NEW YORK STATE FAMILY COURT BENCH BOOK

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2017

FORWARD BY HON. PHILIP V. CORTESE,
MONTGOMERY COUNTY FAMILY COURT JUDGE

This current edition of the Bench Book is a result of the continuous extension, by Judge Judith Claire and me, of the original Procedural Guide written by Judge Claire. I am deeply indebted to Judge Claire for her guidance, advice and contributions to this Bench Book.

Both Judge Claire and I hope that, as you use this Bench Book, you will provide us with your constructive criticism and suggested additions to its contents. Our goal remains to provide Family Court judges, and those judges assigned to Family Court, with a practical and useful guide to the sometimes daunting complexities set out in the Family Court Act.

EVERYONE WHO USES THE BENCH BOOK SHOULD LOOK TO THE STATUTES AND APPLICABLE CASE LAW FOR DEFINITIVE GUIDANCE. WHILE ALL OF THE CASES CITED HAVE BE SHEPARDIZED THRU JANUARY 15, 2017, ANY CASE REFERRED TO IN THE BENCH BOOK SHOULD BE SHEPARDIZED BY YOU. THE PRACTICAL TIPS SET FORTH IN THE BENCH BOOK MAY BE PERSUASIVE BUT ARE NOT CONTROLLING. WHAT IS CONTROLLING ARE THE STATUTES AND CASE LAW FROM THE COURT OF APPEALS AND THE FOUR APPELLATE DIVISIONS.

Any mistakes in the drafting of the Bench Book are solely my responsibility.

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CHAPTER 1. BASIC ARRAIGNMENT AND INFORMATION ON REGISTRY CHECKS

(These two scripts, for representation by attorneys and adjournments, and for the registry check, are

NOT OPTIONAL.

Fail to advise litigants of their right to be represented by an attorney and you will be overturned on appeal. Concerning the right to be represented by an attorney see FCA Section 262(a) and Shepard v. Moore-Shepard, 54 A.D.3d 347 [2nd Dept. 2008] and Matter of Aaron UU, 125 A.D. 3rd 1155 [3rd Dept. 2015]).

(SCRIPT FOR THE COURTROOM.)

You both (or all) have the right to be represented by an attorney of your own choosing.

AND

You have the right to an adjournment in order to talk to an attorney.

If you cannot afford an attorney, and are eligible, one may be appointed to represent you.

If you are looking for a Public Defender you should apply to the Public Defender's Office as soon as possible.

Have you received a copy of the petition filed in Court on (date of filing)? Have you had a chance to read it? (Have the Respondent acknowledge that he/she has received and read the copy of the petition. In rare cases, where it is clear that the Respondent does not read English, you may have to read the essential allegations in the petition to the Respondent.)

ENTRY OF GENERAL DENIAL

I will enter a general denial to the allegations in the petition on your behalf; that is - you are saying that you have read the petition and you do not agree with what is being said in the petition.

REGISTRY CHECKS UNDER FCA SECTION 651(e)(3)&(4)
(As amended, effective April 14, 2010)

Before issuing any temporary or final orders of custody and/or visitation

THE COURT IS REQUIRED TO

conduct a search of the following databases: [FCA Section 651(e)(3)]

1. The statewide registry of orders of protection;
2. The New York State Family Court's child protective proceedings (Article 10);
3. The New York State Family Court's active warrants records; and
4. The sex offender registry.

Once the searches are completed

THE COURT MUST THEN

notify any attorneys for the parties, attorney for the children or self-represented litigants of the results of the required searches.

Before issuing **successive orders** of custody and/or visitation

THE COURT MUST AGAIN

conduct these searches

UNLESS

a search has been conducted within ninety (90) days of the last search. [FCA 651(e)(2)]

Temporary emergency orders: You may issue a temporary emergency order for custody and or visitation

IF

it is not possible to timely review such registry reports.

BUT

after issuing such a temporary emergency order

YOU MUST

conduct those searches within 24 hours of issuance, or the next day court is in session if that 24 hour period falls on a weekend or holiday.

(SCRIPT FOR THE COURTROOM)

"The court is required to conduct a search of the statewide registry of orders of protection; the New York State Family Court's child protective proceedings; the New York State Family Court's active warrants records; and the sex offender registry. We have done that on (state the date the registry check was completed).

The registry check shows the following; (state on the record what was found in the registry check. For instance, "We have found a history of temporary and/or final orders of protections involving the Respondent.")

DO NOT HAND OUT THE SHEETS GENERATED BY YOUR COURT CLERK IN SEARCHING THE REGISTRIES.

WAIVER OF RIGHT TO AN ATTORNEY

In Matter of Kathleen K. V. Steven K., 17 N.Y. 3d 380 [2011] the Court of Appeals analogized the issue of self-representation in this termination of parental rights case to a constitutional right to self-representation in a criminal case as set forth in Faretta v. California, 422 U.S. 806**.** The Court assumed, **WITHOUT DECIDING,** that a parent in a termination of parental rights case has a *Farretta-type* right of self-representation.

The Majority in Kathleen K. set out certain essential requirements that must be satisfied for a criminal defendant to effectively represent himself or herself.

The request to be self-represented must be:

1. Unequivocal and timely asserted;

2. There must be a knowing and intelligent waiver of counsel;

3. And the defendant must not have engaged in conduct which would prevent the fair and orderly exposition of the issues.

The application is "timely asserted" when it is made before the trial begins. If the request is made after the beginning of trial the right to self-representation is **"SEVERELY CONSTRICTED"** and the trial court must exercise its sound discretion and grant the request only under compelling circumstances.

Once the request has complied with the above the court must conduct a **SEARCHING INQUIRY** to ensure that the defendant's waiver is knowing, intelligent and voluntary.

The court must be certain that the **DANGERS AND DISADVANTAGES** of giving up the fundamental right to counsel have been impressed upon the defendant.

Where a party has both a constitutional and statutory right to be represented by counsel (6; NY Const. Article 1, Section 6; and FCA Section 262) the party may waive that right providing that the court undertakes the following steps:

-conduct **A SEARCHING INQUIRY** to determine that the party's decision to represent themselves is made

-knowingly;
-intelligently; and
-voluntarily.

In The People & c. v. Alexander G. Crampe and The People & c. v. Blake Wingate, 17 N.Y.3d 469 (2011) the Court of Appeals noted,

"Although we have eschewed application of any rigid formula and endorsed the use of a nonformalistic, flexible inquiry, the court's record of exploration of the issue 'must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication." The Court went on to say, more succinctly:

"A checklist might be helpful as a memory aid, but there is simply no one-size-fits-all format for a searching inquiry."

(See Matter of Austrolyn O., 135 A.D.3d 414 [1st Dept. 2016])

PRACTICE TIP

WITH THE ABOVE IN MIND, *AND A FULL UNDERSTANDING THAT THERE IS NO RIGID FORMULA FOR A SEARCHING INQUIRY* (Emphasis added), THERE MUST BE A SHOWING THAT THE PARTY WAS AWARE OF THE DANGERS AND DISADVANTAGES OF PROCEEDING WITHOUT COUNSEL.

ONE POSSIBLE PROPOSED SCRIPT FOR WAIVER OF RIGHT TO COUNSEL

"You may waive your right to counsel and choose to represent yourself. If you choose to represent yourself today, you may ask for an attorney at another time. If you choose to represent yourself today, you will be acting as your own attorney and if the case ultimately goes to trial, some of your responsibilities will be: issuing subpoenas, presenting testimonial and documentary evidence, making and meeting objections to inadmissible testimonial or documentary evidence when there is a legal basis to do so, and questioning and cross-examining witnesses, including experts, just like an attorney would do. Do you understand that? So, please listen carefully to the series of questions that I am going to ask you concerning your request to represent yourself."

-What is your age;

-Level of education;

-Do you fully understand English;

-Tell me about your work history;

-Have you recently taken, or are you now taking, medication that would compromise your understanding of what is happening in court;

-Do you have, or have you had, any mental or physical condition that might impair your ability to follow what is happening in court;

-Have you had sufficient time to reflect on representing yourself;

-What is your previous exposure to legal proceedings;

-Have you ever represented yourself at trial;

-Are you familiar with the Civil Practice Law and Rules and the Rules of Evidence;

-I want to be sure that you understand the dangers and disadvantages of

giving up your fundamental right to counsel, and that the right to represent yourself is not an absolute right;

-Do you understand that, even if you object, the Court may appoint stand-by counsel to appear with you in the courtroom;

-Do you understand that some areas of the law are very complicated and that not even a lawyer should represent himself or herself in a court proceeding;

-Have you heard the expression, "He who represents himself has a fool for a client.";

-Do you understand that you may be required to prepare and issue your own subpoenas for the production of witnesses and documents for trial;

-Do you realize that you would have to make your own opening and closing statements, if you chose to do so;

-Do you understand that you will be expected to present direct evidence and explore the testimony of opposing witnesses on cross-examination;

-Do you understand that you will be expected to make appropriate objections to the testimony or documents of the opposing side, when there is a legal basis to do so;

-Do you realize that you risk not being able to introduce evidence because you are not familiar with the rules of evidence;

-Do you understand that you may be expected to produce and cross-examine expert witnesses, if called for in the context of the case;

-Do you understand that you risk not being able to understand legal terms of art used in these legal proceedings;

-Do you understand that you will be held to the same legal standards as an attorney, despite your lack of a legal education;

-Do you understand that you will be expected to conduct yourself appropriately in the courtroom;

-Do you understand that you will receive no advantage or assistance from

the court, as the court is the impartial arbiter of the dispute in this case;

-Are you sure that you understand that the Court is not able to assist you in these proceedings, and that no one will go easy on you because you are representing yourself;

-Have you been coerced or threatened, or in any way influenced to represent yourself;

-Are you fully familiar with the allegations against you in this case, and are you familiar with the statutory and case law that may be applicable to those allegations;

-Are you aware that many times people who represent themselves at trial are unsuccessful;

AND

-Any other factors that you, the judge, believe to be relevant in bearing on a competent, intelligent and voluntary waiver of counsel **in the particular case before you.**

(THE AUTHORS OF THE BENCH BOOK AGAIN CAUTION YOU THAT THERE IS NO ONE-SIZE-FITS-ALL SCRIPT AND THAT YOU *MUST* ADJUST THE SCRIPT BASED ON THE FACTS AND CIRCUMSTANCES OF THE PARTICULAR CASE IN FRONT OF YOU.)

(In developing the above suggested list I would like to express my sincere thanks to the thoughtful trial judge in Wingate, supra, for his searching inquiry of the criminal defendant in the specific case before him.)

continue with the script

"Now that I have explained to you what is expected of you, and conducted a searching inquiry of your understanding of the dangers and disadvantages of proceeding to act as your own attorney:

Do you want an adjournment to speak with an attorney; or

Do you want the Court to appoint an attorney to represent you if you are eligible; or

Do you want to give up your right to counsel and speak for yourself?**"**

CONFIRMATION OF AGREEMENT

These are the seven questions you should ask the parties, and the one question you should ask the attorney for the child, once they have agreed to a settlement on the record:

1. Have you heard the agreement as placed on the record in Court today?

2. Do you understand the terms of the agreement?

3. Do you accept the terms of the agreement?

4. Has anybody forced you into this agreement?

5. Have you had any drugs or alcohol in the last twenty-four hours which would affect your ability to understand what is happening in Court today?

6. Are you satisfied with the representation you had from your attorney?

7. Do you have any questions with regard to the agreement?

8. Does the Attorney for the Child consent to the agreement?

CHAPTER 2. JUVENILE DELINQUENCY
ARTICLE 3 OF THE FAMILY COURT ACT

(Please note the distinction between a "juvenile delinquent", FCA 301.2(1) and a "juvenile offender" FCA 301.2(8). The Legislature, in 1978, "criminalized" several serious acts committed by thirteen-, fourteen-, and fifteen-year-old youths. For a list of these "designated felony acts" see FCA 301.2(8). See also Article 725 of the Criminal

Procedure Law.)

I. PRE-PETITION DETENTION: TIME FRAME (FCA 307.4)

A. If a child in custody is brought in front of a judge before a petition is filed, upon a written application pursuant to FCA 307.3, the judge **SHALL** hold a hearing to make a preliminary determination as to whether the court appears to have jurisdiction over the child. (FCA 307.4(1))

You

MUST

appoint an attorney to represent the child if he or she does not already have an attorney.

You

MUST

read the juvenile his or her rights (See FCA 320.3),

and the juvenile's parent or other person responsible for his or her care

SHALL

be present at the hearing.

HOWEVER

The court is not prevented from proceeding in the absence of such parent or person responsible

IF

reasonable and substantial efforts have been made to notify the parent or other person

FCA §341.2[3] (See Matter of Alexander B., 126 A.D. 3d 533 [1st Dept. 2015])

.

A petition

SHALL

be filed and a probable-cause hearing

SHALL

(where the respondent is to be detained for more than three days pending a fact-finding hearing)

be held under FCA 325.1 within **THREE (3)** days following the initial appearance or **FOUR (4)** days after the filing of the petition, which ever occurs first. (FCA 307.4(7)) See also Matter of Kevin M., 85 A.D.3d 920 [2nd Dept. 2011]

DO NOT be lulled by General Construction Law 25-a: When a period of time is computed from a certain day within which an act is authorized or required to be done, and that day falls on a Saturday, Sunday or public holiday, such act may be done on the next business day.

NOTE: FCA 307.4 CONTAINS NO INDICATION THAT EXTENSIONS FOR WEEKENDS OR HOLIDAYS WERE INTENDED.
(See Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Court Act 307.4)

DETENTION RISK ASSESSMENT INSTRUMENT (DRAI)

B. Any order issued that directs secure or non-secure detention must state in the written order that the youth was assessed and the level of risk determined according to the Detention Risk Assessment Instrument (DRAI). For any youth scoring "low" or "medium" on the DRAI

THE COURT MUST

state the particular reasons why detention was found to be necessary. (FCA §320.5(3)(b)

According to the Office of Children and Family Services, the DRAI must be completed on all JD cases regardless of whether there is an active request for detention.
See "Juvenile Justice and Opportunities for Youth: Frequently Asked Questions"
http://ocfs.ny.gov/main/rehab/drai/faqs.asp

[DRAI is already effective in NYC. Effective outside NYC October 28, 2013]

II. INITIAL APPEARANCE: TIMING (FCA §320.2)

A. If Respondent is detained the initial appearance shall be held no later than seventy-two hours **(3 days)** after a petition is filed or the next day the court is in session, whichever is sooner.

B. If Respondent is not detained the initial appearance shall be held as soon as practicable, and absent good cause shown, within **ten (10**) days after a petition is filed.

C. The factual part of the petition, or any supporting depositions,

MUST

state **non-hearsay allegations,** which, if true, establish every element of each crime charged and that Respondent committed the crime or crimes. **FCA 311.2(3)** (See Matter of Michael M., 3 NY3d 441 [2004]) and (Matter of Jonathan YY., 134 A.D.3d 1344 [3rd Dept. 2015])

D. If Respondent fails to appear after having been given notice of the initial appearance, and a warrant is issued pursuant to FCA § 312.2, computation of the time within which the initial appearance must be held shall exclude the period from the date the court issues the warrant to the date Respondent is returned to Court pursuant to the warrant, or appears voluntarily. However, no period of time may be excluded hereunder unless the respondent's location cannot be determined by the exercise of due diligence--**the court is to determine due diligence based upon the report presented pursuant to FCA § 312.2.**

III. INITIAL APPEARANCE: PROCEDURE (FCA §§320.3, 320.4 and 320.5)

A. Identify all persons present, or have the court officer do this.

B. Advise the Respondent and the parent, or other person legally responsible of the following:

1. Right to remain silent--anything Respondent says can be used against him or her in a court of law; and (FCA §320.3)

2. Right to be represented by retained counsel or an Attorney for the Child appointed by the court. (FCA §320.3)

Note: If a JD proceeding is converted into a PINS proceedings,

YOU MUST,

once again, advise the respondent of his or her right to be represented by counsel of his or her choice, or assigned counsel, and the right to remain silent. **Matter of Aaron UU, 125 A.D. 3rd 1155 [3rd Dept. 2015]).**

a. If an Attorney for the Child has already been appointed inform Respondent the court has appointed ____ as his or her attorney and if he or she has any questions he or she should consult with their attorney.

C. If parent or other person legally responsible for Respondent fails to appear, after reasonable and substantial effort has been made to notify such parent or responsible person of the commencement of the proceeding and such initial appearance, the court shall appoint an Attorney for the Child and state on the record the efforts to locate and/or give notice to the parent or responsible person. (FCA §320.3)

D. Inform Respondent of the nature of the petition filed against him or her and the charge or charges contained in the petition. (FCA §320.4)

E. Presentment agency must cause Respondent and his counsel or Attorney for the Child to be furnished with a copy of the petition, and must read the petition to Respondent on the record. (If the child's attorney is present and acknowledges that he or she has a copy of the petition, and has reviewed it with his or her client, the attorney may waive a reading of the petition.) (FCA §320.4)

F. Respondent shall admit or deny each charge (unless the petition is dismissed or otherwise terminated), and if Respondent refuses to admit or deny, the court is to enter a denial. (FCA §321.1)

G. Address the Attorney for the Child or retained counsel:

1. Ask if Respondent has been served with the petition;

2. Ask if counsel has reviewed the petition with Respondent;

3. Ask if Respondent understands the nature of the charges; and

4. Ask if Respondent admits or denies the allegations and if no response is given enter a general denial.

IV. DENIAL OF ALLEGATIONS

A. Determine whether detention is necessary pursuant to FCA § 320.5

B. Determine whether the case should be referred to the probation service pursuant to FCA § 320.6, for adjustment services.

C. If Respondent is to be detained for more than **three (3)** days pending the fact-finding hearing, schedule a probable-cause hearing pursuant to FCA §§ 325.1 & 325.3, which probable cause hearing is to be held within **three (3)** days of the initial appearance, or within **four (4)** days following the filing of the petition, whichever is sooner.

D. Set the date of the fact-finding hearing: (FCA §340.1)

1. If Respondent is not in detention, the fact-finding hearing must commence within **sixty (60)** days from the conclusion of the initial appearance.

To adjourn past **sixty (60)** days see FCA §340.1[4] where the court

MAY

(a) On its own motion or the motion of the presentment agency,

for good cause shown,

adjourn the fact-finding hearing not more than **three (3)** days if the respondent is in detention and not more than **thirty (30)** days if the respondent is not in detention

HOWEVER

If there is probable cause to believe respondent committed a homicide or crime which resulted in a person being incapacitated from attending court, **adjourn for a reasonable length of time.**

OR

(b) On motion of the respondent

for good cause shown

not more than **thirty (30)** days

OR

(c) on the court's own motion for not more than **six (6)** months if the proceeding has been adjourned in contemplation of dismissal pursuant to FCA § 315.3

THE COURT MUST
state on the record the reasons for any adjournment of fact-finding.

(See Matter of Jallah J., 127 A.D. 3d 972 (2nd Dept. 2015)

2. If Respondent is in detention and the highest count in the petition charges the commission of a Class A, B or C felony, the fact-finding hearing shall commence within **fourteen (14) days** after the conclusion of the initial appearance.

3. If Respondent is in detention and the highest count in the petition is less than a Class C felony, the fact-finding hearing shall commence no more than **three (3)** days after the conclusion of the initial appearance.

4. Trial dates are subject to adjournment pursuant to FCA § 340.1(4).

E. Advise Respondent of his or her obligation to appear at the fact-finding hearing and the consequences of Respondent's failure to appear (Parker Warning: see People v. Parker, 57 N.Y.2d 136 [1982])

1. Respondent has a right and obligation to appear at all stages of the proceedings.

2. If Respondent and/or his or her parents or person legally responsible for his or her care does not appear on any scheduled date, the court may proceed in their absence.

3. If Respondent does not appear for any scheduled appearance, he or she will be placing him or herself and his or her attorney at a significant disadvantage and will not be able to discuss important things with the attorney and assist him or her in efforts to defend Respondent in this case.

4. If Respondent does not appear and the court proceeds in his or her absence, it may result in a finding against Respondent and may also result in Respondent being placed in a detention facility for up to--SPECIFY MAXIMUM PLACEMENT FOR MOST SERIOUS CHARGE IN PETITION. Possible dispositions include: (FCA §352.2)

SCRIPT FOR PARKER WARNING

(For instance: "You have a right and an obligation to appear at your trial and if you do not appear you will put yourself and your attorney at a significant disadvantage. And, if you do not appear you might be removed from your home and placed in a facility for a period of one year, and if you do not cooperate with the authorities at that facility your placement may be extended, after a Court hearing, year by year until your 18th birthday.")

a. Conditional discharge - maximum period of one year. (FCA §353.1)

b. Probation - maximum period of up to 2 years. (FCA §353.2)

c. Placement--in home, suitable private placement, DSS or Office of Children and Family Services (OCFS). (FCA §353.3)

I. Felony--period of up to 18 months.

ii. Misdemeanor--period of up to 12 months.

d. Restrictive placement. (FCA §353.5)

I. Class A felony–OCFS for 5 years.

ii. Felony other than a Class A–OCFS for 3 years.

F. Ask if anyone has any questions

V. INITIAL APPEARANCE: RELEASE OR DETENTION (FCA §320.5)

A. Release

1. The Court may release Respondent upon such terms and conditions it deems appropriate, and if the terms and conditions are imposed the

2. Respondent is to be provided with a written copy of those terms and conditions.

3. The court may modify or enlarge such terms and conditions at any time prior to the expiration of the respondent's release.

B. Detention

1. The court shall not direct detention unless it finds, and states on the record, the facts and reasons for so finding that unless Respondent is detained:

a. There is a substantial probability that Respondent will not appear in court on the return date; or

b. There is a serious risk that before the return date Respondent may commit an act which if committed by an adult would constitute a crime.

DETENTION RISK ASSESSMENT INSTRUMENT (DRAI)

c. Any order issued that directs secure or non-secure detention must state in the written order that the youth was assessed and the level of risk determined according to the Detention Risk Assessment Instrument (DRAI). For any youth scoring "low" or "medium" on the DRAI

THE COURT MUST

state the particular reasons why detention was found to be necessary. (FCA §320.5(3)(b)

According to the Office of Children and Family Services, the DRAI must be completed on all JD cases regardless of whether there is an active request for detention.

