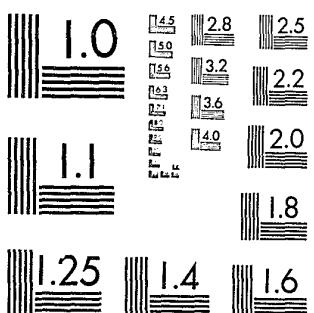


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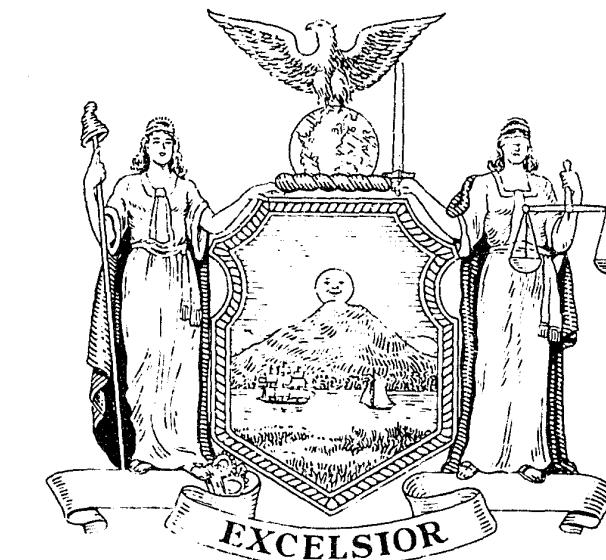
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## THE SECOND ANNUAL REPORT OF THE TEMPORARY STATE COMMISSION TO RECODIFY THE FAMILY COURT ACT

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CHAIRMAN  
31 MARCH 1981

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NEW YORK STATE TEMPORARY COMMISSION  
TO RECODIFY THE FAMILY COURT ACT

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Chairman

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March 31, 1981

TO THE GOVERNOR AND THE LEGISLATURE  
OF THE STATE OF NEW YORK

I have the honor to transmit herewith the second annual report of the Temporary State Commission to Recodify the Family Court Act.

On behalf of the Commission, I should like to express our continuing appreciation of your cooperation and support.

Very truly yours,  
  
GEORGE FRIEDMAN  
Chairman

U.S. Department of Justice  
National Institute of Justice

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THE SECOND ANNUAL REPORT OF THE  
TEMPORARY STATE COMMISSION TO  
RECODIFY THE FAMILY COURT ACT

Assemblyman George Friedman  
Chairman  
31 March 1981

Honorable Leonard F. Bersani  
Honorable Donald J. Corbett, Jr.  
Honorable Thomas A. Demakos  
Janet Hill Gordon, Esq.  
Honorable Howard A. Levine  
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PREFACE

Assemblyman George Friedman was appointed the Chairman of the Temporary State Commission to Recodify the Family Court Act in January 1981, following the resignation of the former Chairman, Assemblyman Howard L. Lasher, who assumed new duties as the Chairman of the Assembly Standing Committee on Insurance.

Assemblyman Friedman is a lifelong resident of Bronx County and is a graduate of the University of Vermont and the New York University School of Law, where he was a member of the Law Review and recipient of a scholarship for academic achievement. He has been a practicing attorney since 1960.

He has served with the New York State Assembly in various capacities since 1964 with an interlude of two years when he was Senior Administrative Assistant to a New York City Councilman. During the 1975-76 Legislative Session, Mr. Friedman served as Chief Counsel to the Assembly Ways and Means Committee and for the preceding two years was Counsel to the Democratic Minority on that Committee.

Assemblyman Friedman was first elected to the Legislature in November 1976 and is now serving his third consecutive term. He is a member of the Assembly Standing Committees

on Codes, Insurance, Housing, Mental Health, and Judiciary.

He has also served as Chairman of the Subcommittee on Mitchell Lama Housing.

In addition to Assemblyman Lasher's resignation, the Commission received the resignation of Joyce A. Ladner, the Vice-Chairman, because of her move from New York State in November 1980. There is presently a vacancy on the Commission to be appointed by the Governor.

The Commission has held five full meetings since April 1980, as follows:

June 5	-- Albany
October 23	-- New York City
November 19	-- Albany
February 25	-- Albany
March 26	-- Albany

As part of its study on family offenses, the Commission held public hearings in New York City on December 11th and in Syracuse on December 15th.

During the Commission's first full year of operation, three major policy decisions were made. First, that a totally new statutory scheme for children and families need be devised. This effort will require a re-examination of the philosophy, procedure, and substantive law of the Family Court Act.

The second policy decision was that the Commission will present a new Act to the Legislature as a whole product. The Commission may submit legislation aimed at resolving particular issues from time to time, but its goal will be to complete a total revision of the Family Court Act.

The third policy issue concerns legislative initiatives by other groups, committees, task forces, and individuals. The Commission encourages those seeking to improve the Family Court to offer their recommendations to the Legislature. If requested (and time permits), the Commission may give informal advice on specific proposed legislation. Anyone who wishes to coordinate their legislative initiatives with the Commission's work will be provided with a Commission work plan and time table, presently being prepared.

This year, the Commission has begun consideration of a number of basic issues: What kind of Family Court does our society need? What should its goals or purposes be? How should it function? How should it be administered? Should the Family Court be merged? Should defense and prosecutorial services be unified? Is a separate procedural code needed? What specific substantive article-by-article changes are required? What has the developing case law done since 1962 to alter the

Family Court Act both substantively and procedurally? What has been the effect of legislative amendments upon the Act? In short, what kind of Family Court do we want and how should it be designed to meet both constitutional and legislative mandates?

To properly lay a basis for consideration of these fundamental questions, the Commissioners examined the original goals and purposes of the Family Court Act as defined by the Joint Legislative Committee on Court Reorganization and then traced both selective case law decisions and legislative amendments that have had an impact upon the Act. A review of this material enabled the Commission to not only see where we started in 1962, but what has occurred in the intervening nineteen years to change the very nature of the Family Court Act.

In addition, the Commission examined the historical development of the relationship between child protective services and the Family Court in Article 10 proceedings and developed a working paper describing the problems in Article 8 proceedings. Moreover, the Commission held public hearings on family offenses and distributed a questionnaire to all Family Court judges in New York State.

These materials gave the Commission an overall perspective of the original goals and purposes of the Family

Court as well as the evolutionary changes stimulated by shifting social values, case decision, and legislative amendments. The materials on Articles 8 and 10 provided a more concentrated view of some of the specific interdisciplinary issues and procedural problems that the Commission must resolve in developing a new statutory scheme for the Family Court.

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ORIGINAL GOALS AND PURPOSES  
OF THE 1962 FAMILY COURT ACT;

SUBSEQUENT CASE DECISIONS AND  
LEGISLATIVE TRENDS

ARTICLE 2

The Right to Assigned Counsel  
for Children -- §§241-249

The Joint Legislative Committee viewed the law guardian program as a key element in the workings and growth of the Family Court:

... The Committee looks to the law guardians to assist the court, to insure against any invasion of civil rights or violations of constitutional privileges, and supply the Legislature and Governor with an independent view of the practical effect of the new Act. Through day to day contacts with other members of the bar, law guardians will also serve a "seeding" function. They will be in a position to inform colleagues of the practices and needs of the court.

Scope

The program is limited to the representation of children involved in neglect, delinquency, and supervision proceedings. These proceedings present special considerations, and lawyers must be familiar with social techniques to give truly effective representation. By turning to Legal Aid Societies, the program increases the opportunities for creating a professional staff familiar with the special workings of the Family Court and therefore better able to render assistance at the point of "intake", at hearings, and in the shaping of orders of disposition. It also draws on the vast experience of a going organization.

The program is limited to children in neglect, delinquency and supervision proceedings because these are the greatest areas of need. The issues presented in these proceedings are difficult. The interests of the children and their parents are not always identical, and a child therefore may not always rely on his parents to serve his interests. Even where the parents would, they are rarely equipped to do so in a court of law.

This is especially true of delinquency proceedings. Though they are "civil" rather than "criminal", the Family Court has almost the same powers of disposition after an "adjudication of delinquency" as a criminal court does after a "conviction of a crime". Family Court proceedings also tend to be informal. Under the circumstances, the Committee has concluded that representation of children in delinquency cases is needed for a practical accomplishment of a fair procedure.

[Joint Legislative Committee,  
p 3.]

When choosing the term "law guardian," the Committee sought to combine the dual concerns of procedural due process with the doctrine of child's best interest. As noted by Douglas Besharov in the Practice Commentaries to the Family Court Act, the actual practical role of the law guardian is often adversarial.

... Although a major reason for the creation of the Law Guardian system was to meet the need for the legal representation of children before the Family Court, lingering behind its creation was the hope that law guardians would not create a fully adversarial system in the Family Court.

The 1970 amendments to this section of the Family Court Act appear to be a legislative reaffirmance of the dual responsibility of the Law Guardian. In addition the original language about "due process of law" and "reasoned determination of facts and proper orders of disposition," the section now states that the Law Guardian system was established for minors "to help protect their interests and to help them express their wishes to the court." The former sounds more like the role of a guardian ad litem and the latter sounds more like an attorney.

...

For better or worse, the adversarial nature of Family Court proceedings has increased and been accentuated beyond anything the original drafters of the Family Court Act probably contemplated.

[Practice Commentary §241,  
pp. 158-59.]

Counsel for children in the 1962 Family Court Act preceded by five years the landmark Supreme Court decision, In re Gault, 387 U.S. 1, 87 S. Ct. 1428 (1967), that juvenile delinquents subject to loss of liberty have a right to fundamental due process, including the right to be represented by counsel.

The first substantial changes in the law guardian system came with the 1970 amendments to the Family Court Act.

The amendment required law guardians to be appointed for all children under Articles 7 and 10. Previously, the child, parent, or guardian had to request counsel.

