assistance and fluctuates annually, is equal to 135% of the poverty income guidelines amount for a single person as reported by the United States Department of Health and Human Services. *See* F.C.A. §413(1)(b)(6), D.R.L. §240(1-b)(b)(6); S.S.L. §111-i(2)(a).

Equally as important as raising the combined parental income maximum, establishing an objective and non-burdensome means of recalculating this benchmark periodically to reflect fluctuations in the economy is critical to ensuring that this figure continues to bear a meaningful relationship to the support needs of children. While setting the threshold at $130, 000 upon enactment, the measure provides that two years from enactment and every two years thereafter, the New York State Office of Temporary and Disability Assistance (NYS OTDA) would be required to revise the combined parental income maximum by the net percentage change, if any, during the two-year period, in the sum of the annual average changes in the consumer price index for all urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the United States Department of Labor. This combined parental income maximum would be published in NYS OTDA regulations every two years pursuant to section 111-i of the social services law, the same provision that now requires NYS OTDA to revise the "self-support reserve" annually and publish the revised figure in its regulations. This new requirement would create no new burden for the agency, since the NYS OTDA already checks the net percentage change in the Consumer Price Index every two years in order to apply "cost of living adjustments" to child support orders; COLA's are applied where the sum of the annual average changes in the CPI is ten percent or greater. *See* F.C.A. §413-a(2)(a); D.R.L. §240-c(2)(a); S.S.L. §111-n(2)(c).

These changes are essential to continue to fulfill the statutory purpose of the *Child Support Standards Act*, that is, to establish "a method for determining an adequate level of support in actions involving children." [Governor's Program Bill Memo, Laws of 1989, ch. 567, p. 1]. The changes are also critically important to ensuring a smooth, expeditious judicial child support process. Upon enactment, the requirements for support magistrates (then called "hearing examiners") to enumerate factors, calculate the basic support obligation and explain their findings in writing regarding any variances from the basic support obligation with respect to all cases falling above the $80,000 combined parental income maximum applied to a minority of cases. With rising incomes and inflation, the support magistrates are now required to invoke this process in what is, in some counties, a substantial portion of their caseloads – requirements that have the inevitable effect of slowing down the process of issuing child support orders.

The *Child Support Standards Act* has more than fulfilled its expectations over the years. Child support awards have consistently risen and have helped to lift custodial parents and children out of poverty. The awards are much more predictable and consistent from jurisdiction to jurisdiction, from Court to Court. Moreover, the Legislature has enacted legislation that has clarified, refined and enhanced the provisions of the statute and the appellate courts have developed a substantial body of case law interpreting the *CSSA*. However, the one area of *CSSA* that has remained unchanged since its passage in 1989 and that remains troublesome in its interpretation is the $80,000.00 'cap' on the mandatory application of the support percentages.

Despite the caveat in the Governor's Program Bill Memo, *supra*, that "the $80,000.00 figure is not intended to artificially limit child support," early applications of *CSSA* indeed treated the figure as a limit or ceiling, above which no support was ordered. In fact, it was not until the Court of Appeals decided Cassano *v.* Cassano, 85 N.Y.2d 649 (1995), that the courts received specific guidance regarding application of the *CSSA* in the large number of cases in which combined parental income exceeds $80,000.00. Raising the benchmark to $130, 000 and establishing a regular vehicle to adjust the figure

appropriately would compel presumptive application of the *Child Support Standards Act* percentages to a far larger spectrum of cases and would thus greatly enhance the consistency of child support awards statewide.

The time has come to raise the anachronistic $80,000 cap and establish an objective and workable vehicle for adjusting the figure to reflect changes in the economy. The Committee's proposal to set the threshold at $130, 000 and require the New York State Office of Temporary and Disability Assistance to revise it every two years based upon changes, if any, in the Consumer Price Index would fulfill those goals.

Proposal

AN ACT to amend the family court act, domestic relations law and social services law, in relation to combined parental income in child support proceedings

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

Section 1. Subparagraph (2) of paragraph (c) 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:

(2) The court shall multiply the combined parental income up to [eighty] a maximum of one hundred thirty thousand dollars by the appropriate child support percentage and such amount shall be prorated in the same proportion as each parent's income is to the combined parental income, provided, however, that two years from the date of enactment of this section and every two years thereafter, the state office of temporary and disability assistance shall review and revise this combined parental income maximum by the net percentage change during the previous two-year period, if any, in the sum of the annual average changes in the consumer price index for all urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the United States Department of Labor. The combined parental income maximum shall be published in regulations in accordance with section 111-i of the social services law.

§2. Subparagraph (2) of paragraph (c) 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:

(c) The amount of the basic child support obligation shall be determined in accordance with the provision of this paragraph:

(1) The court shall determine the combined parental income.

(2) The court shall multiply the combined parental income up to [eighty] a maximum of one hundred thirty thousand dollars by the appropriate child support percentage and such amount shall be prorated in the same proportion as each parent's income is to the combined parental income , provided,

however, that two years from the date of enactment of this section and every two years thereafter, the state office of temporary and disability assistance shall review and revise this combined parental income maximum by the net percentage change during the previous two-year period, if any, in the sum of the annual average changes in the consumer price index for all urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the United States Department of Labor. The combined parental income maximum shall be published in regulations in accordance with section 111-i of the social services law.

§3. Subdivision 2 of section 111-i of the social services law is amended by adding a new paragraph (c) to read as follows:

(c) Two years following the effective date of this paragraph and every two years thereafter, the commissioner shall review and revise the combined parental income maximum to be utilized in calculating orders of child support in accordance with sections 413(1)(c)(2) of the family court act and 240(1-b)(c)(2) of the domestic relations law. The combined parental income maximum, which shall be $130,000 as of the effective date of this paragraph, shall be revised every two years by the net percentage change, if any, during the previous two-year period in the sum of the annual average changes in the consumer price index for all urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the United States Department of Labor. The revised combined parental income maximum shall be published in department regulations.

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

8. Agreements and stipulations 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 parents when they enter 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. However, while the courts "retain discretion with respect to child support" under these statutory provisions, the law is silent regarding remedies for non-compliance with any of these requirements. The Family Court Advisory and Rules Committee is proposing legislation to supply the necessary clarity to this area.

The Committee's measure 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 (3rd 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,[14] the Court affirmed the modification date as the date of the application. *Cf.,* Jefferson *v.* Jefferson, 21 A.D.3d 879, 800N.Y.S.2d 612 (2nd Dept., 2005)(noncompliance with *CSSA* rendered agreement invalid and unenforceable; matter remitted for new determination of child support as of 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 measure 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.

[14] *See, e.g.,* Matter of Dox *v.* Tynon, 90 N.Y. 2d 166, 659 N.Y.S.2d 231 (1997).

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.

(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.

(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.

9. Representation of Family Court judges in habeas corpus proceedings (C.P.L.R. 7009)

Section 7009 of the Civil Practice Law and Rules requires that notification of a habeas corpus proceeding be served upon the Family Court that ordered the challenged detention or upon the Family Court in which the underlying proceeding is pending, even where another court ordered the detention. Failure to so notify the Family Court is a procedural defect that may compel dismissal. *See, e.g.,* People *ex rel* Doe *v.* Beaudoin, 102 A.D.2d 359 (3d Dept., 1984). In language added in 1963, the statute requires that the Family Court judge be represented by the county attorney or, in New York City, by the Corporation Counsel. Laws of 1963, ch. 532, §46.

Since, in juvenile delinquency and child protective proceedings in Family Court, the county attorney or corporation counsel generally represents the petitioner in the underlying proceeding, dual representation of the Family Court judge as well creates an obvious conflict of interest.[15] Additionally, in these and other types of proceedings in Family Court in which a habeas corpus proceeding may be brought, representation of State court judges by county attorneys or by the corporation counsel is anomalous and inappropriate, even where the dual representation issue does not arise. At the time of its passage in 1963, it may have been appropriate, since the costs of Family Courts at the time were borne by the counties and New York City. However, since the late 1970's, Family Court costs have been borne by New York State. Family Court judges have become "employees" of the State [Judiciary Law §39(6)] and Family Court judges have been represented by the Attorney General in other types of proceedings. Similar to the practice in Article 78 and other proceedings, therefore, the Committee is proposing to modify CPLR 7009 by requiring the Family Court to be represented by the New York State Attorney General in habeas corpus proceedings.

Proposal

AN ACT to amend the civil practice law and rules, in relation to habeas corpus proceedings involving detention ordered by the family court

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

Section 1. Paragraph 2 of subdivision (a) of section 7009 of the civil practice law and rules, as amended by chapter 532 of the laws of 1963, is amended to read as follows:

[15] In rare instances, a writ of habeas corpus may be brought by a juvenile delinquent placed by the Family Court in a State facility operated by the New York State Office of Children and Family Services – a rare occurrence because other remedies are generally utilized for juveniles to challenge their placements, *e.g.,* post-dispositional motions and permanency hearings under Article 3 of the Family Court Act and appeals to the Appellate Division. However, should such a case pose a conflict for the Attorney General's office, the placement agency's general counsel could represent the agency.

(a) Notice before hearing. Where the detention is by virtue of a mandate, the court shall not adjudicate the issues in the proceeding until written notice of the time and place of the hearing has been served either personally eight days prior to the hearing, or in any other manner or time as the court may order,

* * *

2. where a person is detained by order of the family court, or by order of any court while a proceeding affecting him or her is pending in the [said] family court, upon the judge who made the order. In all such proceedings, the court shall be represented by the [corporation counsel] attorney general [of the city of New York, or outside the city of New York, by the county attorney]; or,

§2. This act shall take effect immediately.

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

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

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

As in child abuse, child neglect and persons in need of supervision (PINS) proceedings, so, too, in juvenile delinquency proceedings the child's non-custodial parent may be a critical participant in the dispositional process. Sometimes a non-custodial parent or his or her extended family may provide vitally-needed placement resources for a child, both temporarily during the pendency of the action and on a more extended basis at disposition. 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 measure would fill that gap.

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

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

3. Permanency planning goals and services for adolescents: As in the permanency legislation, the proposal would require the Family Court to consider the services necessary to assist juveniles 14 and older, instead of 16 and older, to make the transition from foster care to independent living in juvenile delinquency and PINS cases. *See* Family Court Act §1089(d)(2)(vii)(G). Further, as in the permanency statute, for those juveniles who are neither returning home nor achieving permanence through adoption, the measure 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.

4. Expansion of alternatives to extensions of placement: In an effort to minimize unnecessary extensions of placement in both juvenile delinquency and PINS cases, the proposal would authorize the Family Court, instead of extending placement, 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. These options may be useful where a local probation department, often in conjunction with a community-based agency, is able to provide aftercare services for a juvenile not available through the placement agency. It is not, however, a mandate for any probation department that does not have or does not elect to provide such services. That probation and community-based alternatives can be effective means of addressing juvenile justice cases, while at the same time saving considerable sums of money, has been clearly demonstrated by two programs in New York City. *See* "Alternative to Jail Programs for Juveniles Reduce City Costs," *Inside the Budget*, #148 (NYC Independent Budget Office; July 11, 2006). Further, the addition of these options would facilitate the Court's compliance with the statutory mandates to consider reasonable efforts to return children home at both the dispositional and permanency hearing stages and to make orders consistent with the "least restrictive available alternative." *See* Family Court Act §§352.2(2)(a), 754, 756-a.

5. Educational and vocational release planning in PINS proceedings: Conforming the PINS statute to the 2000 legislation regarding juvenile delinquents and the 2005 permanency legislation applicable to children in foster care, the proposal would require the agency with which a PINS is placed – the local Department of Social Services or an authorized child care agency operating under contract – to engage in constructive planning for the child's release and to report to the Family Court and to the parties on such efforts. Where an extension of placement is not being sought, the measure would require 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 would be required to be annexed to the petition, which must be filed 60 days prior to the date on which the permanency hearing must be held.

The release plan mandated in the report would be required to delineate the steps that the agency has taken or will be taking to ensure that the juvenile would be enrolled in school promptly after release, that records would be promptly transferred and that special education services, if any, would continue until such time as the new local education agency develops and implements a new Individual Education Plan, as necessary. For a juvenile not subject to the State's compulsory education law who affirmatively elects not to continue in school, the agency would be required to describe steps taken or planned to promptly ensure the juvenile's gainful employment or enrollment in a vocational program. In an extension of placement/ permanency hearing, this release plan would be reviewed by the 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. [16]

6. Placement and permanency hearing orders: Permanency hearings would be required for juveniles placed with local Departments of Social Services and with the New York State Office of Children and Family Services for limited 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 would greatly facilitate the planning process and assure compliance with the federally-required time-limits applicable once the youth are transferred . *See, e.g.*, Matter of Donovan Z., 6 Misc.3d 1023(a)(Fam. Ct. , Monroe Co., 2005). Further, as in the permanency legislation, the measure would require that permanency hearing orders in juvenile delinquency and PINS proceedings include: a description of the visiting plan between the juvenile and his or her parent or legally-responsible adult; a service plan designed to fulfill the permanency goal for the juvenile; [17] a direction that the parent or other person legally responsible be notified of, and be invited to be present at, any planning conferences convened by the placement agency with respect to the child; and a warning that if the juvenile remains in placement for 15 out of 22 months, the agency may be required to file a petition to terminate parental rights. A copy of the court order and service plan would be required to be provided to the parent or other legally responsible individual. *See* Family Court Act §§1089(d)(2)(vii)(A), 1089(e). Similar requirements would apply to the dispositional orders placing the juvenile.

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's legislation implementing the federal *ASFA* underscored the Legislature's recognition that the reasonable efforts, permanency planning and permanency hearing requirements of *ASFA* are fully applicable to juvenile delinquency and PINS proceedings in Family Court and are critical aspects of the State's compliance with federal foster care [*Social Security Act*, 42 U.S.C. Title IV-E] funding mandates. *See* Laws of 2000, ch. 145; Senate

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[16] *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).

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

Memorandum in Support of S 7892-a.[18] 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 law guardian representation is continued without interruption and if the agency's responsibilities to work with, and provide appropriate visitation to, the juveniles' parents and other legally-responsible adults is clearly articulated, the likelihood of successful permanency planning is significantly increased. 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. The importance of these provisions are underscored as well in the nationally recognized guidelines recently approved by the National Council of Juvenile and Family Court Judges.[19] As one child welfare expert has written:[20]

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

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

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

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

Proposal

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

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

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

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

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

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

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

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

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

(i) a description of the visitation plan;

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

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

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

§4. The opening paragraph of subdivision 4 and paragraph (ii) of such subdivision of section 355.3 of the family court act, as amended by chapter 198 of the laws of 1991, are amended to read as

follows:

4. At the conclusion of the hearing, the court may, in its discretion, order an extension of the placement for not more than one year or may order that the petition for an extension of placement be dismissed, or that the respondent be placed on probation for not more than one year, pursuant to section 353.2 or that the respondent be conditionally discharged for not more than one year, pursuant to section 353.1 of this chapter. The court must consider and determine in its order:

* * *

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

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

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

* * *

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

* * *

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

* * *

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

* * *

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

* * *

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

(a) a description of the visitation plan;

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

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

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

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

(a) At the initial appearance of a respondent in a proceeding and at the commencement of any

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

* * *

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

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

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

however, that where the local commissioner of social services or person with whom the respondent has been placed files a petition for an extension of the placement and a permanency hearing pursuant to section seven hundred fifty-six-a of this article, such report shall be submitted not later than sixty days prior to the date on which the permanency hearing must be held and shall be annexed to the petition.

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

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

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

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

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

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

(i) a description of the visitation plan;

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

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

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

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

At the conclusion of the hearing, the court may, in its discretion, order an extension of the placement for not more than one year or may order that the petition for an extension of placement be dismissed, or that the respondent be placed on probation for not more than one year, pursuant to section 757 of this chapter. The court must consider and determine in its order:

* * *

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

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

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

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

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

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

(i) a description of the visitation plan;

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

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

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

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

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

1. The department shall establish and enforce standards of instruction, personnel qualifications and other requirements for education services or programs, as determined by rules of the regents and regulations of the commissioner, with respect to the individual requirements of children who are in full-time residential care in facilities or homes operated or supervised by any state department or agency or political subdivision. The department shall cooperate with the office of children and family services, the department of mental hygiene and local departments of social services with respect to educational and vocational training programs for children placed with, committed to or under the supervision of such agencies. The department shall promulgate regulations requiring the cooperation of local school districts in facilitating the prompt enrollment of children who are released or conditionally released from residential facilities operated by or under contract with the office of children and family services, the department of mental hygiene and local departments of social services and in implementing plans for release or conditional release submitted to the family court pursuant to paragraph (c) of subdivision seven of section 353.3 and paragraphs (iii) and (iv) of subdivision (a) of section seven hundred fifty-six of the family court act and the educational components of permanency hearing reports submitted pursuant to section one thousand eighty-nine of the family court act. Such regulations regarding the educational components of permanency hearing reports submitted pursuant to section one thousand eighty-nine of the family court act shall be developed in conjunction with the office of children and family services. Such regulations shall facilitate the retention of children placed or remanded into foster care in their original schools and, if that is not feasible or determined to be in the child's best interests, the immediate enrollment of the children in school and transfer of necessary records. Nothing herein contained shall be deemed to apply to responsibility for the provision or payment of care, maintenance or other services subject to the provisions of the executive law, mental hygiene law, social services law or any other law.