See "Juvenile Justice and Opportunities for Youth: Frequently Asked Questions" http://ocfs.ny.gov/main/rehab/drai/faqs.asp

[DRAI is already effective in NYC. Effective outside NYC October 28, 2013]

2. At the initial appearance the presentment agency may introduce Respondent's previous delinquency findings and, if fingerprinted for the current charge, the fingerprint records maintained by DCJS. **At the conclusion of the initial appearance any fingerprint records shall be returned to the presentment agency and shall not be made a part of the court record.**

3. Upon a finding of facts and reasons which support a detention order the court shall also determine and state in its order of detention:

a. Whether the continuation of Respondent in Respondent's home would be contrary to the best interests of Respondent based upon, and limited to, the facts and circumstances available to the court; **AND**

b. Where appropriate and consistent with the need for protection of the community, whether reasonable efforts were made prior to the date of the court appearance (that resulted in the detention order issued in accordance with FCA § 320.5) to prevent or eliminate the need for removal of the Respondent from his or her home

OR,

c. If Respondent had been removed from his or her home prior to the initial appearance, whether reasonable efforts were made to make

it possible for Respondent to safely return home.

VI. INITIAL APPEARANCE: REFERRAL TO PROBATION

A. If the petition alleges a commission of a designated felony or the commission of a crime enumerated in FCA § 308.1 (4), the probation service shall make a recommendation to the court at the initial appearance regarding the suitability of adjusting the case pursuant to FCA § 308.1

B. The court may, with the consent of the victim or complainant, and the Respondent, refer a case to the probation service for adjustment services. In the case of a designated felony petition the consent of the presentment agency shall also be required to refer a case to probation services for adjustment.

C. If the court refers a case to the probation service pursuant to this section and the probation service adjusts the case, the petition shall be dismissed.

D. If such case is referred to the probation service, the provision of FCA § 308.1 except subdivision 13 thereof, shall apply.

VII. ADMISSIONS PRIOR TO FACT-FINDING HEARING:

(SEE "SCRIPT FOR ACCEPTANCE OF ADMISSION IN JUVENILE DELINQUENCY PROCEEDING" ON PAGE 23)

A. Respondent may enter admissions to those allegations in the petition which are determinable at a fact-finding hearing.

B. Where the petition charges one offense, Respondent may, with the consent of the court and the appropriate presentment agency, enter an admission to a lesser included offense as defined in CPL § 1.20(37).

C. Where the petition charges more than one offense in separate counts, Respondent may, with the consent of the court and the appropriate presentment agency, enter an admission to part of the petition, or a lesser included offense, upon the condition that such admission constitutes a complete disposition of those allegations in the petition which are determinable at the fact-finding hearing.

VIII. ACCEPTANCE OF AN ADMISSION PRIOR TO FACT-FINDING HEARING:

(SEE "SCRIPT FOR ACCEPTANCE OF ADMISSION IN JUVENILE

DELINQUENCY PROCEEDING")

A. The court must state the reasons for consenting to the entry of the admission.

B. Enter an order pursuant to FCA § 345.1 and schedule a dispositional hearing pursuant to FCA § 350.1.

C. Make sure that the parent or other person responsible for the care of the child is present and, if not present, you may proceed if, "...reasonable and substantial effort has been made to notify such parent or other person responsible." FCA §341.2 [3]

IX. TIMING OF DISPOSITIONAL HEARING:

A. If Respondent is detained and has not been found to have committed a designated felony, the dispositional hearing shall commence not more that **ten (10)** days after the entry of an order pursuant to FCA § 345.1, except in the case of an adjournment pursuant to FCA § 350.1 (3).

B. In all other cases the dispositional hearing shall commence not more than **fifty (50)** days after entry of an order pursuant to FCA § 345.1, except in the case of an adjournment pursuant to FCA § 350.1 (3).

C. The court may adjourn the dispositional hearing pursuant to FCA § 350.1 (3):

1. On its own motion, or the motion of the presentment agency, for good cause shown for not more than **ten (10)** days, or

2. On Respondent's motion, for good cause shown, for not more than **thirty (30)** days.

3. The court shall state on the record the reason for any adjournment of the dispositional hearing.

D. Successive motions to adjourn a dispositional hearing beyond the limits enumerated in FCA § 350.1 (1 & 2) shall not be granted in the absence of a showing, on the record, of special circumstances.

X. POST-DISPOSITIONAL PROCEDURES: VIOLATIONS

For jurisdiction, supervision and search orders under this Part see FCA §360.1

A. VIOLATION PETITION (FCA §360.2)

(Underlined language added by L. 2015, c. 499, effective February 18, 2016)

The probation service may file a violation petition at any time during probation, as prescribed by 353.2, or conditional release as prescribed by section 353.1, if it has **reasonable cause** to believe there has been a violation.

The petition must be:

1. Verified and subscribed by the probation service or appropriate presentment agency;

2. Set forth the condition or conditions of the probation order or conditional discharge order alleged to be violated:

3. Provide a reasonable description of the time, place and manner of the violation; and

4. Set forth non-hearsay allegations of the factual part of the petition, along with non-hearsay supporting depositions, which, if true, establish every violation charged.

B. The court must take reasonable and appropriate action to promptly cause the Respondent to appear which may include the issuance of:

1. A summons pursuant to FCA §312.1, or;

2. A warrant pursuant to FCA §312.2.

C. The period of probation or conditional discharge

SHALL

be interrupted, from the date of the filing of the violation petition to the date of the final determination on the violation petition, or until the Respondent reaches the maximum age for acceptance into an office of children and family services facility.

IF

the court determines that there was no violation of probation by the respondent during the period of interruption, that period of interruption shall be credited to

the period of probation.

D. HEARINGS ON VIOLATIONS (FCA §360.3)

The court may not revoke an order of probation or conditional discharge

UNLESS:

1. The court has found that the Respondent violated a condition of the order; and

2. The Respondent has had an opportunity to be heard.

E. At the first appearance on the violation petition the court

MUST

1. Advise the Respondent of the contents of the petition

AND

provide him or her with a copy of the petition.

YOU SHOULD

2. advise the Respondent that he or she has the right to be represented by an attorney at all stages of the proceeding. (FCA §360.3(4)

PRACTICE TIP

that he or she be advised that they have the right to remain silent and that anything they say may be used against them in a court of law.

3. Determine if the Respondent should be released or detained pursuant to FCA §320.5

AND

4. Ask the Respondent if he or she wishes to make a statement with

regard to the violation.

5. If the Respondent makes a statement the court may accept it and base its decision on the statement. See FCA §321.3 in determining whether a statement should be accepted.

   NOTE: Best practice would suggest that the Court use the script for accepting an admission before taking any statement or admission. (See page 24)

6. If there is a hearing the court may receive any relevant, competent and material evidence.

7. The Respondent may cross-examine witnesses and present evidence in his or her own defense.

8. The presentment agency SHALL be present in all stages of the violation proceedings.

F. DISPOSITION AFTER HEARING

The Court may revoke, continue or modify the order of probation or conditional discharge.

If the order is revoked the court

SHALL

order a different disposition pursuant to FCA §352.2

If the Court continues the order of probation or conditional discharge, it

SHALL

dismiss the violation petition.

MISCELLANEOUS

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL

Section 205.24 of the Uniform Rules for the Family Court sets forth terms and conditions that may be attached to an order adjourning a proceeding in contemplation of dismissal in accordance

with section 315.3 of the Family Court Act.

This section of the Court Rules also allows the court to direct the probation service to supervise Respondent's compliance with the terms and conditions, and may require probation to report to the court, in writing or orally, on Respondent's compliance.

CHAPTER 3. SCRIPT FOR ACCEPTANCE OF ADMISSION IN JUVENILE DELINQUENCY PROCEEDING: ARTICLE 3 OF THE FAMILY COURT ACT FCA SECTION 321.3

Before you make an admission today, I want to further explain your rights to you.

YOU HAVE THE RIGHT TO BE REPRESENTED BY AN ATTORNEY.

Attorney (name) has been assigned to represent you. Does he/she represent you in this matter?

Have you had enough time to talk with your attorney about the charges brought against you, and your decision to make an admission in this matter?

I note for the record that your mother/father/guardian (name the individual) is here in Court with you today. Have you had enough time to consult with her/him/them about your decision to make an admission in this matter?

Mr./Ms. (names) have you had enough time to speak with both your son/daughter and his/her attorney about the decision to make an admission in this matter?

YOU DO NOT HAVE TO MAKE AN ADMISSION HERE TODAY.

You are entitled to a fact-finding hearing which is like a trial.

At a fact-finding hearing, it would be the County Attorney's (presentment lawyer's)

obligation to prove the charges against you, BEYOND A REASONABLE DOUBT. (A Violation of Probation Petition is proven by A PREPONDERANCE OF THE EVIDENCE.)

To do that, they would have to convince me of your guilt by calling witnesses and/or producing evidence.

Through your attorney you could cross-examine, that is challenge their witness' testimony, or challenge any evidence they sought to introduce.

You could also present witnesses or evidence of your own.

You would **not have to testify** or say anything at all during these proceedings because you have **AN ABSOLUTE RIGHT TO REMAIN SILENT**.

Do you understand that if you choose to make an admission, that is tell the Court what happened, that you will be giving up your right to a fact-finding hearing?

And, do you understand that you will also be giving up your right to remain silent?

Did anyone promise you anything, threaten you or force you to make an admission?

Have you had any medication, drugs or alcohol within the last 24 hours that would affect your ability to understand what is occurring at this time?

PARENT (OR GUARDIAN)- ARE YOU AWARE OF, AND DO YOU UNDERSTAND, THE RIGHTS BEING WAIVED, THAT IS, GIVEN UP, BY YOUR CHILD?

Before you make an admission, I would like to explain to you what will happen as a result of your making an admission.

The Court will order the Probation Department to meet with you and your parents/guardian and to conduct an investigation including, but not limited to, your history, including any prior contact with the Court, your family history, education, physical or mental health and any services you may have had in the past. The report is to assist the Court in determining the disposition of your case. The Court will then determine what disposition (or sentence) you will be given. (See FCA §351.1)

The Court will have the following choices at disposition:

(See Matter of Lee S., 58 A.D.3d 1088 [3RD Dept. 2009])

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL - If you were to receive an ACOD, and you stayed out of trouble, and followed the rules of your home and school, and obeyed the law, at the end of six months this case could go away as if it never happened? **DO YOU UNDERSTAND WHAT AN ACOD IS?**

CONDITIONAL DISCHARGE - If you were to receive a conditional discharge, the Court could place **conditions** upon you for a period of up to one (1) year. By conditions, I mean that the Court could order you to do certain things or forbid you from doing other things, even if you wanted to do them. **DO YOU UNDERSTAND WHAT A CONDITIONAL DISCHARGE IS? (See FCA §353.1)**

PROBATION - The Court could also place you on probation, supervised by the (Name of County) County Probation Department, for a period of up to two (2) years. If this were to

occur you could live at home but you would have to follow the rules of your household, including a curfew, and you would have to attend school and attend all of your classes. You would also have to meet with a probation officer on a regular basis. You might have to participate in counseling, perform community service, submit to random drug and alcohol testing and/or pay restitution. **DO YOU UNDERSTAND WHAT IT WOULD MEAN TO BE PLACED ON PROBATION? (See FCA §353.2)**

Finally,

PLACEMENT - The Court could also place you in a secure facility, through either the(Name of County) County Department of Social Services or the NYS Office of Children and Family Services for an initial period of up to one year **for misdemeanors**.

(SEE "CONTINUE PLACEMENT RECITATION FOR MISDEMEANORS" ON NEXT PAGE.)

(SCRIPT WHEN PLACEMENT IS BASED ON A DESIGNATED FELONY OR CLASS A FELONY.) (See FCA §353.5)

(For a Designated Felony or Class A Felony, the following applies:)

You may be subjected to placement with the Office of Children and Family Services (OCFS) for an initial period of three (3) years, with initial placement in a secure facility for a

period set by the Court's Order to be not less than six (6) nor more than twelve (12) months - (Family Court Act Section 353.5[5[(a)(I)- followed by placement in a residential facility for a period set by Court Order to be not less than six (6) nor more than twelve (12) months. (Family Court Act Section 353.5[5][iii]

See also: Matter of Joseph G. 196 Misc.2d 904 [2003]

IF APPLICABLE:

You must also be advised that, having previously been found to be a Juvenile Delinquent in Family Court because of the commission of a designated felony act as defined by the Family Court Act, you will not be eligible for youthful offender treatment by a criminal court, and (CPL Section 720.10) such defendants in criminal court are subject to being sentenced as adults upon conviction.

You and your parents must be made fully aware of this significant consequence which comes about as a result of your admission to the felony.

(CONTINUE PLACEMENT RECITATION FOR MISDEMEANORS)

And if you were placed in a secure facility and you did not cooperate with the authorities at that facility, your placement could be extended, after a Court proceeding, year by yearuntil your eighteenth 18th birthday (OCFS placement - through twenty-first 21st birthday). **DO YOU UNDERSTAND WHAT IT WOULD MEAN TO BE**

"PLACED"?

Do you understand all of the choices that the Court will have when we come back to Court the next time for a disposition of this matter?

Mr./Ms. (Names) do you also understand all of the choices the Court will have concerning your child?

(Address the child) Do you also understand that there are no promises as to which one of the choices I have described that I may make in your case? Do you have any questions that you want to ask me?

Mr./Ms. (names) do you understand that there are no promises as to which choice the Court will make in your son's/daughter's case? Do you have any questions that you want to ask me?

After listening to everything I have just explained to you, do you at this time still wish to make an admission?

Do you need any additional time to speak with either your attorney or your father/mother/guardian?

WHAT IS YOUR DATE OF BIRTH? HOW OLD ARE YOU? DID YOU AT THAT DATE, PLACE AND TIME (get specifics from Petition and go through the elements of each offense being admitted). DO YOU MAKE THIS ADMISSION BECAUSE IT IS TRUE?

(State on the record) Based upon answers that Respondent gave to the questions asked by the Court before the admissions were made, the Court finds that Respondent is of sufficient

age, intelligence and maturity to have knowingly, intelligently and voluntarily waived his/her right to remain silent and

his/her right to a hearing in this matter after conferring with his/her attorney (and parent, or guardian).

Further, based on the voluntary answers which Respondent gave to the questions asked by the County Attorney (or Court) (or presentment agency attorney), the Court finds that the allegations contained in the petition, bearing Docket No: _____ have been sustained beyond a reasonable doubt to the following extent:

1. The Respondent, who was born on (date of birth) and, at a time when she/he was less than sixteen (16) years of age, and more particularly on (date of act(s), Respondent engaged in conduct which, if Respondent were over the age of sixteen (16), would constitute the crime of (crime admitted) in violation of Section ____ of the Penal Law, a class Misdemeanor/Felony.

2. I find that Respondent at the above time and place (recite essential factual findings necessary to sustain each element of the criminal act(s) established.) For example: that Respondent stole property consisting of a radio and is responsible for the crime of Petit Larceny in violation of Penal Law Section 155.25, a Class A - misdemeanor.

CHAPTER 4. PATERNITY
ARTICLE 5 OF THE FAMILY COURT ACT

The Court may exclude the general public from the room where the proceedings are heard and may admit only persons directly interested in the case, including officers of the court and witnesses. (FCA §531)

A. **INITIAL APPEARANCE**

1. Identify all persons present or have court officer do this.

2. Respondent has the right to retain counsel, or if indigent, to have counsel appointed. Respondent has the right to an adjournment to seek advice of counsel.

3. Petitioner and Respondent shall be competent to testify, however, **Respondent shall not be compelled to testify.**

   If the Respondent offers testimony of access by others at or about the time charged in the complaint, such testimony **shall not be competent or admissible** in evidence **except** when corroborated by other facts and circumstances tending to prove such access.

4. Parties have a right to one or more genetic marker tests. (FCA §532)
   (If one of the parties objects to the results of test, regardless of whether or not the test is certified, they are entitled to a hearing. At the hearing they must be afforded an opportunity to present evidence related to the test results. (In the Matter of Philip K v. Thervey B., 57 A.D.3d 781 [2nd Dept. 2008])

5. The Court may order genetic testing on its own motion or on the motion of the parties. However, if the court determines it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or a presumption of legitimacy, the Court shall not order such genetic testing (a determination that it is not in the best interest of the child **must be in writing**).

6. The cost of genetic testing is to be born by the moving party, or the Court may order the cost to be apportioned between the parties and in the event one cannot afford the test--DSS or ACS may be required to pay.

B. **ACKNOWLEDGMENT OF PATERNITY**
FCA §516-a

1. The acknowledgment of paternity, per Social Services Law §111-k or Public Health Law §4135-b, establishes paternity and liability to support the child.

2. The acknowledgment of paternity, if unchallenged after sixty (60) days (See FCA §516-a(b)) can only be challenged on the basis of fraud, duress, or material mistake of fact.

C. **PERSONS WHO MAY ORIGINATE PROCEEDINGS**
FCA §522

1. The following may begin proceedings:

a. the mother;

b. a person alleging to be the father;

c. the child's guardian;

d. other persons standing in parental relation to the child or being the next of kin;

e. incorporated society doing charitable work; or

f. public welfare official if mother of child is, or is likely to become, a public charge

D. **FOR WARRANTS SEE FCA §526**

E. **PATERNITY HEARING**
FCA §531

1. The trial is by Court without a jury.

2. The mother or alleged father are competent to testify, but the Respondent **SHALL NOT** be compelled to testify.

3. If the Respondent offers testimony of access by others at or about the time charged in the complaint, such testimony **shall not be competent or admissible** in evidence **except** when corroborated by other facts and circumstances tending to prove such access.

4. If the mother is married both she and her husband may testify as to non-access.

5. The general public **may** be excluded from the Courtroom.

SEE FCA §531-a FOR TESTIMONY BY TELEPHONE, AUDIO-VISUAL OR OTHER ELECTRONIC MEANS

F. DEFAULT IN APPEARANCE BY THE RESPONDENT:

After hearing testimony from the mother, the Court should make the following findings and conclusions on the record.

1. _____ is in default in this proceeding after having been given notice.

2. The Court is entitled to draw a strong inference from his default.

3. The Court declares that _____ is the father of the child, _____, born on _____.

4. The testimony of the mother shows that she and respondent engaged in sexual relations during the time that the child was conceived. (Add any other relevant facts here.)

5. The genetic marker test shows that there is a 99.9% probability of paternity which is **clear and convincing evidence** creating the genuine belief that Respondent is the father.

6. On the basis of these findings, the Court declares Respondent to be the father of the child and refers the matter to the Support Magistrate on the issues of child support and related expenses. (Some Courts will set a minimal amount of child support in the interim.)

   i. The Court also enters a Temporary Order of Child Support in the amount of $_____ per week.

   ii. Payments on the temporary Order shall commence immediately and shall

be made payable every week thereafter through the Support Collection Unit.

iii. Any amount of support set by the Support Magistrate shall be retroactive to the date the petition was filed or such other date as the statute provides.

G. ADMISSION BY THE RESPONDENT

Sir, the purpose of this proceeding today is to determine your desires concerning this paternity proceeding. Before you make any admissions, I want to make certain that you understand your rights and that what you are doing is free and voluntary.

1. You both (or all) have the right to be represented by an attorney of your own choosing. You have the right to an adjournment in order to talk to an attorney. If you cannot afford an attorney, one may be appointed to represent you. If you are looking for a Public Defender you should apply to the Public Defender's Office right away.

2. Are you aware that you cannot be forced to testify against yourself at this hearing?

3. There are two ways that the case against you can be proven. One way is at a hearing and the other is by you making certain admissions. If there were a hearing, the petitioner would have to call witnesses and submit evidence to prove that you are the father of the child. At the hearing, you would have the right to testify, if you chose to, the right to present your own witnesses or other evidence, and the right to cross examine any witnesses who testify against you. Do you understand that?

4. If you make an admission, you give up the right to challenge any testimony or evidence and to present a case in your behalf. Do you understand this?

5. If you make an admission, I will be making a finding of paternity the same as if there had been a hearing conducted and all the necessary facts were proven to show that you are the father. Do you understand that?

6. Are you making your admission of your own free will?

    i. Has anyone forced or threatened you to do this?

ii. Has anyone made you any promises in any way to get you to make an admission?

iii. Have you had any medications, drugs or alcohol which would impair your ability to understand what is happening in Court right now?

7. Have you discussed this with your attorney?

i. Has you attorney answered all of your questions regarding making an admission?

ii. Do you feel you need any more time to discuss this further with your attorney?

8. Do you have any questions?
i. How old are you?

ii. How are you feeling today?

9. Understanding your rights, do you still wish to give up your right to a hearing and make an admission? (Have Respondent admit to having unprotected sexual intercourse with the mother about 9 months before the birth of the baby.)

H. **FINDINGS**

1. Based upon respondent's answers to the questions asked by the Court before making the admission, the Court determines that respondent has knowingly, intelligently and voluntarily waived his right to a hearing in this matter (after consulting with this attorney).

2. Based on the admission made by Respondent and the other materials received in evidence, (including the results of the HLA/DNA tests performed, the Court finds that the allegations contained in the petition have been established by **CLEAR AND CONVINCING EVIDENCE**, and on the basis of that finding, the Court declares respondent to be the father of the child, _____, born to _____ on the _____ day of _____.

3. Refer to Support Magistrate for support issues.

I. **GENETIC MARKER AND DNA TESTS**

FCA §418(a) and §532

The court, on its own motion or on the motion of any party, when paternity is contested,

SHALL

order the mother, the child and the alleged father to submit to one or more genetic marker or DNA tests. However,

NO TEST WILL BE ORDERED

when there are written finding by the court that is not in the best interest of the child on the basis of
res judicata, **equitable estoppel,** or **the presumption of legitimacy of a child born to a married woman.**
(For presumption of legitimacy see FCA §417)

(See FCA § 565 for a challenge to a directive from Social Services requiring a party to submit to genetic testing.)