The proceedings in which Law Guardians may or must be appointed to represent minors have been slowly expanded by the Legislature. Originally, appointments were limited to Article 3 (neglect) and Article 7 (delinquency and supervision) and then only at the request of the minor or his parent or other person legally responsible for his care, or on the Court's own motion. In 1970, this section was amended to require the appointment of a Law Guardian in proceedings under Articles 7 and 10 and to permit it in "any other proceeding under this act."

This section adopts the view that a Law Guardian should be appointed unless there is some valid reason not to do so and the only two valid reasons seem to be: (1) if the minor has "independent legal representation," or (2) if the minor has knowingly, voluntarily, and intelligently waived his right to representation. In approximately 90% of all Article 7 and Article 10 proceedings, the child or children who are the subject of the proceeding are represented by a Law Guardian. (N.Y.S. Judicial Conference, 1974 Annual Report Table p. 424.) In the remainder of cases, the child or the parents have engaged counsel, either privately or through a public quasi-public legal services organization such as Neighborhood Legal Services or the New York Civil Liberties Union.

[Practice Commentary §249,  
pp. 172-73.]

The 1970 amendments, while requiring counsel in Article 7 and Article 10 proceedings, did not resolve the constitutional issue concerning waiver of the right. The next year, the Court of Appeals held in a juvenile delinquency

proceeding that a "heavy burden" rests on the state to show a genuine waiver. In re Lawrence S., 29 N.Y.2d 206, 325 N.Y.S.2d 921, 275 N.E.2d 577 (1971).

Amendments to §249 in 1975 made representation "to extend or continue the placement of a juvenile delinquent or person in need of supervision" pursuant to §756 "non-waivable," but did not resolve the issue of waiver under Article 7. Three years later, the legislature passed an entirely new section that set forth a standard for waiver.

Section 249-a, effective as of July 1978, states that the subject of a juvenile delinquency or person in need of supervision proceeding is presumed to lack the requisite knowledge and maturity to waive the appointment of a law guardian. This presumption is rebuttable only after a law guardian is appointed and the court holds a hearing on the matter.

In the 1975 Commentary to § 249, this writer discussed the possibility of a minor waiving the right to a law guardian. The discussion concluded that "the appointment must be made first and then, with the assistance of counsel, the minor can waive counsel (A waiver under such circumstances would appear to be unlikely)." This new section, adopted in 1978, codifies that conclusion. Furthermore, since the court must also determine that the "waiver is in the best interest of the minor," this section adds an important

additional -- and difficult to satisfy -- criteria, not usually found in waiver considerations.

[Practice Commentary §249-a  
p. 33.]

In 1976, the Court of Appeals held that children in Article 6 permanent neglect proceedings have a right to the appointment of a law guardian. The court noted a potential or actual conflict of interest between parent and child in such cases and the need to protect the rights and interests of the child. In the Matter of Orlando F., 40 N.Y.2d 103, 386 N.Y.S.2d 64 (1976).

Section 249 was amended in 1977 to reflect this decision. Law guardians were provided for all children under Social Services Law §384-b, which covers termination of parental rights proceedings.

The scope of the law guardian system established in the 1962 Family Court Act has been extended and codified by legislative amendment and case law. In addition to its specific provisions, §249 has extended the system to all Family Court proceedings. Although there is discretionary power for the Family Court to appoint counsel for children in all proceedings, for the most part, counsel has not been assigned to children whose rights are affected in support, paternity, or custody disputes.

## ARTICLE 2

Counsel for Indigent Adults in Family Court Proceedings -- §§261 and 262

While the Committee on Court Reorganization provided for children's rights in 1962 by establishing the law guardian system, no similar plan was devised to protect the rights of indigent adults. Sections 621 and 831 of the 1962 Family Court Act only provided notice that the respondent had the right to retain counsel in parental rights termination proceedings and family offense cases.

The growing concern in the early 1970's for the due process rights of indigent respondents was affirmed by the Supreme Court's decision in Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1972), which held that indigent defendants subject to possible incarceration were entitled to assigned counsel.

In 1975, the New York State Legislature codified provisions granting counsel to indigent adults in Family Court Act §§261 and 262. Section 261 provided that "persons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal

10.

charges, and therefore have a constitutional right to counsel in such proceedings."

... This and the following section codify and extend the evolving case law and administrative practice of providing counsel for indigent respondents in various proceedings under the Family Court Act. [See, e.g., *In re Beattie*, 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972), holding that indigent respondent parents in child protective proceedings under Article 10 have a right to assigned counsel since they face the possible loss of custody of the child; *Jennings v. Jennings*, 42 A.D.2d 568, 344 N.Y.S.2d 92 (2d Dept. 1973), holding that respondent husbands have a right to counsel in a proceeding to enforce a support order under Article 4 since they face possible incarceration for failure to comply with the prior court order; accord *People ex rel. Amendola v. Jackson*, 74 Misc.2d 797, 346 N.Y.S.2d 353 (Sup.Ct.West Co. 1973).] This section complements the 1970 amendments to Family Court Act section 249 which extended the Law Guardian system to all proceedings under the Act.

[Practice Commentary §261,  
p. 199.]

Persons entitled to counsel under §262-(a), effective as of January 1, 1976, include:

- respondents under Articles 8, 10, and 6 parts one and three;
- the parent of any child seeking or contesting custody parents, foster parents, or other person having

11.

physical or legal custody under Social Services Law §§358-a, 384, and 392;

- a parent in an adoption proceeding who opposes the adoption of such child;
- any person where an order is being sought to hold such person in contempt of court or in a willful violation of a previous order.

Section 262(b) vests discretionary power in the judge to assign counsel if he determines such counsel is mandated by the New York or U.S. Constitutions. Lawyers assigned to represent indigent adults are provided for in Article 18-b of the county law.

The most recent amendment to §262 in 1978 authorized the appointment of counsel for indigent respondents in paternity proceedings. This latest amendment, like the bulk of those added in 1975, affords counsel to indigent respondents, but the section remains largely silent as to the constitutional rights of indigent petitioners.

The most obvious question concerning this section is whether the legislature can make the distinctions it does in deciding which categories of indigent adults have a right to assigned counsel. For example, except for subsection 262(iv), which provides counsel for indigent parents, foster parents, etc., in proceedings under Social Services Law sections 358-a, 384, and 392, this section only provides

12.

counsel for an indigent respondent. On the basis of this legislative determination that the enumerated respondents have a right to assigned counsel, will petitioners be able to assert successfully an equal protection right to assigned counsel as well?

[Besharov, Practice Commentary §262, pp. 200-201.]

13.

ARTICLE 4

The Joint Legislative Committee for Court Reorganization revised the law of support as previously codified in the Domestic Relations Court Act and the Children's Court Act by:

- removing a previously imposed \$50 limit on awards;
- permitting orders to extend through a child's minority; and
- extending parental responsibility past minority if there were physical or mental handicaps.

The Domestic Relations Court and the Children's Court had been empowered to adjudicate the criminal charge of non-support of wives and children and to commit respondent husbands and fathers to imprisonment for six months. The Family Court, on the other hand, made support a "civil" procedure with the power to commit available only for failure to obey a lawful order of the court [Family Court Act §433]. It was also provided (under the Family Court Act) that the respondent would participate in a probation adjustment process at intake so that the matter could be resolved informally. Only if probation adjustment was unsuccessful would a summons be served [Family Court Act §423]. A Support Bureau in each county was created

14.

to receive and disburse funds paid pursuant to the Act. The Support Bureau would inform probation if there was any past-due payments, and probation would seek to adjust the problem voluntarily without the intervention of the court [Family Court Act §§221-227].

The Family Court's jurisdiction was not extended to include marriage status (divorce or separation), custody, or property. That was reserved for the Supreme Court.

The revisions in Family Court support proceedings since 1962 reflect the development of both the domestic relations law and the federal policy mandates concerning reimbursement for welfare payments to families (AFDC). They also reflect the tension between Family Court and Supreme Court jurisdiction over support.

The scope of Family Court support jurisdiction has been the subject of dispute. It has been argued that Family Court support orders should be limited in nature, only covering immediate basic needs of a family. Since permanent alimony and support orders are the province of the Supreme Court during dissolution, long-term considerations need not be evaluated. Others have claimed that Family Court orders must go as far as possible in resolving all support issues since Family

15.

Court may be the only forum ever to hear the matter. The Court of Appeals has held that the substantive law of the Domestic Relations Law applies to Family Court and that the Family Court must consider all relevant factors, including the respective circumstances of the parties, the financial status, age, health necessities, obligations, status in life, duration and nature of the marriage, and the conduct of the parties in spouse support cases; and a similar list of relevant factors must be considered in child support cases. (See, Steinberg v. Steinberg, 18 N.Y.2d 496, 277 N.Y.S.2d 129 (1966) and Brownstein v. Brownstein, 25 A.D.2d 205, 268 N.Y.S.2d 115 (1st Dept.); for standards, see, Hahn v. Hahn, 78 Misc.2d 585, 358 N.Y.S.2d 236 (Fam. Ct. Monroe 1973), aff'd, 44 A.D.2d 913, 356 N.Y.S.2d 231 (2nd Dept. 1973).) Thus, the Family Court Act goes far beyond the limited scope of support under the old Domestic Relations Court. The Family Court is now called upon to make, upon occasion, complex financial findings. At the same time, there are limitations to this expanded scope of support jurisdiction. For example, the Family Court has no power over property dispositions or the enforcement of a separation agreement, although they may be directly relevant or determinative of the support issue in any particular case.

16.

(See, Borkowski v. Borkowski, 38 A.D.2d 752, 330 N.Y.S.2d 106 (2nd Dept. 1972) concerning property; and Iseman v. Iseman, 48 A.D.2d 809, 369 N.Y.S.2d 413 (1st Dept. 1975) concerning separation agreements.)