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

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

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

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

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

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

11. Criminal and child maltreatment history screening of persons with whom children are directly placed and non-parents seeking guardianship or custody of children
(D.R.L. §240(1-a); F.C.A. §§ 653, 662, 1017, 1027, 1055, 1089; S.C.P.A. § 1707)

In requiring fingerprinting of prospective foster and adoptive parents and adults over the age of 18 residing in their homes, the legislation implementing the federal *Adoption and Safe Families Act* ["ASFA"; Public Law 105-89] is intended to assure the safety and well-being of children and to make their safety paramount. *See* Laws of 1999, ch. 7; Laws of 2000, ch. 145. Consistent with this precept, the federal *Adam Walsh Child Protection and Safety Act of 2006* [Public Law 109-248] requires national and local criminal records screening of prospective adoptive and foster parents, as well as homes not receiving federal foster care reimbursement, and requires child abuse screening of such parents in any state in which they have resided during the past five years. Section 378-a of the Social Services Law has thus been amended to provide for national criminal records screening of prospective foster and adoptive parents. *See* Laws of 2006, ch. 668.

Although the language of the Family Court Act presumes that children will not be placed in the homes of "relatives and other suitable persons" unless they are found upon investigation to be suitable and safe, the statute provides no tools for the Family Court to ensure that this is in fact the case. Unlike the provisions requiring criminal records and child maltreatment screening of prospective foster and adoptive parents, pursuant to Social Services Law §378-a, comprehensive screening is not required in direct remand or placement and in non-parent custody or guardianship proceedings. Since Judges of the Family and Surrogate's Courts must be confident that children before them will be adequately protected and well-cared for in any home into which they are placed and with any adult with whom they regularly spend time, the Committee is proposing legislation to remedy these gaps.

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

The Committee's proposal would require criminal records and child abuse screening of non-parents applying for custody and would authorize the Supreme or Family Court to direct screening of individuals over the age of 18 residing in their homes. Domestic Relations Law §240 and Family

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

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

Additionally, in child protective proceedings under Article 10 of the Family Court Act, the proposal would require criminal records and child maltreatment screening of any "relative or other suitable person" with whom the child is temporarily remanded, pursuant to Family Court Act §§1017 and 1027, or with whom the child is placed, pursuant to subdivision (a) of the Family Court Act §1055. The measure would accord discretion to the Family Court to direct national screening, as well as screening regarding individuals over the age of 18 residing in the person's home.

Enactment of these safety measures is critically important for the protection of the ever-growing number of children before the Family Court, who are directly placed with "relatives or other suitable persons" or who are the subjects of custody and guardianship petitions brought by persons other than the children's parents. A significant, albeit unsurprising, side effect of *ASFA* has been the increasing reliance upon alternatives to foster care, including direct temporary remands and long-term placements of children with "relatives or other suitable persons" and appointment of non-parents as guardians and custodians. The emphasis upon relatives and other third parties has been further underscored by the legislation enacted in 2005 and 2006. Family Court Act §§1027 and 1055 authorize the Family Court to direct local social service districts to investigate and to have children reside in the homes of "relatives and other suitable persons." Laws of 2006, ch. 12. Family Court Act §1017 requires local child protective agencies to commence investigations to locate relatives, including all "suitable" relatives identified by respondent and non-respondent parents and all relatives identified by children over the age of five who play or have played "a significant positive role in [the child's] life," as well as

non-respondent parents and all grandparents. They must be notified of the pendency of the proceeding and, in the case of grandparents and other relatives, of the "opportunity for becoming foster parents or for seeking custody or care of the child, and that the child may be adopted by foster parents if attempts at reunification with the birth parent are not required or are not successful." Laws of 2005, ch. 671. Yet, notwithstanding the references to "investigations," no criminal records or child maltreatment screening is required of individuals who assume direct care, custody or guardianship of a child without becoming foster parents.

Although not involving foster care, direct remands and direct placements under Article 10 of the Family Court Act clearly involve removals of children from their homes, implicating constitutionally-recognized interests, and thus require the same balancing of relative harms recognized by the Court of Appeals in its recent decision in Nicholson *v.* Scoppetta, 3 N.Y.3d 357 (2004). The Court must be assured that in remanding a child to a non-parent, it is truly protecting the child from an imminent risk to his or her life or health and not creating another source of risk to the child. In placing a child on a long-term basis, the Court must find that it is in the child's best interests and that it would be contrary to the child's welfare to be returned home. Clearly, judicial decisions regarding direct remands and placements, as well as custody and guardianship, must be as fully informed as those regarding placements, both temporary and long-term, of children in foster and adoptive homes. To that end, enactment of the Committee's criminal history and child maltreatment screening proposal is critically important.

Proposal

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

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

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

1-a. In any proceeding brought pursuant to this section to determine the custody or visitation of minors, a report made to the statewide central register of child abuse and maltreatment, pursuant to title six of article six of the social services law, or a portion thereof, which is otherwise admissible as a business record pursuant to rule forty-five hundred eighteen of the civil practice law and rules shall not be admissible in evidence, notwithstanding such rule, unless an investigation of such report conducted pursuant to title six of article six of the social services law has determined that there is some credible

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

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

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

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

§662. Rules of court; criminal history check. Rules of court, not inconsistent with any law,

may authorize the probation service to interview such persons and obtain such data as will aid the court in exercising its power under section six hundred sixty-one. Before entry of a final order of guardianship where the prospective guardian is not a parent of the child, the court shall require a criminal history report from the division of criminal justice services regarding such prospective guardian, may require the division of criminal justice services report to include a national criminal history report from the federal bureau of investigation and may require a criminal history report regarding individuals over the age of eighteen residing in the home of the prospective guardian.

§4. Subparagraph (i) of paragraph (a) of subdivision 2 of section 1017 of the family court act, as amended by chapters 3 and 671 of the laws of 2005, is amended to read as follows:

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

(i) place the child temporarily in the custody of such non-respondent parent, other relative or other suitable person [pursuant to article six of this act] during the pendency of the proceeding or until further order of the court, whichever is earlier, and [conduct] order such other and further investigations and reports as the court deems necessary. The court shall direct the petitioner to obtain a report from the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether such person has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law, and may require such reports regarding persons over the age of eighteen residing in such person's home. With respect to a relative or other suitable person, the court shall direct the petitioner to obtain a criminal history report from the division of criminal justice services regarding such person and may require the report to include a national criminal history report from the federal bureau of investigation and a criminal history report regarding individuals over the age of eighteen residing in the home of such person; or

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

(v) If the court issues or is considering issuing an order pursuant to subparagraph (C) of paragraph (i) placing a child in the custody of a relative or other suitable person other than the respondent, the court shall require the commissioner of such district to perform such other and further

investigations and to obtain such reports as the court deems necessary. The court shall direct the petitioner to obtain a report from the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether such person has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law, and may require such reports regarding persons over the age of eighteen residing in such person's home. The court shall direct the petitioner to obtain a criminal history report from the division of criminal justice services regarding the relative or other suitable person and may require the report to include a national criminal history report from the federal bureau of investigation and a criminal history report regarding individuals over the age of eighteen residing in the home of such person.

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

(a) For purposes of section one thousand fifty-two of this part, the court may place the child in the custody of a relative or other suitable person, or of the local commissioner of social services or of such other officer, board or department as may be authorized to receive children as public charges, or a duly authorized association, agency, society or in an institution suitable for the placement of a child. Prior to entry of an order under this subdivision placing a child directly in the custody of a relative or other suitable person, the court shall require the local commissioner of social services to perform such other and further investigations and to obtain such reports as the court deems necessary. The court shall direct the petitioner to obtain a report from the statewide central register of child abuse and maltreatment maintained by the office of children and family services pursuant to title six of article six of the social services law regarding whether such person has been the subject of an indicated report, as such terms are defined in section four hundred twelve of such law, and may require such reports regarding persons over the age of eighteen residing in such person's home. The court shall also direct the petitioner to obtain a criminal history report from the division of criminal justice services regarding such person and may require the report to include a national criminal history report from the federal bureau of investigation and a criminal history report regarding individuals over the age of eighteen residing in the home of such person.

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

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

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

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

Two parallel systems, one judicial and one administrative, coexist to determine the validity of reports of suspected child abuse or maltreatment contained in the statewide central registry. Because these systems operate on different tracks with different time-frames, they sometimes produce disparate results that can be extremely harmful to the children and families involved. Because fair hearings are being held in increasing numbers and with greater dispatch 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 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 meet the credible evidence test must be amended to be "unfounded," which would preclude their use in court or for any purpose other than limited use by child protective agencies in subsequent investigations. *See* Social Services Law §422(5). If OCFS declines to amend the report within 90 days, or if the report is found upon the agency's review to be supported by credible evidence, the report may be the subject of a fair hearing at which the agency has the burden of sustaining the report (or, as the case may be, supporting its disclosure as reasonably related to employment) by a preponderance of the evidence. *See* Matter of Lee T.T *v.* Dowling, 87 N.Y.2d 699 (1996).

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

However, 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 Family Court Advisory and Rules Committee is proposing a simple solution to this conundrum that is designed to harmonize the administrative and judicial processes. The measure would amend sections 22(4), 422(8) and 424-a(1) of the Social Services Law to provide that where a proceeding pursuant to Article 10 of the Family Court Act is pending in Family Court with respect to a child named in a child abuse or maltreatment report, the time periods for 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) would be required to provide the New York State Office of Children and Family Services with copies of pleadings and court orders and would be required to 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.

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 measure will significantly further the goals of justice and accuracy in both the administrative and judicial realms.

Proposal

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

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

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

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

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

(g) The petitioner shall notify the office of children and family services, in accordance with sections 422 and 424-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 paragraph (b) of subdivision 8 of section 422 of the social services law, as amended by chapter 12 of the laws of 1996, are amended to read as follows:

(a)(i) At any time subsequent to the completion of the investigation but in no event later than ninety days after the subject of the report is notified that the report is indicated the subject may request the commissioner to amend the record of the report. If the commissioner does not amend the report in accordance with such request within ninety days of receiving the request, the subject shall have the right to a fair hearing, held in accordance with paragraph (b) of this subdivision, to determine whether the record of the report in the central register should be amended on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this title. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in the child abuse or maltreatment report that is the subject of a request to amend under this section, the ninety-day period to request an amendment of the report and the ninety-day period for the commissioner to amend the report shall not commence 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 department shall immediately send a written request to the child protective service or the state agency which was responsible for investigating the allegations of abuse or maltreatment for all records, reports and other information maintained by the service or state agency pertaining to such indicated report. The service or state agency shall as expeditiously as possible but within no more

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

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

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

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

failure to amend shall not commence, 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 such 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 department. 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 department.

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

§5. Subparagraphs (i), (ii) and (iii) 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 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 department 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 department 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 department has taken action regarding the request to amend or the fair hearing, the department 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 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 shall, as expeditiously as possible but within no more than ten working days of receipt of the inquiry, determine whether, in fact, the person about whom an inquiry is made is the subject of an indicated report. Upon making a determination that the person about whom the inquiry is made is the subject of an indicated report of child abuse and maltreatment, the department shall immediately send a written request to the child protective service or state agency which was responsible for investigating the allegations of abuse or maltreatment for all records, reports and other information maintained by the service or state agency on the subject. The service or state agency shall, as expeditiously as possible but within no more than twenty working days of receiving such request, forward all records, reports and other information it maintains on the indicated report to the department, 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 shall, within fifteen working days of receiving such records, reports and other information from the child protective service or state agency, review all records, reports and other information in its possession concerning the subject, and determine whether there is some credible evidence

to find that the subject had committed the act or acts of child abuse or maltreatment giving rise to the indicated report. Where a proceeding pursuant to article ten of the family court act is pending with respect to a child named in the child abuse or maltreatment report, the child protective service or state agency, as applicable, shall report the status of the proceeding to the department, which shall defer its review and determination until the disposition of such proceeding or until the conclusion of the period of any adjournment of such proceeding in contemplation of dismissal, whichever is later. Immediately upon the disposition of the proceeding or conclusion of any adjournment in contemplation of dismissal, the child protective service or state agency, as applicable, shall report the disposition of the proceeding or outcome of the adjournment in contemplation of dismissal, to the department.

(iii) If it is determined, after affording such service or state agency a reasonable opportunity to present its views, that there is no credible evidence in the record to find that the subject committed such act or acts, the department 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 credible 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 some credible 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 shall determine that there is some credible evidence to find that the subject had committed the act or acts of child abuse or maltreatment giving rise to the indicated report.

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

13. 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* Laws of 2005, ch. 57, Part E. However, the new statute eliminated the ability of parents to obtain necessary emergency relief in the infrequent, but alarming, cases in which their children pose an imminent risk to themselves, their parents or their families. The Family Court Advisory and Rules Committee, therefore, is proposing a measure that would carve out 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 measure would permit a potential PINS petitioner to file a PINS petition and to request a warrant for a child who has absconded and cannot be located. In such a circumstance, the child is not able to appear at the diversion conference and the designated diversion agency is, therefore, not able to provide the required documentation of its diligent efforts to prevent the filing of a petition through the convening of the conference. *See* Matter of James S. *v.* Jessica B., 9 Misc.3d 229 (Fam. Ct., Suff. Co., 2005). This warrant exception would provide an avenue of relief for parents in critical emergency situations in which a child has run away and may be living on the street under dangerous circumstances. 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.

Second, the measure would permit a potential PINS petitioner to file a PINS petition in order to request an order of protection in the rare, but serious, 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, that is, cases in which the requirement for the diversion agency to convene a conference with the child and potential petitioner would impede efforts to prevent injury. Once the emergency has abated and the child and petitioner are before the Court, the Court 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 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 measure would strengthen the PINS statute by restoring much-needed remedies for emergency situations that existed prior to the 2005 enactment, while at the same time furthering the legislative goals of diversion of PINS cases by establishing 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 an effective avenue 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

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

Section 1. Subdivision (g) of section 735 of the family court act, as added by chapter 57 of the laws of 2005, is amended to read as follows:

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

the youth to consent to or actively participate.

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

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

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

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

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

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

§2. 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 may, 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 act, 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 that

it would be contrary to the child's best interests for such efforts to be undertaken. 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 act, 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 or that it would be contrary to the child's best interests for such efforts to be undertaken. 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 and shall apply to petitions filed on or after such effective date.

14. Ensuring compliance with court orders in child welfare cases
(F.C.A. §§1055(b), (d); 1089)

The requirement in the federal *Adoption and Safe Families Act* [Public Law 105-89] for Family Courts to determine whether agencies have made reasonable efforts to further the achievement of permanency for children in foster care reflects the statute's overarching goal of reducing the time children linger in the limbo of foster care. Whether a child's permanency plan is reunification, adoption or an alternative permanent living arrangement, the agency caring for the child must demonstrate to the Family Court on a periodic basis that it has taken active steps to ensure timely achievement of permanency. Neither the federal statute, nor the implementing statutes in New York State [Laws of 1999,ch. 7; Laws of 2000. Ch. 145; Laws of 2005, ch. 3; Laws of 2006, ch. 437], contain guidance or criteria for the Family Court in making these case-specific determinations. The Family Court Advisory and Rules Committee is submitting a proposal to define certain circumstances that may, and in some cases must, result in a finding that reasonable efforts, as required, have not been made.

First, the measure would amend Family Court Act §§1055(b) and 1089 to provide that an agency's failure to provide services ordered by the Family Court, whether to assist family reunification or an alternate permanency plan, may constitute grounds for a finding that required reasonable efforts have not been made. Under current law, the only reference to a sanction for violating a direction by the Court is the authorization in Family Court Act §1015-a to punish a violation of an order for services by contempt under Judiciary Law §753. Utilization of the Court's authority to make a "no reasonable efforts" finding provides a meaningful and less drastic alternative mechanism to secure compliance with a Family Court order for services. Importantly, this determination is curable, that is, an agency can demonstrate compliance and suffer the penalty only for the period of violation. *See* 45 C.F.R. §1356.21(b)2).[21]

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

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

treatment." Further, Family Court Act §1089(d)(2)(viii) authorizes the Family Court, in a review of a child freed for adoption, to direct the agency to place the child in an adoptive home and/or to provide services to the child and prospective adoptive parent or parents.