J. ADMISSION OF TEST RESULTS INTO EVIDENCE
FCA §418(a)

1. The record or report of the results of any such genetic marker or DNA test shall be received in evidence pursuant to CPLR §4518 where no timely objection has been made to the results. Absent timely objections those objections are deemed waived and shall not be heard by the court.

   (The statute does not define "timely objection".)

2. The record or report of test results that indicate 95% probability of paternity creates a rebuttable presumption of paternity and, if unrebutted shall establish paternity and liability for support for the child.

   (See FCA §513 concerning obligation of parents to support a child.)

CHAPTER 5. TERMINATION OF PARENTAL RIGHTS ARTICLE 6, PART 1, OF THE FAMILY COURT ACT

A. FACT-FINDING

1. A petition under Article 6, Part 1 of the Family Court Act, having been filed in this Court, alleging that _____(and _____ is/are permanently neglected children, and the matter having come on for a fact-finding hearing, the Court after hearing the proof and the testimony offered in relation to the case, findings upon **CLEAR AND CONVINCING EVIDENCE** that the Respondent, _____, has permanently neglected said child(ren) in that:
2. Recite the grounds here per the petition such as failure to plan for a period of more than one (1) year, abandonment, mental illness, mental retardation, etc.

3. State the reasons why you so find.

   For instance, the mental illness of a parent, found by CLEAR AND CONVINCING EVIDENCE, which affects his or her present and future ability to care for a child.
   (See Matter of Nereida S., 57 N.Y. 2d 636 [Court of Appeals 1982], and Matter of Angel SS., 129 A.D. 3d 1119 [3rd Dept. 2015])

4. Find that the agency made diligent efforts to reunite the family and return the children home and to encourage and strengthen the family relationship.

5. The Court is entitled to take judicial notice of prior proceedings involving the family group. FCA §164

6. Therefore, it is Ordered that the child(ren) are permanently neglected as defined by Article 6, Part 1 of the Family Court Act.

7. Set a date for the dispositional hearing.

B. DISPOSITIONAL HEARING

1. The Court having made a finding on _____ that the child(ren), _____, were permanently neglected children as defined by Article 6, Part 1 of the Family Court Act, the Court now orders that the guardianship and custody rights of the Respondent, _____, the parent of said

child(ren), are transferred to the Commissioner of Social Services,

2. and it is further ordered that the Commissioner is authorized and empowered to consent to the adoption of the child(ren), subject to the Order of the Court without the consent of or further notice to the parent.

3. The best interests of the child(ren) require that the guardianship and custody of the child be committed to the Department of Social Services.

4. At a dispositional hearing, only material and relevant evidence is admissible.

   The distinction between the two levels of evidence is that hearsay is not allowed when the evidence must be **competent**, material and relevant whereas, in the dispositional hearing, hearsay evidence may be admitted providing it is material and relevant.

5. Evidence of parental contact or failure to maintain contact after the filing may be admi

6. Disposition may commence immediately after fact-finding, provided that, if all parties consent, the Court may dispense with the dispositional hearing and make an Order of Disposition on the basis of competent evidence admitted at fact-finding.

7. Possible dispositions:

   1. Dismissing petition.

   2. Suspending judgment up to one (1) year.

   3. Committing the guardianship and custody of the child upon such conditions that the Court deems proper.

8. An Order of Disposition shall be made solely on the basis of the best interest of the child and there shall be no presumption that such interests will be promoted by any particular disposition.

C. FAILURE TO COMPLY WITH TERMS OF A SUSPENDED JUDGMENT

A **PREPONDERANCE OF THE EVIDENCE** supports a finding that the mother

violated the terms of a suspended judgment

AND

a **PREPONDERANCE OF THE EVIDENCE** supports the court's determination, at disposition, that termination of the mother's parental rights is in the child's best interest.

(See Matter of Davontay Peter H., 127 A.D. 3d 405 [1st Dept. 2015])

(See also Matter of Cody D., 127 A.D. 3d 1258 [3rd Dept. 2015])

D. COURT'S REFUSAL TO ENTER A SUSPENDED JUDGMENT

Family Court did not abuse its discretion in refusing to enter a suspended judgment. The Department of Social Services established that the father failed to comply with his service plan, including failure to complete substance abuse treatment successfully, failure to attend scheduled visitation with the child consistently and failure to verify that he had obtained stable income and housing**.**
(Matter of David W., 129 A.D. 3d 1461 [4th Dept. 2015])

CHAPTER 6. PERSONS IN NEED OF SUPERVISION ARTICLE 7 OF THE FAMILY COURT ACT

NOTE: THE DETENTION RISK ASSESSMENT INSTRUMENT (DRAI) IS NOT APPLICABLE TO PINS PROCEEDINGS.

I. INITIAL APPEARANCE PROCEDURE

A. Identify all persons present or have the court officer do this.

B. Advise Respondent and parent or other person legally responsible of: (FCA §741)

i. Respondent's right to remain silent; and

ii. Respondent's right to be represented by retained counsel or an Attorney for the Child appointed by the court.

Note: If a PINS proceeding evolves from a JD proceeding that was converted into a PINS proceeding,

YOU MUST,

once again, advise the respondent of his or her right to be represented by counsel of his or her choice, or assigned counsel, and the right to remain silent. **Matter of Aaron UU, 125 A.D. 3rd 1155 [3rd Dept. 2015]).**

C. Advise the Respondent and parent that the parent has the right to be present at all stages of the proceedings.

D. If parent or other person legally responsible for Respondent fails to appear, after reasonable and substantial efforts have been made to notify such parent or responsible person of the commencement of the proceeding, at such initial appearance, the court shall appoint an Attorney for the Child (failure of a parent to appear after substantial efforts are made to notify shall not prevent the court from proceeding).

E. Set the matter down for a trial. If Respondent intends to admit to the allegations in the petition, see "acceptance of admission in PINS proceeding".

II. GENERAL INFORMATION

A. The general public **may** be excluded from any hearing under this article and only such persons and the representatives of authorized agencies who have a direct interest in the case may be admitted to the hearing. (FCA §741)

B. Whenever a petition is filed pursuant to Article 7 the Probation Department is to file a written report indicating any previous actions it has taken with respect to the case and the court shall review any determination by the probation service that Respondent does not qualify for adjustment services or adjustment services are terminated pursuant to FCA § 735. The court may, upon consent of Respondent subject to FCA § 748, order that adjustment attempts be undertaken by probation.

C. Advise Respondent and parent or other person legally responsible of:

i. Respondent's right to remain silent--anything Respondent says can be against him or her in a court of law; and

ii. Respondent's right to be represented by retained counsel or an Attorney for the Child appointed by the court.

D. If parent or other person legally responsible for Respondent fails to appear, after reasonable and substantial efforts have been made to notify such parent or responsible person of the commencement of the proceeding and such initial appearance, the court shall appoint an Attorney for the Child.

E. Inform the Respondent of the charge or charges contained in the petition.

F. The Presentment agency must cause Respondent and his counsel or Attorney for the Child to be furnished with a copy of the petition.

G. The Respondent shall admit or deny each charge (unless the petition is dismissed or otherwise terminated), and if the Respondent refuses to admit or deny, the court is to enter a general denial.

H. Set the date of the fact-finding hearing which,

IF RESPONDENT IS IN DETENTION,

shall commence not more than three (3) days after the filing of the petition.

ADVISE THE RESPONDENT OF THE PARKER WARNING

(For instance: "You have a right and an obligation to appear at your trial and if you do not appear you will put yourself and your attorney at a significant disadvantage. And, if you do not appear you might be removed from your home and placed in a facility for a period of one year and if you do not cooperate with the authorities at that facility your placement may be extended, after a Court hearing, year by year until your 18th birthday.") Parker Warning: See People v. Parker, 57 N.Y.2d 136 [1982]

III. §205.64. PROCEDURE WHEN A REMANDED CHILD ABSCONDS (PINS) See Uniform Rules for the Family Court

A. When a child was remanded to a facility under FCA §739, and then runs away, the facility the child ran away from must send the Court a written notice stating:

i. Name of the child;

ii. Docket Number of the pending proceeding;

iii. Date the child ran away; and

iv. The efforts made to secure the return of the child.

B. Once the Court gets the above notice the Court Clerk shall:

i. Put the case on the Court's calendar no later than the next Court day for such action as the Court deems appropriate; and

ii. Notify the Petitioner, presentment agency and Attorney for the Child or privately retained counsel of the Court proceeding.

IV. TEST TO BE USED IN ASSESSING APPROPRIATENESS OF DISPOSITION

The test to be employed in assessing the appropriateness of a disposition imposed in a PINS proceeding is not whether the disposition is the least restrictive disposition available, but instead, whether it is one that addresses the best interest of the child.

(See Matter of Tayler BB., 97 A.D.3d 1075 [3rd Dept. 2012]

CHAPTER 7. ACCEPTANCE OF ADMISSION IN PINS PROCEEDING, ARTICLE 7 OF THE FAMILY COURT ACT

[NOTE: A new §743 of the Family Court Act (L. 2015, c. 499) was added effective February 18, 2016, requiring the allocution below. While this has been a standard best practice it is now a legal requirement.]

(SCRIPT)

Before you make an admission here today, I want to further explain your rights to you.

YOU HAVE THE RIGHT TO BE REPRESENTED BY AN ATTORNEY.

Attorney (name) has been assigned to represent you. Does he/she represent you in this

matter?

Have you had enough time to talk with your lawyer about the charges brought against you and your decision to make an admission in this matter?

I note for the record that your mother/father/guardian (name the individual) is here in Court with you today. Have you had enough time to consult with her/him/them about your decision to make an admission in this matter?

Mr./Ms. (name) have you had enough time to speak with both your son/daughter and his/her attorney about the decision to make an admission in this matter?

YOU DO NOT HAVE TO MAKE AN ADMISSION HERE TODAY.

You are entitled to a fact-finding hearing which is (like a trial).

At a fact-finding hearing, it would be the Petitioner's obligation to prove the charges against you, BEYOND A REASONABLE DOUBT. (A Violation of Probation Petition is proven by a preponderance of the evidence.)

To do that they would have to convince me of your guilt by calling witnesses and/or producing evidence.

Through your attorney you could cross-examine, that is (challenge) their witness' testimony, or challenge any evidence they sought to introduce against you.

You could also present witnesses or evidence of your own.

You would not have to testify or say anything at all during these proceedings because you have an **ABSOLUTE RIGHT TO REMAIN SILENT**.

Do you understand that if you choose to make an admission, that is tell the Court what happened, you will be giving up your right to have a fact-finding hearing?

And, do you understand that you will also be giving up your right to remain silent?

Did anyone promise you anything, threaten you or force you to make an admission?

Have you had any medication, drugs or alcohol within the last 24 hours that would affect your ability to understand what is occurring in Court at this time?

PARENT/GUARDIAN - ARE YOU AWARE OF, AND DO YOU UNDERSTAND, THE RIGHTS BEING WAIVED, THAT IS, GIVEN UP, BY YOUR CHILD?

BEFORE YOU MAKE AN ADMISSION, I WOULD LIKE TO EXPLAIN TO YOU WHAT WILL HAPPEN AS A RESULT OF YOUR MAKING AN ADMISSION. The Court will order the Probation Department to meet with you and your parents/guardian and conduct an investigation, including, but not limited to, your history including any prior contact with the Court, your family history, education, physical or mental health and any services you may have had in the past. The report is to assist the Court in determining the disposition of the case. The Court will then determine what disposition (or sentence) you will be given.

The Court will have the following choices at disposition:

1. THE COURT MAY DISCHARGE YOU WITH A WARNING-

2. ADJOURNMENT IN CONTEMPLATION OF DISMISSAL - If you were to receive an ACOD, and stayed out of trouble, and followed the rules of your home and school, and

obeyed the law, at the end of six months, this case could go away as if it never happened? **DO YOU UNDERSTAND WHAT AN ACOD IS?**

(A CONDITIONAL DISCHARGE IS NOT AVAILABLE FOR PINS)

3. SUSPENDED JUDGMENT- The court may suspend the judgment against you for up to **one (1)** year unless the court finds, at the end of that one year, that exceptional circumstances require an additional period of **one (1)** year. Under a suspended judgment you may be required to follow certain terms and conditions set forth by the court. You may be required to pay restitution, perform community service and, where alcohol and/or drugs are involved, complete an alcohol and/or drug awareness program. **DO YOU UNDERSTAND WHAT A SUSPENDED JUDGMENT IS?** [See 22 N.Y.C.R.R. Part 205.66(12)]

4. PROBATION - The Court could also place you on probation, supervised by the (Name of County) County Probation Department, for a period of up to two years. If this were to occur, you could live at home, but you would have to follow the rules of your household, including a curfew, and you would have to attend school and attend all of your classes. You would also have to meet with a probation officer on a regular basis. You might have to participate in counseling, perform community service, submit to random drug and alcohol testing and/or pay restitution. **DO YOU UNDERSTAND WHAT IT WOULD MEAN TO BE PLACED ON PROBATION?**

Finally,

5. **PLACEMENT** - The Court could place you in a non-secure facility, through the (Presentment Agency) (DSS) or (ACS) for an initial period of up to one (1) year. And if you

were placed in a non-secure facility and you did not cooperate with the authorities at the facility, your placement could be extended, after a Court proceeding, year by year until your eighteenth (18th) birthday. **DO YOU UNDERSTAND WHAT IT WOULD MEAN TO BE "PLACED"?**

Do you understand all of the choices that the Court will have when we come back to Court the next time for a disposition of this matter?

Mr./Ms. (names) do you also understand all of the choices the Court will have concerning your child?

(Address the Child) Do you understand that there are no promises as to which one of the choices I have described that I may make in your case?

Mr./Ms. (names) do you also understand that there are no promises as to which choice the Court will make in your son's/daughter's case?

After listening to everything I have just explained to you, do you at this time still wish to make an admission?

Do you need any additional time to speak with either your attorney or your father/mother/guardian?

WHAT IS YOUR DATE OF BIRTH? HOW OLD ARE YOU? DID YOU AT THAT DATE, PLACE AND TIME (get the specifics from the Petition and go through each one being admitted). DO YOU MAKE THIS ADMISSION BECAUSE IT IS TRUE?

(State on the record) Based upon the Respondent's answers to the questions posed during this allocution, I find that the Respondent is of sufficient age, intelligence and maturity to have knowingly, intelligently and voluntarily waived his/her right to remain silent and his/her right to

a hearing in this matter after conferring with his/her attorney (and parent or guardian).

Further, based on the voluntary answers Respondent gave to the questions asked by the County Attorney (or Court) the Court finds that the Respondent has admitted to being a Person in Need of Supervision in full satisfaction of Docket No: _____ on the Petition filed on (date), in that the respondent (here set forth what was found as a result of the admission, e.g. on such and such days he or she was absent from school without a legitimate excuse, or on such and such a day he or she was beyond the control of a parent, etc).

CHAPTER 8. FAMILY OFFENSE PROCEEDING ARTICLE 8 OF THE FAMILY COURT ACT

Upon filing of a Family Offense Petition pursuant to Article 8 a hearing is scheduled , either right away or within 24 hours, and testimony is taken to determine if a Temporary Order of Protection should be issued.

PLEASE NOTE: Section 812 (1) of the Family Court Act has been amended to include identity theft, grand larceny and coercion as crimes for which the Family Courts and the Criminal Courts have concurrent jurisdiction. (See Laws.2013, Chapter 526)

PLEASE ALSO NOTE: Aggravated Harassment in the Second Degree: Penal Law §240.30(1)(a) was found to be unconstitutional in People v. Golb, 23 NY3d 455 [Court of Appeals, 2014] This section of the Penal Law was amended by the Legislature, (L. 2014, c. 188 § 1) effective July 23, 2014, to bring it into line with the above decision .

SUBJECT MATTER JURISDICTION

In what appears to be a case of first impression for an appellate court in this state, the First Department has stated that, "There is no geographic limitation in Family Court Act §812, or elsewhere in the Family Court Act, as to where a family offense is to have occurred in order to confer subject matter jurisdiction upon the Family Court." (Richardson v. Richardson, 80 A.D.3d 32 [1st Dept. 2010])

There is also protection for pets. See FCA §842(i)(1)

I. AT THE EX PARTE HEARING

A. Identify all persons present, or have the court officer do this.

B. Advise the petitioner of the right to retain counsel, the right to an adjournment to consult with counsel, or, if indigent, to have counsel appointed. (FCA §821-a)

C. Advise the petitioner of the right to proceed with the hearing and disposition on the family offense in Family Court; or to have the allegations contained in the petition heard in an appropriate criminal court; or to proceed in both the Family and criminal courts at the same time.

D. Ask the Petitioner for details involving the Family Offense. (see suggested questions at the end of this section)

E. Be sure that the parties and children named in the petition are "members of the same family or household".

i. People related by consanguinity or affinity;

a. Consanguinity*: the relationship of persons of the same blood or origin.

b. Affinity*: the relationship that one spouse has to the blood relatives of the other spouse; relationship by marriage.

*Black's Law Dictionary, Eighth Edition.

ii. people legally married to each other;

iii. people formerly married to each other;

iv. people who have a child in common whether or not those people were ever married or ever lived together;

v. people involved in "intimate relationships".

An "intimate relationship" is a fairly new category that is not very clearly defined at this time. Factors for the Court to consider are:

-People might be in an "intimate relationship" whether or not they are related by blood or marriage;

-People may or may not have lived together;

-The "intimate relationship" may or may not be sexual;

-The relationship may be short or long term;

-Frequency of interaction.

There is no requirement that the relationship ended at a time relatively recent to the filing of the petition. See Willis v. Rhinehart, 76 A.D.3d 641 [2nd Dept. 2010]

The determination as to whether persons are or have been in an ***"intimate relationship"*** is a fact-specific determination which may require a hearing.
(See Leff v. Ryan, 134 A.D.3d 939 [2nd Dept. 2016])

The Legislature added FCA §812 (1) (e) to the Article on Family Offenses to cover:

persons who are not related by consanguinity or affinity

and

who have been in an intimate relationship regardless of whether the lived together**.** See the above section (v.) for the factors to be considered. The Legislature left it to the courts to determine, on a case-by-case basis, what qualifies as an "intimate relationship."

Case law suggests

that the relationship should be direct and not one based on a connection with a third party.

(See Parrella v. Freely, 90 A.D. 3d 664 [2nd Dept. 2011])
(See Johnson v. Carter, 123 A.D. 3d 853 [2nd Dept. 2014])
(See Cambre v. Kirton, 130 A.D.3d 926 [2nd Dept. 2015])

Case law also suggests

that, based on the specific factors of the case cited below, a mother's boyfriend, who dated the mother for over three years, spent substantial time visiting with the mother and child, and exercised parental authority over the child, brought into existence a "quasi-step-parent-step-child relationship.
(See Jose M v. Angel V, 99 A.D. 3d 243 [2nd Dept. 2012])

NOTE: A casual acquaintance or ordinary fraternization between people in a business or social context is not an "intimate relationship".

vi. The Court may, upon motion, extend the order of protection for a reasonable period of time **upon a showing of good cause** or on consent of the parties. (See FCA §842, emphasis added)
Malloy v. Malloy, 2014-07966 [2nd Dept. 2016]

F. Ask the Petitioner what she/he would like the Court to do.

G. Ask the Petitioner if there is anything else they would like to include in the Temporary Order of Protection. (For instance, the removal of firearms or the protection of pets, the issuance of an order of support [See Section H below].

Transfer to Criminal Court (FCA §813)

At anytime **before** a finding on the Family Offense Petition the Court **may** order that the matter be prosecuted as a criminal offense **BUT ONLY:**

i. with the consent of the Petitioner;

ii. on reasonable notice to the District Attorney;

iii. the District Attorney **SHALL** have an opportunity to be heard on the proposed transfer to criminal court.

At the same time the matter is transferred to Criminal Court, Family Court may issue, or continue, a Temporary Order of Protection which will remain in effect until the Defendant is arraigned in Criminal Court.

REMEMBER, Petitioner has the right to proceed directly, without Court referral, in either Family Court or Criminal Court.

(Please remember that "concurrent jurisdiction" does not mean "identical jurisdiction". (Richardson v. Richardson, 80 A.D.3d 32 [2nd Dept. 2010]))

H. For good cause shown issue a Temporary Order of Protection in favor of the petitioner and, where appropriate, in favor of the petitioner's children or any other children residing in the petitioner's household.

The Court **MAY** order Temporary child support in an amount sufficient to meet the needs of the child, without a showing of immediate or emergency need. FCA §828(4)

Upon making an **ORDER FOR TEMPORARY CHILD SUPPORT** you

MUST

advise the Petitioner of the availability of child support enforcement services (usually through support collection services)

AND

set the matter down for further proceedings under Article 4 (support proceedings).

I. Schedule an initial appearance for Respondent to appear.

ISSUANCE OF WARRANT (FCA §827)

NOTE: If you issue a warrant for the arrest of the Respondent under Article 8, and direct that the Respondent post bail or be committed to jail, if the Respondent fails to post bail or is committed

YOU MUST

Schedule a hearing without reasonable delay

but in no event later than one hundred and twenty hours (5 days) after the arrest or one hundred and forty four hours (6 days) if a Saturday, Sunday or legal holiday occurs during custody.

The hearing is to determine, upon MATERIAL and RELEVANT evidence, whether there is sufficient cause to keep the Respondent in custody. If sufficient cause does not exist, or no hearing was held, then the Respondent must be released in his or her own recognizance. See FCA §821-a(4)

The Court may issue a warrant for the arrest of the Respondent, at the time the Petition is first presented to the Court, when it appears that:

1. The Summons on the Family Offense cannot be served;

2. The Respondent has failed to obey the summons;

3. The Respondent is likely to leave the jurisdiction of the Court;

4. The summons, in the Court's opinion, would be ineffectual;

5. The safety of the Petitioner or child is endangered;

6. Aggravating circumstances exist which require the immediate arrest of the Respondent.

   Aggravating circumstances mean:

   i. Physical injury or serious physical injury to Petitioner caused by Respondent;

   ii. The use of a dangerous instrument against the Petitioner by the Respondent;

   iii. A history of repeated violations of prior Orders of Protection by Respondent;

   iv. Prior conviction of Respondent for crimes against Petitioner;

   v. Exposure of any family or household member to physical injury by Respondent;

   vi. Similar incidents, behaviors or occurrences which, to the Court, constitute an immediate or on-going danger to the Petitioner or any member of Petitioner's family or household.