The nature and scope of support jurisdiction has also been influenced by the passage in 1974 of the Child Support Enforcement program as part of the Social Service Amendment to the Social Security Act, Title IV-D (42 U.S.C.A. 601, et seq.). This conditioned federal matching aid to families with dependent children (AFDC) with state efforts to locate absent parents, to establish support obligations, and to collect the debt. Although the assignment of support obligations to the state was not new under New York State law, the establishment of the state IV-D agencies and parent locator services increased the number of such cases coming to court [Social Services Law §11a, et seq.].

In response to the numerous cases generated by the IV-D system, a number of amendments to the Family Court Act have been passed. Section 439 of the Family Court Act (L.1977, C.388) provided for the appointment of hearing examiners to hear and report on the facts in support cases. Section 440 of the Family Court Act (L.1977, C.516) provides that support payments be made directly to support enforcement collection

17.

units of Social Service. Both the AFDC and non-AFDC are now covered by the locator and enforcement apparatus.

The Uniform Support of Dependents Law, Domestic Relations Law Article 3, adopted in 1958 (formerly McKinney's Unconsolidated Laws §§2111-2118), is also under the jurisdiction of the Family Court Act. It sets up a procedural mechanism for interstate enforcement of support under the substantive law of Article 4 (with regard to New York State residents) and the enforcement of foreign support orders. Effective as of June 1980, 37A now provides for the clerk of the Family Court to maintain a Registry of Foreign Child Support Orders. Support Collection Units of the Department of Social Services are now the collection agency for U.S.D.L. cases as well.

Under IV-D regulations, the Department of Social Services has established its own support collection units and support formulas, and it is the Department of Social Services that attempts to resolve cases outside of court when AFDC reimbursement is involved. There is general agreement that probation resolves very few non-AFDC support matters. The original informal intake system in Family Court support matters has thereby been reduced in importance. Under the Family Court

18.

Act, all support proceedings must be initiated in Family Court. The court applies its own judicial standards (N.Y.S. Constitution, Article 6, §13b). There is disagreement between the Department of Social Services' support enforcement agencies and the Family Court regarding the proper amounts for support awards, the causes of court delays, and lack of enforcement. Title IV-D does not require courts to establish support liability, and there has been discussion concerning removing Department of Social Services AFDC reimbursement (or perhaps all support cases) to an administrative agency.

The trend in the area of enforcement of support has shifted away from voluntary compliance and informality toward stronger enforcement remedies. In 1968, the Family Court was empowered to enter money judgments, and in 1980, §460 was amended to provide that, barring a showing of good cause, judgment shall be entered [L.1980, C.645]. Similarly, compulsory financial disclosure [§4240a, L.1977, C.516], payroll deduction orders [L.1977, C.519], limitation of courts' ability to cancel arrears [§458], a presumption of wilfullness on failure to pay support, and the addition of interest on arrears in judgments [§12, L.1979, C.437 and §1, L.1980, C.241] have been added to the Act.

19.

As with other articles of the Family Court Act, case law and legislation have added the requirement of provision of counsel for respondents in enforcement proceedings. [Argesinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1972).] [Family court Act §262, 1975 amend.]

In 1979, the entire Family Court Act Article 4 was transformed by the Supreme Court decision in Orr v. Orr, 440 U.S. 268 (3/15/79), requiring gender neutrality in support statutes. Subsequent cases and legislation has conformed the Act to meet this standard [L.1980, C.281].

The 1962 Joint Legislation Committee also addressed itself to the relationship between Supreme Court and Family Court with regard to support and custody:

The new Judiciary Article provides that the Supreme Court has jurisdiction over matrimonial actions -- separation, annulment, divorce. It gives the Family Court, however, jurisdiction to hear and determine the support and custody aspects of these actions when such support and custody matters are referred to it by the Supreme Court. This constitutional arrangement has been implemented in Article 5, Part 6 of the proposed Family Court Act.

Part 6 deals with the respective roles of the Supreme Court and the Family Court in support matters generally. The Committee notes that Sections 464 and 466 are central in the new legislative pattern.

Section 464 empowers the Supreme Court to refer support and custody matters to the Family Court. It provides that on such a referral, "the Family Court has jurisdiction to determine the application with the same powers possessed by the Supreme Court" and that "the Family Court's disposition of the application is an order of the Family Court" appealable as such.

Section 466 gives the Supreme Court power to decide whether it or the Family Court should have jurisdiction in a given case to enforce or modify a Supreme Court support order in a matrimonial action. Accordingly, one paragraph of this section authorizes the Supreme Court to give the Family Court exclusive jurisdiction over such an order. Another paragraph permits the Supreme Court to retain exclusive jurisdiction. Still another paragraph applies when the Supreme Court has not specified in the order which court has jurisdiction.

The Committee expects that this arrangement will avoid conflicts of jurisdiction and needless technical difficulties. It also trusts that the proposals will permit the courts to render effective and speedy decisions in this area of law.

[Joint Legislative Committee,  
p. 20]

In 1962, the sole ground for divorce in New York State was adultery, and the "tender years doctrine," which predisposed the courts to award custody of children to mothers, was the law in effect. Since 1962, the Domestic Relations Law was amended, expanding the grounds for divorce and increasing the number of matrimonial cases, including the issues of support

and custody, heard in Supreme Court. This may have resulted in a duplication of effort never contemplated by the Joint Committee.

On July 19, 1980, Article 4 was amended to provide for jurisdiction over "proceedings for support or maintenance," a reference to the new equitable distribution and maintenance amendments to the Domestic Relations Law. Family Court was also given expanded jurisdiction over "equitable distribution of property" when cases are referred by the Supreme Court.

Under this new grant of jurisdiction, the Family Court may confront issues concerning transfer of title, corporate law, complicated tax questions, etc. previously outside the scope of Family Court's traditional support jurisdiction.

To summarize, changes in the nature of Family Court support proceedings have been brought about by:

- broadening of the concept of support beyond the minimum standard contemplated for "public charge" cases;
- court responsibility for a large volume of support and support enforcement cases brought by the Department of Social Services;

- formalization of practice and procedures, including the passage of strong civil enforcement statutes; and
- divorce reform, providing for easier marriage dissolution and equitable distribution of property.

ARTICLE 5

In consolidating paternity jurisdiction from the Children's Court and the Court of Special Sessions, the Joint Legislative Committee accomplished two changes in paternity proceedings: it completed the evolution from criminal to civil and it eliminated the three-judge panel previously hearing paternity cases in New York City.

Under the new Judiciary Article, the Family Court is given jurisdiction over proceedings for "the establishment of paternity." This jurisdiction is currently exercised by the Children's Courts outside the City of New York and by the Court of Special Sessions in New York City. The new Family Court Act gives the Family Court exclusive jurisdiction over these proceedings throughout the state.

The normal practice in the Family Court is for a single judge to hear and determine proceedings. This practice has been made applicable to paternity proceedings. Though contested paternity proceedings are currently heard in New York City by a panel of three judges, the Committee concluded that sufficient reason has not been advanced for changing the normal Family Court practice.

The Committee also decided that it was under a responsibility to revise the applicable law so that it was civil rather than criminal in nature. Accordingly, the proposed legislation eliminates archaic references drawn from the criminal law. It also recognizes that a principal purpose of the proceeding is to resolve problems of support. The part dealing with orders makes this clear.

[Joint Legislative Committee,  
p. 20 (Emphasis added).]

24.

The purpose of Family Court paternity proceedings was to determine paternity and order support to facilitate the care of needy women and children and to prevent them from becoming public charges.

The history of the nature of paternity proceedings in Family Court parallels that of support actions. First, the 1974 federal reimbursement scheme for AFDC funding requires that AFDC-recipient mothers cooperate in providing information to the Department of Social Services to establish paternity and in assigning the right of support. Since the initiation of this program, the number of paternity proceedings brought by the Department of Social Services has increased dramatically and now represents three-fourths of all paternity proceedings in Family Court. [Office of Court Administration Report 1979.]

The Department of Social Services must file petitions in Family Court to obtain orders of filiation, even if the support enforcement agency has obtained a consent from the putative father.

Second, in disputed paternity cases, all respondents have been afforded the right to assigned counsel. Respondents have been afforded counsel in Article 4 enforcement matters as well as Articles 6 and 8.

25.

An issue for the Commission's consideration in defining the nature of paternity proceedings in Family Court is how should the volume of cases generated by the Department of Social Services be handled?

Recently, the legislature passed a bill allowing HLA blood tests to be admitted into evidence as proof of paternity. This amendment may eventually serve to decrease the need for a large number of disputed paternity matters since the HLA test can determine paternity within a high percentage of certainty. It has been suggested that paternity consent decrees be handled by an administrative agency along with support liability and enforcement proceedings. If the HLA increases such consents, this would effectively reduce Family Court involvement.

The tension between Supreme Court and Family Court arises in the paternity area as well as in support and custody matters. It has been held that a Family Court order of filiation does not serve as a status determination for all purposes, but only as a basis on which to award support. [In the Matter of Salvatore S., 58 A.D.2d 867, 396 N.Y.S.2d 872 (2nd Dept. 1977).] Only New York Supreme Court declaratory judgments resolve the status issue. Are the limitations on the nature of Family Court's jurisdiction to remain in effect, despite the grant of counsel and other due process rights?

Foster Care and ARTICLE 6:  
PART 1 (Termination of Parental Rights)

The Joint Legislative Committee gave the Family Court authority to approve and monitor placements of children under Articles 7 (delinquency and PINS) and 3 (now 10 -- neglect). But it did not expect the court to play a role in the larger system of foster care in which parents voluntarily surrender their children to the state for placement in foster homes or institutions.

In 1971, the legislature, concerned about the thousands of children who had been placed in foster care and then forgotten, enacted §392 of the Social Services Law, providing Family Court review of every foster care placement after two years and periodically thereafter. (In 1975, the time for the first review was shortened to eighteen months.) The court was to scrutinize the foster care agency's plan for the child's future and provision of services to the child's family, and after a hearing, order that the child either be returned to the natural parents, freed for adoption, or continued in care. The dual purpose of §392 was (1) to assure that no child was simply "lost" in perpetual foster care and that every child eventually would have a permanent home, and (2) to oversee the

diligence of foster care agencies in planning for and delivering services to the children and families in the foster care system.