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

Third, the landmark permanency legislation enacted in 2005 authorizes the Family Court to recommend in orders regarding children freed for adoption that the New York State Department of Social Services (now the Office of Children and Family Services) investigate the facts and circumstances of local social service districts' discharge of their responsibilities for the care and welfare of children in their custody pursuant to section 395 of the Social Services Law. *See* Family Court Act §1089(d)(viii)(B)(III).[22] However, no analogous provisions were enacted with respect to children in foster care who were not freed for adoption, although the utility of such provisions for those children is clearly equally as great. The Family Court Advisory and Rules Committee's proposal would remedy this gap.

The Committee's proposal would thus amend section 1089 of the Family Court Act to provide that in all permanency hearings conducted pursuant to Article 10-A of the Family Court Act, for children freed for adoption as well as those who are not, the Family Court would have the discretion to recommend to the New York State Office of Children and Family Services (OCFS) that it investigate the facts and circumstances concerning the discharge of responsibilities by a local social services district with respect to a particular case, pursuant to section 395 of the Social Services Law. This recommendation for an OCFS investigation would be optional in cases where the Family Court has reason to believe that a social services district is not in compliance with laws or regulations. However, the recommendation for an OCFS investigation would be mandatory in any case in which the Court has made a determination, pursuant to the federal and state *Adoption and Safe Families Act* [Public Law 105-89; Laws of 1999, ch.7], that reasonable efforts, where appropriate, should have been, but were not, made to prevent the child's placement or facilitate reunification of the child with his or her family. *See* Family Court Act §§1022(a), 1027(b), 1028, 1052.

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

Additionally, court records in all cases referred would be made available to the New York State Office of Children and Family Services to assist in its review or investigation. Further, while the referral to OCFS may provide the Court with a useful alternative to the imposition of contempt sanctions, the availability of this option would not impair the authority of the Court to utilize section 156 of the Family Court Act and Article 19 of the Judiciary Law in appropriate cases. In a case involving a freed child, the referral to OCFS would only be mandatory if the Family Court had reason to believe that the local social services district had violated a court order, pursuant to section 1089(d)(viii)(B)(II) of the Family Court Act, directing provision of services or assistance to the child and the prospective adoptive parent as authorized or required by the applicable comprehensive annual services program plan.

While not frequently invoked, the Family Court's successful experiences in utilizing its existing authority to refer cases involving children freed for adoption to OCFS for investigation [former Family Court Act §1055-a(7), now F.C.A. §1089(d)(viii)(B)(III)] provides strong support for its extension to all child protective and foster care proceedings as a means of ensuring appropriate provision of reunification, preventive or other services in accordance with applicable laws and regulations. The New York State Office of Children and Family Services has been responsive to these referrals, has issued comprehensive reports and has directed changes that have inured to the benefit of children and families before the Court. For example, in one case, OCFS recommended that the order freeing the child for adoption be set aside and that the child be reunited with a rehabilitated parent.

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

Children's sense of time require everyone involved in the child welfare system to treat every case with a sense of urgency; weeks or months may seem like a lifetime for a child. The Family Court's important, federally-imposed responsibility in this regard is to keep up the

momentum, using all available means to minimize the disruption in children's lives and to ensure that, as quickly as possible, they can achieve stability, either through return to their families or through another permanent home.

Rigorous judicial monitoring of each case, including enforcement of court orders through prompt imposition of sanctions, where necessary, is a critical element of the standards governing the "Model Courts" designated in New York City and Erie Counties by the National Council of Juvenile and Family Court Judges, which have been replicated across the State. *See Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, 1995). It is a central element as well of the "problem-solving" approach to the mission of the courts long championed by Chief Judge Judith Kaye and recognized by the national Conference of Chief Justices and Conference of State Court Administrators in a joint resolution in 2000.[23] Significantly, it was highlighted in the *Trial Court Performance Standards*, published by the Bureau of Justice Assistance of the United States Justice Department:[24]

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

A determination that necessary reasonable efforts have not been made is a less severe sanction than contempt and, as noted, is reversible through demonstration of compliance. A referral to OCFS for investigation is a useful alternative that may prevent imposition of any sanction at all. Both of these options are important corrective measures that can be used judiciously to promote fulfillment of the directives of the Family Court. Children and their families deserve no less.

Proposal

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

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

Section 1. Paragraph (i) of subdivision (b) of section 1052 of the family court act, as

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

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

amended by chapter 3 of the laws of 2005, is amended by adding a final unnumbered paragraph to read as follows:

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

§2. Subdivision (d) of section 1055 of the family court act, as added by chapter 437 of the laws of 2006, is amended to read as follows:

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

and upon due notice to all parties to the proceeding, including the law guardian, has obtained a stay, modification or extension of such order. The fact that the foster parent or parents or the law guardian filed or could have filed a proceeding to legally free the child shall not relieve the agency or social services official of the finding that reasonable efforts, where appropriate, have not been made to further the child's permanency plan of adoption and of other remedies provided by law for failure to comply with a court order.

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

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

(J) Where the court has reason to believe that the local social services district has failed

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

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

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

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

15. Procedures and remedies for violations of orders of protection in Family Court and matrimonial proceedings and probation in family offense cases (F.C.A. §§446, 551, 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." Laws of 1994, ch. 222, §1. To that end, concurrent civil and criminal jurisdiction was provided both for initial issuance and for enforcement of orders of protection. In addition to enhancing criminal penalties for violations of orders of protection, subsequent amendments strengthened civil enforcement remedies, both in Family and Supreme Courts. *See, e.g.,* Laws of 1996, ch. 644; Laws of 1999, ch. 606, 635. However, fragmentation and gaps in the civil enforcement provisions of both the Family Court Act and Domestic Relations Law impede fulfillment of the promise of the 1994 legislation.

The Family Court Advisory and Rules Committee has developed a legislative proposal designed to provide a clear road map for civil enforcement of orders of protection in Family and Supreme Courts. The proposal clarifies that the violation procedures and consequences contained in Article 8 of the Family Court Act apply to all orders of protection and temporary orders of protection issued in family offense, child support, paternity, child custody, visitation, divorce and other matrimonial proceedings. Additionally, consistent with chapter 579 of the Laws of 2003, the measure would amend Family Court Act §841(c) to authorize the Family Court to place a respondent on probation for a period of up to two years or, where an order of protection pursuant to Family Court Act §842 has been issued for five years, a period of up to five years. Since Family Court Act §841 explicitly authorizes concurrent issuance of both an order of probation and an order of protection as a disposition of an Article 8 family offense proceeding, logic dictates that the duration of both orders should be equal. Clearly, the duration of probation supervision over a respondent in a family offense matter should be coextensive with the duration of the order of protection, that is, coextensive with the period of time determined by the Family Court as the period necessary to protect a victim of family violence from suffering further violence.

Violation procedures would be clarified by the incorporation by reference in sections 446, 551 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 §846-a that are available to the Family Court once a willful violation has been found;[25] and

[25] 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.

• 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,[26] 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.[27] Where a violator is already on probation, the Court would be authorized to revoke or modify the order of probation. Additionally, the Court's power to compel payment of legal fees and costs, law guardian fees and costs, restitution and medical expenses would be clarified, as would the Court's authority to suspend an order of visitation or require that visitation be supervised. None of these are new powers; all are powers currently exercised by the Courts. *See, e.g.,* Matter of C.B. *v.* J.U., 5 Misc.3d 1004 (Sup. Ct., N.Y. Co., 2004)(supervised visitation ordered). Consolidating several scattered provisions, the proposal would also enumerate the options available to the Court to commit the violator to jail for up to six months,[28] revoke or suspend a firearms license and direct the surrender of firearms.

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 clearly spell out the additional options available to the Supreme Court upon a finding of a willful violation, that is, probation, imposition of legal and medical fees and costs, suspension of visitation or a direction that visitation be supervised, and commitment to jail. *See* Laws of 1999, ch. 606.

With increased issuance of temporary and permanent orders of protection in matrimonial proceedings resulting from the 1999 legislation, it would be helpful for the Domestic Relations Law to delineate specific sanctions available to Supreme Court for violations. Section 7(b) of Article 6 of the New York State Constitution accords to the Supreme Court the powers of the Family Court,

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

[27] 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.

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

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 clearly delineating 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 measure 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 violations of orders of protection and temporary orders of protection and probation in family offense cases

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

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

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

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

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

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

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

seven of this act.

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

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

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

§846-a. Powers on failure to obey order. If a respondent is brought before the court for failure to obey any lawful order issued under this article, or an order of protection 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 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 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 or modify the conditions of such probation, provided, however, that pending the determination of a violation of probation, the period of probation shall be tolled as of the date of filing of the violation petition or motion;

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

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

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

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

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

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

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

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

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

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

* * *

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

following:

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

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

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

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

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

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

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

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

i. in accordance with paragraph g of subdivision three of this section and section eight hundred forty-six-a of the family court act, immediately revoke or, in the case of a violation of a temporary order of protection, suspend any license to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law of the party found to have violated the order, and arrange for the immediate surrender and disposal of any firearm such party owns or possesses, if the court determines that the willful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, stalking, assault or attempted assault. If the willful failure to obey such order involves the infliction of serious physical injury as defined in subdivision ten of section 10.00 of the penal law or the use or threatened use of a deadly weapon or dangerous instrument, as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, such revocation and immediate surrender and disposal of any firearm owned or possessed by such party shall be mandatory, pursuant to subdivision eleven of section 400.00 of the penal law.

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

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

subdivision ten of this section.

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

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

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

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

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

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

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

its violation;

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

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

i. in accordance with subdivision nine of this section and section eight hundred forty-six-a of the family court act, immediately revoke , or in the case of a violation of a temporary order of protection, suspend any license to carry, possess, repair and dispose of firearms pursuant to section 400.00 of the penal law of the party found to have violated the order, and arrange for the immediate surrender and disposal of any firearm such party owns or possesses, if the court determines that the willful failure to obey such order involves violent behavior constituting the crimes of menacing, reckless endangerment, stalking, assault or attempted assault. If the willful failure to obey such order involves the infliction of serious physical injury as defined in subdivision ten of section 10.00 of the penal law or the use or threatened use of a deadly weapon or dangerous instrument, as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, such revocation and immediate surrender and disposal of any firearm owned or possessed by such party shall be mandatory, pursuant to subdivision eleven of section 400.00 of the penal law.

§7.This act shall take effect on the ninetieth day after it shall have become a law, provided, however, that section 4 shall apply to family offenses committed on or after such date.

16. Orders of protection in termination of parental rights proceedings, child protective proceedings and permanency hearings regarding children freed for adoption
(F.C.A. §§634, 1056, 1072, 1089; S.S.L. §384-b)

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

Additionally, section 1056 of the Family Court Act permits an order of protection against respondent parents or legal guardians in child protective proceedings to last only as long as a child protective dispositional order, that is, until the next permanency hearing or expiration of agency supervision.[29] This stands in sharp contrast to custody cases, in which an order of protection may last until the child reaches the age of 18, even though the family violence to be prevented in a child protective proceeding may be just as serious, if not more so, than that in custody cases.

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, which may remain in effect until the child's 18th birthday, may, among other conditions, prohibit the birth parent from contact with the child and the child's foster or pre-adoptive parent. Second, the proposal would amend Family Court Act §1089 to authorize such an order to be issued as part of the disposition of a permanency hearing regarding a child freed for adoption. Third, the measure would amend Family Court Act §1056 to add a condition to orders of protection in child protective proceedings requiring the respondent to stay away, inter alia, from a "person with whom

[29] 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 one they have been in care for eight months and then every six months thereafter. *See* Family Court Act §§1052, 1054, 1055, 1057, 1089.

the child has been paroled, remanded, placed or released by the court..." and would permit orders of protection to last for a duration appropriate to the circumstances of particular cases, thereby eliminating the need for the child protective agency, acting on behalf of a domestic violence victim, to request annual extensions or to initiate independent family offense actions.

Finally, in order to optimize their effectiveness, the measure would require 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* [Laws of 1994, ch. 222, 224], has become an invaluable tool both for law enforcement and the courts. With 1,571, 061 orders of protection in the database, as of December 12, 2006,[30] 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. 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 .[31] 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%.[32] Research has estimated that children are abused at a rate 1,500 times higher than the national

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[30] Source: NYS Office of Court Administration Division of Technology (Dec., 2006).

[31] 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.

[32] *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

average in homes where domestic violence is also present.[33] Significantly, child sexual abuse has also been closely correlated with domestic violence.[34] 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.

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

Proposal

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

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

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

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

The court may enter an order under section six hundred thirty-one committing the guardianship and custody of the child to the petitioner on such conditions, if any, as it deems proper. For good cause shown, the court may issue an order of protection under section six hundred fifty-six of this article to protect the health and safety of the child and the child's foster or pre-adoptive parent or parents or to prevent the commission of a criminal offense against them. The order may direct the respondent to observe reasonable conditions that may include, among others, that the respondent stay away from the child and from the home, school, business or place of employment of the child or the child's foster or

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of Mothers of Abused Children: A Controlled Study," 84 *Pediatrics* #3 (1989); L. Walker, *The Battered Woman Syndrome* 59 (1984)].

[33] "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)].

[34] 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].

pre-adoptive parent or parents. Prior to issuing the order, the court shall inquire as to the existence of any other orders of protection involving the parties and shall give the respondent notice and an opportunity to be heard. The court shall state its reasons on the record for issuing the order. The order may remain in effect until the child's eighteenth birthday, unless the court, on notice to the respondent, the child's current custodian and the law guardian, modifies or vacates the order.

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

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

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

1. The court may [make] issue an order of protection in assistance or as a condition of any other order made under this part. [Such] Prior to issuing an order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties. An order of protection issued under this section shall remain in effect concurrently with, shall expire no later than the expiration date of, and may be extended concurrently with, [such other] another order [made] issued under this part[, except as provided in subdivision four of this section]. However, for good cause shown, the court may direct that an order of protection issued under this section shall remain in effect for a specified period up to the eighteenth birthday of the youngest child for whom a finding of child abuse or neglect has been made, unless the court, on notice to the respondent, the child's current custodian and the law guardian, modifies or vacates the order. The order of protection may set forth reasonable conditions of behavior that the court deems necessary and proper to protect the health and

safety of the child and the child's caretaker to be observed for a specified time by a person who is before the court and is a parent or a person legally responsible for the child's care or the spouse of the parent or other person legally responsible for the child's care, or both. Such an order may require any such person:

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

* * *

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

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

D. The court may make an order of protection in the manner specified by section one thousand fifty-six of this act in assistance or as a condition of any other order made under this section. The order of protection may set forth reasonable conditions of behavior that the court deems necessary and proper to protect the health and safety of the child and the child's caretaker to be observed for a specified period of time by a person before the court. Prior to issuing an order of protection under this section, the court shall inquire as to the existence of any other orders of protection involving the parties and the children. In the case of a child freed for adoption, the court, for good cause shown, where necessary to protect the health and safety of the child and the child's foster or pre-adoptive parent or parents or to prevent the commission of a criminal offense against them, may issue an order of protection directing a person whose parental rights had been terminated or surrendered to observe reasonable conditions enumerated therein. The conditions may include, among others, that such person shall stay away from the child and

from the home, school, business or place of employment of the child or the child's foster or pre-adoptive parent or parents. The order may only be issued after the person or persons restrained by the order have been given notice and an opportunity to be heard . The court shall state its reasons on the record for issuing the order. The court may direct that the order remain in effect for a specified period up to the child's eighteenth birthday, unless the court, on notice to the person or persons restrained by the order, the child's current custodian and the law guardian, modifies or vacates the order.

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

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

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

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

fifty-three and eight hundred twenty-seven of the family court act, and arrest and bench warrants as defined in subdivisions twenty-eight, twenty-nine and thirty of section 1.20 of the criminal procedure law, insofar as such warrants pertain to orders of protection; provided, however, that warrants issued pursuant to section one hundred fifty-three of the family court act pertaining to articles three[,] and seven [and ten] of such act and section 530.10 of the criminal procedure law shall not be included in the registry. The superintendent shall establish and maintain such registry for the purposes of ascertaining the existence of orders of protection, temporary orders of protection and warrants and for enforcing the provisions of paragraph (b) of subdivision four of section 140.10 of the criminal procedure law.

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

17. Requirements for notices of indicated maltreatment reports and changes in foster care placements in child protective and voluntary foster care proceedings

(F.C.A. §§1055, 1089; S.S.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 few years, culminating in the passage of the federal *Adoption and Safe Families Act of 1997* [Public Law 105-89], its state implementing legislation [Laws of 1999, ch. 7] and the landmark permanency law [Laws of 2005, ch. 3]. Both the federal and State *Adoption and Safe Families Act*s emphasize that the safety of the child is paramount, compelling the conclusion that the Court and parties must be informed on a timely basis of all events affecting child safety, especially indicated reports of abuse or maltreatment.