The **warrant expires 90 days from date of issue**, but may be renewed, from time

to time, by the Clerk of the Court.

II. INITIAL APPEARANCE OF RESPONDENT (FCA §821-a(3))
Preliminary Procedure

(NOTE: No statement made during a preliminary conference may be admitted into evidence at a fact-finding hearing under the Family Court Act, or in a criminal court, at anytime prior to conviction. See FCA § 824)

A. Identify all persons present, or have the court officer do this.

B. Advise parties of their right to retain counsel, the right to an adjournment to consult with counsel, or, if indigent, to have counsel appointed.

C. Advise the Petitioner that she/he may proceed in Family Court or Criminal Court, or both Family Court and Criminal Court at the same time.

D. Advise Respondent of the allegations contained in the petition before the court.

E. Provide Respondent with a copy of the petition and the Court may:

1. If Respondent is in custody, order the release of Respondent on his or her own recognizance pending further appearances;

2. Direct Respondent post bail in a manner authorized by FCA 155-a in an amount set by the court; or

3. Issue a commitment order directing that Respondent be remanded to the custody of the sheriff or other appropriate law enforcement official until such time as bail is posted as required by the court.

4. If you set bail and remand the Respondent to custody, and Respondent fails to post bail, you

MUST

hold a hearing without unreasonable delay,

BUT IN NO EVENT

later than five (5) days (120 hours) or six (6) days (144 hours) if a Saturday or Sunday or legal holiday occurs during custody, to determine, upon MATERIAL and RELEVANT evidence, whether sufficient cause exists to keep the Respondent in custody. (See FCA §821-a (4)).

F. **IN MOST CASES** you simply confirm that the Respondent got the Temporary Order of Protection, that the terms of the terms of the Temporary Order of Protection are understood and set the matter down for trial.

G. Inquire as to the existence of any other orders of protection involving the parties.

YOU MAY ALSO

H. **PROVIDE FOR CHILD SUPPORT:** You **MAY** make an order for temporary child support. But, if you do so, you **MUST** advise the petitioner of child support enforcement services. [See FCA Section 828 (4)]

I. Protect animals in the household.

J. Order the immediate surrender of weapons.

BY ADMINISTRATIVE ORDER SIGNED BY CHIEF ADMINISTRATIVE JUDGE A. GAIL PRUNDENTI DATED DECEMBER 26, 2013 YOU MAY ALSO:

K. Award custody and set terms and conditions for that custodial arrangement, or permit an individual to visit with the children pursuant to a court order or a separation agreement or some other written agreement.

L. Permit an individual to enter the residence at a specific time, accompanied by a law enforcement agency, to remove personal belongings not at issue in litigation.

M. Order the prompt return of identification documents (e.g. license, social security card, insurance cards, etc.) and pay for or provide access to health or medical insurance for care and treatment arising from the incident or incidents forming the basis of the temporary order.

N. Order a party to pay counsel fees.

(If ordering payment of attorney's fees consider requiring the attorney requesting counsel fees to provide the appropriate attorney's affidavit concerning the services rendered along with a detailed statement for services rendered, on notice to the Respondent and the Respondent's attorney, if represented.)

O. Order a party to participate in a batterer's education program designed to help end violent behavior (and pay associated costs).

P. Order an individual to refrain from acts that create an unreasonable risk to the health, safety or welfare of children, family or household members.

Q. Pay the petitioner restitution up to $10,000.

PRACTICE TIP

(If you are considering ordering restitution you should only do so after a hearing.)

III. HEARING ON PETITION (FCA §832)

A. To determine whether the allegations in the petition are supported by a **FAIR PREPONDERANCE OF THE EVIDENCE**.

B. After completion of Fact-Finding, the dispositional hearing may begin immediately, after the required findings are made on the record.

A NOTE OF CAUTION:

FCA§ 812 notes that, "For the purposes of this article,'disorderly conduct' includes disorderly conduct not in a public place."

The Court of Appeals, in People v. Baker, 20 N.Y.3d 354 (2013) noted that, "Critical to a charge of disorderly conduct under Penal Law §240.20(3), is the presence of an intent to cause **public** harm, which requires a finding that defendant's disruptive statements and behavior were of a **public rather than an individual dimension**." (Emphasis added)

Each Appellate Division has interpreted the language of §812 as requiring that the petitioner prove, by a preponderance of the evidence, that the respondent intended to cause, or created a risk of causing, a public inconvenience, annoyance or alarm.

(See Matter of Janice M., 96 A.D.3d 482, [1st Dept. 2012])
(See Cassie v Cassie, 109 A.D.3d 337, [2nd Dept. 2013])
(See Matter of Sharon D., 130 A.D.3d 1179, [3rd Dept. 2015])
(See Matter of Christy Brazie, 99 A.D.3d 1258, [4th Dept. 2012])

The Second Department, in Cassie v Cassie, supra, noted, "The family offense of harassment in the second degree serves to protect individuals from annoying or alarming behavior that is confined to the individual disputants."

IV. ORDERS OF DISPOSITION (FCA §841)

A. At the Conclusion of a dispositional hearing the Court may enter an Order:

1. Dismissing the Petition.

2. Suspending judgment for NOT more than six (6) months.

3. Placing Respondent on Probation for not more than one (1) year (See FCA §841©.

4. Making an Order of Protection.

5. Directing Restitution in an amount not to exceed $10,000.

V. ORDER OF PROTECTION UPON DISPOSITION (FCA §842) MAY INCLUDE:

A. Reasonable conditions of behavior for not more than two (2) years,

OR

for a period not in excess of five (5) years upon a finding by the court, on the record, of aggravating circumstances (See FCA §827),

OR

that the conduct alleged in the petition is a violation of a valid order of protection.

B. Stay away from individuals and places.
C. Refrain from certain behaviors.

D. Pay counsel fees and disbursements.

E. Require counseling.

F. Provide for medical expenses incurred as a result of the incident or incidents upon which the Order is based.

G. **YOU MUST**: Provide copies of the Order of Protection to state or local correctional or jail facilities where respondents are or will be detained. If Respondents are on, or will be on, probation or parole, provide copies of the Order of Protection to the probation Department or Division of Parole. (See L. 2008, c. 56, Part D).

VI. SURRENDER OF FIREARMS AND LICENSES (FCA §842-A)

VII. VIOLATION OF COURT ORDER (FCA §846-a)

A. If, after a hearing, the court finds that by ***competent proof*** that the respondent has willfully failed to obey a lawful order issued under Article 8

("Competent proof", depends on whether the contempt is civil or

"Criminal and civil contempt have different levels of proof as 'criminal contempt must be proven beyond a reasonable doubt', whereas 'civil contempt...must be proven by clear and convincing evidence.'"
(See Stuart LL., v Aimee KK., 123 A.D. 3d 218 [3rd Dept. 2014])

THE COURT MAY:

1. modify the existing order to add reasonable conditions of behavior to the existing order of protection;

2. make a new order of protection under FCA Section 842;

3. order forfeiture of bail in a manner consistent with Article 540 of the Criminal Procedure Law;

4. order respondent to pay the reasonable and necessary attorney's

fees in connection with the violation petition where the court finds that the violation was willful; and

5. commit respondent to jail for a term not to exceed six months, which commitment may be served on certain specified days or parts of days.

PRACTICE TIP

If the penalty for willful violation of an order of protection is incarceration for a definite term, or any part of a term, consider finding that a willful violation of the order of protection has been committed **BEYOND A REASONABLE DOUBT.**

While the Appellate Divisions have been divided in their opinions concerning the standard of proof necessary when committing a respondent to jail for a willful violation of a court's order (See Matter of Stuart LL v. Aimee KK, 123 A.D.3d 218 [3rd Dept. 2014]), it may be best to keep in mind,

AS A GENERAL PRINCIPLE,

that the greater the restriction on a person's liberty, the higher the level of proof required to impose that restriction.

(See Rubackin v. Rubackin, 62 A.D.3d 11 [2nd Dept. 2009])

In the Matter of Stuart LL, the Third Department said, "Where, as here, a person who has violated an order of protection is incarcerated as a punitive remedy for a definite period - with no avenue to shorten the term by acts that extinguish the contempt - then that aspect of the Family Ct Act article 8 proceeding 'is one involving criminal contempt [and] [t]he standard of proof that must be met to establish that the individual willfully violated the court's order is beyond a reasonable doubt'" (Quoting from the Rubackin case above noted.)

For an excellent discussion of the differences between civil and criminal contempt see Pamela R. v. James N., 25 Misc 3d 670 [Albany County Family Court: Judge W. Dennis Duggan]

In a nutshell, as noted in Rubackin and Stuart, the best rule of thumb for distinguishing between civil and criminal contempts is as follows: if the

respondent "holds the keys to the jail cell in his hands," then it is a civil contempt.

CONSECUTIVE TERMS OF IMPRISONMENT

The Court of Appeals in Matter of Emma Walker v. Fred Walker, 86 N.Y. 2nd 624 (1995) held,

"...that the Family Court is not generally precluded from imposing, in the exercise of prudent and appropriate discretion, a maximum six-month jail commitment for each separate and distinct violation of an order of protection, to be served consecutively."

APPEAL OF AN ORDER OF PROTECTION

The Court of Appeals in the Matter of Veronica P. v. Radcliff A. (decided 2/12/15) concluded that an appeal from a contested order of protection issued by Family Court, based upon a finding that the subject individual has committed a family offense, is not mooted by the expiration of the order of protection. The Court noted that, "...even where the resolution of an appeal may not immediately relieve a party from a currently ongoing court-ordered penalty or obligation to pay a judgment, *the appeal is not moot if an appellate decision will eliminate readily ascertainable and legally significant enduring consequences that befall a party as a result of the order which the party seeks to appeal." (*Emphasis added)

CHAPTER 9. FAMILY OFFENSE PETITION
SUGGESTED QUESTIONS FOR A PROTECTIVE ORDER HEARING*

The questions below are to cover each area necessary for determining whether to enter a permanent or temporary Order of Protection. Although the questions are set out in logical order, to assure that all areas are covered, they may be asked in any order that makes sense in a particular situation.

All questions should be phrased in language that a litigant under stress would be able to understand. Stay away from words like "incidents", "occurred", "discipline" and "employed". Avoid the use of legal terms such as "pending" and "spouse" when a common term is available. Do not ask leading questions that call for legal conclusions such as "harass" and "threaten".

When trying to determine what is being alleged, keep in mind this rhyme:

I have six honest serving friends, they taught me all I knew. Their names are "what", and "why" and "where", and "how" and "when" and "who".

JURISDICTION

1. Do you and the Respondent have any other Court cases right now? In any Court?

2. Have you ever asked for an Order of Protection against the Respondent before now? What happened?

3. Has the Respondent ever asked for an Order of Protection against you? What happened?

4. Has anyone else ever asked for an Order of Protection against you?

5. Do you know if anyone else has ever asked for an Order of Protection against the Respondent?

RELATIONSHIP WITH RESPONDENT

1. Who do you want me to protect you from?

2. How are you connected to him (her)? [If the answer does not tell enough, suggest "your husband/", "wife?", "boyfriend?", "sister?", "intimate relationship?", etc.; do not use the term "spouse"]

ELEMENTS OF THE OFFENSE

1. Tell me what happened.

2. Why did you come to Court today? (This is an important question, but needs to be asked only if what is described is a course of conduct, and it is not obvious.)

3. Has he (she) ever done anything like this before? Were the children present?
4. When was the first time he (she) did something like this? What was it? Were the children present?

5. What is the worst thing he (she) ever did to you? When was that? Were the

children present?

6. Did you have to go to the hospital, or see a doctor , after that? What about the children? Were they injured?

7. Did he (she) use a gun or a knife, or anything else dangerous?

ADDITIONAL INFORMATION ABOUT THE RESPONDENT

1. Does he (she) have a job? What kind of a job? Where? Rate of pay?

2. How does he(she) treat the child(ren)?

3. Does he (she) see any doctors or therapists for mental problems?

4. Does he (she) see anyone about drug or alcohol problems?

5. Has he (she) ever had a problem with drugs or alcohol?

6. Was he (she) using drugs or alcohol when this happened?

7. Do you have any pets? Has he (she) ever tried to hurt the pet?

RELIEF REQUESTED

1. Do you have a job? (Alerts you to include workplace in the OP)

2. What can we do that would help you the most? (Allows order to be fashioned to fit the problem)

ADDRESS CONFIDENTIALITY

1. Does he (she) know where you live?

2. Does he (she) know where you work?
3. Would you feel safer if he (she) did not know your address?

*The above suggested questions were adopted (and subsequently edited) from The Family Violence Task Force.

CHAPTER 10. ARTICLE TEN OF THE FAMILY COURT ACT FCA §1017 PLACEMENT OF CHILDREN

FCA §1012 DEFINITIONS Amendment (L. 2015, c. 567, effective 6/18/16):

(1) "Parent" means a person who is recognized under the laws of the state of New York to be the child's legal parent.

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

(n) "Suitable person" means any person who plays or has played a significant positive role in the child's life or in the life of the child's family.

PRACTICE TIP: Keep in mind that Domestic Relations Law § 74 contains provisions for school attendance and health care coverage for children who are in the custody of a person, other than a parent, as long as that person has a lawful order of custody or guardianship.

PLEASE NOTE: Family Court Act §1017 has been amended effective June 18, 2016. (See L. 2015, c. 567)

A. FCA §1017

1. Authorizes children to be placed in the temporary custody of relatives or other suitable persons during the pendency of the proceeding.

2. Requires that those persons with whom the child is placed consent to the jurisdiction of the court.

3. Authorizes the court to issue a Temporary Order of Protection.

4. Authorizes the court to place the relative, or suitable persons, under the supervision of the local social services district or authorized agency during the pendency of the child protective proceedings.

B. When the court determines that a child must be removed from his/her home - (See FCA §1017(1)) the court

SHALL:

1. Direct the local commissioner of social services to locate any non-respondent parent of the child and inform him or her, in writing, of the proceedings and that he or she may seek temporary release of the child under Article 10 or Article 6.

A "non-respondent parent" per FCA §1017(1) shall include:

i. a person entitled to notice of the proceeding and the right to

ii. a non-custodial parent entitled to notice and the right to enforce

OR

Locate any relatives of the child including the child's grandparents.

OR

Locate any relative, identified by a child over 5 years old, as a relative who played a significant positive roll in the child's life.

2. Inform these people, in writing, of the proceedings and
3. Inform the relatives or suitable persons of the proceedings and that they may become foster parents, or seek to provide free care for the child under Article 10, or seek custody or guardianship of the child under Article 6.

4. DSS must record the results of their investigation and shall report the results to the court, the parties and the attorney for the child.

5. The court shall also direct the local commissioner of social services to conduct an inve

ANY PERSON

i. who is not recognized to be the child's legal parent and,

ii. does not have the rights of a legal parent but who

a, has filed with the putative father register an

b. has a pending paternity petition or;

c. has been identified as a parent of the child by the child's

iii. The local commissioner of social services must record the results of this investigation and shall report the results of its investigation to the court, the parties and the attorney for the child.

6. After reviewing the DSS report concerning the non-respondent parent or suitable relatives the

COURT SHALL DETERMINE:

i. Whether there is a suitable non-respondent parent, other relative or suitable person with whom the child may reside,

AND

ii. if the person is a relative, does that relative want to be a foster parent and get paid as such or is the relative willing to provide free care to the child during the pendency of any orders under the Article 10 proceedings.

IF

iii. The Court determines that the child may appropriately reside with a suitable non-respondent parent, other relative or other suitable person

THEN

iv. The court must, after a review of the statewide registry of orders of protection, child protective proceedings, active Family Court warrants and the sex offender registry:

EITHER

v grant a temporary order of custody or guardianship to the non-respondent parent, relative or other suitable person pursuant to a petition filed under Article 6 , pending further order of the court,

OR

vi. or at disposition of the proceedings grant a final order of custody or guardianship to the non-respondent parent, relative or other suitable person pursuant to Article 6 and FCA §1055-b.

OR

vii. The court may:

temporarily release the child directly to the non-respondent parent,

OR

viii. temporarily place the child with a relative or suitable person under Article 10 during the pendency of the proceedings or until further order of the court, which ever is earlier, and conduct such investigations as the Court deems necessary.

OR

ix. Remand or place the child with the local commissioner of social services and direct the commissioner to have the child reside with the relative or suitable person,

AND

x. within twenty-four (24) hours, direct the commissioner to investigate the house of the relative or other suitable person.

7. If the home of the non-respondent parent, relative or suitable person is found to be unqualified the local commissioner shall report such fact and the reasons the home is unqualified to the court, the parties and the attorney for the child, forthwith.

8. The court

MAY NOT

i. issue an order temporarily releasing a child to a non-respondent parent or

UNLESS

ii. these parties submit to the jurisdiction of the court concerning the child.

9. The order

SHALL

set forth the terms and conditions applicable to the

i. person or persons,

ii. the child protective agency,

iii. the social services official, and

iv. duly authorized agency with respect to the child.

10. The order

MAY

include, but not be limited to,

i. a direction that the person or persons caring for the child cooperate in making the child available for court ordered visitation with

ii. provide for appointments with and visits by the child protective agency, including visits in the home and in-person contact with the child protective agency, social services official or other duly authorized agency,

iii. and make arrangements for appointments with the child's attorney, clinician or other individual or program providing services to the

11. The court may also issue a temporary order of protection under FCA §1022(f);

§1023 or §1029

AND

an order directing that services be provided pursuant to FCA §1015-a.

PRACTICE TIP

If you place the child under Article 10 you **MUST**, on the date of placement, scheduled a permanency hearing not more than eight (8) months from the first date of placement, and then EVERY six (6) months thereafter while the child remains in placement under Article 10 [See Article 10-A: Permanency Hearings for Children Placed Out of their Homes, FCA §1086 et seq.]

AND

12. the local commissioner of social services should approve such relative or other suitable person as a foster parent, if qualified.

IF

the Court determines that a suitable non-respondent parent or other relative cannot be found,

THEN

Remand or place the child with a suitable person per either FCA §§1027(b), 1055(a) or 1055-b

OR

Remand or place the child with the local commissioner of social services pursuant to the above sections.

CHAPTER 11. ARTICLE 10 REMOVAL/PLACEMENT CHECKLIST

The checklist applies to **§§ 1021, 1022, 1024** and **1027** proceedings where removal of a child is sought,

AND

§1028 proceedings where return of the child is sought.

(**NOTE:** Every §1027 hearing, which is the initial hearing on any neglect or abuse case, requires the Court to review the status of the child--was the child removed?, is the child to remain in the home during the pendency of the proceeding?, is the child to be placed with a non-respondent parent, fit and willing relative or other suitable person?, is there a need for an Order of Protection?, are services required?, etc.) See Nicholson v. Scoppetta, 3 N.Y.3d 357 (2004)

___ Make specific findings that parents/persons legally responsible either were given, or were not given, notice of the proceedings before the Court
-If no notice given, must state why;

___ Make findings that the parents/persons legally responsible either were present, or were not present, at the proceedings before the Court;

___ Make findings regarding whether the child appears to suffer from neglect or abuse;

___ Make findings whether removal, or continued removal, is necessary to avoid immediate danger to the child;

___ Make findings **why** removal or continued removal is necessary to avoid immediate danger to the child;

___ Make findings why continuation in the home is contrary to the child's best interest;

___ Make findings with regard to what reasonable efforts were made **prior** to the removal, in order to avoid the need for the removal;

If no reasonable efforts were made, you must state why the efforts were not made, *e.g.*, sex abuse or other heinous allegations, or prior findings of the Court such as an Order of Supervision or ACOD with terms and conditions already in place;

___ Make findings that imminent risk not able to be eliminated by the issuance of a Temporary Order of Protection;

___ Make findings that no suitable relatives or other suitable persons are known to DSS who

are both suitable and willing to take custody of the child;

___ Direct the local commissioner of social services or ACS to conduct a search for relatives who are suitable and willing;

___ Set permanency hearing date within eight (8) months from date of initial removal (unless the child has already been in care which requires permanency hearings every six (6) months after the initial permanency hearing).

NOTE: If any of the above findings cannot be made based on the record before the Court, removal may not be warranted. These findings are also aimed at ensuring that State and Federal funding streams are not cut off.

CHAPTER 12. § 1022 REMOVAL OF CHILD BEFORE THE FILING OF A PETITION

I. FAMILY COURT ACT § 1022 - TEMPORARY REMOVAL -

The Court may order the temporary removal of the child before the filing of a petition where the parent, or other person legally responsible for the child's care, is:

(1.) Absent

OR

a) was asked and refused to consent to temporary removal;

AND

b) the parent was informed of an intent by the removing agency to apply for an order under FCA §1022;

AND

c) the parent was informed of the information required by FCA §1023.

(2.) If the parent is present:

a) inform the parent of the right to be represented by counsel, including information on obtaining counsel if indigent;

AND

b) inform the parent that the child **appears** to suffer from abuse or neglect by his parent or person legally responsible for the care of the child, and;

THAT

c) the immediate removal of the child is necessary to avoid imminent danger to child's life or health;

AND

d) inform the parent that there is not enough time to file a petition and hold a hearing under FCA §1027.

II. FAMILY COURT ACT §1022 (a)(i)(C)(ii) - TIMING

When a child protective agency applies for immediate removal, schedule the case for that same day and continue the case on successive, subsequent court days until a decision is made by the Court on removal.

III. COURT DETERMINATION REGARDING REMOVAL FAMILY COURT ACT § 1022(a)(iii)

In determining whether removal of a child is necessary because of imminent risk to the child the Court

SHALL

Consider and determine in its order:

a) whether continuation in the child's home would be contrary to the child's best interests - make specific findings of fact as to why the child cannot stay at home;

b) if an Order of Protection could eliminate the risk to the child - if an Order of Protection would not eliminate the risk, make sure the local commissioner of social services or ACS states, on the record, why it would not help. (See FCA §1029 for Temporary Order of Protection.)