In 1973, the legislature enacted §358-a of the Social Services Law. It was a response to the requirements of federal law enabling states to receive federal funds for the maintenance in foster care of children from AFDC families, so long as those children were placed in foster care by court order (42 U.S.C.A. §601, *et seq.*). Section 358-a therefore provided for a court proceeding, commencing within thirty days of placement, to determine that the placement was in the child's best interest because the parents were unable to provide adequately for its care, maintenance, and supervision. In 1976, the section was amended to require the court also to find that the parents' surrender of custody had been knowing and voluntary. Two years later, by a further amendment, the thirty-day hearing was required for all foster care placements, whether or not the families were on AFDC, and the state was authorized to withhold reimbursement for any placement for which the agency did not file a timely §358-a petition. In 1979, the Child Welfare Reform Act mandated the denial of reimbursement (from April 1, 1981) for failure to file timely petitions or implement orders under both §§358-a and 392.

Parents have rights of notice and appointed counsel in §358-a hearings, although they may waive the right to notice when they sign the instrument of surrender to foster care. Parents have rights of notice and appointed counsel in §392 hearings, and foster parents who have cared for a child for eighteen months may also be parties and have appointed counsel. Putative fathers may receive notice and give evidence "relevant to the best interest of the child" [§384-c(3).] New York's scheme for the administrative and judicial review of an agency's decision to remove a child from a foster home has been upheld by the U.S. Supreme Court in Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977). Legislative revision of the rights of putative fathers to participate in foster care decisions resulted from the U.S. Supreme Court decision in Caban v. Mohammed, 441 U.S. 380 (1979), which struck down §111(l)(c) of the Domestic Relations Law requiring only the mother's consent to the adoption of an out-of-wedlock child.

Since the enactment of §§358-a and 392, the foster care system has come under increasingly severe attack. Some of this criticism has been directed to the Family Court. It is alleged that court hearings are essentially pro forma, that

judges do not sufficiently examine the justification for placement or the agency's plan for permanence, and that the court's inefficiency results in prolonged delays so that hearings and orders are almost always far behind mandated deadlines. On the other hand, some critics believe that routine oversight of the judgments and performance of the Department of Social Services and the voluntary child care agencies is not a proper judicial function. They look to further reformation of the foster care system through such mechanisms as the preventive services requirement and fiscal penalties of the Child Welfare Reform Act, in preference to the use of the court as a kind of "super-agency" attempting to monitor thousands of administrative decisions. (In 1979, about 4,200 foster care review petitions and 7,900 foster care placement petitions were filed.)

Three current or impending developments will affect the debate over the court's role in foster care placement and review. First, the newly enacted federal Adoption Assistance and Child Welfare Act (P.L. 96-272) removes the requirement that a placement be court-ordered as a condition of state eligibility for federal funds, so long as there is

judicial review within six months. Relaxation of the federal mandate has reopened discussion of alternatives to

the present §358-a. Some possibilities that have been raised include placement hearings by an administrative panel with the availability of judicial review, or the scheduling of the judicial placement hearing several months after placement in order to allow time for an agency plan for the foster child to be developed. Second, the Child Welfare Reform Act will be fully effective April 1, 1981. In addition to the provisions already mentioned, this will require earlier and more detailed agency planning and case record-keeping for each child in care. Third, pilot programs in New York City and Monroe County, based upon models developed in Arizona, Ohio, New Jersey, South Carolina, and Washington, are using lay volunteers to review cases before and between court hearings, to present information and recommendations to the court, and in some circumstances to act as advocates for the child and the parents with agencies and the court. These programs are providing a wholly new resource for the court, provoking discussion of further possible uses of citizen volunteers in Family Court.

Article 6 of the Family Court Act of 1962 carried over many of the provisions of the old Children's Court and Domestic Relations Acts concerning judicial termination of parental rights. At that time, permanent neglect was the single

specified ground. In 1976, an amendment to the Social Services Law incorporated the permanent neglect provision of Article 6 and consolidated with it three further grounds: death of both parents and no lawfully appointed guardian, abandonment, and mental illness or retardation of the parent (Social Services Law §384-b). The Family Court Act (§611) was amended to refer to the substance and procedures of the Social Services Law for permanent neglect proceedings; however, many provisions of Article 6 still apply, and must be read in conjunction with the Social Services Law in such proceedings.

The Surrogate's Court has concurrent jurisdiction with Family Court over abandonment and mental illness.

In 1976, the Court of Appeals held that children who are subjects of permanent neglect proceedings have the right to appointed counsel. In the Matter of Orlando F., 40 N.Y.2d 103, 386 N.Y.S.2d 64 (1976). The next year, the legislature amended §249 to provide law guardians for all termination proceedings. Parents also have the right to appointed counsel under §262, as do some foster parents.

In a permanent neglect case, the court is guided by the dual legislative intent to preserve the natural family but also, where "positive, nurturing parent-child relationships

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no longer exist," to free children for adoption so that they will not remain in "unnecessarily protracted" foster care [§§384-b(1)(a) and (b)]. The court must consider all these factors: (1) the respective rights and claims of natural parents and foster parents, (2) the best interest of the child, (3) the duty of the parents to maintain continued contact with the child and plan for the future, (4) the duty of the child care agency to make "diligent efforts to encourage and strengthen the parental relationship" [§384-b(7)(a)], and (5) legislative policy supporting the right of the child to a permanent home.

The case law reveals that the task of reconciling these various and often conflicting principles is not easy. For example, the courts have held the agency's "diligent efforts" up to increasing scrutiny, but even where the agency has clearly failed in its obligations, the child's best interest may be found to require termination after prolonged separation from the parents. Cf., Matter of Leon RR, 48 N.Y.2d 117, 421 N.Y.S.2d 863 (1979); Matter of Sanjivini K., 47 N.Y.2d 374, 418 N.Y.S.2d 339 (1979). While most of the recent legislative changes in the foster care system are intended to further general public policy to achieve permanency for each child in the shortest time possible, the case law on termination reflects the

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complexity of countervailing factors in particular circumstances. The recent Court of Appeals decision in Matter of Hime Y. (2/24/81) reversed a termination order based on the mother's mental illness because "no professional opinion was offered that the mother would be unable for the foreseeable future properly to care for Hime." But the dissenting opinion by Judge Wachtler objects, "... the statutory goal of providing permanent homes for children whose parents' mental condition renders them unfit to raise them now or in the foreseeable future ... should not be frustrated simply because an expert witness suggests a vague possibility that the parent might at some date in the future, perhaps the distant future, recover...." The dilemma of the Hime decision is typical of the kinds of conflict with which the Family Court is confronted in termination cases.

ARTICLE 6: PART 3

Under Part 3 of Article 6, the issue of custody in habeas corpus proceedings or matrimonial cases was originally limited to those cases referred from Supreme Court. Cases were to be referred so that the Family Court's particular sensitivity to family issues could be utilized. Two major changes have occurred since 1962. In 1976, respondents in custody cases were provided with counsel [Family Court Act §262], and in 1978, Family Court jurisdiction was extended to include original jurisdiction over habeas corpus proceedings. Litigation concerning concurrent jurisdiction with Supreme Court continues. For example, in Bartlett v. Hollenbeck, 100 Misc.2d 748, 420 N.Y.S.2d 140 (1979), it was held that the grant of original jurisdiction does not authorize Family Court to modify a previous order of Supreme Court. Thus, while the nature of Family Court's jurisdiction was expanded, the limitations of its power are still being tested.

There are a number of trends in the custody area that may continue to affect Family Court, which are presently under debate by those in the field:

1. The standard for determining custody and visitation.

The "best interests of the child" has been the guiding principle since 1925. Finlay v. Finlay, 240 N.Y. 429. However, the meaning of the phrase is in a constant state of flux. For example, the maternal preference referred to as "the tender years doctrine" has been replaced by a "comparative fitness standard" in contests between natural parents. (See, Salk v. Salk, 393 N.Y.S.2d 841 (1971).) Should we define the term "best interests"? How does the best interests test apply to visitation? (See, the recent Court of Appeals case of Weiss v. Weiss, \_\_\_ N.Y.2d \_\_\_ (1981).)

There is also a trend in our courts toward granting joint custody. The Court of Appeals, however, has held it would not affirm a joint custody award where the parties are antagonistic. [Braiman v. Braiman, 44 N.Y.2d 584, 407 N.Y.S.2d 449 (1978); Perotti v. Perotti, 355 N.Y.S.2d 68; Woicik v. Woicik, 321 N.Y.S.2d 5 (1971).]

2. Counsel.

Under §249, as amended in 1976, the Family Court is empowered to appoint a law guardian for the child in any proceeding under the Family Court Act. Pursuant to this section, a law guardian was appointed to represent a child in a divorce

proceeding where custody was in dispute. Borkowski v. Borkowski, 90 Misc.2d 957, 396 N.Y.S.2d 962 (Sup. Ct. Steuben Co. 1977). The issue of appointment of counsel for children in all custody cases is a hotly debated one.

#### 3. Child's Preference.

How far does the court have to go in considering a child's wishes? Hambleton v. Palmer, 27 A.D.2d 978, 278 N.Y.S.2d 700 (4th Dept. 1967), held that it may be improper for the court to make a custody determination without making any effort to determine the desires of the child. For the opposite holding, see, Matter of J Children, 377 N.Y.S.2d 530. Under what circumstances should the child be questioned? In chambers? On the stand? Privately? With counsel present?

#### 4. Professional participation.

Questions concerning the role of psychiatrists, psychologists, and social workers in resolving custody disputes continues to be central, e.g., California has instituted panels of experts to help resolve disputed cases.

Other changes in Article 6 have been the addition of the right of the court to grant an order of protection and the passage of the Uniform Child Custody Jurisdiction Act,

effective in New York September 1978 as Article 5A of the Domestic Relations Law. The Uniform Child Custody Jurisdiction Act was passed to help avoid jurisdictional competition with foreign jurisdictions.