Equally as important, the federal *ASFA* measures success in terms of outcomes, that is, the States' ability to reach federally-established targets for timely achievement of permanency for children. The first "Child and Family Service Review (CFSR)," conducted by the Administration for Children and Families of the United States Department of Health and Human Services (HHS), concluded that New York State, with among the lowest scores in the nation, demonstrated how far New York State has to go to achieving the federal targets.[35] New York State's inadequate performance compels legislative action before the next CFSR – scheduled to occur after the conclusion of the implementation by the New York State Office of Children and Family Services of its "Program Improvement Plan"– in order to ensure that the Family Courts can exercise their important monitoring functions on the basis of complete, timely information. The 2005 permanency legislation, with its salutary provisions for continuing jurisdiction, is an important step, but further legislation is necessary to ensure that information regarding the most compelling of circumstances is conveyed to the Court, the law guardian and the parties on a timely basis. The Committee's proposal to require prompt notice of indicated reports of child abuse or maltreatment and of changes in children's placements is a critically-needed next step in the effort to bring New York State into compliance with *ASFA*.

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

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

child and as to changes in the child's placement, is vital to the effective exercise of the Family Court's continuing jurisdiction and is a critical component of New York State's ability to comply with the *ASFA* funding eligibility mandates.

Recognizing that "time is of the essence" where children are concerned, the Family Court Advisory and Rules Committee is submitting an expanded version of its earlier proposal to assure that the Family Court, the parties and law guardians are informed promptly of any changes in placement that may warrant Court intervention. The proposal would amend sections 1055 and 1089 of the Family Court Act , as well as section 358-a of the Social Services Law, to require an agency with whom a child has been placed, either voluntarily or as a result of an abuse or neglect finding, or to whom guardianship and custody has been transferred as a result of the child being freed for adoption, to report to the Court, the parties and the law guardian within 30 days of any change in the child's placement status and within five days of the date that any report of abuse or maltreatment is found to be indicated. The two types of reports, in fact, are related, as the existence of an indicated report of maltreatment may bear directly upon the suitability of a planned status change.[36]

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

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

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

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

of the children, is not conveyed to the Court or parties until the next permanency hearing, often a delay of several months. This proposal will facilitate timely, informed responses to changes in children's placements and incidents of maltreatment, thus prompting more expeditious and effective resolution of their cases.

Proposal

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

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

Section 1. Section 1055 of the family court act, as amended by chapter 437 of the laws of 2006, is amended by adding a new subdivision (j) to read as follows:

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

§2. Subparagraph (vii) of paragraph 2 of subdivision (d) of section 1089 of the family court act, as added by chapter 3 of the laws of 2005, is amended by adding a new 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, shall report any change in placement within thirty days of such change in any case in which the child is moved from the foster home, relative's or other suitable person's home or program into which he or she has been placed or in which the foster parents or

relatives or other suitable persons with whom the child is placed move out of state with the child. Each report shall state the reasons for such change, as well as the grounds for the official's or agency's conclusion that such change is in the best interests of the child. Nothing in this section shall limit the authority of the court to order that no change in placement may be made, except in an emergency posing an imminent risk to the child, without prior notice to the court, the parties and the child's law guardian. A report shall also be required to be submitted to the court, the parties and the law guardian of any indicated report of child abuse or maltreatment where the child or another child in the same home is the subject within five days of the indication of the report; provided, however, that where the indicated report concerns a child in a foster boarding or prospective adoptive home, the agency may redact the address of the home.

§3. Subdivision 3 of section 358-a of the social services law, as amended by chapter 3 of the laws of 2005, is amended by adding a new paragraph (g) to read as follows:

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

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

18. 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* [Laws of 1994, ch. 222, 224], the New York State Legislature demonstrated its intent to assure a more rigorous response by law enforcement agencies and the courts to domestic violence. Victims of domestic violence are afforded easy access to either or both Family and criminal courts for prosecution of family offense cases. In addition, offenders are subject to mandatory arrest and face heightened consequences for abusive acts in both courts. Local probation departments serving both family and criminal courts, therefore, require sufficient information regarding both the offense and the offender in order to assist the courts in responding effectively to these legislative changes.

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, as of December 12, 2006, there were 1, 571,061 orders of protection entered onto the registry. 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 Family Court Advisory and Rules 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 measure permits inquiry into "the presence or absence of aggravating circumstances," since the Court may order up to a three-year, rather than a one-year, order of protection where such circumstances, as defined in section 827(a)(vii) of the Family Court Act, have been found. Second, it permits investigation of "the extent of injuries or out-of-pocket losses to the victim which may form the basis for an order of restitution," a dispositional order authorized pursuant to subdivision (e) of section 841 of the Family Court Act. Third, in order to prevent issuance of inconsistent orders and provide insight as to the respondent's record of compliance, the proposal permits inquiry into "the history of the respondent with respect to family offenses and orders of protection in this or other courts." Significantly, if the completion of the fact-finding stage coincides with the first appearance of both parties before the Family Court, this investigation may assist the Court in fulfilling its duty, pursuant to subdivision six of section 821-a of the Family Court Act, to "inquire as to the existence of any other orders of protection between the parties." 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; Laws of 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; Laws of 1996, ch. 644; Laws of 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."[38] 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 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

[38] 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.

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. [39] 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 measure 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 family court act, the criminal procedure law and the executive 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, as amended by chapter 224 of the laws of 1994 and chapter 349 of the laws of 1995, are amended and a new subdivision 7 is added to read as follows:

4. Courts and law enforcement officials shall have the ability to disclose and share information with respect to such orders and warrants consistent with the purposes of this section, subject to applicable provisions of the family court act, domestic relations law and the criminal procedure law concerning the confidentiality, sealing and expungement of records. Designated representatives of a local probation department shall have access to information in the statewide registry of orders of protection and warrants

[39] 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.

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 local law enforcement official or court official be held liable for any violations of rules and regulations promulgated under this section, or for any damages for any delay or failure to file an order of protection, or to transmit to the law enforcement communication network pertaining to orders of protection or related family court arrest warrants, or for acting in reliance upon such information. For purposes of this subdivision, law enforcement official shall include but not be limited to an employee of a [sheriffs] sheriff's office, or a municipal police department or a peace officer acting pursuant to his or her special duties.

* * *

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 title and subdivision (a) of section 835 of the family court act, such subdivision as amended by chapter 529 of the laws of 1963, are amended to read as follows:

§835. Sequence of hearings; probation investigations and reports. a. Upon completion of the fact-finding hearing, the dispositional hearing may commence immediately after the required findings are made. In aid of its disposition, the court may adjourn the proceeding for an investigation and report by a local probation 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 is amended to read as follows:

3. Permissible in any case. For the purposes of sentence or issuance of an order of protection pursuant to subdivision five of section 530.12 of this chapter, the court may, in its discretion, order a pre-sentence investigation and report in any case, irrespective of whether such investigation and report is required by subdivision one or two.

§4. Subdivision 4 of section 390.30 of the criminal procedure law, as amended by chapter 618 of the laws of 1992, is amended to read as follows:

4. Abbreviated investigation and short form report. In lieu of the procedure set forth in subdivisions one, two and three, where the conviction is of a misdemeanor or family offense, as defined in subdivision one of section 530.11 of this law, other than a felony, the scope of the pre-sentence investigation may be abbreviated and a short form report may be made. The use of abbreviated investigations and short form reports, the matters to be covered therein and the form of the reports shall be in accordance with the general rules regulating methods and procedures in the administration of probation as adopted from time to time by the state director of probation and correctional alternatives pursuant to the provisions of article twelve of the executive law. No such rule, however, shall be construed so as to relieve the agency conducting the investigation of the duty of investigating and reporting upon:

(a) the extent of the injury or economic loss and the actual out-of-pocket loss to the victim, including the amount of restitution and reparation sought by the victim, after the victim has been informed of the right to seek restitution and reparation, or

(b) in a case involving a family offense, as defined in subdivision one of section 530.11 of this chapter, the defendant's history of family offenses and orders of protection, including violations, in proceedings or actions in this or other courts, the extent of injuries or threats of injury to the complainant or members of complainant's family or household, the use or threatened use of dangerous instruments against the complainant or members of complainant's family or household, whether the defendant is in possession of any firearms and, if so, whether defendant is licensed or otherwise authorized to be in possession of such firearms, the extent to which the defendant poses an immediate and ongoing danger to the complainant or members of the complainant's family or household and any other information relevant to the issue of whether an order of protection, in addition to any other disposition, should be issued in accordance with

subdivision five of section 530.12 of this chapter, or

(c) any matter relevant to the question of sentence or issuance of an order of protection that the court directs to be included in particular cases.

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

III Previously Endorsed Measures

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

The increasing use of acknowledgments of paternity as a means of establishing filiation, in lieu of prosecution of paternity petitions in Family Court, has revolutionized paternity law and has facilitated the collection of child support for untold numbers of children. However, the governing statutes, the Family Court Act and Public Health Law, lack clarity in one critical respect, that is, regarding procedures for revoking a paternity acknowledgment. Perhaps most important, the statutes fail to clearly require the Family Court to consider the important principle of equitable estoppel prior to permitting a non-marital father to challenge paternity through a DNA or other genetic test. That the doctrine of equitable estoppel is firmly established in New York statutes and must be applied as a matter of fairness prior to ordering genetic testing was recently underscored by the Court of Appeals in Matter of Shondel J. *v.* Mark D., 7 N.Y.3d 320, 820 N.Y.S.2d 199 (2006). *See also*, Matter of Gina L. *v.* David W., 34 A.D.3d 810 (2d Dept., 2006).

Recently, the Supreme Court, Appellate Division, Second Department, in Matter of Westchester County Department of Social Services o/b/o/ Melissa B. *v.* Robert W.B., 25 A.D.3d 62, 803 N.Y.S.2d 672 (2d Dept., 2005), provided a clear road-map for the Family Courts to follow in addressing applications to revoke paternity acknowledgments. *Accord*, Matter of Demetrius H. *v.* Mikhaila C.M., -A.D.3d-, 2006 WL 3759707, 2006 N.Y. Slip Op. 09812 (4th Dept., Dec. 22, 2006); Matter of Oneida Co. Dept.of Social Services *v.* Joseph C., 289 A.D.2d 1077 (4th Dept., 2001, *lve. app. dismissed,* 98 N.Y.2d 647 (2002). The Family Court Advisory and Rules Committee is proposing a measure to clarify paternity acknowledgment revocation procedures that would, in effect, codify the Melissa B., Demetrius H. and Joseph C. decisions in order to expand their reach throughout New York State.

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

In directing that these prerequisites must be met prior to ordering a genetic test, the Court in Melissa B. rejected the holding of the Supreme Court, St. Lawrence County, in Wilson *v.* Lumb, 181 Misc.2d 1033 (Sup. Ct., St Lawrence Co., 1999), a case that has generated much confusion statewide. In Wilson, the Court sustained an Article 78 proceeding brought to direct the ordering of genetic testing on the ground that issuance of such a testing order was said to be a ministerial act that should have occurred automatically upon the filing of the vacatur petition. Relying upon the language of current Family Court Act §516-a(b)("the court shall order..."), the Court ruled that the support magistrate (then called a hearing examiner) should have directed genetic testing notwithstanding the fact that the petition to vacate the paternity acknowledgment had been brought more than 60 days after its execution. Recognizing the lack of clarity in the statutes, the Court in Wilson assumed that the issues of fraud, duress and mistake of fact, as well as the child's best interests, could and would be addressed after the genetic testing was performed. However, Family Court Act §516-a(b) appears to require vacatur of a paternity acknowledgment either if the Court determines the non-marital father is not the father (e.g., as a result of the genetic test) or if fraud, duress or mistake of fact are found, even though proof of fraud, duress or mistake of fact must be proven as a prerequisite to a request for a genetic test in a proceeding to vacate a paternity acknowledgment more than 60 days after its execution. Compounding the difficulty, Family Court Act §516-a contains no reference to the child's best interests and thus would appear to require vacatur of a paternity acknowledgment even in a circumstance in which a child has had a long-standing relationship with the acknowledged father and would be harmed by its disruption.

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

Proposal

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

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

Section one. Subdivision (b) of section 516-a of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

(b) (i) An acknowledgment of paternity executed pursuant to section one hundred eleven-k of the

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

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

(c) Neither signator's legal obligations, including the obligation for child support arising from the acknowledgment, may be suspended during the challenge to the acknowledgment except for good cause as the court may find. [If a party petitions to rescind an acknowledgment and if the court determines that the alleged father is not the father of the child, or if the court finds that an acknowledgment is invalid because it

was executed on the basis of fraud, duress, or material mistake of fact, the court shall vacate] If the court vacates the acknowledgment of paternity [and], the court shall immediately provide a copy of the order to the registrar of the district in which the child's birth certificate is filed and also to the putative father registry operated by the department of social services pursuant to section three hundred seventy-two-c of the social services law. In addition, if the mother of the child who is the subject of the acknowledgment is in receipt of child support services pursuant to title six-A of article three of the social services law, the court shall immediately provide a copy of the order to the child support enforcement unit of the social services district that provides the mother with such services.

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

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

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

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

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

First, in determining whether an accused juvenile delinquent should be detained prior to disposition, the Family Court would be required to consider whether there are available, appropriate alternatives to detention, a corollary to the existing mandate to consider whether reasonable efforts have been made to prevent the need for detention, similar to the recent amendment to the Persons in Need of Supervision statute [Family Court Act §720(5)(a)]. Where the Court determines that grounds for detention exist under current statutory standards, the Court would have the discretion to release a juvenile on condition of cooperation with a program of electronic monitoring, if such program is available under the auspices of the local probation department and if such a program would obviate the concerns that otherwise would have caused the juvenile to be detained, that is, if electronic monitoring would ensure the juvenile's likely appearance in Family Court or minimize the risk of commission of an act that would be a crime if committed by an adult, as applicable. Such an alternative to otherwise costly detention has been used extensively in the federal system and in other jurisdictions. *See, e.g.*, Colorado Children's Code, Col. Rev. Stat., Tit. 19, Art. 2, Pt.3, §19-2-302(4)(h). As a form of conditional release, obviating the necessity of detention, it would be consistent with available detention alternatives in criminal cases.[40]

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

Second, the measure would authorize the Family Court to direct that an adjudicated juvenile delinquent, who would otherwise be placed, be required to participate in an intensive probation supervision program for all or part of the period of probation to the extent available in the county. In light of the requirement in section 303.1(a) of the Family Court Act that Criminal Procedure Law provisions be "specifically prescribed" in the Family Court Act in order to be applicable, this provision would provide the necessary analogue to section 65.10(4) of the Criminal Procedure Law, the statutory response to the decision of the Court of Appeals in People *v.* McNair, 87 N.Y.2d 772 (1996). *See* Laws of 1996, ch. 653. A program of electronic monitoring, to the extent available, would be permissible as a component of an intensive supervision regimen, but it would not replace the in-person contacts so vital to the success of probation, particularly as applied to juveniles. Enactment of an authorization for electronic monitoring in New York is long-overdue. Several other states utilize this option as a vital component of a dispositional plan in juvenile delinquency cases[41] and the Supreme Court, Appellate Division, Third Department recently endorsed its use as a reasonable condition of probation in a Person in Need of Supervision (PINS) proceeding. *See* Matter of Kristian CC., 24 A.D.3d 930, 805 N.Y.S.2d 473, 2005 Slip Op. 09380 (3d Dept., 2005), *lve. app. denied*, 6 N.Y.3d 710 (2006).

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

Intensive supervision is a critically-needed dispositional alternative. Enhanced state reimbursement has been available for several years for intensive probation supervision for adults, but far smaller amounts have been afforded to juvenile programs. That intensive probation can be an effective means of addressing juvenile justice cases, while at the same time saving considerable sums of money, has been clearly demonstrated recently in New York City. *See* "Alternative to Jail Programs for Juveniles Reduce City Costs," *Inside the Budget*, #148 (NYC Independent Budget Office; July 11, 2006). Nationally, such programs are recognized as providing cost-effective, safe alternatives to residential placement.[42]

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[41] *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).

[42] *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.