AND (where appropriate)

c) whether reasonable efforts were made - prior to the date of the application for temporary removal - to prevent or eliminate the need for removal from the child's home - make specific findings of fact on what those reasonable efforts were.

d) The local commissioner of social services **MUST** advise the Court what action it took to avoid removal, or, if no actions were taken under the circumstances, why that lack of action was appropriate - Make specific Findings of Fact.

Family Court Act § 1022(a)(v) The Court shall also determine:

- whether imminent risk to child may be eliminated by the issuance of a Temporary Order of Protection per FCA §1029 - directing removal of a person or persons from child's home.
(Note: If the temporary order of protection is issued before the filing of a petition, and a petition is not filed under Article 10 within **ten** (10) days from the granting of the order, the order must be vacated.)

IV. WHEN TEMPORARY REMOVAL OF CHILD IS ORDERED

THE COURT MUST

a) state its findings with respect to the necessity of such removal, i.e. why an Order of Protection is insufficient;

b) what specific circumstances exist that place the child's health or life in imminent danger;

c) and what efforts were made, prior to removal, to avoid the removal - these efforts must be child and case specific;

d) whether the Respondent was present at hearing;

e) if the Respondent was not present, what notice was given to Respondent of the hearing;

f) order a date certain for the first permanency hearing in eight (8) months from date the child was first removed. See FCA §1089(a)(1)

Family Court Act §1022(b) **COURT ORDER MUST SPECIFY:**

g) the facility to which child is brought;

h) that, except for good cause shown, the Petition for neglect or abuse shall be filed within three (3) court days of the Order of Removal;

i) the Court shall hold a §1027 hearing **THE NEXT COURT DAY** after the Petition is filed;

j) see Family Court Act §1022© for emergency medical procedures and requirements for a hearing.

This Court order shall be issued immediately, but in no event later than the next court day after the child is removed.

V. THE PERSON REMOVING THE CHILD SHALL (Family Court Act §1022(d)**)**

a) give written notice, by personal service, to parent or person legally responsible for care of the child, of the right to apply to Family Court for return of the child per FCA §1028;

b) the name and telephone number of the child care agency where the child will be taken;

c) if available, the telephone number of person to be contacted for visits with the child;

d) information required under FCA §1023.

THE ABOVE NOTICE SHALL BE:

e) personally served on the parent, the non-respondent parent or the person legally responsible for the child;

f) if such person is not present at the child's residence at the time of removal, a copy of the notice shall be affixed to the door and a copy mailed to the person at last known place of residence within twenty-four (24) hours of removal.

VI. PRELIMINARY ORDERS; NOTICE AND APPOINTMENT OF COUNSEL FCA §1022-a:

At a hearing held pursuant to FCA §1022 of this part, at which the respondent is present, the court shall advise the respondent, and any non-respondent parent who is present, of the allegations in the application and

SHALL

appoint counsel for each in accordance with FCA §262, unless waived.

PLEASE NOTE: Family Court Act §1022-a has been amended effective June 18, 2016. See L. 2015, c. 567.

CHAPTER 13. REMOVAL OF CHILDREN WITHOUT COURT ORDER FAMILY COURT ACT 1027 HEARING

Where a child is removed without a Court order, or, where there was a §1022 hearing where respondent was either not present, or not represented by counsel,

THE COURT MUST

- hold a hearing, not later than **three (3)** court days after the filing of a petition, to determine whether a child's interest needs protection pending a final Order of Disposition; including whether the child should be returned home pending final disposition of the case. The hearing

MUST CONTINUE ON SUCCESSIVE DAYS,

until the Court makes a decision.

Provide notice of the hearing per FCA §1023.

Upon the hearing, if the Court finds that removal is necessary to avoid imminent risk to the child's life or health

THE COURT MAY

remove or continue the removal of the child and remand the child to a place approved by the local commissioner of social services; (See FCA §1017.)

OR

- for good cause shown, release the child to his or her parent or other person legally responsible for his or her care pending a final order of disposition in accord with FCA §1017(a)(ii)

> **PLEASE NOTE**: Family Court Act §1027 has been amended effective June 18, 2016. See L. 2015, c. 567.

THE COURT SHALL

- set forth the Court's specific findings-of-fact which support removal. The court must do more than identify the existence of a risk of serious harm.
-***The court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. The court must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests. (See Nicholson v. Scoppetta, 3 N.Y. 3d 357 [2004])***

Set forth whether Respondent was present at the hearing and what notice Respondent was given. (FCA §1036).

- Set forth whether removal occurred

per FCA §1021 (Temporary Removal with Consent);

per §1022 (Temporary Removal before Filing a Petition); or

per §1024 (Emergency Removal without Court Order).

- Set forth why it would **NOT** be in the child's best interest to stay at home.

- Also state what, if any, reasonable efforts were made by the local commissioner of social services to avoid or eliminate removal of the child from the home.

- State whether an Order of Protection would eliminate the need for removal, and if not, why not?

- Order the date certain for the first permanency hearing within eight (8) months of the date the child was first removed.

COURT TO DETERMINE

- Whether continuation in child's home is contrary to the child's best interest - you need specific findings-of-fact to support the determination;

AND

- whether reasonable efforts were made to prevent or eliminate need for removal of the child - you need specifics;

- if reasonable efforts have been made to make it possible for child to return home;

- if the Respondent is present in Court, and not previously served with the Summons and Petition, serve the Respondent;

- if Respondent is not present in Court - serve per FCA §1036.

COURT NEEDS TO:

a) inquire about child's health (mental, physical and dental health);

b) arrange for services for the family per FCA §1015-a;

c) see if a Temporary Order of Protection would help avoid the need to remove the child.

THE COURT SHALL

in all cases involving Abuse

AND MAY

in cases involving Neglect

a) Order an exam of child per FCA §251 (medical exam);

b) Doctor to forward results and **color photos** of exam to Court;

c) Make sure everyone has the following two (2) dates:

-the next Court date, and

-the "date certain" for the FIRST PERMANENCY HEARING which must be scheduled within eight (8) months from the date the child was first removed. (FCA §1089.)

Section 1027-a - Placement of Siblings

- When a child is removed by Social Services the Social Services official must place the child with the other siblings or half-siblings who have been removed. This placement is presumptively in the child's best interests;

UNLESS

- such placement is contrary to the child's best interests.

- If placement with the other siblings or half-siblings is not immediately available, it must be arranged for within thirty (30) days of removal.

RETURN OF CHILD TEMPORARILY REMOVED
FAMILY COURT ACT §1028

Upon the application of a parent, or other person legally responsible for the care of a child, the Court

MUST

hold a hearing to determine if the child should be returned home.

The hearing

MUST

take place <u>within three (3) court days of the application</u> and

<u>SHALL NOT</u>

be adjourned;

UNLESS

there has already been a hearing pursuant to §1027 or §1022 of the Family Court Act at which the parent or other person legally responsible for the child was present **and** had the opportunity to be represented by counsel;

OR

Upon good cause shown.

Upon the hearing, the Court

SHALL

grant the application for the return of the child

UNLESS

the Court finds that the return presents an imminent risk to the child's life or health - See Family Court Act §1028(a) and (b). ***(See Nicholson v. Scoppetta, 3 N.Y. 3d 357 [2004])***

In determining whether temporary removal of the child is necessary the Court

SHALL

consider and determine in its Order:

whether continuation in the child's home would be contrary to the best interests of the child - be specific in your findings-of-fact;

AND
(where appropriate)

whether reasonable efforts were made - (**PRIOR TO THE DATE OF THE HEARING**)- to prevent or eliminate the need for the removal of the child.

AND

(where appropriate)

Whether reasonable efforts were made - (**AFTER REMOVAL OF THE CHILD**) - to make it possible for the child to safely return home - you need to set forth the specifics.

HOWEVER

if the Court determines that reasonable efforts to prevent or eliminate the need for removal were not made, and it was reasonable not to make those efforts, the Court shall include such a finding in its Order - FCA §1028©;

AND

that the lack of such efforts was appropriate under the circumstances,

SHALL

also be included in that determination.

THE COURT MUST

consider and determine whether imminent risk to the child would be eliminated by the issuance of a Temporary Order of Protection pursuant to Family Court Act §1029 directing the removal of a person or persons from the child's residence.

(This §1029 Temporary Order of Protection must be vacated in ten (10) days if a neglect petition not is filed within those ten (10) days.)

If a parent, or other person legally responsible for the care of the child, waives his or her right to a hearing under §1028

THE COURT SHALL

advise such person, at the time he or she waives the right to a hearing, that - regardless of the waiver - that person may make an application for the return of the child under Family Court Act §1028 at any time during the pendency of the proceeding as long as there has been no §1022 or §1027 hearing where the person was represented by counsel.

If the Court determines that reasonable efforts to prevent or eliminate the need for

removal were not made, and that the lack of such efforts was appropriate under the circumstances, (Family Court Act § 1028(d))

THEN THE COURT SHALL

order the child protective agency to provide or arrange for appropriate services or assistance to the child and the child's family as set forth in Family Court Act §115-a or Family Court Act §1022©.

THE COURT MAY

issue a Temporary Order of Protection pursuant to Family Court Act §1029 as an alternative to , or in conjunction with, any other order or disposition authorized under Family Court Act §1028.

SECTION 1028-a
APPLICATION OF A RELATIVE TO BECOME A FOSTER PARENT

If a relative applies to become a foster parent the

COURT SHALL

- hold a hearing to determine whether or not the child should be placed with the relative in **kinship foster care**;

BUT

- hold the hearing ONLY if the relative is related within the third (3^{rd}) degree of consanguinity:
(parents, grandparents, brothers, sisters, great grandparents, aunts, uncles, nephews and nieces) to either parent;

AND

- the child has been temporarily removed under Article 10 of the FCA or placed per §1055 in non-relative foster care;

AND

- the relative is willing to become a foster parent;

AND

- local commissioner of social services has refused to place the child with the relative for reasons other than the relative's failure to qualify as a foster parent;

AND

- the application is brought within six (6) months from the date the relative received notice (per FCA §1017) that the child was being removed from his/her home

AND

-no later than twelve (12) months from the date the child was actually removed.

The determination is based on the best interests of the child.

CHAPTER 14. ABUSE
ARTICLE 10 OF THE FAMILY COURT ACT

PLEASE NOTE: Family Court Act §1017 has been amended effective June 18, 2016. See L. 2015, c. 567.

Family Court Act §1017 has been amended to:

1. Authorize children to be placed in the temporary custody of relatives or other suitable persons during the pendency of the proceeding;

2. Require that those persons consent to the jurisdiction of the Court;

3. Authorize the Court to issue a Temporary Order of Protection;

4. Authorize the Court to place the relative, or suitable person, under the supervision of the local social services district or authorized agency during the pendency of the child protective proceedings.

I. INITIAL APPEARANCE (FCA §1033-b)

A. Identify presence of parties and inform Respondent of Rights and Charges

1. Identify presence of all parties or have the court officer do this.

2. Appoint an Attorney for the Child: FCA §1033-b)1(a). If the child was previously represented, the court must, "to the extent practicable and appropriate" appoint the same attorney. FCA §249(b)

3. Advise the Respondent of allegations in the petition (FCA §1033-b(1)(b).

   Reading of the allegations in the petition may be waived;

   upon the consent of Respondent's attorney,

   AND

   a representation, on the record by counsel, that counsel has explained the allegations to the Respondent

   AND

   that Respondent was provided with a copy of the petition.

   Respondent must acknowledge on the record both receipt of the petition and that the allegations in the petition were explained to him or her by counsel . Id.

   PRACTICE TIP

   (Read the allegations in the petition to the Respondent, whether or not Respondent's counsel has done so. Then there is no question that the Respondent has heard the allegations.)

4. Advise the Respondent of the right to an adjournment to obtain counsel. Id.

5. Advise the Respondent of the right to have the Court assign counsel for an eligible Respondent. FCA §1033-b(1)© and FCA §262.

6. If the child has already been removed from the home, advise the Respondent of the right to a **HEARING PURSUANT TO FCA §1028 FOR RETURN OF THE CHILD AND THAT HEARING MAY BE**

REQUESTED AT ANY TIME DURING THE PROCEEDING. **This recitation cannot be waived.** FCA § 1033-b(1)(d).

7. Ask the child protective agency whether the agency intends to prove, **BY CLEAR AND CONVINCING EVIDENCE**, that the child is severely or repeatedly abused as defined in subdivision 8 of the Social Services Law §384-b. If the agency answers affirmatively, the court must advise the Respondent of the agency's intention.

II. ADJOURNMENT IN CONTEMPLATION OF DISMISSAL - ABUSE

A. Prior to, or at the time of fact-finding, the Court may order an adjournment in contemplation of dismissal (ACD) if all parties, including Petitioner, Respondent and the Attorney for the Child consent to the ACD. The court must then inform the Respondent of the provisions of Family Court Act §1039, as follows:

(READ THE FOLLOWING SCRIPT)

1. An ACD is an adjournment of the proceeding for a period of up to one (1) year with the goal of ultimately dismissing the case against you.

2. You are obligated to follow certain terms and conditions during the period of adjournment

and

those terms and conditions will be read into the record by the attorney for the Petitioner.

or

A copy of the terms and conditions has been provided to both you and your attorney and you acknowledge receipt of a copy of those terms and conditions. Have those terms and conditions been explained to you? Do you understand those terms and conditions?)

3. The terms and conditions shall include a requirement that the child and Respondent be under the supervision of Child Protective Services during the adjournment period.

4. Child Protective Services is required to make a progress report to the

Court, to you and to the Attorney for the Child within ninety (90) days of the Court Order unless dispensed with by the Court.

5. The period of adjournment may be extended by the Court by the agreement of all parties.
6. During the adjournment period, the Petitioner, the Attorney for the Child or the Court may restore the matter to the calendar; that is, bring the matter back to Court. If the case is restored to the calendar, the Court will hold a hearing to determine whether you have substantially complied with the terms and conditions of the Order. If the Court finds that you have failed to substantially comply with the Order, the Court shall:

    a. If you have already admitted to a finding of abuse, proceed to disposition.

    b. If you have not admitted to a finding, schedule a Fact-Finding Hearing within sixty (60) days after the application to restore the matter to the calendar was filed.

7. If the proceeding is not restored to the calendar during the adjournment period, at the end of the adjournment period, the matter is deemed dismissed by the Court.

B. Ask the Respondent if he or she understands what an ACD means and if he or she has discussed it with his or her attorney.

C. Ask counsel for Petitioner to read terms and conditions of ACD into the record.

Or, ask the Respondent if he/she has reviewed the terms and conditions with his/her lawyer and does he/she understand those terms and conditions.

D. Ask all parties if they consent to the ACD.

E. Ask the Attorney for the Child if he/she feels it is in the best interest of the child(ren).

F. If the Respondent consents to an ACD with an admission, the Court must proceed with the admission colloquy set forth in Section III below entitled, “Admission or Consent to a Finding of Abuse by the Respondent.”

III. ADMISSION OR CONSENT TO A FINDING OF ABUSE BY THE RESPONDENT

A. INFORM RESPONDENT OF HIS OR HER RIGHT TO A HEARING INCL

(READ THE FOLLOWING SCRIPT)

1. You have the right to remain silent and you will be giving up that right by making an admission, or by consenting to a finding of abuse without an admission.

2. Petitioner (agency) has the burden of proving the allegations in the petition and can do so by calling witnesses and submitting other evidence to prove the abuse.

3. You have the right to cross-examine the witnesses and challenge the evidence offered against you.

4. By making an admission or consenting to a finding of abuse, (or by consenting to a finding of abuse without making an admission) you give up your right to challenge the evidence and testimony offered against you.

5. By making an admission, or consenting to a finding of abuse,(or by consenting to a finding of abuse without making an admission) you give up your right to offer witnesses and evidence in your own defense.

6. By making an admission, or consenting to a finding of abuse, (or by consenting to a finding of abuse without making an admission) you give up your right to testify.

7. An admission or consent to a finding (or a consent to finding without making admission) has the same legal effect as if there had been a hearing and all the necessary facts were proven.

8. Do you have any questions you would like to ask the court or your attorney before making an admission (or agreeing to a finding of abuse without an admission)?

9. The allegations in the abuse petition deemed to have been proven are as follows: (Read the paragraphs outlining the allegations of abuse.)

A. ESTABLISH THAT RESPONDENT'S ADMISSION IS VOLUNTARY

1. Ask Respondent if anyone used any force or duress to get him or her to make the admission or consent to a finding of abuse without an admission.

2. Ask the respondent if he or she discussed the admission or finding with his or her attorney.

3. Ask the Respondent if he or she is suffering from any mental or physical condition that would affect his/her judgment concerning the proceedings in Court today.

4. Ask the Respondent is he/she has consumed any alcoholic beverages or medication or drugs which would affect his/her judgment concerning the proceedings in Court today.

B. **GIVE STATUTORY WARNINGS PURSUANT TO FCA §1051(F)(I)-(III) BY INFORMING RESPONDENT OF THE FOLLOWING:***

(CONTINUATION OF SCRIPT)

1. The Court will make a dispositional Order which **MAY** include an order placing the child or children in foster care for a period of up to one (1) year, subject to proceedings for review of the placement or extension of the placement.

2. If the child is placed in foster care and you fail to maintain contact with, or you fail to plan for the future of the child, that failure could lead to proceedings for the termination of your parental rights and the possibility of the adoption of your child or children. If your child or children remain in foster care for fifteen (15) of the most recent twenty-two (22) months, the agency may be required by law to file a petition to terminate your parental rights.

3. A report has already been made to the New York State Central Registry of Child Abuse and Maltreatment; and

-It will remain on file until ten (10) years after the eighteenth
(18th) birthday of the youngest child named in the report;

-You will not be able to have the report removed from the registry;

-The existence of the report may be made known to employers who are seeking to screen your application for work in the field of child care, and to child care agencies if you were to apply to become, or you became a foster parent, or if you sought to adopt a child.

***IF THE COURT FAILS TO INFORM THE RESPONDENT OF THE ABOVE STATUTORY WARNINGS, THE ADMISSION MUST BE VACATED BY THE COURT UPON MOTION OF ANY PARTY.**

D. OBTAIN FORMAL WAIVER OF HEARING ON THE RECORD BY RESPONDENT

(CONTINUATION OF SCRIPT)

Ask the Respondent if, after everything the Court has said, and after fully discussing the matter with his or her attorney, he or she wishes to waive his or her right to a hearing and make certain admissions as set forth below.

E. CONDUCT INQUIRY OF RESPONDENT - (ALLOCUTION)

Place the admission on the record: Have Respondent placed under oath and conduct an inquiry of the facts which Respondent is admitting.

IV. FINDINGS BY THE COURT AFTER ADMISSION - ABUSE

A. ABUSE - THE COURT MUST MAKE THE FOLLOWING FINDINGS AFTER ADMISSION:

(READ THE FOLLOWING SCRIPT)

1. The Court finds that Respondent knowingly, intelligently and voluntarily waived his/her right to a hearing.

2. That, based on the admission by the Respondent, and other evidence, the Court finds, by a preponderance of evidence, (clear and convincing evidence if severe or repeated abuse has been alleged) that the allegations in the petition have been proven.

3. That the child(ren) named in the petition is(are) under 18 years of age.

4. That Respondent is the parent or other person legally responsible for the child(ren).

5. That the child(ren) named in the petition is(are) an abused child.

State applicable definition for Abuse under FCA §1012(e)(I) thru (iii):

(e)(I) Respondent inflicted or allowed physical injury to be inflicted upon such child by other than accidental means and such injury caused or created a substantial risk of death or serious or protracted loss or impairment of the function of a bodily organ;

AND/OR

(e)(ii) Respondent created or allowed to be created a substantial risk of physical injury to such child by other than accidental means which was likely to cause death or serious or protracted disfigurement or protracted impairment of the physical or emotional health or protracted loss of impairment of a bodily organ;

AND/OR

(e)(iii) Respondent committed or allowed to be committed a sex offense against such child as defined in the Penal Law.

If (e)(iii) applies, the Court should make a finding that the acts to which the child was subjected would constitute (name the crime) as defined in Section _____ of the Penal Law.

V. FINDING BY THE COURT AFTER A FACT-FINDING HEARING - ABUSE

A. Before a Fact-Finding Hearing commences, the Court must make the following

findings pursuant to FCA § 1041:

1. That the person or persons legally responsible for the child's care (FCA § 1012(g) is present at the hearing and has received a copy of the Petition.

2. If the parent or person legally responsible is not present at the hearing, the Court must make a finding that every reasonable effort has been made to effect service pursuant to FCA §1036 or §1037.

NOTE

In an abuse proceeding a determination that a respondent is a person legally responsible (PLR) for a child's care, as defined by FCA § 1012(g) is, according to the Court of Appeals in Matter of Yolanda D. (88 NY2d 790 [1996]), "...a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case."

Factors to be considered include, but are not limited to:

1. The frequency and nature of the contact between the child and the PLR;

2. The nature and extent of the control exercised by the respondent over the child's environment;

3. The duration of the respondent's contact with the child;

4. The respondent's relationship to the child's parents.

See also Matter of Trenasia J., 25 N.Y. 3d 1001 (Court of Appeals, 2015), in particular Justice Rivera's concerns in her dissent.

B. In a Fact-Finding Hearing:

NOTE

The right of a Respondent parent to be present at every stage of an Article 10 proceeding is not absolute as the proceeding is civil in nature.

Family Court must balance the due process rights of an Article 10 Respondent with the mental and emotional well-being of the child.

The rights of a Respondent may be protected by permitting the child to testify in the courtroom and have that child's testimony viewed by the Respondent, via close-circuit television, in a different room at the courthouse. However, the Respondent's lawyer should be present in the courtroom when the child is testifying to allow for cross-examination after consultation with the Respondent.