It should also be noted that, because of the enormous rise in the divorce rate and the changes in social relations, custody will continue to be a crucial issue.

ARTICLE 7

The changes that have taken place in the nature of Family Court proceedings for delinquency and PINS are so numerous and so complex that they can only be summarized in broad outline for purposes of this study. Article 7 will be discussed under three headings: changes in delinquency proceedings from 1962 to 1976; changes in delinquency proceedings resulting from the legislation of 1976 and 1978; and PINS.

I. Delinquency: 1962-1976

Early in the history of the juvenile court movement, there was agreement that juvenile delinquency proceedings should be "civil", not "criminal." This agreement was based on a sense of a child's exuberance and vitality and the stress of the early years of life. The restraints and disciplines of adulthood have not yet been established. The possibilities of change are seemingly great. And so the decision was made to avoid a criminal conviction for the young and to shape the law and provide a court to guide and supervise, rather than punish, children in trouble.

The Committee adheres to that decision. It finds, however, that an "adjudication of delinquency" as a practical matter may have a damaging effect on a child and on his career as a citizen. Indeed, the common understanding is that such an adjudication involves a youth who commits crimes and requires supervision, treatment or commitment. The Committee also

finds that the power of a court on such an adjudication is substantially similar to the power of a criminal court on "conviction of crime"....

[Joint Legislative Committee,  
p. 6.]

Recognizing both the desirability of maintaining the distinctive civil character of the juvenile court with its goal of supervision and treatment rather than punishment, and at the same time the similar practical effects of an adjudication of delinquency and conviction for a crime, the Committee redefined delinquency narrowly, to apply only to violations of the Penal Law. Other juvenile misconduct previously covered by the law of delinquency was now redefined under the new category of "person in need of supervision." But the Family Court's jurisdiction over delinquency was narrowed further by the definition of a delinquent as a juvenile who "requires supervision, treatment or confinement" [§712]. This requirement was

... designed to focus attention on the reason for such proceedings in the Family Court, and serve as a way of conserving its energies.

The Family Court is essentially a last resort. Its energies and processes should be reserved for children requiring official

supervision. Conduct which amounts to technical violation of law and does not evidence a need for court action should be dealt with in the community.

With this in mind, the Committee concluded that the Family Court should have appropriate powers in proper cases....

[Joint Legislative Committee,  
p. 8.]

Among the "appropriate powers" of the court were the following:

... It may suspend judgment, using the process of adjudication as a device for influencing the child and his family. It may place him in a more suitable environment. It may use its probation service as an instrument of education, guidance and supervision. It may enter an order of protection. In stated circumstances, it may use its power of commitment.

[Joint Legislative Committee,  
pp. 8-9.]

If the Committee intended the court to have broad discretion in determining disposition, it also recognized the need for fair procedure in both adjudication and disposition. The Purpose clause of Article 7, §711, stated "[t]he purpose of this article is to provide a due process of law (a) for considering a claim that a person is a juvenile delinquent or

a person in need of supervision and (b) for devising an appropriate order of disposition...." The Committee's Comment to §711 cited People v. Lewis, 260 N.Y. 171 (1932) as indicating

that not all of the constitutional requirements of a "criminal trial" necessarily apply to a "civil proceeding" involving juvenile delinquency. The practical result is that the Legislature has wide discretion in prescribing the processes of law in this area. This section expresses a legislative determination to provide a due process of law and recognizes the role of the courts in reviewing under the constitution the "dueness" of the process thus provided.

[Joint Legislative Committee,  
p. 100.]

In 1966, four years after the new Family Court Act was passed, the Court of Appeals re-examined the conclusion in People v. Lewis, that a juvenile delinquency proceeding is civil rather than criminal. Citing in particular the "due process" provision of the Purpose clause (§711), the "notice of rights" provisions of §741, and the report of the Joint Legislative Committee, the court ruled that the legislature in 1962 had effectively rejected People v. Lewis, and that a juvenile delinquency proceeding is at least quasi-criminal in nature. Matter of Gregory W., 19 N.Y.2d 55, 277 N.Y.S.2d 675 (1966).

From its inception, the Family Court Act provided a higher standard of due process in the adjudication of delinquency than many other juvenile courts in the country. The U.S. Supreme Court decision in In re Gault, 387 U.S. 1 (1967), noted that New York's statute provided the four basic constitutional rights it identified as essential to due process in juvenile delinquency proceedings: the right to notice of charges and time to prepare for trial, the right to counsel, the right to confront and cross-examine witnesses, and the right to remain silent.

The broad statements in Gregory W. and Gault about the nature of delinquency proceedings laid the foundation for many later refinements of the meaning of "due process" in juvenile court.

Two subsequent U.S. Supreme Court decisions helped define the scope of due process in the Family Court. The first, In re Winship, 397 U.S. 358 (1970), addressed the New York statute directly, and found unconstitutional its provision for adjudication upon a preponderance of the evidence. The Supreme Court ruled that "proof beyond a reasonable doubt" was the required standard. The second, McKeiver v. Pennsylvania, 403 U.S. 528 (1971), held that a full adversarial process was not required in order to provide "fundamental fairness," and therefore juveniles did not have the constitutional right to a jury trial. The Court explained that it did not wish to dispense entirely with "the idealistic prospect of an intimate, informal protective proceeding" that marked the distinctive purpose of juvenile courts.

In the years 1962-1976, the major changes in the law of delinquency in New York resulted from the rapid development of case law dealing with the rights of accused delinquents to due process and fair treatment. Much of this litigation came about as a consequence of the drafters' provision for counsel and law guardians in delinquency proceedings. While the Joint Legislative Committee declared "that counsel is often indispensable to a practical realization of due process of law" [p. 44], Douglas Besharov notes an "underlying

"ambivalence" about the role of the law guardian, "which sought to marry the dual concerns of due process and the child's best interest." Nevertheless, Besharov writes,

... many attorneys fulfilling the role of Law Guardian have pushed ... for the fullest possible recognition of the legal rights of the young. They have fought with all their professional skills and energy to prevent an adjudication against their young clients ... on the grounds that nothing in the Family Court practice relieves an attorney of his professional, ethical, and personal obligations under the code of professional responsibility to "represent a client zealously within the bounds of law...."

For better or worse, the adversarial nature of Family Court proceedings has increased and been accentuated beyond anything the original drafters ... probably contemplated.

[Practice Commentary, §241,  
pp. 158-59.]

In 1962, the Joint Legislative Committee had decided not to give criminal jurisdiction to the new Family Court in part because it wished to avoid the need for full formal criminal procedure.

The Committee concluded that it would be unwise, at this time, to give the Family Court the extensive powers given the criminal courts under the Penal Law of the State of New York. This would also introduce the technical requirements of the Code of Criminal Procedure. In the

Committee's view, while a due process of law should be used in the Family Court, criminal powers and procedures would be inconsistent with the proper development of the Family Court, during its formative period, as a special agency for the care and protection of the young and the preservation of the family.

[Joint Legislative Committee,  
p. 2.]

In 1970, the Court of Appeals held that the Code of Criminal Procedure (predecessor to the Criminal Procedure Law) did not apply in delinquency proceedings. In re Daniel Richard D., 27 N.Y.2d 90, 313 N.Y.S.2d 704 (1970), cert. denied, 403 U.S. 926 (1971). In fact, however, even by 1970, and certainly by the mid-1970's, many rules of procedure from the Criminal Procedure Law had been incorporated into delinquency practice. Writing in 1975, Besharov summarized and evaluated the cumulative effects of the case law on delinquency:

As a result, except for a certain degree of formality, the absence of certain types of pre-trial proceedings (including grand jury proceedings and pre-trial suppression proceedings), and the absence of trial by jury, proceedings under Article 7 are in many ways identical to adult criminal court proceedings. This is, of course, a substantial evolution from the practice under the Family Court Act when it was first enacted, but it is in no way contrary to the spirit of the Act. Indeed, the Act and the spirit behind it have in many

ways encouraged and nurtured these developments. The effect of this evolutionary change has been an adjudicatory process that more nearly insures that the juvenile respondent's procedural and constitutional rights are protected.

[Practice Commentary, §711,  
p. 551.]

The following are highlights of case law that significantly altered delinquency proceedings from the provisions drafted in 1962. It is notable that most of these decisions address issues arising between arrest and adjudication, and do not narrow or rigidify the court's broad powers of disposition, which many commentators see as the heart of the juvenile court's special responsibilities to provide supervision, treatment, and guidance in accordance with each child's needs and best interest.

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Juveniles are protected by the same constitutional standards for arrest and search and seizure that apply to adults. The exclusionary rules of the Criminal Procedure Law apply to juveniles in delinquency proceedings. In re Irving S., 36 A.D.2d 642, 314 N.Y.S.2d 752 (2nd Dept. 1972); In re Steven B., 30 A.D.2d 442, 293 N.Y.S.2d 946 (1st Dept. 1968).

Juveniles are entitled to Miranda warnings. In re Jose R., 35 A.D.2d 972, 317 N.Y.S.2d 933 (2nd Dept. 1970); In re Aaron D., 30 A.D.2d 183, 290 N.Y.S.2d 935 (1st Dept. 1968).

A heavy burden falls upon the state to show that a juvenile has knowingly and willingly waived the right to counsel. In re Lawrence S., 29 N.Y.2d 206, 325 N.Y.S.2d 921 (1971); In re Paul H., 47 A.D.2d 853, 365 N.Y.S.2d 900 (2nd Dept. 1975).

The U.S. Supreme Court decisions in U.S. v. Wade, 388 U.S. 218 (1966) and Gilbert v. California, 388 U.S. 263 (1966), dealing with standards for out-of-court identification procedures, apply to delinquency proceedings. In re William D., 36 A.D.2d 970, 321 N.Y.S.2d 510 (2nd Dept. 1971).