Significantly, not only does intensive probation supervision save money, but it may also facilitate access to federal dollars . Funds from the federal child welfare programs can be made available to localities for these programs if the Division of Probation and Correctional Alternatives and local probation departments work in partnership with the New York State Office of Children and Family Services and local social services districts. If intensive supervision services that are provided to youth in order to prevent placement are explicitly included in the statewide plan for child welfare services, federal reimbursement at a rate of 75% would be available as a preventive service under Title IV-B of the Social Security Act. 42 U.S.C.A. §§622, 623 [Social Security Act, Title IV-B].[43] Federal reimbursement for child welfare services to prevent placement of juvenile delinquents is contemplated, so long as the facilities where the youth would have been placed are eligible for federal foster care funding -- that is, they are not secure detention centers or forestry camps or training schools housing over 25 juveniles. 42 U.S.C. §672(c) [Social Security Act, Title IV-E]. Indeed, in order to increase its eligibility for foster care reimbursement under this section, the New York State Office of Children and Family Services in recent years has moved toward conversion of its facilities to house under 25 residents.

The New York State Legislature has recognized the applicability of the federal mandates to juvenile delinquency cases, including most recently, the *Adoption and Safe Families Act* [Public Law 105-89], by incorporating into State law the requirements that Family Court judges make findings, prior to ordering both detention and placements of juveniles into facilities eligible for federal reimbursement, that "reasonable efforts" have been made to prevent the placements. *See* Family Court Act §§352.2(2)(b); Laws of 1999, ch. 7; Laws of 2000, ch. 145. Eliminating unnecessary placements of juvenile delinquents will facilitate State compliance with, and concomitant eligibility of funding from, the federal *Adoption and Safe Families Act* and the *Juvenile Justice and Delinquency Prevention Act*, in light of the applicability of the strict permanency planning mandates to all juveniles in placement facilities that are in receipt of federal foster care funding. *See* Public Law 107-273; V. Hemrich, "Applying *ASFA* to Delinquency and Status Offender Cases," 18 *ABA Child Law Practice* #9: 129, 133 (November, 1999).

Even apart from federal or state funding eligibility, investing intensive probation supervision resources in youth who would otherwise be likely to be placed would result in substantial savings of placement dollars, since probation supervision, even with enhanced officer-to-juvenile ratios and electronic monitoring programs, represents but a fraction of the cost of residential placement.[44]

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[43] 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.

[44] By analogy, the New York City "Family Ties" program provided intensive, home-based services to juveniles, thereby enabling them to be placed on intensive probation supervision rather than in residential care. The program demonstrated a net savings of $11,043,318 in placement costs from its inception in 1989 through the end of 1991,

Importantly,

however, the proposal does not require such expenditures, as both the electronic monitoring and the intensive probation provisions authorize their utilization only " to the extent available" in a particular locality.

Proposal

AN ACT to amend the family court act and the executive law, in relation to alternatives to detention and conditions of probation in juvenile delinquency cases

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

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

The court shall not direct detention unless available alternatives to detention would not be appropriate, including, but not limited to, conditional release in accordance with subdivision two of this section. If the court makes a finding, pursuant to paragraph (a) or (b) of this subdivision, that detention is nonetheless necessary, the court may consider whether utilization of electronic monitoring, to the extent available, as a condition of release would address the basis for the finding, that is, significantly reduce the substantial probability that the respondent will not return to court on the return date or the substantial risk that the respondent may before the return date commit an act that if committed by an adult would constitute a crime, as applicable. If the court so finds and if such a program is available in the county, the court may order the probation department to supervise the respondent through a program of electronic monitoring, which shall be implemented in accordance with regulations to be promulgated by the division of probation and correctional alternatives pursuant to subdivision one of section two hundred forty-three of the executive law.

§2. Subdivision 3 of section 353.2 of the family court act is amended by re-lettering paragraphs (e) and (f) as (f) and (g) and adding a new paragraph (e) to such subdivision to read as follows:

(e) cooperate with a program of intensive supervision by the probation department during the period of probation or a specified portion thereof, to the extent available in the county, upon a finding on

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but was eliminated from the City's budget a few years later. S*ee Family Ties: A Financial Analysis*, N.Y.C. Dept. of Juvenile Justice (June, 1993), p.7.

the record by the court that, absent cooperation with such a program, placement of the respondent would be necessary. Such a program shall be conducted in accordance with regulations to be promulgated by the division of probation and correctional alternatives and may require the respondent, among other conditions, to comply with a program of electronic monitoring to the extent available in the county, as provided by subdivision one of section two hundred forty-three of the executive law;

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

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

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

1. The director shall exercise general supervision over the administration of probation services throughout the state, including probation in family courts and shall collect statistical and other information and make recommendations regarding the administration of probation services in the courts. He or she shall endeavor to secure the effective application of the probation system and the enforcement of the probation laws and the laws relating to family courts throughout the state. After consultation with the state probation commission, he or she shall adopt general rules which shall regulate methods and procedure in the administration of probation services, including investigation of defendants prior to sentence, and children prior to adjudication, supervision, case work, record keeping, and accounting, program planning and research so as to secure the most effective application of the probation system and the most efficient enforcement of the probation laws throughout the state. Such rules shall permit the establishment of a program of intensive probation supervision for juveniles directed to receive such services pursuant to paragraph (e) of subdivision three of section 353.2 of the family court act and shall include, but not be limited to: specification of the maximum caseload levels and training required for intensive supervision probation officers; the frequency and nature of probation contacts with juveniles in the program, schools and other agencies; and supervision, treatment and other services to be provided to such juveniles. Such rules shall further provide for the establishment of a program of electronic

monitoring for accused juvenile delinquents who would otherwise be detained prior to disposition pursuant to subdivision three of section 320.5 of the family court act and for adjudicated juvenile delinquents placed on probation on condition of cooperation with a program of electronic monitoring pursuant to paragraph (e) of subdivision three of section 353.2 of the family court act. Such rules shall provide that the probation investigations ordered by the court in designated felony act cases under subdivision one of section 351.1 of the family court act shall have priority over other cases arising under articles three and seven of such act. Such rules shall be binding upon all probation officers and when duly adopted shall have the force and effect of law, but shall not supersede rules that may be adopted pursuant to the family court act. He or she shall keep [himself] informed as to the work of all probation officers and shall from time to time inquire into and report upon their conduct and efficiency. He or she may investigate the work of any probation bureau or probation officer and shall have access to all records and probation offices. He or she may issue subpoenas to compel the attendance of witnesses or the production of books and papers. He or she may administer oaths and examine persons under oath. He or she may recommend to the appropriate authorities the removal of any probation officer. He or she shall transmit to the governor not later than February first of each year an annual report of the work of the division of probation and correctional alternatives for the preceding calendar year, which shall include such information relative to the administration of probation and correctional alternatives throughout the state as may be appropriate. He or she may from time to time publish reports regarding probation including probation in family courts, and the operation of the probation system including probation in family courts and any other information regarding probation as he or she may determine provided expenditures for such purpose are within amounts appropriated therefor.

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

3. Dispositional alternatives and procedures for acceptance of admissions and violations of orders of probation and suspended judgment in persons in need of supervision proceedings (F.C.A. §§ 743, 754, 757, 776, 779, 779-a)

The increase in the maximum age of jurisdiction for persons in need of supervision (PINS) proceedings, the statutory restrictions placed upon detention and placement of PINS over the age of 16 and, most recently, the major reform in the area of PINS diversion, focused attention upon the critical need to examine and modernize the statutory structure governing these proceedings. *See* Laws of 2000, ch. 596; Laws of 2001, ch. 383; Laws of 2005, ch. 57, Part E. The major recodification effort undertaken by the Temporary State Commission on Child Welfare that resulted in the enactment of a separate juvenile delinquency article (Article 3) in the Family Court Act in 1982 [Laws of 1982, chs. 920, 926] left the legislative framework governing PINS proceedings virtually unchanged since its original enactment as part of the Family Court Act of 1962. The sole amendments to the PINS statute (Article 7 of the Family Court Act) were those repealing juvenile delinquency provisions, and subsequent PINS amendments have solely addressed diversion and criteria for detention and placement Thus, significant case law affecting PINS proceedings has not been codified; nor has the Legislature clarified which, if any, of the procedural changes incorporated into Article 3 with respect to juvenile delinquents should apply in PINS cases. The Family Court Advisory and Rules Committee proposes that four provisions of Article 7 of the Family Court Act be amended to address these matters.

First, consistent with the requirement in the new PINS statute that dispositions be the "least restrictive available alternative" consistent with the respondent juvenile's needs and best interests, the Committee's measure would authorize the Family Court to place an adjudicated person in need of supervision, who would otherwise be placed out of the home, into an intensive probation supervision program, where available, for all or part of the period of probation to the extent such a program is available. The New York State Division of Probation and Correctional Alternatives would be directed to promulgate regulations to guide local probation departments that elect to operate such programs, addressing such issues as: maximum probation officer caseloads; special training requirements for the probation officers carrying out the intensive supervision program; the nature and frequency of the probation contacts with the juveniles, schools and other agencies; and the level and type of supervision, treatment and other program components. Intensive supervision is a critically-needed dispositional alternative, particularly in light of the elimination in 1996 of the Family Court's authority to place PINS in facilities operated by the New York State Office of Children and Family Services. *See* Laws of 1996, ch. 309. While some State funding has been appropriated for intensive supervision programs for juvenile delinquents since 1994, no such reimbursement was made available in persons in need of supervision cases, despite the obvious cost-effectiveness of such alternatives to far more expensive placements.

The need for this measure is underscored by the conclusions reached by the Vera Institute of Justice in its two studies, *Changing the PINS System in New York: A Study of the Implications of Raising the Age Limit for Persons in Need of Supervision* (PINS) (Vera Inst., Sept., 2001) and *Changing the Status Quo for Status Offenders: New York State's Efforts to Support Troubled Teens* (Vera Inst., Dec., 2004), that were commissioned by the New York State Office of Children and Family Services. The 2001 study characterized detention and placement as the "most expensive" and "least satisfying" pre-dispositional and dispositional options for the juveniles, their families and the system as a whole – options that have

not been demonstrated to improve either the truancy or absconding problems that form the gravamen of most PINS petitions and that have drained resources away from more promising solutions. *Id.*, at p. 34, 38. The 2004 study highlights the efficacy of the use of creative alternatives to detention and placement for PINS.

Second, the Committee's proposal adds a new section 743 to the Family Court Act, establishing a judicial allocution procedure for accepting admissions in PINS cases analogous to the allocution required in juvenile delinquency cases [Family Court Act §321.3]. The Committee's proposal 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.

In Matter of Tabitha L.L., 87 N.Y.2d 1009 (1996), the Court of Appeals held that it would be inappropriate to incorporate section 321.3 of the Family Court Act into Article 7 in the absence of specific legislative authorization. It did not determine whether an allocution procedure is constitutionally required, since that issue was not preserved for appellate review. In a subsequent case, Matter of Tabitha E., 271 A.D.2d 719, 720 (3rd Dept., 2000), however, the Appellate Division, Third Department, held it to be reversible error for the Family Court to accept an admission in a PINS proceeding without first advising the respondent of her right to remain silent. *Accord*, Matter of Steven Z., 19 A.D.3d 783 (3d Dept., 2005); Matter of Matthew RR, 9 A.D.3d 514 (3d Dept., 2004); Matter of Nichole A., 300 A.D.2d 947 (3rd Dept., 2002); Matter of Jody W., 295 A.D.2d 659 (3rd Dept., 2002); Matter of Shaun U., 288 A.D.2d 708 (3rd Dept., 2001). The Committee submits that considerations of due process -- equally compelling in PINS as in juvenile delinquency cases -- militate in favor of equivalent protections and, therefore, urges the Legislature to enact a provision for PINS cases comparable to the allocution requirement applicable to juvenile delinquency proceedings.

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 would have to 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 would be required to 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).[45] 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; Laws of 1999, ch.7; Laws of 2000, ch. 145].

Proposal

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

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

Section 1. The family court act is amended by adding a new section 743 to read as follows:

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

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

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

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

The provisions of this subdivision shall not be waived.

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

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

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

[45] 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.

exceptional circumstances require an additional year of probation, the court may continue probation for an additional year.

* * *

(e) If the respondent has been found to be a person in need of supervision, and if the court further finds that, absent intensive probation supervision, the respondent would be placed pursuant to section seven hundred fifty-six of this act, the court may direct the respondent to cooperate with a program of intensive probation supervision during all or part of the term of probation. The local probation department may provide intensive probation supervision to respondents so directed pursuant to this subdivision in accordance with regulations to be promulgated by the state division of probation and correctional alternatives pursuant to subdivision one of section two hundred forty-three of the executive law.

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

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

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

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

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

jurisdiction.

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

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

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

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

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

supervision and the respondent's whereabouts are unknown. The court must be notified promptly of the circumstances of any such probationers.

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

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

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

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

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

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

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

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

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

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

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

1. The director shall exercise general supervision over the administration of probation services throughout the state, including probation in family courts, and shall collect statistical and other information and make recommendations regarding the administration of probation services in the courts. He or she shall endeavor to secure the effective application of the probation system and the enforcement of the probation laws and the laws relating to family courts throughout the state. After consultation with the state probation commission, he or she shall adopt general rules which shall regulate methods and procedure in the administration of probation services, including investigation of defendants prior to sentence[,] and children prior to adjudication, supervision, case work, record keeping, and accounting, program planning and research so as to secure the most effective application of the probation system and the most efficient enforcement of the probation laws throughout the state. Such rules shall permit the establishment of a program of intensive probation supervision for juveniles directed to receive such services pursuant to subdivision (e) of section seven hundred fifty-seven of the family court act and shall include, but not be limited to: specification of the maximum caseload levels and training required for intensive supervision probation officers; the frequency and nature of probation contacts with juveniles in the program, schools and other agencies; and supervision, treatment and other services to be provided to such juveniles. Such rules shall provide that the probation investigations ordered by the court in designated felony act cases under subdivision one of section 351.1 of the family court act shall have priority over other cases arising under articles three and seven of such act. Such rules shall be binding upon all probation officers and when duly adopted shall have the force and effect of law, but shall not supersede rules that may be adopted pursuant to the family court act. He or she shall keep [himself]

informed as to the work of all probation officers and shall from time to time inquire into and report upon their conduct and efficiency. He or she may investigate the work of any probation bureau or probation officer and shall have access to all records and probation offices. He or she may issue subpoenas to compel the attendance of witnesses or the production of books and papers. He or she may administer oaths and examine persons under oath. He or she may recommend to the appropriate authorities the removal of any probation officer. He or she shall transmit to the governor not later than February first of each year an annual report of the work of the division of probation and correctional alternatives for the preceding calendar year, which shall include such information relative to the administration of probation and correctional alternatives throughout the state as may be appropriate. He or she may from time to time publish reports regarding probation including probation in family courts, and the operation of the probation system including probation in family courts and any other information regarding probation as he or she may determine provided expenditures for such purpose are within amounts appropriated therefor.

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

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

As part of the 2005 New York State budget, the Legislature enacted landmark legislation significantly expanding the requirements for services to be provided to children and families as a means of preventing unnecessary prosecutions and costly out-of-home placements of Persons in Need of Supervision (PINS). *See* Laws of 2005, ch. 57. Unfortunately, all too often, prosecutions of juveniles by their parents under the family offense provisions of Criminal Procedure Law §530.11 *et seq.*, and Article 8 of the Family Court Act have become a rapidly escalating means of evading the clear requirements and protections for youth, as well as the family services available, under the 2005 PINS legislation. *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 (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 Family Court Advisory and Rules Committee is proposing legislation, therefore, to close that loophole by specifying that family offenses committed by juveniles under the age of 18 against their parents or guardians should be dealt with as Persons in Need of Supervision (PINS) proceedings in accordance with Article 7 of the Family Court Act, rather than as family offense proceedings pursuant to 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 the utilization of the comprehensive statutory framework of Article 7.

Article 8 of the Family Court Act is an inappropriate vehicle for proceeding against juveniles as it lacks important statutory protections, some constitutionally required and some required by federal law, applicable to juveniles, including, *inter alia*, the right to a law guardian, proof beyond a reasonable doubt, consideration for adjustment or diversion, detention and placement in juvenile facilities separate and apart from adults, and orders of disposition appropriate to their needs and best interests. *See, e.g.,* Family Court Act §§249, 304.1, 308.1, 342.2, 352.2, 720, 734, 735, 754. The rights to law guardian representation and to proof beyond a reasonable doubt have been held to be of constitutional magnitude and, under New York law, are equally applicable in juvenile delinquency and PINS proceedings. *See* In re Gault, 387 U.S. 1 (1967); In re Winship, 397 U.S. 358 (1970); In re Iris R., 33 N.Y.2d 987 (1974). Unlike attorney representation in Article 8 proceedings pursuant to section 262 of the Family Court Act, law guardian representation in juvenile delinquency and PINS cases is presumptively non-waivable. *See* Family Court Act §249-a.