See Matter of Elisha M.W., 96 A.D. 3d 863 [2nd Dept. 2012]
See In re Moona C., 107 A.D. 3d 466 [1st Dept. 2013]

ALSO NOTE

(pursuant to an amendment of §651 effective 6/18/16)

Where there is a custody proceeding pending under FCA §651 at the same time the article ten abuse matter or ten-A permanency matter is pending, the court

MAY

jointly hear the custody and visitation petition and the dispositional hearing on the article 10

OR

hear the custody and visitation matter during the permanency hearing

PROVIDED

that in both cases, whether the article six custody matter is pending in conjunction with the article ten abuse matter or the article 10-A permanency matter,

THE COURT MUST

determine the custody and visitation matter in accordance with the provisions of article 6 of the Family Court Act.

1. REBUTTABLE PRESUMPTION OF PARENT CULPABILITY UNDER FCA §1046 (A)(II).

A prima facie case of child abuse or neglect may be established by evidence of an injury to a child which would ordinarily not occur absent an act or omission of Respondents, and that Respondents were the caretakers of the child at the time the injury occurred.

The burden of proving child abuse **ALWAYS** rests with the petitioner.

However, once the petitioner has established a prima facie case, **the burden of going forward shifts to Respondents** to rebut the evidence of parental culpability.

The establishment of a prima facie case does not require the court to find that the parents were culpable;

it merely establishes a rebuttable presumption of parental culpability which the court may or may not accept based upon all the evidence in the record.

(See Matter of Philip M. 82 N.Y. 2d 238 [Court of Appeals, 1993]

2. **FAMILY COURT ACT §1046(A)(VI): STATEMENTS BY CHILD: CORROBORATION**

Prior statements made by a child regarding allegations of abuse or neglect

SHALL BE

admissible in evidence.

HOWEVER

If those statements are uncorroborated they shall not be sufficient to make a fact-finding of abuse or neglect.

ANY

evidence which tends to support the reliability of the child's previous

statements, including, but not limited to, the types of evidence defined in this subdivision shall be sufficient corroboration.

(See Matter of Nicole V., 71 N.Y. 2d 112 [Court of Appeals 1987])

(See Matter of Jada K.E., 96 A.D. 3d 744 [2nd Dept. 2012])

(See also Matter of Olivia C., 97 A.D. 3d 910 [3rd Dept. 2012])Petitioner established that Respondent pleaded guilty to gross sexual misconduct of his biological daughter (from another relationship) in Maine. This qualifies as evidence in the instant case of Olivia's two out-of-court statements in which she details her charges of rape against the Respondent.

(See Matter of Zeeva M., 126 A.D. 3d 799 [2nd Dept. 2015] where the child's out of court disclosures were not sufficiently corroborated.)

(See Matter of Ninoshka M., 125 A.D.3d 567 [1st Dept. 2015] where daughter's out of court statements sufficiently corroborated by respondent's own admission and respondent's brother's testimony.)

(See Ordona v. Campbell, 132 A.D.3d 1246 [4th Dept. 2015])

3. THE TESTIMONY OF THE CHILD SHALL NOT BE NECESSARY TO MAKE A FACT-FINDING OF ABUSE OR NEGLECT.

NOTE: To constitute a business record exception to the hearsay rule, the proponent of the record (for example, the Department of Social Services or the Administration of Children's Services) must first demonstrate that it was within the scope of the entrant's business duty to record the act, transaction or occurrence sought to be admitted.

But this satisfies only half the test.

In addition, each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception.

IT WAS ERROR TO ADMIT INTO EVIDENCE THE ENTIRE CASE FILE AS A BUSINESS RECORD. (An in camera review of the

file may be necessary.)

(See The Matter of Leon RR**,** 48 N.Y. 2d 117 [Court of Appeals, 1979])

4. Determination of **ABUSE** must be based on a **PREPONDERANCE OF THE EVIDENCE** (FCA §1046(b)(I)).

5. A determination of **SEVERE OR REPEATED ABUSE** must be based on **CLEAR AND CONVINCING EVIDENCE**, and the fact-finding order **SHALL** state that the determination is based on clear and convincing evidence. FCA §1046(b)(ii).

Social Services Law §384-b (8) (a) (I) provides that a child can be found to be severely abused as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life.

The Court of Appeals in Matter of Dashawn W., 21 N.Y. 3d 36 [2013]

notes

that its depraved indifference jurisprudence under the Penal Law

has no bearing on

whether a child is severely abused within the meaning of

With regard to Social Services Law §384-b (8) (a) (I)

"circumstances evincing a depraved indifference to human life" refers

to

The risk intentionally or recklessly posed to the child by the ***parent's***
abusive conduct.

That even in severe abuse cases there is a requirement that the presentment agency make

> "...diligent efforts to encourage and strength the parental relationship including efforts to rehabilitate the respondent
>
> **WHEN**
>
> such efforts will not be detrimental to the best interests of
>
> **HOWEVER WHEN**
>
> such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future..."
>
> **AND/OR WHEN**
>
> the court has previously determined, in accordance with the Family Court Act §1039-b (a), that reasonably efforts to return the child to his or her home are no longer required, those efforts may be discontinued.
>
> See also ***aggravated circumstances*** as defined in Family Court Act §1012 (j) along with ***severe or repeated abuse, as determined by clear and convincing evidence,*** as defined in Family Court Act §1051 (e) and Social Services Law §384-b (8).

6. Only competent, material and relevant evidence may be admitted pursuant to FCA §1046(b)(ii) in a fact-finding hearing. (Whereas, in a dispositional hearing, evidence admitted need only be material and relevant. The distinction between the two levels of evidence is that hearsay is not allowed when the evidence must be **competent**, material and relevant whereas, in the dispositional hearing, hearsay evidence may be admitted providing it is material and relevant.

C. Findings of Abuse:

1. Upon making a finding of abuse, the Court must specify the paragraph or paragraphs of subdivision (e) of FCA §1012, which have been established:

(e)(I) Respondent inflicted or allowed physical injury to be inflicted upon such child by other than accidental means and such injury caused or created a substantial risk of death or serious or protracted loss or impairment of the function of bodily organ;

AND/OR

(e)(ii) Respondent created or allowed to be created a substantial risk of physical injury to such child by other than accidental means which was likely to cause death or serous or protracted impairment of the physical or emotional health or protracted loss or impairment of a bodily organ;

AND/OR

(e)(iii) Respondent committed or allowed to be committed a specific sex offense against such child as defined in Article 130 of the Penal Law.

2. If the Court makes an additional finding of severe abuse or repeated abuse by **CLEAR AND CONVINCING EVIDENCE**, the Court must state the grounds for its determination.

VI. DISPOSITION UPON CONSENT - ABUSE

(PLEASE NOTE: Family Court Act §1052 has been amended to allow for an Order of Custody to a relative or other suitable person as a disposition under §1055-b of the Family Court Act.

If you make such an order under Article 6, **no agency involvement or supervision is permitted.** In order to arrive at this disposition the relative or other suitable person must have filed a custody or guardianship petition under Article 6.)

CUSTODY UNDER ARTICLE 6 AS THE DISPOSITION UNDER ARTICLE 10
You may grant Article 6 custody or guardianship, as an Article 10 disposition, if the Court finds that:

1. It is in the child's best interest and will give the child a safe and permanent home.

AND

2. The safety of the child "will not be jeopardized" if the Respondents in the Article 10 proceeding are not under supervision or provided with any services.

OR

3. All parties consent to the custody or guardianship.**)**

OR

4. If after a consolidated Article 6 and Article 10 hearing the Court finds "extraordinary circumstances" exist in the case where a parent fails to consent to the custody or guardianship

AND

5. Granting the Order is in the child's best interest.

DISPOSITION

FCA §1052(b)(I) requires that the court

SHALL

state the grounds for any disposition made under this section.

IF THE COURT PLACES A CHILD PURSUANT TO FCA §1055

YOU MUST

determine whether continuation in the child's home would be contrary to that child's best interests and that;

THAT

reasonable efforts were made, before the dispositional hearing, to prevent or eliminate the need for the child's removal from the home;

AND

if the child was removed from the home before the date of the hearing that the removal was in the child's best interest;

AND

where appropriate, reasonable efforts were made to make it possible to return the child home safely.

IF

you determine that reasonable efforts to prevent or eliminate the need for removal were not made**,** but the lack of effort was reasonable under the circumstances;

THEN

include such a finding in your disposition.

IF

the permanency plan for the child is adoption, guardianship or some other permanent living arrangement, other than reunification with the parents, the court order

SHALL

include a finding that reasonable efforts, including consideration of appropriate in-state or out-of-state placements, are being made to make and finalize such alternative placement.

FCA §1052(b)(i)1 thru 7 lists all the instances where reasonable efforts to prevent or eliminate the need for removal are not required**.**

A. ADDRESS RESPONDENT CONCERNING DISPOSITION

After the County Attorney (or DSS Attorney) has read the proposed plan, including any terms and conditions, into the record inquire of Respondent as to the following:

(READ THE FOLLOWING SCRIPT)

1. Do you understand that you have a right to a hearing and the right to have the Court direct a dispositional plan after a hearing?

2. Based on the proposed plan placed on the record by the county attorney (presentment agency) do you waive (give up) your right to a hearing and consent to the terms and conditions of the plan?

3. Do you agree with the terms and conditions of the plan?

4. Do you understand that if you do not comply with those terms and conditions, the county attorney (presenting agency) has a right to file a petition for the termination of your parental rights and if they prove that you did not comply with those conditions your parental rights could be terminated?

5. Do you have any questions you would like to ask your attorney about the terms and conditions of the plan before the Court orders you to comply with the plan?

B. ADDRESS ATTORNEY FOR THE CHILD

Ask the attorney for the child if he/she believes that the dispositional plan is in the best interests of the child?

C. DISPOSITIONAL ORDER

State on the record that, based on the Findings-of-Fact, the recommendations of the county attorney (presentment agency), the approval of the Attorney for the Child and the consent of the Respondent, the Court will enter a dispositional order in accordance with the terms and conditions placed on the record by the County Attorney (presentment agency).

D. REQUIREMENTS OF ADOPTION AND SAFE FAMILIES ACT (ASFA)

IF THE CHILD IS PLACED OUTSIDE OF THE HOME, ASFA requires the Court to make the following findings:

1. Remaining in the home would be contrary to the best interests and contrary to the welfare of the child - the court must also state a factual basis for this finding.

Reasonable efforts have been made to try to keep the child in the home- the court must state a factual basis for this finding.

AND

2. That reasonable efforts have been made to try to return the child to the home if the child had been placed outside the home under a temporary placement order - the court must also state some factual basis for this finding.

Be sure that a Permanency Planning Hearing has been scheduled within eight (8) months of the first date the child was placed outside the home, and every six (6) months thereafter for as long as the child remains in placement.

E. VISITATION PLAN

Pursuant to ASFA, all Article 10 Orders **MUST:**

1. Have a visitation plan; and

2. A directive from the court that the agency must inform the parents of all service plan review dates, that the parents have a right to attend these service plan reviews, and that the parents may have an advocate present.

The Order must further direct the agency to provide the parent with a copy of the service plan and the Court Order. Visitation must be outlined in the plan and the parent must be allowed to see the child at least once every two weeks unless otherwise agreed. This is the minimum requirement under the regulations. The Court can order as much visitation as it believes is appropriate.

F. NOTICE OF POSSIBLE PETITION TO TERMINATE PARENTAL RIGHTS

The Order **MUST** contain a notice that the agency may be required to file a Petition for Termination of Parental Rights if the child remains in care for fifteen (15) out of the most recent twenty-two (22) months.

VII. WARNING PER FCA §1052© AT DISPOSITION

FCA §1052 © requires the Court to advise Respondents who have been adjudicated to have abused a child as defined in FCA §1012 (e) (I), or has a finding of a felony offense sex offense as defined in

Penal Law §§ 130.25 rape in the third degree, a class E felony;
130.30 rape in the second degree, a class D felony;

130.35 rape in the first degree, a class B felony;
130.40 criminal sexual act in the third degree, a class E felony;
130.45 criminal sexual act in the second degree, a class D felony;
130.50 criminal sexual act in the first degree, a class B felony;
130.65 sexual abuse in the first degree, a class D felony; and
130.70 aggravated sexual abuse in the first degree;

AND

that any subsequent adjudication of child abuse as defined in FCA §1012 (e) (I),

OR

a felony conviction based on the aforementioned sex offenses,

MAY RESULT IN

an action to terminate his/her parental rights

AND

the immediate commitment of the guardianship and custody of his/her children, or the children for whom he/she is legally responsible, to the local Department of Social Services pursuant to Social Services Law §384-b.

The termination of his/her parental rights would be based upon the ground of severe a abuse or rep

VIII. VIOLATION OF TERMS AND CONDITIONS OF SUPERVISION:

Pursuant to Family Court Act §1072, if the respondent is placed under supervision pursuant to §1054 or §1057 of the Family Court Act and after a hearing

THE COURT MAY

1. revoke the order of supervision and enter any other order that may have been made at the time the order of supervision was made;

OR

2. commit the respondent to jail for a term not to exceed six (6) months.

PRACTICE TIP

To sustain a violation of a court order of supervision there must be **CLEAR AND CONVINCING EVIDENCE** that the respondent exhibited a continuous, willful and unjustifiable refusal to obey the order.

(See Matter of Rachael A., 278 A.D.2d 528 [3rd Dept. 2000]
(See Matter of Brittany T., 48 A.D.3d 995 [3rd Dept. 2008]

CHAPTER 15. NEGLECT
ARTICLE 10 OF THE FAMILY COURT ACT

PLEASE NOTE: Family Court Act §1017 has been amended to:

1. Authorize children to be placed in the temporary custody of relatives or other suitable persons during the pendency of the proceeding.

2. Require that those persons consent to the jurisdiction of the Court.

3. Authorize the Court to issue a Temporary Order of Protection.

4. Authorize the Court to place the relative or suitable person under the supervision of the local social services district or authorized agency during the pendency of the child protective proceedings.

I. INITIAL APPEARANCE (FCA §1033-b)

B. Identify presence of parties and inform Respondent of Rights and Charges

1. Identify presence of all parties or have the court officer do this.

2. Appoint an attorney for the child: FCA §1033-b)1(a). If the child was previously represented, the court must, "to the extent practicable and appropriate" appoint the same attorney for the child. FCA §249(b)

3. Advise Respondent of the allegations in the petition. FCA § 1033-b(1)(b) Be sure that the Respondent has a copy of the petition.

   Reading of the allegations in the petition may be waived

Upon consent of Respondent's attorney

AND

A representation on the record by counsel that counsel has explained the allegations in the petition to the Respondent.

AND

That Respondent was provided with a copy of the petition.

Respondent must acknowledge on the record both receipt of the petition and that the allegations in the petition were explained to him or her by counsel . Id.

PRACTICE TIP

(Read the allegations in the petition to the Respondent, whether or not Respondent's counsel has done so. Then there will then be no question that the Respondent has heard the allegations.)

4. Advise the Respondent of the right to an adjournment to obtain counsel. Id.

5. Advise the Respondent of the right to have the Court assign counsel for an indigent Respondent. FCA §1033-b(1)© and FCA §262.

6. If the child has already been removed from the home, advise the Respondent of the right to a **HEARING PURSUANT TO FCA §1028 FOR RETURN OF THE CHILD AND THAT HEARING MAY BE REQUESTED AT ANY TIME DURING THE PROCEEDING**. **This recitation cannot be waived.** FCA §1033-b(1)(d).

II. ADJOURNMENT IN CONTEMPLATION OF DISMISSAL - NEGLECT

A. Prior to, or at the time of fact-finding, the Court may order an adjournment in contemplation of dismissal (ACD) if all parties, including Petitioner, Respondent and attorney for the child consent to the ACD. The court must then inform the Respondent of the provisions of Family Court Act §1039, as follows:

(READ THE FOLLOWING SCRIPT)

1. An ACD is an adjournment of the proceeding for a period of up to one (1) year with the goal of ultimately dismissing the case against you.

2. You are obligated to follow certain terms and conditions

AND

those terms and conditions will be read into the record by the attorney for the Petitioner.

OR

A copy of the terms and conditions have been provided to both you and your attorney. Have those terms and conditions been explained to you? Do you understand those terms and conditions?

3. The terms and conditions shall include a requirement that the child and Respondent be under the supervision of Child Protective Services during the adjournment period.

4. Child Protective Services is required to make a progress report to the Court, to you and to the attorney for the child within 90 days of the Court Order unless dispensed with by the Court.

5. The period of adjournment may be extended by the Court by agreement of all parties.

6. hearing to determine whether you have substantially complied with the terms and conditions of the Order. If the Court finds that you have failed to substantially comply with the Order, the Court shall:

   a. If you have already admitted to a finding of neglect, proceed to disposition.

b. If you have not admitted to a finding, schedule a Fact-Finding Hearing within sixty (60) days after the application to restore the matter to the calendar was filed.

7. If the proceeding is not restored to the calendar during the adjournment period, at the end of the adjournment period, the matter is deemed dismissed by the Court.

B. Ask the Respondent if he or she understands what an ACD means and if he or she has discussed it with his or her attorney.

C. Ask counsel for Petitioner to read terms and conditions of ACD into the record.

OR

ask the Respondent if he/she has reviewed the terms and conditions with his/her lawyer and does he/she understand those terms and conditions.

D. Ask all parties if they consent to the ACD.

E. Ask the attorney for the child if he/she feels it is in the best interest of the child(ren).

F. If the Respondent consents to an ACD with an admission, the Court must proceed with the admission colloquy set forth in Section III below entitled, "Admission or Consent to a Finding of Neglect by the Respondent."

III. ADMISSION OR CONSENT TO A FINDING OF NEGLECT BY THE RESPONDENT

A. INFORM RESPONDENT OF HIS OR HER RIGHT TO A HEARING INC

(READ THE FOLLOWING SCRIPT)

1. You have the right to remain silent and you will be giving up that right by making an admission or by consenting to a finding of neglect without an admission.

2. Petitioner (agency) has the burden of proving the allegations in the petition and can do so by calling witnesses and submitting other evidence to prove the neglect.

3. You have the right to cross-examine the witnesses and challenge the evidence offered against you.

4. By making an admission, or consenting to a finding of neglect, (or by consenting to a finding of neglect without making an admission) you give up your right to challenge the evidence and testimony offered against you.

5. By making an admission, or consenting to a finding of neglect, (or by consenting to a finding of neglect without making an admission) you give up your right to offer witnesses and evidence in your own defense.

6. By making an admission or consenting to a finding of neglect, (or by consenting to a finding of neglect without making an admission) you give up your right to testify.

7. An admission or consent to a finding (or a consent to a finding of neglect without making an admission) has the same legal effect as if there had been a hearing and all the necessary facts were proven.

8. Do you have any questions you would like to ask the court or your attorney before making an admission (or agreeing to a finding of neglect without an admission)?

9. The allegations in the neglect petition are deemed to have been proven as follows: (Read the paragraphs outlining the allegations of neglect.)

A. <u>ESTABLISH THAT RESPONDENT'S ADMISSION IS VOLUNTARY</u>

1. Ask Respondent if anyone used any force or duress to get him or her to make the admission or consent to a finding of neglect without an admission.

2. Ask the Respondent if he or she discussed the admission or finding with his or her attorney.

3. Ask the Respondent if he or she is suffering from any mental or physical condition that would affect his or her judgment concerning the proceedings in Court today.

4. Ask the Respondent is he or she has consumed any alcoholic beverages or medication or drugs which would affect his or her judgment concerning the proceedings in Court today.

B. **GIVE STATUTORY WARNINGS PURSUANT TO FCA §1051(F)(I)-(III) BY INFORMING RESPONDENT OF THE FOLLOWING:***

(CONTINUATION OF SCRIPT)

1. The Court will make a dispositional order which **MAY** include an order placing the child or children in foster care for a period of up to one (1) year, subject to proceedings for review of the placement or extension of the placement.

2. If the child is placed in foster care and you fail to maintain contact with, or you fail to plan for the future of the child, that failure could lead to proceedings for the termination of your parental rights and the possibility of adoption of your child or children. If your child or children remain in foster care for fifteen (15) of the most recent twenty-two (22) months, the agency may be required by law to file a petition to terminate your parental rights.

3. A report will be made to the New York State Central Registry of Child Abuse and Maltreatment; and

-It will remain on file until ten (10) years after the eighteenth (18^{th}) birthday of the youngest child named in the report;

-You will not be able to have the report removed from the registry;

-The existence of the report may be made known to employers who are seeking to screen your application to

work in the field of child care, and to child care agencies if you were to apply to become or you became a foster parent, or if you sought to adopt a child.

***IF THE COURT FAILS TO INFORM THE RESPONDENT OF THE ABOVE STATUTORY WARNINGS, THE ADMISSION MUST BE VACATED BY THE COURT UPON MOTION OF ANY PARTY.**

D. OBTAIN FORMAL WAIVER OF HEARING ON THE RECORD BY RESPONDENT

(CONTINUATION OF SCRIPT)

Ask the Respondent if, after all the Court has said, and after fully discussing the matter with his or her attorney, he or she wishes to waive his or her right to a hearing and make certain admissions as set forth below.

E. CONDUCT INQUIRY OF RESPONDENT - (ALLOCUTION)

Place the admission on the record: Have Respondent placed under oath and conduct an inquiry of the facts being admitted to by the Respondent.

IV. FINDINGS BY THE COURT AFTER ADMISSION - NEGLECT

A. NEGLECT - THE COURT MUST MAKE THE FOLLOWING FINDINGS AFTER ADMISSION:

(READ THE FOLLOWING SCRIPT)

1. That Respondent knowingly, intelligently and voluntarily waived his or her right to a hearing.

2. That, based on the admission by the Respondent and other evidence, the Court finds, by a preponderance of evidence, that allegations in the petition have been proven.

3. That the child(ren) named in the petition is(are) under eighteen (18) years of age.

4. That Respondent is the parent or other person legally responsible for the child(ren).

5. That the child(ren) named in the petition is(are) a neglected child(ren).

State applicable definition for Neglect under FCA §1012(f)(I) or (A) or (B) or (B)(ii):

(f)(I) Neglected child(ren) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his or her parent, or other person legally responsible for his or her care, to exercise a minium degree of care.