A juvenile is entitled to voir dire suppression hearings.

In re James H., 34 N.Y.2d 814, 359 N.Y.S.2d 48 (1974); In re Robert P., 40 A.D.2d 638, 336 N.Y.S.2d 212 (1st Dept. 1972); In re Gary C., 42 A.D.2d 704, 346 N.Y.S.2d 276 (2nd Dept. 1973).

No finding of delinquency is permissible on the basis of unsworn and uncorroborated evidence given by a child under twelve years of age. In re Wade H., 41 A.D.2d 817, 342 N.Y.S.2d 696 (1st Dept. 1973); In re Steven B., *supra*. No finding of delinquency is permissible on the basis of the uncorroborated

testimony of an accomplice. Matter of Lance S., 51 A.D.2d 1057, 382 N.Y.S.2d 97 (2nd Dept. 1976); In re William L., 41 A.D.2d 674, 340 N.Y.S.2d 1001 (2nd Dept. 1973).

The same standards apply to juveniles in a determination of competency to stand trial that apply to adults. People ex rel. Thorpe v. Clark, 62 A.D.2d 216, 403 N.Y.S.2d 910 (2nd Dept. 1978); Matter of John Y., 36 A.D.2d 790, 319 N.Y.S.2d 216 (3rd Dept. 1971).

The reasonable doubt standard is retroactive. Ivan V. v. City of New York, 407 U.S. 203 (1972).

Youths placed in juvenile facilities have a constitutional right to rehabilitative treatment. (This was a class action suit enjoining the use of isolation, physical restraints, and tranquilizers for punitive purposes in a state training school.) Pena et al. v. N.Y. State Division for Youth, 419 F. Supp. 203 (S.D.N.Y., 1976).

A juvenile has the right to notice and a hearing in a proceeding to extend placement. People ex rel. Arthur F. v. Hill, 29 N.Y.2d 17, 323 N.Y.S.2d 426 (1971).

A juvenile on parole (in "aftercare") from the Division for Youth is entitled to counsel and a hearing prior to revocation of parole. People ex rel. Silbert (Anthony R.) v. Cohen, 29 N.Y.2d 12, 323 N.Y.S.2d 2d 422 (1971).

## II. Legislation on Delinquency: 1976 and 1978

Although case law on delinquency continued to evolve after 1976, the most significant changes from that date resulted from two legislative enactments: the Juvenile Justice Reform Act (L.1976, C.878) and the juvenile offender law (L.1978, C.481).

The Juvenile Justice Reform Act was one of a package of bills enacted in 1976 to strengthen the juvenile justice system in face of the apparent increased incidence and seriousness of juvenile crime. The legislation was very complicated: Barsky and Gottfried list thirty-four separate amendments to the Family Court Act, Executive Law, Mental Hygiene Law, Education Law, and others simply by way of introduction. [Supplementary Practice Commentaries, 1976, Preceding §711, pp. 266-67.]

The 1976 Act, as subsequently amended, may be summarized as follows:

(1) The addition of "the need for protection of the community" as one of the purposes of Article 7, along with "the needs and best interests" of the child [§711]. The legislation specifically requires that the court take both factors into consideration in all delinquency proceedings. "[T]he legislation ... reflects a belief that neither set of needs can be served unless they are both served" [Supplementary Practice Commentaries, 1976, §711, p. 269]. Significantly, earlier that same year, the Court of Appeals had upheld the constitutionality of preventive detention of juveniles, citing the need both to protect the community and to shelter children. People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 385 N.Y.S.2d 518 (1976).

(2) The definition of "designated felony acts." The legislature categorized certain serious felonies (generally those involving violence) as "designated felonies" when committed by children of fourteen or fifteen years of age, or in some cases, thirteen years of age. The category also included certain repeat offenses, for example, any felony offense by a juvenile previously adjudicated for two prior acts that would, if committed by an adult, constitute felonies. Juveniles charged with designated felonies may not be adjusted at intake without the written approval of a judge, and in some cases, of the prosecution counsel. Designated felonies may be prosecuted by the district attorney. A "designated felony part" was established in the New York City Family Court, and elsewhere proceedings involving designated felonies take precedence over every other matter except Article 10.

(3) "Restrictive placement" after adjudication for certain designated felonies. The court is authorized to order restrictive placement, after a probation investigation and diagnostic assessment, which, depending upon the offense and the juvenile's age, results in successive minimum periods of "secure" and "non-secure" confinement and intensive supervision. Such placements may be extended, in certain cases, up to the

juvenile's twenty-first birthday. The discretion of the Division for Youth to release a juvenile from a restrictive placement is limited. Under the pre-1976 statute, most placements were limited to eighteen months, subject to one-year extensions up to the child's eighteenth birthday, and DFY had considerable discretion to transfer or release juveniles from its various facilities and programs.\* These original provisions, with some additional restrictions on agency discretion, still apply in delinquency cases other than designated felonies.

(The 1962 Act did contain provision for commitment of certain adjudicated fifteen-year-olds for periods up to three years, but it was seldom used, and in 1976 it was repealed.)

(4) A tightening of procedure and accountability throughout delinquency proceedings, including numerous provisions that the court place on the record the reasons for its decisions (for example, in ordering detention, granting adjournments, and ordering restrictive placement). The same judge is required to preside throughout a case, including post-disposition hearings, and the counsel presenting the petition must receive notice of and may participate in dispositional hearings. These and other similar provisions are intended to

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\* In the early years of the Family Court, judges often selected specific facilities for placement. Later, DFY assumed that function. There have been a number of recent cases in which Family Court judges have claimed the authority to select a placement rather than leave the matter to the discretion of DFY. The issue is still unresolved.

assure that determinations in delinquency proceedings are made on the basis of complete information and with the participation of the individuals most familiar with the facts and circumstances of each case.

Barsky and Gottfried characterize the goals of the 1976 legislation and its effects upon the nature of Article 7 as follows:

A common theme of this program is accountability and responsibility -- for the juvenile and for the agencies and individuals who make up the juvenile justice system.

All too many juveniles who get into trouble -- even those who commit violent crimes -- have not been helped, treated or punished. Our system may repeatedly ignore their misconduct. At the same time, the system often over-reacts to minor offenses, creating hostility that breeds violence.

... This legislation is aimed at making juveniles more reasonably accountable and responsible for their conduct in two basic ways. The first is to broaden the range of dispositional alternatives available, to enable the system to respond more appropriately to different kinds of youngsters. The second way is to strengthen procedures and control within the system. This is hoped to be achieved in part by improving accountability of and decision-making by those within the system.

This legislation cannot be characterized simply as taking a "rehabilitation" or "treatment" approach, a "punishment" approach, or a "quarantine" approach. There are, instead, elements of various theories of juvenile justice

incorporated in it. Certainly, the legislation reflects rehabilitative thinking, as demonstrated by the requirements for determining need for a restrictive placement and for services to be provided in secure facilities. Equally certain, most juveniles will regard their secure or prolonged confinement, or their work for restitution or public service, at least initially, as punishment. It is hoped that they will come to think society takes them and their conduct seriously. And even if rehabilitation and punishment are not effective, the legislation is designed to remove certain youngsters from the community, in appropriate cases, for sufficient time for them to mature and develop some self-control in a setting that is as benign and helpful as possible.

[Supplementary Practice Commentaries, 1976, Preceding §711, pp. 267-68.]

However, there are those who do not agree with Barsky and Gottfried's conclusion that "the 1976 legislation does not represent an attempt to radically alter the theory or purpose of the juvenile justice system" [p. 268]. Arguably, the explicit provision of protection of the community as a purpose of Article 7 co-equal to the needs and best interest of the child does represent a major departure from the 1962 Act. This, combined with the mandatory secure confinement provisions of a restrictive placement, has been interpreted by some experts as a significant retreat from the open-ended

dispositional discretion and the supervision and treatment purposes of the 1962 statute. On the other hand, treatment still remains an essential purpose of Article 7 and was considered so in the 1976 amendments. These provide that the court take into account, in deciding whether to order a restrictive placement, such factors as the respondent's needs and best interest, record and background, and the nature of the offense, including whether anyone was injured (§753-a). (Also to be considered: the community's need for protection and the age and physical condition of the victim.) There were new provisions for the placement and transfer of juveniles to mental health facilities (§§753-a and 760), and amendments to the Mental Health, Education, and Executive Laws regarding services for children in DFY facilities and private agencies.

In passing the Juvenile Justice Reform Act of 1976 and its later amendments, the legislature rejected proposals for moving the "worst" juvenile offenders out of Family Court and into the adult criminal justice system. The "tougher" dispositional options of the 1976 legislation were intended to address these offenders in particular. But in the Summer of 1978, following a public furor over a series of especially

vicious murders committed by juveniles, a special session of the legislature passed the Governor's Crime Package Bill, which made fourteen- and fifteen-year-olds criminally responsible for more than a dozen crimes (including various degrees of murder, rape, arson, and burglary) and thirteen-year-olds for murder.

The "JO" law is an amendment to the Penal Law and the Criminal Procedure Law, not the Family Court Act, and though it affects juveniles, it does not directly affect the juvenile court. A juvenile arrested as a JO moves through the adult criminal justice system unless he is referred back to the Family Court at one of a number of points, from screening by the district attorney's office through trial and under some circumstances even after sentencing.

The main purpose of the JO law was not so much to try juveniles in the criminal courts (where in fact they have the additional benefits of the full Criminal Procedure Law and right to a jury trial) as to obtain the longer sentences available in the adult system. Whereas an adjudicated designated felon can be held only until he is twenty-one years old, a juvenile offender can be sentenced to a term past his twenty-first birthday. (Sentenced JO's are sent to juvenile

facilities, however, the same secure facilities in which designated felons and other delinquents are placed.)