The remedies of exclusion and incarceration available 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*. 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 a juvenile to be adjudicated 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 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 amended by chapter 635 of the laws of 1999, is amended to read as follows:

The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the

second degree, aggravated harassment in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household, except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Family offenses alleged to have been committed by a child under the age of eighteen against a parent or guardian shall be addressed in accordance with article seven, rather than this article, of this act. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this article, "members of the same family or household" shall mean the following:

§2. The opening paragraph of subdivision 1 of section 530.11 of the criminal procedure law, as amended by chapter 635 of the laws of 1999, is amended to read as follows:

The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household, except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Family offenses alleged to have been committed by a child under the age of eighteen against a parent or guardian shall be addressed in accordance with article seven of the family court act. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this section, "members of the same family or household" shall mean the following:

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

5. Determinations of the Family Court regarding children in foster care
(F.C.A. §§352.2, 754, 1039-b, 1052(b)(i)(A); S.S.L. §§358-a)

The statutory provisions implementing the federal *Adoption and Safe Families Act* [Public Law 105-89] in New York State, as well as the recent permanency legislation, delineate the rare circumstances warranting a judicial determination that an authorized agency would no longer be required to expend "reasonable efforts" to reunify a child with his or her parent. These circumstances involve egregious cases in which severe or repeated child abuse by a parent, a parent's conviction for an enumerated serious felony, involuntary termination of the parental rights of the child's sibling or half-sibling, prolonged refusal by the parent to accept services, placement of a child on an abuse finding after return home from a child neglect placement or abandonment of a child five days old or younger at a safe haven militate in favor of the agency proceeding quickly to attain a permanent home for the child through adoption or other permanent alternative to return to the parent's care. *See* Laws of 2005, ch. 3; Laws of 1999, ch. 7. In each of these circumstances, the Family Court is required to enter an order dispensing with the "reasonable efforts" requirement, unless it determines, and states its findings in its order, that such efforts would be in the child's best interests, would not be contrary to the child's health and safety and would be likely to result in the reunification of the child and parent in the foreseeable future. New York State's staute implementing the *Adoption and safe Families Act* was intended to "ensure that no child ever grows up in foster care," *inter alia*, by ending the practice of prolonged foster care in "harmful circumstances," such as these, in which reunification of the child with the parent would not be appropriate. *See* Governor's Memorandum of Approval, McKinney's 1999 Session Laws, ch. 7, p. 1467.

Unfortunately, the statutory provisions implementing the federal mandate are a patchwork of inconsistent provisions, only one of which articulates a burden of proof or quantum of evidence required and only one of which contains a procedural framework for the judicial determination to dispense with reasonable efforts. Judicial authority to dispense with the reasonable efforts requirement is contained in the statutory provisions governing voluntary placements of children into foster care, as well as placements in persons in need of supervision, juvenile delinquency and child abuse and neglect proceedings. *See* Social Services Law § 358-a(3)(b); Family Court Act §§352.2(2)(c), 754(2)(b), 1039-b, 1052(b). Only the aggravated circumstance of parental refusal of services articulates the quantum of proof required (clear and convincing evidence) and only the child abuse and neglect provisions [Family Court Act §§1039-b and 1052(b)] delineate a motion procedure. In all other sections, the statute simply requires the Family Court to make the determination if the requisite circumstances are present. This has the clearly-unintended effect of restricting the standing to request this determination in child protective proceedings, but not in any other cases involving placements of children, and of leaving ambiguous the level of evidence required. The proposal of the Family Court Advisory and Rules Committee seeks to remedy these disparities.

As in the provision regarding parental refusal of services, the proposal would codify the numerous recent cases that have required clear and convincing evidence for all determinations under Family Court Act §1039-b to dispense with reasonable efforts. This threshold is consistent with the quantum of proof required in termination of parental rights cases by the United States Supreme Court in Santosky *v.* Kramer, 455 U.S. 745 (1982). *See, e.g.,* Matter of Jaime S., 9 Misc.3d 460 (Fam. Ct., Monroe Co., 2005) [reiterated in 9 Misc.3d 1118(A) (Fam. Ct., Monroe Co., 2005)]; Matter of S.H., 6 Misc.3d 851 (Fam. Ct., Onon. Co., 2004); Matter of Edwin L., 3 Misc.3d 1108(a)(Fam. Ct., Kings Co., 2004); Matter of Carl D., 195 Misc.2d 741 (Fam. Ct., Genessee Co., 2003); Matter of Sarah B., 2003 *WL* 1923540 (Fam. Ct., Kings Co., 2003);

Matter of Jasbin H., 184 Misc.2d 23, 25 (Fam. Ct., Oneida Co., 2000).

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

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

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

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

Proposal

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

court regarding children in foster care

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

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

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

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

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

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

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

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

* * *

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

* * *

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

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

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

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

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

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

§6. This act shall take effect immediately.

6. Procedures for violations of adjournments in contemplation of dismissal, probation, placements and conditional discharges in juvenile delinquency cases
(F.C.A. §§315.3, 360.2)

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

First, Article 3 of the Family Court Act is 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.

88 N.Y.2d, at 603. Noting that the scope of the hearing will vary according to the circumstances of particular cases, the Court left a determination of the degree of formality required to the discretion of the Family Court. It did, however, assume, in the absence of statutory guidance, that a violation petition would be filed, providing notice to the juvenile of the violation, that the juvenile would be given an opportunity to respond to the petition with or without a hearing, and that hearsay evidence would be admissible to establish the allegations of the petition.

The Committee's proposal codifies these elements of the holding in Matter of Edwin L. and provides needed amplification of the applicable procedures. The proposal requires a verified petition, which must be served on the respondent juvenile, for restoration to the calendar of a juvenile delinquency matter adjourned in contemplation of dismissal and provides the respondent with an opportunity to respond to the motion. Filling a gap in the Family Court Act, the proposal authorizes the Family Court to order that the respondent juvenile be detained and provides for an expedited

determination of the violation petition in such cases, consistent with the criteria and time frames applicable in other detention cases. The measure codifies the direction in Matter of Edwin L. that hearsay evidence should be admissible.[46] If the petition to restore the matter to the calendar is sustained, the case would be set down for a fact-finding or dispositional hearing, depending upon whether the matter had been adjourned in contemplation of dismissal before or after entry of a fact-finding order. Similar to the provision regarding probation violations [Family Court Act §§360.2(4), (5)], the proposal further provides that the period of the ACD would be tolled during the pendency of the petition, and that, if the petition to restore the matter to the calendar is dismissed, the period during which the petition was pending would be credited to the period of the adjournment in contemplation of dismissal.

Second, the proposal remedies the failure of the provisions regarding violations of orders of probation to specify the type of support for the violation petition allegations. Because the violations often concern a juvenile's compliance or lack of compliance with orders to cooperate with particular programs, it should be possible for probation violation petitions to be based upon allegations supported by letters, reports and other documents from the programs in question.[47] The proposal thus specifies that petition allegations may include hearsay, although the current requirement for the evidence of proof of the petition to be relevant, material and competent would be retained.

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

Finally, the proposal remedies an anomaly in the placement statute. While a placement with the New York State Office of Children and Family Services is tolled when a child is absent without leave and a warrant is outstanding [Exec. Law §510-b(7)], no comparable provision exists with respect to a

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

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

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.

Proposal

AN ACT to amend the family court act, in relation to violations of adjournments in contemplation of dismissal and orders of conditional discharge in juvenile delinquency cases

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

Section 1. Subdivision 1 of section 315.3 of the family court act, as amended by chapter 237 of the laws of 1991, is amended to read as follows:

1. Except where the petition alleges that the respondent has committed a designated felony act, the court may at any time prior to the entering of a finding under section 352.1 and with the consent of the respondent order that the proceeding be "adjourned in contemplation of dismissal." An adjournment in contemplation of dismissal is an adjournment of the proceeding, for a period not to exceed six months, with a view to ultimate dismissal of the petition in furtherance of justice. Upon issuing such an order, providing such terms and conditions as the court deems appropriate, the court must release the respondent. The court may, as a condition of an adjournment in contemplation of dismissal order, in cases where the record indicates that the consumption of alcohol may have been a contributing factor, require the respondent to attend and complete an alcohol awareness program established pursuant to [paragraph six-a of subdivision (a) of] section [19.07] 19.25 of the mental hygiene law. [Upon *ex parte* motion by the presentment agency, or upon the court's own motion, made at the time the order is issued or at] At any time during [its] the duration of an order issued pursuant to this section, the court may restore the matter to the calendar in accordance with subdivision four of this section. If the proceeding is not restored, the petition is, at the expiration of the order, deemed to have been dismissed by the court in furtherance of justice.

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

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

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

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

adjustment.

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

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

* * *

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

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

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

7. Duration of term of probation and procedures for violations of probation in child support proceedings (F.C.A. §§454, 456)

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

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

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

Second, Family Court Act §456 is entirely silent regarding procedures to be followed in the event of a violation of probation. All too often, the burden falls upon custodial parents to take time off from work to prepare, file and arrange service of violation petitions. Again comparable to other probation violation provisions, the Committee's proposal would instead require the local probation department to file a verified probation violation petition and would provide an opportunity for the probationer and parties to be to be heard as prerequisites to revocation of probation in the event of a willful violation. The measure would further provide that the period of probation would be tolled as of the date of filing of the violation petition and that in the event the violation petition is not sustained, the tolling period would be credited to the period of probation. Providing a mechanism consistent with due process to bring alleged child support violators to the attention of the Family Court would benefit the families as well – taking the onus off of custodial parents to initiate and prosecute violation proceedings that should instead be handled by local probation departments.

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

Proposal

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

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

Section 1. Paragraph (c) of subdivision 3 of section 454 of the family court act is amended to read as follows:

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

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

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

year of probation, the court may continue probation for an additional year.

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

§3. This act shall take effect immediately.

8. Modification of orders of child support in family court and matrimonial proceedings
(F.C.A. §§451, 461; D.R.L. §236B(9)(b))

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

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

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

way to limit, restrict, expand or impair the rights of any party to file for a modification of a child support order as is otherwise provided by law." Family Court Act §413-a(4); Domestic Relations Law §240-c(4).

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

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

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

Proposal

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

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

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

§451. Continuing jurisdiction.

Except as provided in article five-B of this act, the court has continuing jurisdiction over any support proceeding brought under this article until its judgment is completely satisfied and may modify, set aside or vacate any order issued in the course of the proceeding, provided, however, that the modification, set aside or vacatur shall not reduce or annul child support arrears accrued prior to the making of an application pursuant to this section. The court shall not reduce or annul any other arrears unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing payment prior to the accrual of the arrears, in which case the facts and circumstances constituting such good cause shall be set forth in a written memorandum of decision. A modification may increase support payments [nunc pro tunc as of] retroactively to the date of the initial application for support based on newly discovered evidence. Any retroactive amount of support due shall be paid in one lump sum or periodic sums, as the court directs, taking into account any amount of support which has been paid. Upon an application to modify, set aside or vacate an order of support, no hearing shall be required unless such application shall be supported by affidavit and other evidentiary material sufficient to establish a prima facie case for the relief requested.

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

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

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

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

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

services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the court shall not direct the schedule of repayment of retroactive support. The provisions of this subdivision shall not apply to a separation agreement made prior to the effective date of this part.

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

9. Judicial authority to direct establishment of a trust fund or other designated account for the benefit of children in matrimonial, child support and paternity cases (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.

10. Child support obligation of support obligors

whose incomes are below the poverty level

(D.R.L. §240(1-b); F.C.A. §413(1))

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

Compounding the infirmity identified in Rose *v.* Moody, the statutes contain ambiguous provisions leading to anomalous, unintended results. Both subdivision (1)(d) of section 413 of the Family Court Act and subdivision (1-b)(d) of section 240 of the of the Domestic Relations Law provide that "where the annual amount of the basic child support obligation would reduce the non- custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater." A literal reading of this provision as applied to an indigent non-custodial parent would compel the conclusion that the child support obligation would constitute the difference between the non-custodial parent's income and the self- support reserve in virtually all instances, as that figure would generally be greater than $25 per month. For example, a non-custodial parent with no income would be ordered to pay $12, 569 in child support, since the difference between $0 and the self-support reserve ($12, 569 annually, the level in 2004) is $12, 569, a greater amount than $25 per month ($300 annually).

Additionally, in cases where the basic child support obligation would reduce the non-custodial parent's income to a level below the self-support reserve but not below the poverty level, both subdivisions provide alternative standards for determining child support, that is, the greater of $50 per month or the difference between the non-custodial parents' income and the self-support reserve. However, both statutes are silent regarding whether separate amounts may also be ordered in such cases for child care, future medical and educational expenses, in accordance with subparagraphs four, five, six and seven of paragraph (c) of both subdivision one of section 413 of the Family Court Act and subdivision (1-b) of section 240 of the Domestic Relations Law. Several cases have, therefore, disallowed the inclusion of any of these expenses as part of the child support order in such circumstances. *See* Callen *v.* Callen, 287 A.D.2d 818 (3rd Dept., 2001); In Re Rhianna R., 256 A.D.2d 1184 (4th Dept., 1998)[citing Matter of Cary (Mahady) *v.* Megrell, 219 A.D.2d 334 (3rd Dept., 1996), *lve. app. dismissed,* 88 N.Y.2d 1065 (1996)]; Dunbar *v.* Dunbar, 233 A.D.2d 922 (4th Dept., 1996).

The Family Court Advisory and Rules Committee is recommending legislation to correct these anomalies and to codify the decision in Rose *v*. Moody. The proposal would make the presumption in favor of a minimum order of $25 per month rebuttable by a showing that such an order would be unjust or inappropriate, based upon the ten factors applicable to departures from the child support standards. *See* Domestic Relations Law §240(1-b)(f); Family Court Act §413(1)(f). The Family or Supreme Court would thus be authorized to order payment of an amount it deems to be just and appropriate. It would eliminate the proviso that "[i]n no instance shall the court order child support below $25 per month." Further, the proposal would delete the alternative standard for determining the child support obligation for non-custodial parents for whom imposition of the obligation would cause their incomes to fall below the poverty level, that is, the "difference between the non-custodial parent's income and the self-support reserve." Finally, in cases where imposition of the basic child support obligation would reduce the non-custodial parent's income to an amount below the self-support reserve, but not the poverty, level, the measure would clarify that the Court would be authorized, although not required, to direct payments for child care, educational and health care expenses, as part of its child support order.[48]

Proposal

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

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

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

(d) Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the noncustodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month [or the difference between the noncustodial parent's income and the self- support reserve, whichever is greater], provided, however, that if the court finds that such basic child support obligation is unjust or inappropriate, which finding shall be based upon considerations of the factors set forth in paragraph (f) of this subdivision, the court shall order the non-custodial parent to pay such amount of the child support as the court finds just and appropriate. Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual

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

amount of the basic child support obligation would reduce the noncustodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be fifty dollars per month or the difference between the noncustodial parent's income and the self- support reserve, whichever is greater, in addition to any amounts that the court may, in its discretion, order in accordance with subparagraphs four, five six and/or seven of paragraph (c) of this subdivision .

* * *

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

* * *

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

agreement or compromise that includes an amount for child support less than twenty-five dollars per month.]

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

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

* * *

(g) Where the court finds that the noncustodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the noncustodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth, in a written order, the factors it considered; the amount of each party's pro rata share of the basic child support obligation; and the reasons that the court did not order the basic child support obligation. Such written order may not be waived by either party or counsel; provided, however, and notwithstanding any other provision of law, including but not limited to section four hundred fifteen of this act, the court shall not find that the non-custodial parent's pro rata share of such obligation is unjust or inappropriate on the basis that such share exceeds the portion of a public assistance grant which is attributable to a child or children. [In no instance

shall the court order child support below twenty-five dollars per month.] Where the non-custodial parent's income is less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue.

* * *

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

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

11. Procedures regarding child support and paternity proceedings
(F.C.A. §§ 413-a, 516-a, 565; D.R.L. §240-c;
S.S.L. §§111-h, 111-k, 111-n; P.H.L. §4135-b; CPLR 5241, 5252)

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

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

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

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

complex doctrines of equitable estoppel, res judicata and the presumption of legitimacy, they are more appropriately addressed in the context of judicial proceedings.

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

Proposal

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

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

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

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

§2. Subdivision (a) of section 516-a of the family court act, as amended by chapter 398 of the laws of 1997, is amended to read as follows:

(a) An acknowledgment of paternity executed pursuant to section one hundred eleven-k of the social

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

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

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

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

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

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

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

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

1. (a) An acknowledgment of paternity of a child, as provided for in article five-B or section five hundred sixteen-a of the family court act, by a written statement, witnessed by two people not related to the signator or as provided for in section four thousand one hundred thirty-five-b of the public health law; provided, however, that an acknowledgment of paternity by a child under the age of eighteen shall be executed only before a judge or support magistrate of the family court. Prior to the execution of such acknowledgment by the child's mother and the respondent, they shall be advised, orally, which may be through the use of audio or video equipment, and in writing, of the consequences of making such an acknowledgment. Upon the signing of an acknowledgment of paternity pursuant to this section, the social services official or his or her representative shall file the original acknowledgment with the registrar.