(Note: Court properly found, by a preponderance of the evidence, that respondent father neglected the subject child by reason of

DOMESTIC VIOLENCE

against the non-party mother. See Matter of Tanveer L., 125 A.D.3d 556 [1st Dept. 2015], citing Nicholson v. Scoppetta, 3 NY3d 357, 368-369 [2004])
(See In Re Corine G., 135 A.D.3d 443 [1st Dept. 2016])
See Matter of Cheyenne OO., 135 A.D.3d 1096 [3rd Dept. 2016])

(f)(A) In failing to supply the child(ren) with adequate food, clothing, shelter or education in accordance with the provisions of Part One of Article Sixty-Five (65) of the Education Law, or medical, dental or optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so.

(f)(B) In failing to provide the child(ren) with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm or a substantial risk thereof, including the infliction of excessive corporal punishment;

or by the misusing of a drug or drugs; or by misusing alcoholic beverages to the extent that he or she loses self-control of his or her actions;

or by any other acts of a similarly serious nature requiring the aid of the Court;

PROVIDED, HOWEVER,

that where the Respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the Respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he or she loses self-control of his or her actions

SHALL NOT ESTABLISH

that the child is a neglected child in the absence of evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as set forth in paragraph (I) of this subdivision.

(f)(B)(ii) A child(ren) who has been abandoned, in accordance with the definition in Social Services Law §384-b(5), by his parents or other person legally responsible for his care.

(Note: In the Matter of Afton C, 17 N.Y. 3d 1 [2011] the Court of Appeals agreed with the Appellate Division (Matter of Afton C. (James C.), 71 A.D.3d 887 [2nd Dept. 2010], that "[t]he mere fact that a designated sex offender resides in the home is not sufficient to establish neglect absent a showing of actual danger to the subject children".

V. FINDING BY THE COURT AFTER A FACT-FINDING HEARING - NEGLECT

A. Before a Fact-Finding Hearing commences, the Court must make the following findings pursuant to FCA §1041:

1. That the person or persons legally responsible for the child's care (FCA § 1012(g)) is present at the hearing and has received a copy of the Petition.

NOTE

In a neglect proceeding a determination that a respondent is a person legally responsible (PLR) for a child's care, as defined by FCA § 1012(g) is, according to the Court of Appeals in Matter of Yolanda D. (88 NY2d 790 [1996]), "...a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case."

Factors to be considered include, but are not limited to:

i. The frequency and nature of the contact between the child and the PLR;

ii. The nature and extent of the control exercised by the respondent over the child's environment;

iii. The duration of the respondent's contact with the child;

iv. The respondent's relationship to the child's parents.

(See also Matter of Trenasia J., 25 N.Y. 3d 1001 (Court of Appeals, 2015), in particular Judge Rivera's concerns in her dissent.)

2. If the parent or person legally responsible is not present at the hearing, the Court must make a finding that every reasonable effort has been made to effect service pursuant to FCA §1036 or §1037.

3. Proof that a person repeatedly misuses drugs or alcohol such that it produces a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation or incompetence...shall be prima facie evidence of neglect of a child in the care of such a person. This operates to eliminate a requirement of specific parental conduct vis-a-vis the child and neither actual impairment nor specific risk of impairment need be established,

(See FCA §1012(f)(1)(B) and §1046(a)(iii). See also In the Matter of Nassau County Department of Social Services, on Behalf of Dante M., v. Denise J., 87 N.Y. 2d 73 [Court of Appeals 1995])

EXCEPT

It shall not be prima facie evidence of neglect if the person caring for the child is voluntarily and regularly participating in a recognized rehabilitative program. FCA §1046(a)(iii). Also see In the Matter of

Paolo W. 56 A.D. 3d 966 [3rd Dept. 2008]

B. In a Fact-Finding Hearing:

NOTE

The right of a Respondent parent to be present at every stage of an Article 10 proceeding is not absolute as the proceeding is civil in nature.

Family Court must balance the due process rights of an Article 10 Respondent with the mental and emotional well being of the child.

The rights of a Respondent may be protected by permitting the child to testify in the courtroom and have that child's testimony viewed by the Respondent, via close-circuit television, in a different room at the courthouse. However, the Respondent's lawyer should be present in the courtroom when the child is testifying to allow for cross-examination after consultation with the Respondent.

ALSO NOTE

(pursuant to an amendment of FCA §651 effective 6/18/16)

Where there is a custody proceeding pending under FCA §651 at the same time the article ten neglect matter or ten-A permanency matter is pending, the court

MAY

jointly hear the custody and visitation petition and the dispositional hearing on the article 10

OR

hear the custody and visitation matter during the permanency hearing

PROVIDED

that in both cases, whether the article six custody matter in pending in conjunction with the article ten neglect matter or the article 10-A permanency matter,

THE COURT MUST

determine the custody and visitation matter in accordance with the provisions of article 6 of the Family Court Act.

See Matter of Elisha M.W., 96 A.D. 3d 863 [2nd Dept. 2012]
See In re Moona C., 107 A.D. 3d 466 [1st Dept. 2013]

1. REBUTTABLE PRESUMPTION OF PARENT CULPABILITY UNDER FCA SECTION 1046 (A)(II).

A prima facie case of child abuse or neglect may be established by evidence of an injury to a child which would ordinarily not occur absent an act or omission of Respondents, and that Respondents were the caretakers of the child at the time the injury occurred.

The burden of proving child neglect **ALWAYS** rests with the Petitioner.

However, once the Petitioner has established a prima facie case,

THE BURDEN OF GOING FORWARD SHIFTS TO RESPONDENTS

to rebut the evidence of parental culpability.

The establishment of a prima facie case <u>does not</u> require the court to find that the parents were culpable;

it merely establishes a rebuttable presumption of parental culpability which the court <u>may or may not</u> accept based upon all the evidence in the record.

(See Matter of Philip M. 82 N.Y. 2d 238 [Court of Appeals, 1993])

FAMILY COURT ACT §1046(A)(VI): STATEMENTS BY CHILD: CORROBORATION

Prior statements made by a child regarding allegations of abuse or neglect

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if those statements are uncorroborated they shall not be sufficient to make a fact-finding of abuse or neglect.

ANY

evidence which tends to support the reliability of the child's previous statements, including, but not limited to the types of evidence defined in this subdivision shall be sufficient corroboration.
(See Matter of Nicole V., 71 N.Y. 2d 112 [Court of Appeals 1987])

(See Matter of Jada K.E., 96 A.D. 3d 744 [2nd Dept. 2012])

(See also Matter of Olivia C., 97 A.D. 3d 910 [3rd Dept. 2012]) Petitioner established that Respondent pleaded guilty to gross sexual misconduct of his biological daughter (from another relationship) in Maine. This qualifies as evidence in the instant case of Olivia's two out- of-court statements in which she details her charges of rape against the Respondent.)

(See Matter of Zeeva M., 126 A.D. 3d 799 [2nd Dept. 2015] where the child's out of court disclosures were not sufficiently corroborated.)

(See Matter of Ninoshka M., 125 A.D.3d 567 [1st Dept. 2015] where daughter's out of court statements sufficiently corroborated by respondent's own admission and respondent's brother's testimony.)

(See Ordona v. Campbell, 132 A.D.3d 1246 [4th Dept. 2015])

THE TESTIMONY OF THE CHILD SHALL NOT BE NECESSARY TO MAKE A FACT-FINDING OF ABUSE OR NEGLECT.

NOTE: To constitute a business record exception to the hearsay rule, the proponent of the record (for example, the Department of Social Services or the Administration of Children's Services) must first demonstrate that it was within the scope of the entrant's business duty to record the act,

transaction or occurrence sought to be admitted.

BUT THIS SATISFIES ONLY HALF THE TEST.

In addition, each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct, or the declaration must meet the test of some other hearsay exception.

IT WAS ERROR TO ADMIT INTO EVIDENCE THE ENTIRE CASE FILE AS A BUSINESS RECORD. (An in camera inspection may be required.)
(See The Matter of Leon RR**,** 48 N.Y. 2d 117 [Court of Appeals, 1979]

2. Determination of **NEGLECT** must be based on a **PREPONDERANCE OF THE EVIDENCE** FCA §1046(b)(I).

3. Only competent, material and relevant evidence may be admitted pursuant to FCA §1046(b)(ii) in a fact-finding hearing.

   Whereas, in a dispositional hearing, evidence admitted need only be

   The distinction between the two levels of evidence is that hearsay is not allowed when the evidence must be **competent**, material and relevant whereas, in the dispositional hearing, hearsay evidence may be admitted providing it is material and relevant.

4. Proof that a person repeatedly misuses drugs or alcohol such that it produces a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation or incompetence...shall be prima facie evidence of neglect of a child in the care of such a person. This operates to eliminate a requirement of specific parental conduct vis-a-vis the child and neither actual impairment nor specific risk of impairment need be established,

   EXCEPT

   It shall not be prima facie evidence of neglect if the person caring for the child is voluntarily and regularly participating in a recognized rehabilitative program. FCA §1046(a)(iii). Also see In the Matter of Paolo W. 56 A.D. 3d 966 [3rd Dept. 2008]

C. Findings of Neglect:

(f)(I) Neglected child whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his or her parent or other person legally responsible for his or her care to exercise a minium degree of care

(f)(A) In failing to supply the child with adequate food, clothing, shelter or education in accordance with the provisions of Part One of Article Sixty-five of the Education Law, or medical, dental or optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so.

(f)(B) In failing to provide the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm or a substantial risk thereof, including the infliction of excessive corporal punishment;

or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he or she loses self-control of his or her actions;

or by any other acts of a similarly serious nature requiring the aid of the Court;

PROVIDED, HOWEVER,

that where the Respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the Respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he or she loses self-control of his or her actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as set forth in paragraph (I) of this subdivision.

(f)(B)(ii) Who has been abandoned, in accordance with the definition in Social Services Law §384-b(5), by his parents or other person legally responsible for his care.

VI. DISPOSITION UPON CONSENT - NEGLECT

(PLEASE NOTE: Family Court Act §1052 has been amended to allow for an Order of Custody to a relative or other suitable person as a disposition under §1055-b of the Family Court Act. If you make such an order, no agency involvement or supervision is permitted. In order to achieve this disposition the relative or other suitable person must have filed a custody or guardianship petition under Article 6.

A. CUSTODY UNDER ARTICLE 6 AS THE DISPOSITION UNDER ARTICLE 10

You may grant Article 6 custody or guardianship, as an Article 10 disposition, if the Court finds that:

1. It is in the child's best interest and will give the child a safe and permanent home.

AND

2. The safety of the child "will not be jeopardized" if the Respondents in the Article 10 proceeding are not under supervision or provided with any services.

AND

3. All parties consent to the custody or guardianship.

OR

4. If after a consolidated Article 6 and Article 10 hearing the Court finds "extraordinary circumstances" exist in the event that a parent fails to consent to the custody or guardianship.

AND

5. Granting the order is in the child's best interest.

DISPOSITION

FCA §1052(b)(I) requires that the court

SHALL

state the grounds for any disposition made under this section.

IF THE COURT PLACES A CHILD PURSUANT TO FCA §1055

YOU MUST

Determine whether continuation in the child's home would be contrary to that child's best interests and;

THAT

reasonable efforts were made, before the dispositional hearing, to prevent or eliminate the need for the child's removal from the home;

AND

if the child was removed from the home before the date of the hearing that the removal was in the child's best interest;

AND

where appropriate, reasonable efforts were made to make it possible to

IF

you determine that reasonable efforts to prevent or eliminate the need for removal were not made**,** but the lack of effort was reasonable under the circumstances.

THEN

include such a finding in your disposition.

IF

the permanency plan for the child is adoption, guardianship or some other permanent living arrangement other than reunification with the parents**,** the court order

include a finding that reasonable efforts, including consideration of appropriate in-state or out-of-state placements, are being made to make and finalize such alternative placement.

FCA §1052(b)(i)1 thru 7 lists all the instances where reasonable efforts to prevent or eliminate the need for removal are not required.

B. ADDRESS RESPONDENT

After the County Attorney (or presentment agency) has read the proposed Plan on the record, inquire of Respondent as to the following:

(READ THE FOLLOWING SCRIPT)

1. Do you understand that you have a right to a hearing and the right to have the Court direct a dispositional plan after a hearing?

2. Based on the proposed plan placed on the record by the County Attorney (presentment agency) do you waive (give up) your right to a hearing and consent to the terms and conditions of the plan?

3. Do you agree with the terms and conditions of the plan?

4. Do you understand that if you do not comply with those terms and conditions, the county attorney (presentment agency) has a right to file a petition and if they prove that you did not comply with those conditions, your parental rights could be terminated?

5. Do you have any questions you would like to ask your attorney about the terms and conditions of the plan before the Court orders you to comply with the plan?

C. ADDRESS ATTORNEY FOR THE CHILD

1. Ask the attorney for the child if he or she believes that the dispositional plan is in the best interests of the child?

D. DISPOSITIONAL ORDER

State on the record that, based on the findings-of-fact, the recommendations of the county attorney (presentment agency), the approval of the attorney for the child and the consent of the Respondent,

the Court will enter a dispositional order in accordance with the terms and conditions placed on the record by the county attorney (presentment agency).

E. REQUIREMENTS OF ADOPTION AND SAFE FAMILIES ACT (ASFA)

IF THE CHILD IS PLACED OUTSIDE OF THE HOME, ASFA requires the Court to make the following findings:

1. Remaining in the home would be contrary to the best interests and contrary to the welfare of the child(ren) - the court must also state a factual basis for this finding.

   Reasonable efforts have been made to try to keep the child(ren) in the home - the court must state a factual basis for this finding.

AND

2. That reasonable efforts have been made to try to return the child(ren) to the home if the child(ren) had been placed under a temporary placement order - the court must also state some factual basis for this finding. Be sure a Permanency Planning Hearing has been scheduled within eight (8) months of the first date the child(ren) was placed, and every six (6) months thereafter as long as the child(ren) remains in placement.

F. VISITATION PLAN

Pursuant to ASFA, all Article 10 Orders **MUST:**

1. Have a visitation plan; and

2. A directive that the agency must inform the parents of service plan review, the dates of the service plan reviews, and of their right to attend these service plan reviews and have an advocate present.

The order must further direct the agency to provide the parent with a copy of the service plan and the Court Order. Visitation must be outlined in the plan and the parent must be allowed to see the child at least once every two weeks unless otherwise agreed. This is a minimum requirement under the regulations. The Court can order as much visitation as it believes appropriate.

G. NOTICE OF POSSIBLE PETITION TO TERMINATE PARENTAL RIGHTS

The Order **MUST** contain a notice that the agency may be required to file a Petition for the Termination of Parental Rights if the child(ren) remains in care for fifteen (15) out of the most recent twenty-two (22) months.

VII. VIOLATION OF TERMS AND CONDITIONS OF SUPERVISION:

Pursuant to Family Court Act §1072, if the Respondent is placed under supervision pursuant to §1054 or §1057 of the Family Court Act and, after a hearing

THE COURT MAY

1. Revoke the order of supervision and enter any other order that may have been made at the time the order of supervision was made;

2. Commit the Respondent to jail for a term not to exceed six (6) months.

To sustain a violation of a court order of supervision there must be **clear and convincing** evidence that the respondent exhibited a continuous, willful and unjustifiable refusal to obey the order.

(See Matter of Rachael A., 278 A.D. 2d 528 3rd Dept. 2000]
(See Matter of Brittany T., 48 A.D. 3d 995 [3rd Dept. 2008]

CHAPTER 16. PERMANENCY HEARINGS UNDER FAMILY COURT ACT §1089

§1089 SETS FORTH:

I. PROCEDURES FOR SCHEDULING A PERMANENCY HEARING

II. PROCEDURES FOR NOTICE OF THE HEARING

III. PROCEDURES FOR CONDUCTING THE HEARING

IV. PROCEDURES FOR DETERMINING AN APPROPRIATE DISPOSITIONAL REMEDY

(Your attention is drawn to the Practice Commentaries by Prof. Merril Sobie in the McKinney's Cumulative Pocket Part for Book 29A - Judiciary Court Act, 2006.)

I. SCHEDULING THE HEARING - FCA §1089(a)

(Please do not confuse this with FCA §1089-a which addresses custody and guardianship under FCA Article Six and SCPA Article 17.

FCA §1089-a is outlined further on in the Bench Book.)

1. For children freed for adoption:

    a. At the conclusion of the dispositional hearing the Court shall:

        i. Set a date certain for the permanency hearing and advise all parties, except the Respondents in the Termination of Parental Rights petition, of that date.

        ii. Begin the permanency hearing within thirty (30) days of the date the child was freed for adoption, on notice to the parties for whom notice is required.

2. For all other permanency hearings:

    a. At the conclusion of the hearing where the child was first remanded or placed the Court shall:

        i. Set a date certain for an initial permanency hearing and advise all parties in Court of that date.

ii. Schedule the initial permanency hearing within eight (8) months from the date the child was first removed from the home.

iii. Complete the permanency hearing within thirty (30) days of the commencement of the hearing.

3. All permanency hearings, following that first permanency hearing, must be commenced within six (6) months from the date of the last permanency hearing. (See section on six-month permanency hearings, FCA §1089(a)(3)

AND

You must complete the permanency hearing within thirty (30) days of commencement of the hearing. FCA §1089(a)(3)

II. NOTICE FOR THE HEARING - FCA §1089(b)

At least fourteen (14) days before the date certain for the permanency hearing (which was scheduled in Court six (6) to eight (8) months ago

the local social services district

SHALL

Serve notice of the permanency hearing AND a copy of the permanency hearing report, by regular mail, to the court and:

1. The child's parents (unless the parental rights of the parent have been terminated or surrendered);

2. Any non-respondent parent;

3. Any person legally responsible for the child;

4. The foster parent where the child currently resides;

5. The agency supervising the care of the child by agreement with the social services district; (the foster parent and social services agency SHALL be parties to the proceedings.)

6. The Attorney for the Child;

7. The attorney for the Respondent parent;
8. Any pre-adoptive parenting;

9. Any relative providing care for the child;

10. The child if the child is 10 years of age or older. ((Amended L. 2015, c. 573 effective 12/22/15)

IF

the child had lived continuously for twelve (12) months with a former foster parent, that former foster parent must also have notice of the hearing, but the former foster parent is NOT given a copy of the permanency hearing report.

The court, on the motion of any party or the court's own motion, may dispense with notice to the former foster care parent if such notice would not be in the child's best interest.

HOWEVER

the pre-adoption parent, relative, or former foster parent, on the basis of such notice,

SHALL

have the right to be heard but shall not be a party to the permanency hearing. Failure of the pre-adoptive parent, relative or former foster parent to appear at the permanency hearing shall constitute a waiver of the right to be heard. The failure to appear shall not cause a delay in the hearing nor be a ground for the invalidation of any order issued by the court pursuant to this section.

(This section, FCA § 1089(b), was amended by L. 2015, c. 573, effective 12/22/15)

III. PROCEDURES FOR CONDUCTING THE HEARING

[NOTE: The certification requirement contained in 22 NYCRR 130-1.1a applies to permanency hearing reports. These reports, which FCA §1089(b)(1) and(2) specifies shall be served on the other parties and "shall be submitted to the court,"

must be signed by an attorney for the social services agency responsible for the report.

(See In the Matter of Heaven C., 71 A.D. 3d 1301 [3rd Dept. 2010])

See FCA §1089© for all of the very many items that must be included in the permanency hearing report.

Use these items as a step-by-step guide for conducting the hearing and obtaining the legally sufficient information necessary to reach an appropriate dispositional remedy.

The pre-adoptive parent or former foster parent shall have an opportunity to be heard at the hearing, but is not a party to the hearing. If they do not appear, after notice, their opportunity to be heard is deemed waived (See FCA §1089(b)(2)).

IV. PROCEDURES FOR DETERMINING AN APPROPRIATE DISPOSITIONAL REMEDY

See FCA §1089(d) for all the very many items that must be considered by the Court in reaching an appropriate dispositional remedy.

A copy of the court order that results from the permanency hearing, which order includes the date certain for the next permanency hearing (not more than six (6) months from completion of the previous permanency hearing)

AND

a copy of the permanency hearing report as approved, adjusted or modified, by the Court,

SHALL

be given to the parent or other person legally responsible for the child.
(See FCA § 1089(e).

CHAPTER 17. SIX MONTH PERMANENCY HEARING FCA §1089

(THE PROVISIONS OF FAMILY COURT ACT §1046(A) & © SHALL APPLY TO ALL PROCEEDINGS UNDER THIS ARTICLE.)

A. The following parties are entitled to participate in the permanency hearing and would receive a report and a notice reminding them of the date of that hearing no later than fourteen (14) days before the date certain for the hearing. The local

social services agency **SHALL** serve the notice of the permanency hearing, along with the permanency hearing report, by regular mail upon:

See FCA Section 1089(b)

1. The parent or person legally responsible for the child's care - including any non-respondent parent. If the parent's rights have been terminated no notice is to be sent to them;

2. Any agency supervising the care of the child on behalf of the local social services agency;

3. The foster parent or relative or other caretaker in whose home the child resides at the time of filing of the extension of placement proceeding; (These folks are considered to be non-parties but may be heard at the hearing.)

4. The Attorney for the Child (appointment of the same Attorney for the Child should be continued from prior proceedings) and attorney for the Respondent parent;

5. The child over ten years of age has a right to be present at the hearing although the child may waive that right after consulting with his or her attorney. The attorney for the child may request, and the court SHALL grant, an adjournment of the hearing whenever necessary to protect the child's right to meaningful participation in the hearing. (Amended L. 2015, c. 573, effective 12/22/15)

6. Any prior foster parent that the child had been placed with for more than one (1) year is entitled to notice of the permanency planning hearing, but not a copy of the report. The foster parent is considered a non-party but may be heard at the hearing.

See FCA §1089(c) for content of the Permanency Hearing Report.

B. **DETERMINATIONS TO BE MADE AT THE HEARING**:
(Family Court Act §1089(d):

(**Please see: In the Matter of Julian P., 106 A.D. 3d 1383 [3rd Dept. 2013]The court may not impose concurrent and contradictory permanency goals. Please remember that the court must find some age-appropriate manner in which to consult with the child**.