The impact of the JO law on the juvenile justice system has not been great in the sense that severe offenses have in some way been taken out of the Family Court. In fact, well over half of the nearly 2,500 JO arrests in the first eighteen months were dismissed, not prosecuted, or removed to Family Court before indictment, and about another 25% were removed to Family Court from Supreme Court for disposition [DCJS Study, 1980]. But with the enactment of the JO law, New York's juvenile justice system became what some observers cite as the harshest in the nation. This is due largely to two points on which New York law stands in sharp contrast to the laws of other states. First, New York has the lowest age limit for juvenile court jurisdiction. Only three other states end juvenile jurisdiction after fifteen years of age, whereas the great majority of states (thirty-seven) end jurisdiction after seventeen years of age. Second, New York is the only state in which juveniles charged with the most serious offenses are waived from the adult criminal courts "down" to the Family Court. Everywhere else,

serious offenders are waived "up" from the juvenile to the adult courts. Thus, in New York all sixteen-year-olds and a certain number of thirteen-, fourteen-, and fifteen-year-olds are subject to the original jurisdiction of the criminal courts, whereas in most other states, they would still fall within the original jurisdiction of the juvenile courts.

Therefore, while the JO law, which was explicitly punitive in intent, might not have lessened the "treatment" orientation of the Family Court itself, the laws of New York State clearly reflect the view that some juvenile lawbreakers should not be treated, but rather should be punished (or at least incapacitated).

### III. PINS

The Joint Legislative Committee carved the new category of person-in-need-of-supervision (PINS) out of the former categories of delinquency and neglect. Its reasons for differentiating PINS from neglect are described in the section on Article 10. Its reasons for differentiating PINS from delinquency and the purpose of PINS jurisdiction were described as follows:

"Person in need of supervision" is defined by the Committee as "a male less than sixteen years of age and a female less than eighteen years of age who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority, and requires supervision or treatment." ...

Avoiding stigma. "Juvenile delinquent" is now a term of disapproval. The judges of the Children's Court and the Domestic Relations Court of course are aware of this and also aware that government officials and private employers often learn of an adjudication of delinquency. Some judges are therefore reluctant to make such an adjudication in the absence of conduct violating the Penal Law. In some cases, however, they feel compelled to do so when they conclude that supervision is necessary for the proper development of the child....

... The Committee therefore proposes to retain, but redefine, the category of juvenile delinquency and add the new category of person in need of supervision. Though there is no certainty about these judgments, the Committee expects that this pattern will reduce the instances of stigma and at the same time permit the court to use appropriate resources in dealing with persons in need of supervision.

Defining powers. With the introduction of the new category of person in need of supervision, the proposed legislation defines the powers of the police and the courts in relation to the specific circumstances involved. An alleged juvenile delinquent may be taken into custody without court order under stated circumstances; a person assertedly in need of supervision may not. An alleged juvenile delinquent may be placed in detention pending the filing of a petition or after one has been filed; a person assertedly in need of supervision may not. The draft authorizes a commitment only on an adjudication of juvenile delinquency.

Power of commitment

The decision not to authorize a commitment in the case of a person in need of supervision is an important element of the statutory pattern. Any commitment -- whether "civil" or "criminal", whether assertedly for "punitive" or "rehabilitative" purposes -- involves a grave interference with personal liberty and is justified only by urgent reason.

This urgent reason has not been shown in the instance covered by the statutory definition of "person in need of supervision". If the need for supervision is the result of improper guardianship, the law of neglect applies and a placement may be made under the conditions specified in that law....

There is a second reason for this decision. The Committee has been advised by many persons that existing facilities for children are not wholly satisfactory. Demands on limited space, staff and facilities have increased with the rapid expansion of our young population since the end of World War II. Under normal circumstances, institutionalization presents difficulties. With increased demand not fully met, it becomes even more difficult to realize not in theory, but in practice, the asserted purposes of commitment in these cases. These facts, in the Committee's judgment, make it even more difficult to justify a commitment in the absence of delinquency as defined here.

[Joint Legislative Committee,  
pp. 6-8.]

The Committee's PINS and neglect categories also incorporated much of the conduct previously within the jurisdiction of New York City's Girls' Term Court. This court was abolished and much of its jurisdiction transferred to the new Family Court.

Thirteen years later, Douglas Besharov argued that some of the Committee's assumptions "have not been borne out by experience."

... They assumed that PINS behavior evidenced less serious emotional and social problems than delinquent ("criminal") behavior. They saw PINS behavior as a precursor to delinquent behavior and they expected that early, remedial treatment would prevent the incipient delinquency....

However, many observers of the Family Court ... have come to see that a large proportion of PINS children have more intense emotional and behavioral problems than delinquent children who may have committed a single criminal act or a series of minor criminal acts....

The truth of the matter is that there are no clear dividing lines between delinquent and PINS children....

[Practice Commentary §712  
pp. 564-65.]

Besharov also commented on stigma attaching to the "PINS" label only a short time after the term was invented precisely in order to avoid the stigmatization of children [p. 556].

In 1972, the Court of Appeals ruled unconstitutional the age distinction between boys and girls in the definition of PINS. In re Patricia A., 31 N.Y.2d 83, 335 N.Y.S.2d 33 (1972).

However, the legislature still has not changed the statutory language, and there is continuing debate whether to set the upper age limit for both sexes at sixteen, seventeen, or eighteen years of age. In practice, no PINS petitions are filed for girls over sixteen years of age. (The Joint Legislative Committee itself had lowered the age of jurisdiction over girls from twenty-one to eighteen years of age, with no thought of equal protection, but because eighteen was the age of consent and "a young woman should be free to exercise a considerable discretion in shaping her life so long as she complies with the law of the land". [p. 13].)

The definition of PINS jurisdiction has been little changed or clarified since 1962. In 1970, the ground of habitual truancy was replaced by a reference to the attendance requirements of the Education Law, and in 1977, a new provision was added whereby a violation of Penal Law §221.05 (unlawful possession of marijuana) may be the basis of a PINS petition. Otherwise, case law has established that a course of conduct rather than a single act is required to show incorrigibility. In re Raymond O., 31 N.Y.2d 730, 338 N.Y.S.2d 105 (1972); In re David W., 28 N.Y.2d 589, 319 N.Y.S.2d 845 (1971). Beyond this, no changes have occurred in the statute or through case law to satisfy criticisms that the PINS

definition is vague and overbroad, and constitutional challenges on those grounds have failed. Tomasita N. v. City of New York, 30 N.Y.2d 927, 335 N.Y.S.2d 683, appeal dismissed sub nom. In re Negron, 409 U.S. 1052 (1972); Mercado v. Rockefeller, 502 F.2d 666 (2nd Cir. 1974), cert. denied, 420 U.S. 925 (1975).

The Court of Appeals in In re Iris R., 33 N.Y.2d 987, 353 N.Y.S.2d 743 (1974) applied the Winship standard of proof beyond a reasonable doubt to PINS adjudications.

The Joint Legislative Committee was strongly opposed to the detention or commitment of PINS, which would have been prohibited by its 1962 draft Family Court Act. But the ban on detention was never implemented, and a new §720 enacted in 1973 codified existing practices regarding the pre-adjudication and pre-placement detention of both PINS and delinquents. Section 720 reflects the growing concern over the detention of juveniles in adult jails, a practice subsequently forbidden under the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415, 42 U.S.C.A. §5601, et seq.) as a condition of eligibility for federal funds. The same federal statute requires that PINS, both before and after adjudication, be kept out of juvenile detention or

correctional facilities and held in non-secure shelter facilities, a mandate which is spurring current efforts towards the deinstitutionalization of PINS.

Case law in New York has also dealt with the issue of PINS placements. In re Ellery C., 32 N.Y.2d 588, 347 N.Y.S.2d 51 (1973), and In re Lavette M., 35 N.Y.2d 136, 359 N.Y.S.2d 20 (1974), prohibited the placement of PINS in state training schools containing delinquents. But the court in Lavette emphasized the treatment purpose of PINS dispositions by allowing placement in an all-PINS training school absent a clear showing that the treatment provided would be inadequate. It further defined a right of individualized treatment as including the requirement of an initial diagnosis and periodic reassessment of the child's needs. In Martarella v. Kelley, 359 F. Supp. 478 (S.D.N.Y. 1973), the court ruled that holding a PINS in placement for more than thirty days without treatment constitutes cruel and unusual punishment.

#### ARTICLE 8

It was the original purpose of the legislature to give Family Court jurisdiction over "disorderly conduct and assaults in the family," thereby providing a civil forum for such offenses. The idea was to replace the penal approach with a civil proceeding. Family Court was not given criminal jurisdiction, although family offenses were transferred from a criminal forum [Joint Legislative Committee, p. 19]. The following was the basis fo the Committee's decision:

#### Findings

Most family offense cases currently involve assault and disorderly conduct charges by wives against husbands. The wife's purpose in bringing the charge is rarely to secure a criminal conviction. Each case is somewhat different, but three patterns tend to emerge:

Some wives despair of salvaging their marriage. They seek to use the threat of criminal prosecution to compel the husband to leave home. Their main purpose is to secure protection, support, and custody of children -- matters that are beyond the formal powers of criminal courts.

Others (normally married less than five years) treat the assault or disorderly conduct as a sign of trouble in their marriage. They turn to the court to obtain assistance in resolving the underlying difficulty. Hence, their main purpose is a form of conciliation. The criminal charge in these cases is thus essentially a means for invoking the court's

jurisdiction, though it is said that the possibility of criminal prosecution deters husbands from continuing to beat their wives while the conciliation procedures are used.

In the third group are those who have been married for more than five years and who are prepared to settle for considerably less than an ideal existence. The husband works and supports the family. But, he drinks on weekends and beats or verbally abuses the wife. The wife's purpose here is to use the court proceeding to persuade her husband to stop beating her and, perhaps, to stop heavy drinking. Home Term in New York City, which has jurisdiction over such matters, uses Psychiatric and Alcoholism Clinics in an effort to help.