* * *

2. (a) when the paternity of a child is contested, a social services official or designated representative may [order] direct the mother, the child, and the alleged father to submit to one or more

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

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

5. Objections. (a) Where there is an objection to a cost of living adjustment, either party or the support collection unit shall have thirty-five days from the date of mailing of the adjusted order by the support collection unit to submit to the court identified thereon specific written objections, requesting a hearing on the adjustment of the order of support.

* * *

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

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

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

(a) Immediately preceding or following the in-hospital birth of a child to an unmarried woman, the person in charge of such hospital or his or her designated representative shall provide to the child's

mother and putative father, if such father is readily identifiable and available, the documents and written instructions necessary for such mother and putative father to complete an acknowledgment of paternity witnessed by two persons not related to the signatory; provided, however, that an acknowledgment of paternity by a child under the age of eighteen shall be executed only before a judge or support magistrate of the family court. Such acknowledgment, if signed by both parties, at any time following the birth of a child, shall be filed with the registrar at the same time at which the certificate of live birth is filed, if possible, or anytime thereafter. Nothing herein shall be deemed to require the person in charge of such hospital or his or her designee to seek out or otherwise locate a putative father who is not readily identifiable or available. The acknowledgment shall be executed on a form provided by the commissioner developed in consultation with the appropriate commissioner of the department of family assistance, which shall include the social security number of the mother and of the putative father and provide in plain language (i) a statement by the mother consenting to the acknowledgment of paternity and a statement that the putative father is the only possible father, (ii) a statement by the putative father that he is the biological father of the child, and (iii) a statement that the signing of the acknowledgment of paternity by both parties shall have the same force and effect as an order of filiation entered after a court hearing by a court of competent jurisdiction, including an obligation to provide support for the child except that, only if filed with the registrar of the district in which the birth certificate has been filed, will the acknowledgment have such force and effect with respect to inheritance rights. Prior to the execution of an acknowledgment of paternity, the mother and the putative father shall be provided orally, which may be through the use of audio or video equipment, and in writing with such information as is required pursuant to this section with respect to their rights and the consequences of signing a voluntary acknowledgment of paternity including, but not limited to, that the signing of the acknowledgment of paternity shall establish the paternity of the child and shall have the same force and effect as an order of paternity or filiation issued by a court of competent jurisdiction establishing the duty of both parties to provide support for the child; that if such an acknowledgment is not made, the putative father can be held liable for support only if the family court, after a hearing, makes an order declaring that the putative father is the father of the child whereupon the court may make an order of support which may be retroactive to the birth of the child; that if made a respondent in a proceeding to establish paternity the putative father has a right to free legal representation if indigent; that the putative father has a right to a genetic marker test or to a DNA test when available; that by executing the acknowledgment, the putative father waives his right to a hearing, to which he would otherwise be entitled, on the issue of paternity;

that a copy of the acknowledgment of paternity shall be filed with the putative father registry pursuant to section three hundred seventy-two-c of the social services law, and that such filing may establish the child's right to inheritance from the putative father pursuant to clause (B) of subparagraph two of paragraph (a) of section 4-1.2 of the estates, powers and trusts law; that, if such acknowledgment is filed with the registrar of the district in which the birth certificate has been filed, such acknowledgment will establish inheritance rights from the putative father pursuant to clause (A) of subparagraph two of paragraph (a) of section 4-1.2 of the estates, powers and trusts law; that no further judicial or administrative proceedings are required to ratify an unchallenged acknowledgment of paternity provided, however, that both the putative father and the mother of the child have the right to rescind the acknowledgment within the earlier of sixty days from the date of signing the acknowledgment or the date of an administrative or a judicial proceeding (including a proceeding to establish a support order) relating to the child in which either signatory is a party; that the "date of an administrative or a judicial proceeding" shall be the date by which the respondent is required to answer the petition; that after the expiration of sixty days of the execution of the acknowledgment, either signatory may challenge the acknowledgment of paternity in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof on the party challenging the voluntary acknowledgment; that they may wish to consult with an attorney before executing the acknowledgment; and that they have the right to seek legal representation and supportive services including counseling regarding such acknowledgment; that the acknowledgment of paternity may be the basis for the putative father establishing custody and visitation rights to the child; if the acknowledgment is signed, it may be the basis for requiring the putative father's consent prior to an adoption proceeding; the mother's refusal to sign the acknowledgment shall not be deemed a failure to cooperate in establishing paternity for the child; and the child may bear the last name of either parent, which name shall not affect the legal status of the child. In addition, the governing body of such hospital shall insure that appropriate staff shall provide to the child's mother and putative father, prior to the mother's discharge from the hospital, the opportunity to speak with hospital staff to obtain clarifying information and answers to their questions about paternity establishment, and shall also provide the telephone number of the local support collection unit.

§9. Subparagraph (D) of paragraph 2 of subdivision (g) of section 5241 of the civil practice law and rules, as amended by chapter 335 of the laws of 2006, is amended to read as follows:

(D) In addition to the remedies herein provided and as may be otherwise authorized by law, upon a finding by the [family] court <u>that issued the income deduction order</u> that the employer or income payor

failed to deduct or remit deductions as directed in the income execution, the court shall issue to the employer or income payor an order directing compliance and, after giving the employer or income payor notice and an opportunity to be heard, may direct the payment of a civil penalty not to exceed five hundred dollars for the first instance and one thousand dollars per instance for the second and subsequent instances of employer or income payor noncompliance. The penalty shall be paid to the creditor and may be enforced in the same manner as a civil judgment or in any other manner permitted by law.

§10. Subdivision 1 of section 5252 of the civil practice law and rules, as amended by chapter 335 of the laws of 2006, is amended to read as follows:

1. No employer shall discharge, lay off, refuse to promote, or discipline an employee, or refuse to hire a prospective employee, because one or more wage assignments or income executions have been served upon such employer or a former employer against the employee's or prospective employee's wages or because of the pendency of any action or judgment against such employee or prospective employee for nonpayment of any alleged contractual obligation. In [addition to being subject to the] a civil action [authorized in] brought pursuant to subdivision two of this section, where any employer discharges, lays off, refuses to promote or disciplines an employee or refuses to hire a prospective employee because of the existence of one or more income executions and/or income deduction orders issued pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of this article, the court may, in addition to awarding damages, direct the payment of a civil penalty not to exceed five hundred dollars for the first instance and one thousand dollars per instance for the second and subsequent instances of employer or income payor discrimination. The penalty shall be paid to the creditor and may be enforced in the same manner as a civil judgment or in any other manner permitted by law.

§11. This act shall take effect immediately.

12. Elimination of the bar to subsequent remedies for court-approved agreements or compromises of child support with respect to out-of-wedlock children (F.C.A. §516)

Section 516 of the Family Court Act, which requires court approval of an agreement between the mother and putative father for the support and education of an out-of-wedlock child and, when so approved, bars other remedies for the support and education of the child, has long generated constitutional controversy and serious questions as to its continued efficacy. In Matter of Clara C. *v.* William L., 96 N.Y.2d 244 (2001), the Court of Appeals, in a 4-3 decision, declined to rule on the constitutionality of section 516 of the Family Court Act on the ground that a narrower ground for decision was available. The Court held that the Family Court's failure to adequately review the compromise agreement before approving it contravened the statutory proviso that an agreement is binding "only when the court determines that adequate provision has been made" for the support of the child. Three judges of the Court of Appeals, however, would have ruled that the statute was unconstitutional as applied in that it denied the out-of-wedlock child equal protection of the laws:

> Our concurring position at minimum raises serious doubts as to the continued general efficacy of compromise arrangements under section 516, even when the Family Court meticulously performs its statutory obligation to ensure the adequacy of the child support provisions of the agreement...Leaving the constitutional issue in limbo until another case makes it way to our Court in which the settlement was properly approved – so that the constitutional issue would have to be reached – does not serve the best interests of nonmarital children, their mothers or putative fathers in paternity matters.

96 N.Y.2d at 253 (concurring opinion). The Family Court Advisory and Rules Committee proposes that the issue not be left in limbo and that this now-obsolete, discriminatory statute be repealed.

This proposal finds support, not only in the concurrence in Clara C., but also in the decision of the United States District Court in Williams *v.* Lambert, 902 F. Supp. 460 (S.D.N.Y., 1995). The Court in Williams held that section 516 can withstand constitutional challenge only if its operative language is deemed not to bar other remedies –that is, if out-of-wedlock children are not foreclosed from seeking remedies available to children born of marriages, including actions to modify child support. The Family Court, Orange County, in Matter of Ilene P.V. *v.* Felix V., 3 Misc.3d 759 (Fam. Ct., Orange Co., 2004), declined to apply section 516 to foreclose a subsequent action to modify. Invoking the holding in Clara C., the Court held that, since no inquiry had been made at the time of entry of the 516 agreement regarding the adequacy of support for the child, the preclusive effect of section 516 in barring other remedies would not be imposed.

Section 516 of the Family Court Act, enacted in 1962 but derived from the old Domestic Relations Law, originally served two purposes. First, it encouraged non-marital fathers to settle paternity claims, thereby reducing the necessity for legal proceedings. Agreements under section 516 offered the non-

marital father certainty and a limitation on his future support obligation, while the interests of the child and mother were protected by the requirement for judicial review. Second, the statute helped ensure that the child would not be without support from the father. By furnishing an incentive to settle, the statute sought to prevent support of the out-of-wedlock child from becoming lost in the intricacies of the paternity adjudicatory process and the uncertainties of its outcome. Bacon *v.* Bacon, 46 N.Y.2d 477, 480 (1979).

As noted in both the concurrence in Clara C. and the federal court in Williams, however, the linchpin of the Bacon decision -- the "complex and difficult problems of proof" in paternity cases -- no longer stands as a justification for retention of section 516 of the Family Court Act. Technological advances in blood genetic marker testing, the statutory enactments requiring their use, and the evidentiary weight the courts are mandated to accord such test results combine to simplify the proof in paternity proceedings, thus rendering them far less daunting as a means of obtaining orders of filiation and support for children. Indeed, in the Clara C. case, blood tests indicated a 99.9% probability that William L. was the father. Consequently, it would not have been difficult to prove paternity and afford the child the benefits of all available child support remedies, including the ability to seek modification, all of which were barred because of the section 516 agreement.

Although blood grouping tests had been in use in paternity proceedings for many years, until 1981 they were admissible only for the purposes of excluding the respondent as the father. As a result of scientific advances in the field, the Legislature, impressed by the increasing accuracy of the tests, amended section 532 of the Family Court Act to permit the use of blood tests as positive evidence of paternity as well. The most recent amendments of both state and federal law, as well as appellate decisions, have accorded weight to blood and other genetic test results in some cases that is tantamount to evidentiary certitude. *See* Laws of 1997, ch. 398; Laws of 1994, ch. 170; *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* [Public Law 104-193]; Barber *v.* Davis, 120 A.D.2d 364 (1st Dept., 1986); Nancy M. G. *v.* Dann OO, 148 A.D.2d 714 (2nd Dept., 1989); Discenza *v.* James M., 148 A.D.2d 196 (3rd Dept., 1989).

Williams *v.* Lambert, *supra*, is consistent with a long line of decisions casting constitutional doubt on the the disparate treatment of children who are born out-of-wedlock, as compared to children born to married couples. *See, e.g.,* Levy *v.* Louisiana, 391 U.S.68 (1968); Gomez *v.* Perez, 409 U.S. 535 (1973); Pickett *v.* Brown, 462 U.S.1 (1983); Clark *v.* Jeter, 486 U.S. 456 (1988); Mills *v.* Habluetzel, 456 U.S. 91 (1982). In Clark, the Supreme Court held that a six-year statute of limitations for paternity actions violated the equal protection clause in unacceptably differentiating between in-wedlock and out-of-wedlock children. Thereafter, the United States Supreme Court remanded Gerhardt *v.* Estate of Moore, 407 N.W. 2d 895 (1987), *judgment vacated*, 486 U.S. 1050 (1988), to the Supreme Court of Wisconsin for further consideration in light of Clark *v.* Jeter, *supra*. That case concerned a Wisconsin statute that allowed defendants in paternity proceedings to enter into settlements whereby they admitted paternity and paid off their child support obligation in one lump sum – a statute that, like section 516 of the Family Court Act, barred the child from further remedies. Upon reconsideration, the Wisconsin Supreme Court found that the same principle that rendered the differential treatment of children born out-of-wedlock, as opposed to marital children, unconstitutional in Clark *v.* Jeter applied to preclude enforcement of a

paternity settlement as a bar to a child's subsequent independent action for support. Gerhardt *v.* Estate of Moore, 441 N.W. 2d 734 (1989).

Significantly, New York courts have held that individuals who were not parties to agreements under section 516 of the Family Court Act could not be deemed to be foreclosed from pursuing child support remedies. The New York Court of Appeals held, in Matter of Commissioner of Social Services of the City of New York *v.* Ruben O., 80 N.Y.2d 409 (1992), that a welfare official, as assignee of the rights of a mother who had signed a section 516 agreement, is permitted to compel payment of child support despite the father's compliance with the court-approved agreement. Further, holding that the lower court had "failed in its duty to make an independent determination of the best interests of the child," the Supreme Court, Appellate Division, Fourth Department, in Matter of Michelle W. *v.* Forest James P., 218 A.D.2d 175, 178-9 (4th Dept., 1996), held an agreement under section 516 of the Family Court Act to be void and against public policy, where it released the obligor from any child support obligations beyond three years. In upholding a challenge by the law guardian, the Court stated:

> Indeed, a contract depriving a child of his rights is not binding upon the child [citations omitted]. Agreements cannot be upheld where children are treated as chattels and their rights bartered away...Here, the parties have in effect bargained away the birthright of the child. This agreement not only set forth the parental rights and support obligation of respondent, it completely eradicated his parental responsibilities. A parent cannot buy another parent's rightsor sell his or her own rights. A contract exchanging parental rights for compensation simply cannot be countenanced by the courts. [citation omitted].

Accord, Andre *v.* Warren, 248 A.D.2d 271 (1st Dept., 1998) (remand for appointment of law guardian and hearing on issue of whether agreement fulfills child's best interests); Department of Public Aid *ex rel* Cox *v.* Miller, 146 Ill.2d 399, 586 N.E.2d 1251 (S.Ct., Ill., 1992); Okla. Dept. of Human Services *ex rel* KAG *v.* TDG, 1993 Ok. 193, 861 P.2d 990 (1993). Significantly, section 513 of the Family Court Act has been amended to make it clear that in-wedlock and out-of-wedlock children must be treated similarly for the purposes of support, thus ending uncertainty about support awards for out-of-wedlock children.

These developments have rendered unnecessary, inappropriate and no longer in the child's best interests the compromise procedure and preclusion of further remedies contained in section 516 of the Family Court Act. Section 516 agreements that, like the one in Clara C., have been perfunctorily approved with limited judicial inquiry, are at the very least not enforceable and rest on a shaky constitutional limb. Section 516 of the Family Court Act, therefore, should be repealed.

Proposal

AN ACT to amend the family court act, in relation to agreement or compromise of support in

paternity proceedings

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

Section 1. Section 516 of the family court act is REPEALED.

§2. This act shall take effect immediately.

REPEAL NOTE -- Section 516 of the Family Court Act, proposed to be repealed by this act, provides for court approval of a written agreement or compromise for child support between a putative father and a mother or person on behalf of a child, which, when so approved, bars other remedies for child support.

13. Authority of Supreme and Family Courts to direct child protective investigations and, if indicated, the filing of child protective petitions in conjunction with custody or visitation proceedings (D.R.L. §240; F.C.A. §§657, 817)

In adjudicating various types of proceedings in Family Court, the ability of the Family Court judges to call upon local social services districts to perform child protective investigations pursuant to section 1034 of the Family Court Act has often proven invaluable, both to protect children before the Court and to assist the Court in fulfilling its statutory duty to accurately determine the children's "best interests." It has been utilized to obtain an independent investigation, for example, where an allegation of child abuse or neglect has been made by a party or by the law guardian or where it becomes evident during the course of a proceeding that child maltreatment may have occurred. Where the investigation results in a determination by the agency that the child maltreatment allegation is "indicated" – *i.e.*, supported by credible evidence, as provided by section 412(12) of the Social Services Law – the Court may direct an individual to file a child protective petition, pursuant to section 1032(b) of the Family Court Act, where the child protective agency has not already done so. *See* Besharov, Practice Commentaries, McKinney's Cons. Laws of NY, Book 29A, Family Court Act §1034, p. 76. What is not altogether clear, however, is whether the Family Court has the authority to direct a child protective agency, not only to investigate, but also to file a child protective petition.[49]

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

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

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

New York City, the Family Court Legal Services of the New York City Administration for Children's Services to "present the case in support of the petition."[50]

The importance of delineating specific authority to the Family and Supreme Court to direct investigations and, if indicated, filings of child protective petitions cannot be overstated. All too often, child protective investigations are performed and result in an "indicated" report, only to be closed the same day without any petition being drawn or services being provided to the families to ensure protection of the children or remediation of the problems found.[51] While many such cases should be addressed through provision of services, rather than filing of a petition, there are instances where a petition, often in addition to services, would be more appropriate. For example, where serious concerns exist regarding protection of children from abusive parents, simply granting custody to relatives in the absence of a child protective petition may provide insufficient protection both to the children and their kin; kinship homes may be better supported in the context of a child protective proceeding. This measure will help to ensure that where specific allegations of child maltreatment have been found upon investigation to be supported by credible evidence, the Family or Supreme Court would be able to direct the filing of a petition and thereby to facilitate appropriate court intervention to further the protection of the children and assistance to the family.