The court **MUST** determine and issue its findings **AND** enter an order of disposition, in writing, to:

1. Terminate the placement and return the child to the parent or other person legally responsible for the child's care, with such further orders as the court deems appropriate,

OR

2. Where the child is not returned, whether the permanency goal for the child should be approved or modified, and the anticipated date for achieving the goal. The permanency goal may be determined to be:

NOTE: The permissible options for the permanency goal are listed as alternatives. Nothing in the statute indicates that the court may select and impose on the parties two or more goals simultaneously. (See Matter of Julian P., supra.)

a. return to parent;

OR

b. placement for adoption with the local social services official filing a petition for termination of parental rights;

OR

c. referral for legal guardianship;

OR

d. permanent placement with a fit and willing relative;

OR

e. placement in another planned permanent living arrangement that includes a significant connection to an adult willing to be a permanency resource for the child.

IF

the local social services official has placed the child in another planned permanent living arrangement,

the agency must document to the court a **compelling reason** for determining that it would not be in the best interests of the child to return home,

OR

be referred for termination of parental rights and placed for adoption;

OR

placed with a fit and willing relative; or

OR

placed with a legal guardian.

3. No placement may be continued under this section beyond the child's eighteenth (18) birthday without his or her consent and, in no event, past the child's twenty-first (21st) birthday.

HOWEVER

A former foster youth, previously discharged from foster care due to failure to consent to a continuation in foster care, may be returned to foster care if the court allows the return upon a finding that the youth has

NO REASONABLE ALTERNATIVE

to foster care and has consented to enrollment in, and attendance at, a vocational or educational program per Family Court Act §1091.

4. The court must determine whether reasonable efforts have been made to effectuate the child's permanency plan. The court must determine, per FCA §1089(d)(2)(iii);

a. Whether reasonable efforts have been made to eliminate the need for placement and enable the child to return home;

UNLESS

the child is freed for adoption **OR** the court determines that such efforts are not required per FCA §1039(b)

b. Whether reasonable efforts have been made to make or finalize alternative permanent placements such as adoption, guardianship, placement with a fit and willing relative or another planned permanent living arrangement other than return to the parent. The court must consider appropriate in-state and out-of-state placements

c. Where return home is not likely, what efforts should be made to evaluate or plan for another permanent plan including in-state and out-of-state placements.

d. What did the local social services agency do to implement educational and vocational programs

5. The Court must set a date in six (6) months - "date certain" - for the next permanency hearing and advise all parties. You may want to set the date closer to five (5) months to leave some leeway for the social services agency to effect service of the appropriate notices within fourteen (14) days of the hearing, and to take into account any adjournment requests. The Attorney for the Child remains assigned to the child at all times during the pendency of placement.

6. Where placement is extended the court order **SHALL** include:

a. A description of the visitation plan;

b. Where the **child is not freed for adoption**, notification to the parents, or those legally responsible for the child, of planning conferences [see Social Services Law §409-e(3)], their right to attend planning conferences and their right to have counsel or a representative with them at those conferences;

c. Where the **child is not freed for adoption**, direction that the parents or those legally responsible for the child keep the local social services agency advised of their current whereabouts and mailing address;

d. Where the **child is not freed for adoption**, notice that if the child

remains in foster care for fifteen (15) of the most recent twenty-two (22) months, the agency may be required to file a petition to terminate the parent's rights;

e. Where the child **has been freed** for adoption, and is over fourteen (14) years old **and** has voluntarily withheld his or her consent for adoption, the facts and circumstances concerning the child's decision to withhold consent for adoption and the child's reasons for that decision;

f. Where the child has been **placed out-of-state**: whether that placement continues to be appropriate, necessary and in the child's best interests;

g. Where the **child reaches the age of fourteen (14) years** before the next permanency hearing, what services and assistance have been given to the child to assist in learning independent living skills;

h. Any other findings or orders that the court deems appropriate. For a list see FCA §1089(d)(2)(viii).

7. A copy of the court order which includes that date certain for the next permanency hearing and the permanency hearing report as approved, adjusted, or modified by the court **SHALL** be given to the parent or other person legally responsible for the child. See FCA §1089(e)

CHAPTER 18. FCA SECTION 1089-a

A. CUSTODY OR GUARDIANSHIP WITH RELATIVES OR SUITABLE PERSONS UNDER ARTICLE SIX OF THE FAMILY COURT ACT OR ARTICLE SEVENTEEN OF THE SURROGATE'S COURT PROCEDURE ACT

FCA § 1089-a (Amended L., 2015, c. 567, effective 6/18/16)

Where the permanency plan is placement with a fit and willing relative or a respondent parent the court

MAY

issue an order of custody or guardianship in response to a petition filed by a

respondent parent, relative or suitable person seeking custody or guardianship of the child under article six of the Family Court Act (FCA) or article seventeen of the Surrogate's Court Procedure Act (SCPA).

A petition for custody or guardianship

MAY

be heard jointly with a permanency hearing. An order of custody or guardianship issued in under this section of the law

WILL RESULT IN

a **TERMINATION OF ALL** pending orders issued pursuant to the permanency article or article ten of this act

IF

the following conditions have been met:

1. The court finds that granting custody to the relative or relatives or suitable person or persons is in the child's best interest

AND

that the termination of the order placing the child pursuant to article ten of the FCA will not jeopardize the safety of the child.

In determining whether the best interests of the child will be promoted by such an order the court

SHALL

give due consideration to

a. the permanency goal of the child,

b. the relationship between the child and the relative,

c. whether the relative and the local social services agency have entered into an agreement to provide kinship guardianship assistance payments for the child to the

relative under title ten of article six of the social services law,

AND, IF SO,

whether a fact-finding hearing pursuant to §1051 has occurred

AND

whether **compelling reasons** exist for determining that the return home of the child and the adoption of the child are **not in the best interest of the child and are, therefore, not appropriate permanency options**

AND

d. the court finds that granting custody to the respondent parent or parents, relative or relatives, or suitable person or persons, or guardianship of the child to these folks, will provide the child with a safe and permanent home

AND

e. the parents, the attorney for the child, the local department of social services, and the foster parent of the child who has been the foster parent for one year or more

CONSENT TO BOTH

the issuance of an order of custody or guardianship under article six of the FCA or article seventeen of the SCPA

AND

the termination of the order of placement pursuant to the permanency plan or article ten of the FCA

OR

f. if any of the parties object to the granting of custody or

guardianship, the court has made the following findings

after a joint hearing on the permanency of the child and the petition under article six of the FCA or article seventeen of the SCPA that:

if the relatives or suitable persons have filed a petition for custody or guardianship,

and a parent or parents fail to consent to the granting of the petition,

the court finds that the relatives or suitable persons have demonstrated that

EXTRAORDINARY CIRCUMSTANCES

exist that support the granting of an order of custody or guardianship under article six of the FCA or article seventeen of the SCPA

AND

that the granting of the order will serve the best interests of the child

OR

If a relative or relatives or suitable person or persons have filed a petition for custody or guardianship,

and the local department of social services, the attorney for the child or the foster parent of the child who has been the foster parent for one year or more

objects to the granting of the petition

THE COURT FINDS

that granting custody or guardianship of the child to

the relative or relatives or suitable person or person is in the best interests of the child.

OR

if a respondent parent has filed a petition for custody under article six

AND

a party who is not a parent of the child objects to the granting of the petition, the court finds

EITHER

that the objecting party has failed to establish **EXTRAORDINARY CIRCUMSTANCES**

OR

the court finds that the objecting party has established EXTRAORDINARY CIRCUMSTANCES

BUT

granting custody to the petitioning respondent would nonetheless be in the child's best interest

OR

if a respondent parent has filed a petition for custody under article six of the FCA

and the other parent fails to consent to the granting of the petition

THE COURT FINDS

that granting custody to the petitioning respondent is in the child's best interest.

B. CUSTODY AND VISITATION OF NON-RESPONDENT PARENT UNDER ARTICLE SIX OF THE FCA

(This is the new part of Section 1089-a; Amended L., 2015, c. 567, effective 6/18/16)

1. CUSTODY AND VISITATION PETITION OF NON-RESPONDENT PARENT UNDER ARTICLE SIX OF THE FAMILY COURT ACT.

Where a proceeding filed by a non-respondent parent under article six of the FCA is pending at the same time as a permanency proceeding, the court

MAY

jointly hear the permanency and custody and visitation

PROVIDED

that the court determines that the non-respondent parent's custody petition was filed in accordance with the provisions of article six of the FCA**.**

2. CUSTODY AND VISITATION PETITION OF NON-RESPONDENT PARENT UNDER SECTION 240 OF THE DOMESTIC RELATIONS LAW

Where a custody and or visitation proceeding concerning a child of a marriage is brought in supreme court pursuant to Domestic Relations Law (DRL) §240 at the same time as a proceeding in brought in Family Court pursuant to article ten of the FCA, the court presiding over the proceedings under article ten of the FCA

MAY

jointly hear the permanency

AND

UPON REFERRAL FROM SUPREME COURT,

may also preside over the hearing to resolve the matter of custody and visitation pending in supreme court,

PROVIDED, HOWEVER

that the Family Court **MUST** determine the non-respondent parent's rights in accordance with DRL §240(1)(a).

3. An order made pursuant to this section of the FCA

SHALL

set forth the required findings as provided in §1089-a(a), where applicable, including,

whether the guardian and local department of social services have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under title ten of article six of the Social Services Law**,**

that a fact-finding hearing pursuant to §1051 of the FCA and a permanency hearing pursuant to §1089 of the FCA have occurred,

and compelling reasons exist for determining that the return home of the child is **NOT** in the best interest of the child and a return home is **NOT** an appropriate permanency option,

that an order under this section granting article six custody

SHALL

RESULT IN THE TERMINATION OF ANY ORDERS IN EFFECT PURSUANT TO ARTICLE TEN OF THE FCA.

4. Regardless of any other provision of the law the court

SHALL NOT

issue an order of supervision

NOR MAY

the court require the local department of social services to provide services to the respondent or respondents when granting custody or guardianship under article six of the FCA or article seventeen of the SCPA.

5. As part of the order granting custody or guardianship under the FCA or the SCPA, the court

MAY

require that the local department of social services and the attorney for the child child receive notice of, and be made parties to, any subsequent proceedings to modify the order of custody or guardianship pursuant to the article six proceedings**.**

HOWEVER,

if the guardian and the local department of social services have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under title ten of article six of the social services law,

THE ORDER MUST

require that the local department of social services and the attorney for the child receive notice of, and be made parties to, any subsequent proceeding involving custody or guardianship of the child**.**

6. Any order pursuant to this section of the FCA

SHALL CONCLUDE

the court's jurisdiction over the article ten proceeding and the court

SHALL NOT

maintain jurisdiction over the proceeding for further permanency hearings.

7. The court SHALL hold age appropriate consultation with the child,

HOWEVER

if the child is fourteen or older

THE COURT SHALL

ascertain his or her preference for a suitable guardian or custodian. Where the child is over the age of eighteen he or she SHALL consent to the appointment of a suitable guardian or custodian.

CHAPTER 19. FORMER FOSTER CARE YOUTH RE-ENTRY PROCEEDINGS FAMILY COURT ACT §1091

I. MOTION TO RETURN TO FOSTER CARE PLACEMENT BY A CHILD UNDER TWENTY-ONE (21) YEARS OF AGE

A youth, under the age of twenty-one (21), who was discharged from foster care due to failure to consent to continuation of placement

MAY, BY MOTION

by order to show cause, filed by the youth or a local social services official on consent of the youth, request a return to placement

IF

there is compelling reason for the youth to return to foster care;

PROVIDED

that the motion by order to show cause was made within twenty-four (24) months

FROM

the date of the first final discharge that occurred on, or after, the youth's eighteenth (18^{th}) birthday.

THE COURT SHALL NOT

entertain a motion by the youth, or local social services official, filed after the twenty-four month period described above.

The motion, by affidavit or other evidence,

SHALL **SHOW**

1. That the former foster care youth had no reasonable alternative to foster care;

2. The youth consents to enrollment in, and attendance at, an appropriate educational or vocational program

UNLESS

evidence is submitted that such enrollment or attendance is unnecessary or inappropriate given the particular circumstances of the youth.

3. Re-entry into foster care is in the youth's best interests.

4. The youth consents to re-entry into foster care.

TIME FRAME AND NOTICE

The motion must be made by order to show cause on ten (10) days notice to the social services official and

MUST SHOW

by affidavit or other evidence

THAT

i. The requirements of FCA§1091(a), that is, paragraphs one (1), two (2) and three

(3) listed above have been met

AND

ii. The local social services district consents to the re-entry of the youth

OR

iii. If the local social services districts refuses to consent, that the refusal was unreasonable.

PLEASE NOTE

If, at any time during the pendency of these proceedings, the court finds

A COMPELLING REASON

that it is in the best interests of the youth to be returned to foster care immediately pending a final decision on the motion

THE COURT MAY

issue a temporary order returning the youth to the custody of the local commissioner of social services, or other officer, board or department authorized to receive children as public charges.

Where the local social services district refuses to consent to the re-entry,

AND

it is alleged that the refusal is unreasonable, the court

SHALL

grant a motion to return the child to foster care

IF

the court finds, and states in writing, that the refusal is unreasonable.

THE COURT SHALL

find the refusal unreasonable

IF

a.. the former foster care youth has no reasonable alternative to foster care;

b. The youth consents to enrollment in, and attendance at, an appropriate educational or vocational program

UNLESS

evidence is submitted that such enrollment or attendance is unnecessary or inappropriate given the particular circumstances of the youth.

c. Re-entry into foster care is in the youth's best interests.

Upon making a determination on the motion where a motion pursuant to this section has previously been granted

IN ADDITION

to the applicable findings required by this section,

THE COURT SHALL

grant the motion to return the youth to foster care

ONLY

1. upon a finding that there is a compelling reason for such youth to return to care;

2. if the court has not previously granted a subsequent motion for the youth to return to care pursuant to this paragraph [FCA§1091(3)] and,

3. upon consideration of the youth's compliance with previous orders of the court, including the youth's previous participation in an appropriate educational or vocational program, if applicable.

REMEMBER

If the child is accepted back into foster care you

MUST SCHEDULE AND COMMENCE

a permanency hearing within thirty (30) days of the date the foster care youth was returned to foster care. FCA §1089(a)(1)(ii)

CHAPTER 20. JUDICIAL SURRENDER/CONSENT DOMESTIC RELATIONS LAW §115-b

I. MAKING A RECORD - BIOLOGICAL PARENT'S CONSENT & SURRENDER

A. ADDRESS PARTIES

1. Inform the birth parent that Court will be asking a series of questions, and that the parent should listen carefully and, if there is anything he or she does not understand, let the Court know.

B. PARENT PLACED UNDER OATH

1. Establish the relationship of the parent to the child:

   a. Ask if he or she is the birth father or mother of the child, (name) born on (date of birth).

2. Mental and Physical condition: ascertain the physical and mental condition of the birth parent:

   a. Ask how he or she is feeling.
   b. Ask if, within the last 24 hours, he or she has had any alcoholic beverages to drink.

   c. Ask if, within the last 24 hours, he or she has consumed any drugs or medication of any kind.

   d. Ask if he or she is under the care of any physician, mental health professional or institution for any type of physical or mental condition.

C. INFORM PARENT OF STATUTORY RIGHTS :
Social Services Law §383-c (3) (b)

1. Right to Counsel: Inform the birth parent of his or her right to be represented by counsel of his or her own choosing, and his or her right to have an attorney appointed to represent him or her if he or she cannot afford one.

2. Right to Adjournment:

   a. Inform the birth parent of the right to an adjournment to consult with an attorney.

   b. Ask him or her if he or she wants an adjournment to obtain a lawyer.

3. Right to Supportive Counseling:

   a. Explain that supportive counseling is counseling that is designed to resolve any doubts he or she may have, and help him or her to make the right decision and to help him or her through this difficult time.

   b. Ask if he or she wants such supportive counseling, if so the matter will be adjourned for that purpose.

   c. Ask if he or she has received any such supportive counseling or discussed this decision with anyone else.

4. Final and Irrevocable:

   a. Inform him or her that the surrender shall be final and irrevocable upon execution.

      (See Matter of Brittany and Others, 130 A.D.3d 1271 [3rd Dept, 2015])
      (See Matter of Naquan L.G., 140 A.D.3d 757 [2nd Dept. 2016])

5. Right to Financial Assistance:

a. Ask him or her if one of the reasons why he or she is considering surrendering the child is because he or she is unable to care for the child due to financial difficulties. If so,

i. inform him or her that arrangements can be made with the social services agency for financial assistance.

ii. Ask if he or she would like an adjournment to discuss the possibility of financial assistance with a representative of the social services agency.

D. Inform Birth Parent of Consequences of Unconditional Surrender: (For conditional surrender, see Section E)

1. He or she will have no right to see or contact the child in the future.

2. He or she will have no say as to how the child is raised; where the child goes to school; what religion the child practices; or any other matters in the child's life.

3. He or she will be giving up all rights to custody, visit with, speak with, write to or learn about the child, forever. (Social Services Law §383-c[3](b)).

4. He or she will be giving up each and every right that he or she has as a birth parent to this child.

5. The surrender becomes irrevocable and final as of today and he or she cannot change his or her mind or ask to get the child back after he or she signs the surrender.

E. CONDITIONAL SURRENDER (other than to an authorized agency):

If this is a conditional surrender of a child, other than to an authorized agency, inform the birth parents of the following:

a. Do you understand that the following conditions are the only rights you will be keeping with respect to this child and that you will be waiving (that is, giving up) any and all other rights you may have to this child, including

the right to see or contact the child; say how the child is raised; where the child goes to school; what religion the child practices; or other matters relating to the child's life; that you will be giving up all rights to custody, to visit with, write to or speak with the child; and that you will be giving up each and every right as a parent to this child, except for these specific rights: (list conditions of the surrender on the record)?

b. Do you understand that after the adoption is finalized you may not be able to successfully enforce these rights in the future if the adopting parents decide not to honor these conditions? In that case the Court would make a determination on the issue of those rights based on the child's best interests at the time the petition is filed?

F. CONDITIONAL SURRENDER (to an authorized agency):

NOTE: An Attorney for the Child **must** be appointed in any surrender of a child to an authorized agency, whether the child is in foster care or not. (FCA §249).

If this is a conditional surrender of a child to an authorized agency, the Court must inform the birth parents of the following:

1. Do you understand that the following conditions are the only rights you will be keeping with respect to this child and that you will be waiving (that is, giving up) any and all other rights you may have to this child, including the right to see or contact the child; say how the child is raised; where the child goes to school; what religion the child practices; or other matters relating to the child's life; that you will be giving up all rights to custody, to visit with, write or speak to the child; except for these specific rights: (list conditions of the surrender on the record)?

2. Do you understand that after the adoption is finalized you may not be able to successfully enforce those rights in the future if the adopting parents decide not to honor those conditions? In that case the Court would make a determination on the issue of those rights based on the child's best interests at the time the petition is filed.

3. Do you understand that you must give the agency an address to notify you if there is a failure of the conditions and that you must keep the agency informed of any change in address prior to the finalization of the adoption?

4. Do you understand that if there is a substantial failure of a material condition before the adoption is finalized there are certain procedures which must be followed, those are:

   a. The agency must notify you, the Attorney for the Child and the Court within twenty (20) days of the alleged failure occurring;

   b. The birth parent can waive such a notice specifically in the surrender document;

   c. The agency is responsible to bring the matter back to Court within thirty (30) days of the notice of alleged substantial failure of a material condition. The Court will review the allegation of substantial failure of a material condition and, where necessary, hold a hearing; and

   d. If the agency fails to file for such a review/hearing, the Attorney for the Child or birth parent may file for one any time before the finalization of the adoption. (Social Services Law §383-c).

G. SURRENDER AND ACKNOWLEDGMENTS

Ask the birth parent the following questions:

1. Do you consent to the adoption of this child and agree to surrender and give up all your rights concerning this child? (Except for the conditions in a conditional surrender.)

2. Is your testimony given today, and the consent and surrender of this child, voluntary?

3. Has anyone forced you, coerced you or threatened you in any way to surrender this child?

4. Has anyone paid you any money, given you anything of value or promised the same to you to get you to surrender this child, or to get you to consent to the adoption of this child?

5. Has anyone promised you or suggested to you that you might be able to get this child back in the future?

H. EXECUTION OF THE DOCUMENTS

1. Hand the "Judicial Surrender" and any other documents to the birth parent.

2. Ask the birth parent to carefully review the documents, specifically the Warnings and Notices entitled "Judicial Surrender".

3. Advise birth parent that if he or she has any questions, he or she can have a moment to consult with his or her attorney. If not represented, the Court can try and answer any questions he or she may have.

4. After he or she has reviewed the documents, ask him or her to sign the documents.

5. If the documents are already signed say: "I show you the documents you have signed concerning the judicial surrender. Is that your signature on each of the documents?"

I. AFTER EXECUTION OF THE DOCUMENTS:

1. State on the record that the birth parent has executed and acknowledged the execution of the following documents - list all documents. (i.e. Judicial Surrender; terms and conditions in a conditional surrender.)

J. FINAL QUESTIONS

1. Ask the birth parent, counsel for the birth parent and Attorney for the Child (if applicable) if there are any other questions.

K. FINDINGS-OF-FACT BY THE COURT

Make the following findings-of-fact on the record:

1. He or she, (name) is the birth father or mother of the child, (name) born on (date of birth).

2. He or she is physically and mentally competent to execute these surrender instruments and to consent to the adoption of this child.

3. He or she knows and understands the consequences of his or her surrender

of the child and he or she understands that the surrender and consent are irrevocable.

4. He or she has been advised as to, and understands, his or her legal rights and has knowingly waived his or her right to seek further legal advice or other supportive counseling of any kind in connection with these surrender proceedings.

5. That the surrender and consent to the adoption are freely and voluntarily given by the birth parent.

6. Acknowledge on the record that the Court has signed the Judicial Surrender and other documents which require the Court's signature and that a duplicate original of each of these documents, which include (list documents) are being handed to the birth parent at this time.

7. Hand the documents to the birth parent.

8. Ask the birth parent if he or she acknowledge receipt of a duplicate original copy of each of the documents which the Court just listed.