Proposal

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

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

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

1-d. On its own motion or on the motion of any party or the law guardian in proceedings under this section, the court may direct an investigation pursuant to section one thousand thirty-four of the family court act. If the investigation results in an indicated report as defined in subdivision twelve

[50] As noted in the Practice Commentary to section 254 of the Family Court Act, the County Attorney or Corporation Counsel does not actually "represent" the petitioner, as in the case of a typical attorney-client relationship, but, rather, represents the State with the attendant obligation to "seek justice." Besharov, Practice Commentaries, McKinney's Cons. Laws of NY, Book 29A, Family Court Act §254, p. 283. *See also*, *Lawyer's Code of Professional Responsibility*, Ethical Consideration 7-14; *Standards of Practice for lawyers Representing Child Welfare Agencies* (American Bar Assoc.; Aug., 2004). Significantly, in child abuse cases, the New York City Family Court Legal Services and, outside New York City, the District Attorney is a "necessary party" to the proceeding. Family Court Act §254(b).

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

of section four hundred twelve of the social services law, the court, after giving the local social services commissioner and the subject of the report notice and an opportunity to be heard, may direct the commissioner to file a child protective petition under article ten of the family court act with respect to allegations found in the investigation to be indicated. The court may direct that the child protective petition be heard by the judge presiding over proceedings under this section.

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

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

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

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

proceedings under this part.

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

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

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

There are a variety of situations in which children and adults may be deemed by judges to require the protection afforded by a guardian *ad litem*. For example, in Family Court, the respondent in a child protective proceeding (the parent of the child who is allegedly mistreated) may be under 18 years of age. Adults may require guardians *ad litem* when their own mental capacity is challenged, for instance, in termination of parental rights proceedings based on the parents' mental illness or retardation. Additionally, guardians *ad litem* are occasionally appointed in matrimonial proceedings in Supreme Court in lieu of a law guardian.

While judges now have the authority to make these appointments, they are reluctant to do so because they cannot guarantee that the guardian *ad litem* will receive any payment. Section 1204 of the Civil Practice Law and Rules authorizes payment for the services of a guardian *ad litem* by "any other party or from any recovery had on behalf of the person whom such guardian represents or from such person's other property." Neither the Family Court Act nor the CPLR provide for payment where there is no monetary corpus from which payment can be made, and the courts have ruled that no public funds may be used in such circumstances. *See* Matter of Wood *v.* Cordello, 91 A.D. 2d 1178 (4th Dept. 1983). *See also* Matter of Baby Boy O., 298 A.D.2d 677 (3rd Dept., 2002)(County Commissioner of Social Services could not be ordered to pay for guardian *ad litem* as he was not a party). In Family Court proceedings, the parties are often indigent and thus unable to remunerate the guardian *ad litem*.

This measure 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 law guardians and counsel for indigent adults. By virtue of section 165 of the Family Court Act, section 1204 of the CPLR, as amended, would apply to Family Court proceedings. In addition, if the proceeding is one in which there is a subsequent monetary recovery, the funds would be able 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.

15. Procedures and powers of the Supreme and Family Courts with respect to violations of orders of custody and visitation (F.C.A. §657; D.R.L. §242)

Throughout New York State, custody and visitation cases comprise an increasingly significant proportion of the caseload of the Family Court[52] and are prevalent in contested matrimonial proceedings in Supreme Court. These sensitive, often volatile, cases raise some of the most difficult issues before the courts, with serious ramifications for both children and parents. Unfortunately, the statutory framework governing custody and visitation proceedings provides scant guidance and only limited powers for the courts in responding to violations of court orders. Apart from contempt, with its sanction of up to six months of incarceration, the statutes are silent as to available sanctions and procedures for enforcement of custody and visitation orders. *See* Family Court Act §156 (incorporating Article 19 of the Judiciary Law by reference). The Family Court Advisory and Rules Committee, therefore, is submitting a legislative proposal to address these omissions.

The proposal would add a new section 657 to the Family Court Act and a new section 242 to the Domestic Relations Law that would set forth the powers of the courts and the procedures to be followed when custody and visitation orders and related orders of protection are violated. The proposal would require a hearing, upon notice to all parties and the law guardian, if any, to determine whether competent proof establishes an alleged violation and, if so, whether the violation was willful. Where a violation has been established, the measure would provide that the court may require that visitation with the child or children be supervised, that the violator participate in an available rehabilitative program and pay the costs of such program, and that the violator comply with the terms and conditions of a new or modified order of protection. In the event of a willful violation, the measure would also authorize the court to impose a sentence of incarceration, including intermittent or weekend detention, for a period of up to six months, probation for a period of up to one year, and/or to direct the violator to pay restitution, including out-of-pocket expenses and attorneys' fees incurred as a result of the violation. Finally, the proposal provides that a party placed on probation for violating an order of custody or visitation would be able to be prosecuted for a violation of probation, which, if proven, may result in revocation of the order of probation and imposition of alternative sanctions.

In custody and visitation cases, Supreme and Family Courts are charged with responsibility for determining the best interests of children, both to protect family relationships that are vital to healthy child development and, at the same time, to protect children against the damaging effects of family violence where it has occurred. In order to fulfill these goals, it is essential for the courts to have adequate procedural vehicles and a wide range of appropriate powers with which to enforce their orders. Enactment of the Committee's proposal would provide the Family and Supreme Courts with these needed mechanisms.

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[52] According to New York State Office of Court Administration figures, custody filings in Family Courts statewide increased 108%, from 85,334 in 1990 (16% of the total 540,209 petitions filed) to 177,772 in 2005 (27 % of the total 665, 970 petitions filed), reflecting an escalation that continues to date.

Proposal

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

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

Section 1. The family court act is amended by adding a new section 657 to read as follows:

§657. Powers of the court on violation of a custody or visitation order. (a) If a party is brought before the court for failure to obey an order of custody or visitation or an order of protection or temporary order of protection issued under this article, the court shall hold a hearing, upon notice to the parties and law guardian, if any, in order to determine whether competent proof exists that the party has failed to obey any such order and, if so, whether such violation was willful.

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

(i) commit the party to jail for a term not to exceed six months, provided, however, that if appropriate, the court may direct that such commitment may be served upon certain specified days or parts of days or that the commitment be suspended; provided further that at any time within the term of such sentence, the court may revoke such suspension for good cause shown;

(ii) place the party on probation for up to one year under such conditions as the court may determine and in accordance with the provisions of the criminal procedure law;

(iii) direct the party to pay restitution to the petitioner for expenses incurred as a result of such violation, including, but not limited to, out-of-pocket expenses incurred as a result of the party's failure to cooperate with an order of custody or visitation, and to pay the fees and reasonable expenses of petitioner's counsel and of the law guardian, if any, that were incurred as a result of such violation; and

(iv) make an order in accordance with subdivision (c) of this section.

(c) If the court determines that the party violated an order issued under this article, whether or not such violation was willful, the court may:

(i) require any visitation to be supervised by a person or agency designated by the court;

(ii) require the respondent to participate in an available rehabilitative program, including, but not limited to, a non-residential substance abuse program or educational program or parent education program, and to pay the costs of such participation; and

(iii) issue or modify an order of protection or temporary order of protection in accordance with section six hundred fifty-five or six hundred fifty-six of this article.

(d) If the court has reasonable cause to believe that a party, who has been placed on probation in accordance with this section, has violated the terms and conditions of probation, the court, after giving notice and an opportunity to be heard to the parties and law guardian, if any, may revoke such order of probation and make any other order authorized by this section. The period of probation shall be deemed tolled as of the date of filing of the probation violation petition or motion, but, in the event that the court does not find that the order of probation was violated, the period of such interruption shall be credited to the period of probation.

§2. The domestic relations law is amended by adding a new section 242 to read as follows:

§242. Powers of the court on violation of a custody or visitation order. 1. If a party is brought before the court for failure to obey an order of custody or visitation or an order of protection or temporary order of protection issued under this article, the court shall hold a hearing, upon notice to the parties and law guardian, if any, in order to determine whether competent proof exists that the party has failed to obey any such order and, if so, whether such violation was willful.

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

a. commit the party to jail for a term not to exceed six months, provided, however, that if appropriate, the court may direct that such commitment may be served upon certain specified days or parts of days or that the commitment be suspended; provided further that at any time within the term of such sentence, the court may revoke such suspension for good cause shown;

b. place the party in violation on probation for up to one year under such conditions as the court may determine and in accordance with the provisions of the criminal procedure law;

c. direct the party to pay restitution to the other party for expenses incurred as a result of such violation, including, but not limited to, out-of-pocket expenses incurred as a result of the party's failure to cooperate with an order of custody or visitation, and to pay the fees and reasonable expenses of

petitioner's counsel and of the law guardian, if any, that were incurred as a result of such violation; and

d. make an order in accordance with subdivision three of this section.

3. If the court determines that the party violated an order issued under this article, whether or not such violation was willful, the court may:

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

b. require the party to participate in an available rehabilitative program, including, but not limited to, a non-residential substance abuse program or educational program or parent education program, and to pay the costs of such participation; and

c. issue an order of protection or temporary order of protection in accordance with subdivision three of section two hundred forty of this chapter.

4. If the court has reasonable cause to believe that a party, who has been placed on probation in accordance with this section, has violated the terms and conditions of probation, the court, after giving notice and an opportunity to be heard to the parties and law guardian, if any, may revoke such order of probation and make any other order authorized by this section. The period of probation shall be deemed tolled as of the date of filing of the probation violation petition or motion, but, in the event that the court does not find that the order of probation was violated, the period of such interruption shall be credited to the period of probation.

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

IV. Future Matters:

Under the leadership of the Committee's co-chairs, Hon. Sara Schechter, Judge of the Family Court, New York County, and Peter Passidomo, Chief Family Court Magistrate, the Family Court Advisory and Rules Committee had a year of unusual accomplishment in 2006. In addition to its legislative achievements, the Committee convened a ground-breaking roundtable at the New York State Bar Association in June, 2006, regarding the educational needs of children in out-of-home care, which led to establishment of working groups that will continue to pursue education-related projects during 2007. Following the models of its successful child welfare roundtables in 2004 and 2005, the Committee expanded its collaboration to include the education community. This successful forum, chaired by Family Court Judges Joan Cooney and Paul Buchanan, with Chief Administrative Judge Lippman presiding, brought together a broad spectrum of judges, education and child welfare officials at the State and local levels, legislative staff and advocates. Continuing this successful approach, the Committee is, therefore, planning a similar roundtable on inclusion of sensitive identifying information, such as social security numbers, in Family Court records and judgments, which will address the competing considerations of confidentiality and information-sharing, with particular attention to the problem of identity theft.

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

• **Child Welfare**: assistance in the implementation of new "one family/one judge," child welfare investigation access order and permanency legislation; continued implementation of initiatives developed as part of the roundtable on the educational needs of children in out-of-home care; continued efforts to develop proposals regarding child protective-related custody proceedings and paternity establishment in child protective cases; review of federal and State proposals regarding child welfare financing and subsidized guardianship; and further development of proposals to incorporate elements of "Model Court" initiatives into Family Court practice.

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

• **Child Support and Paternity:** planning for the confidentiality and information-sharing roundtable noted above and, depending upon its outcome, development of proposed rules and/or legislation; continued consideration of possible improvements in evidentiary procedures in support cases, especially in light of technological advancements; review of the effectiveness of health insurance provisions in meeting the

needs of children in support cases and in complying with existing and proposed federal requirements; continued consideration of proposals to improve support laws regarding joint, split and shared custody, multiple family situations and remedies for enforcement of orders against self-employed obligors; and preparation of a Court rule regarding filing dates, inter-county transfers of cases and expedited support procedures.

• **Custody, Visitation and Domestic Violence:** continued consideration of proposals to mitigate problems of conflicting orders of protection and of criminal orders that are "subject to" custody and visitation orders in Supreme and Family Courts; continued review of the recommendations of the Matrimonial Commission, including the impact of custody mediation and parent coordinator programs on domestic violence victims and their children; review of forms and procedures for assuring compliance with address confidentiality orders in Family Court proceedings; and continued development of proposals to enhance the courts' effectiveness in responding to domestic violence.

• **Forms and Technology:** continuation of efforts to simplify current uniform forms to enhance access to justice for self-represented litigants and to streamline the comprehensive forms; and coordination of forms efforts with the implementation of the Uniform Case Management System ("UCMS") in Family Courts statewide.

This substantial agenda reflects the Committee's sustained focus upon fulfillment of Chief Justice Judith S. Kaye's vision of the courts as problem-solvers, not simply as case processors – a vision articulated as well in the joint resolution of the national Conference of Chief Justices and Conference of State Court Administrators.[53] Rigorous judicial oversight and effective enforcement of court orders are critical elements of this vision. Whether it be non-compliance by a juvenile respondent in a delinquency or person in need of supervision case, a parent or child protective or child care agency in a child welfare matter or an adult respondent in a support, paternity, custody or family offense proceeding, the Committee is seeking creative means to ensure that Family Courts receive all necessary information on a timely basis, convene hearings promptly that comport with due process and secure compliance with judicial orders through imposition of diverse sanctions that are appropriate in severity and responsive to the individual problems presented. Equally as important are the Committee's efforts to incorporate, to the extent feasible, the principles of "front-loading" of services and conferencing, continuity of court and counsel; expedited judicial processes and continuous judicial monitoring into Family Court law and practice that have infused recent legislation and that have demonstrated success in the rapidly-expanding specialized

[53] Conference of Chief Justices/Conference of State Court Administrators, CCJ Resolution 22/COSCA Resolution 4 In Support of Problem-solving Courts (Aug. 3, 2000)[in Casey, P. and Hewitt, W., *Court Responses to Individuals in Need of Services: Promising Components of a Service Coordination Strategy for the Courts,* Appendix A, pps. 57, 58 (Nat'l. Center for State Courts, 2001)]. *See also* J.S. Kaye, "Strategies and Need for Systems Change: Improving Court Practice for the Millennium," 38 *Fam. & Conciliation Cts. Rev.* 159 (Apr., 2000); J. S. Kaye, "Making the Case for Hands-On Courts: Judges are learning that a problem-solving approach can stop the cycles of drug use and dysfunction," *Newsweek*, Oct. 11, 1999; J.S. Kaye, "Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run," 48 *Hastings L.J.* 851, 860 (July, 1997).

child welfare and family treatment court parts and other reform initiatives statewide.[54]

The Committee, which includes experienced judges, support magistrates, Family Court clerks and court attorneys, practitioners and law school professors drawn from throughout New York State, brings a variety of valuable perspectives to the task of addressing the complex problems facing the Family Court. The substantial expertise of the Committee's active and diverse membership contributed to significant accomplishments in 2006, including landmark legislation, comprehensive rules revisions and the promulgation of 138 new and revised forms, each of which have been posted on the Unified Court System's Internet web-site for ready public access (http://www.nycourts.gov). In 2007, the Committee hopes to compile a similar record of achievement as it grapples with the many difficult issues within its jurisdiction during these most difficult of times.

In conclusion, the Committee pledges to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman its continuing deep dedication in 2007 to improving the functioning of the Family Court and the quality of justice it delivers.

Respectfully submitted,

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[54] *See Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, 1995); *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, 2000); Schechter, "Owning *ASFA*," 53 *Juv. & Fam. Ct. Judges Journal* #4:1 (Fall, 2002); Schechter, "Family Court Case Conferencing and Post-dispositional Tracking: Tools for Achieving Justice for Parents in the Child Welfare System," 70 *Ford. L.Rev.* 427, 428 (Nov., 2001); M. Mentaberry, "OJJDP Fact Sheet: Model Courts Serve Abused and Neglected Children" (U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Jan., 1999).

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