#### Proposals

Given the actual purposes that prompt wives to make "criminal charges" of disorderly conduct or assault, the Committee concluded that these concerns should be treated in the Family Court by means of a civil proceeding. The aim is not punishment, but practical help. Depending on the circumstances, this help may require an order of protection, support or conciliation. If the Family Court concludes that these processes are inappropriate in a particular case, it is authorized to transfer the proceedings to an appropriate criminal court.

[Joint Legislative Committee,  
p. 18 (Emphasis added).]

The comments to §823, establishing the probation intake service, states that its purpose was "to sift out cases not requiring judicial action ... while guaranteeing access to a judge to avoid possible abuses of voluntary informed adjustment procedure."

Article 8 was not revised again until 1977.

In 1977, the case of Bruno v. Codd, 90 Misc.2d 1047, 396 N.Y.S. 974, reversed on technical grounds, 64 A.D.2d 582, 407 N.Y.S.2d 165, aff'd, 47 N.Y.2d 582, 419 N.Y.S.2d 901, was brought by twelve women Family Court petitioners against the New York City Police Department for failure to afford them legal protection under Article 8 of the Family Court Act and against Family Court clerks for failure to give them access to the court to obtain orders of protection. The lower court held that city police owe a duty of protection to battered wives in the same manner they owe it to any citizen injured by another's assault, notwithstanding that jurisdiction lies in the Family Court rather than Criminal Court (a consent decree to this effect was signed by the police in 1978 -- the case as to Family Court was dismissed for failure to exhaust administrative remedies). Meanwhile, the legislature amended Article 8 (L.1977, C.449), providing for concurrent jurisdiction over family offenses by Family Court and Criminal Court. Petitioners are to be advised of the following: there is concurrent jurisdiction over family offenses in both Family Court and Criminal Court; a Family Court proceeding is civil and is for the purpose of attempting to keep the family unit intact; and Criminal Court is to prosecute the offender and can result in a criminal conviction.

In 1980, a bill was passed, giving exclusive jurisdiction over first-degree assaults to Criminal Court.

(Domestic Relations Law §252, also passed in 1977, provides that the Supreme Court shall entertain an application for an order of protection in an action for separation, annulment, or divorce. Divorce actions, however, do not technically exclude Family Court from jurisdiction over family offenses.) While the criminal forum was restored in family offense cases, Family Court's power to punish for a violation was also increased [§262 -- contempt, possible six months incarceration]. New civil remedies have been added to allow an award of counsel fees to petitioners and empowering a Family Court judge to order a respondent to attend educational programs concerning battering.

Respondents have been granted the right to assigned counsel [Family Court Act §262] in all Article 8 proceedings.

The original purpose of Article 8 -- to remove disorderly conduct and assaults by adult family members from the Criminal Court -- has been reversed. There are conflicting views concerning the nature of family offense jurisdiction now. Some contend that family offenses should only be heard in Criminal Court; others believe that Family Court, to be an effective civil forum, should have the power to award damages

and medical expenses to petitioners. Still others argue that criminal jurisdiction should exist in Family Court. Finally, it is said that Supreme Court should have all civil jurisdiction over support, custody, family offenses, and divorce so that "marital cases" could be heard in one forum. A more detailed exploration of the various views of the nature of Family Court's role in family offenses are found in the Staff Report on Article 8 and the Public Hearings Transcript and Report, which have been previously distributed to the Commission.

ARTICLE 10

In delineating a role for the new Family Court with respect to neglected children, the Joint Legislative Committee emphasized two major distinctions: first, between the jurisdiction of the court and the responsibilities of social welfare institutions, and second, between the focus and scope of neglect proceedings on the one hand and of delinquency and PINS proceedings on the other.

REVISION OF THE LAW  
OF NEGLECTED CHILDREN

Scope of proceedings

The Social Welfare Law defines the responsibilities of public welfare officials "to provide adequately for those unable to maintain themselves." It also defines the responsibility of public and duly authorized agencies for the care and protection of children. By way of contrast, the law governing neglect proceedings and thus the role of the new Family Court is limited to cases in which children are "neglected", in a legal sense, by their parents or others legally responsible for their care.

The Committee found that all interested persons agreed that parents "neglect" their children (in a legal sense) when they fail adequately to supply them with food, clothing, shelter, education, or medical or surgical care "though financially able or offered financial means to do so." They agreed that if parents were not financially able nor offered financial means to care for their children, the problem should be dealt with administratively under the Social Welfare Law rather than judicially under the Family Court Act.

The Committee found, however, that interested persons disagreed over the extent to which children whose parents supply the physical needs of life may nevertheless be adjudicated as "neglected children." Some say that the court should be empowered to make an adjudication of neglect when a child suffers from "improper supervision;" others, when he suffers from "a parental pattern of not satisfying his emotional needs;" still others, whenever there is a parental pattern of "not properly caring for the child."

The Committee concluded that these differences reflect the diversity of practices and beliefs in our society, and that this diversity was not a proper matter of governmental regulation so long as certain basic standards were not violated.

The Committee also concluded that the Family Court's neglect jurisdiction should be invoked only in situations of serious need. The normal legislative pattern is to authorize a court, which has coercive powers at its disposal, to act only when methods of persuasion, informal adjustment, and help have failed. The Committee does not believe that the legislation it proposes for the new Family Court should deviate from this pattern.

Accordingly, paragraph (ii) of the statutory definition of "neglected child" (Section 312) refers to a male under sixteen or female under eighteen years of age who "suffers serious harm from the improper guardianship, including lack of moral supervision or guidance, of his parents or other person legally responsible for his care, and requires the aid of the court." Absent serious harm and a need for the court's aid, the matter should not be brought to court.

What should be done? There are a large variety of private and public agencies concerned with the care and protection of the young. These include schools, religious institutions, protective agencies, settlement houses, and other community groups. If these are inadequate for any reason the Legislature is available as a forum for dealing with those problems directly.

Relation to juvenile delinquency  
and person in need of supervision  
proceedings

The proposed Family Court Act deals with neglect proceedings separately from juvenile delinquency and person in need of supervision proceedings. This arrangement differs from the arrangement of the Children's Court and Domestic Relations Court Acts, which with few exceptions treat these proceedings similarly and in the same statutory sections. The report now discusses the arguments advanced for continuing the current arrangement, analyzes the focus of each proceedings, and then describes the relation between these proceedings under the new Act.

Argument for continuing current arrangement. It is said that an adjudication of "neglect" or "delinquency" is only designed to satisfy a formal requirement for the assertion of jurisdiction. From that point on, the argument continues, the nature of the formal adjudication is of little importance. The central concern should be to make an order of disposition adapted to the actual needs of the child. These needs, it is said, may be identical in the case of two children, one adjudicated "neglected" and the other "delinquent", and the new Family Court should be free to shape its order of disposition in terms of these needs and without limitations imposed by the nature of the adjudication. Hence, the argument concludes that the law governing both proceedings should be similar and stated in the same statutory sections.

As an example of the asserted need for similar procedures and powers, those who urge this view point to children brought to court for "delinquency" who in reality are neglected by their parents. Some claim that the converse is also true -- that some children who are brought to court as "neglected" in actuality could be adjudicated as "delinquent."

The Committee has considered these arguments. Persuaded that cases of alleged delinquency may better be treated as instances of neglect, it provides that a neglect petition may be substituted at any stage of a juvenile delinquency or person-in-need-of-supervision proceeding. It is not persuaded, however, that significant numbers of neglect cases may be treated as cases of delinquency. This conclusion and others now detailed led the Committee to deal with the proceedings separately....

Differences in proceedings. The main purpose of a neglect proceeding under the proposed legislation is to assure that the home satisfies at least the minimal requirements of a suitable place for a child to grow. Only in grave and urgent circumstances does it authorize removal of a child from his home and his being placed elsewhere.

The main purpose of a juvenile delinquency proceeding or a person-in-need-of-supervision proceeding is the treatment, supervision or commitment of the child. This of course may require giving direction to the family by means of an order of protection; the proposed legislation authorizes the court to do so. But the Committee is persuaded that the differences in focus are sufficient to warrant related differences....

Relevance of person in need of supervision proceedings. Early proponents of a juvenile court argued that children who violated the criminal law should not be tried as criminals, that due

recognition should be given the pep and plasticity of children, and hence that a special court should be established to deal with them. To support their proposal, they argued that juvenile offenders were more like "neglected" children than "criminals" and should be treated similarly. As a result, the law of delinquency was joined to the law of neglect, and there was a considerable duplication of language in the two definitions.

Over the years, the statutory pattern was used by judges who were unwilling to make an adjudication of delinquency in certain cases in which they thought the child required official supervision. To avoid the unhappy choice of making an adjudication of delinquency and retaining jurisdiction or of not making the adjudication and leaving the child unsupervised, they turned to the law of neglect. This law gave the court the same powers on an adjudication of neglect as on an adjudication of delinquency, but avoided the stigma of delinquency.

These historical considerations need not be perpetuated. The Committee has introduced person-in-need-of-supervision proceedings to permit the court to act in appropriate circumstances without an adjudication of delinquency. It fully approves the underlying purpose of Family Court proceedings for children. It also believes that the proposed statutory arrangement of treating neglect and delinquency proceedings separately serves to clarify the purpose of each and to permit meaningful distinctions in procedure and powers.

[Joint Legislative Committee,  
pp. 13-17.]

The Joint Committee was also concerned about the long-term effects of placements following adjudications of neglect, and therefore created a role for the court in monitoring the continuation of placements.

According to expert opinion, the probability of a satisfactory return home of a placed child diminishes considerably after the first year of placement. This consideration and the desirability of periodic review of the work of those with whom the child is placed seem to the Committee of major importance. Accordingly, it proposes that no placement under the law of neglect "may be for a period in excess of one year, unless the court finds at the conclusion of that period and after hearing that exceptional circumstances require continuation of the placement for an additional year." Successive extensions are permitted.

[Joint Legislative Committee,  
p. 17.]

The new act therefore required the court to hold an annual hearing to review every neglect placement. Only upon a finding of "exceptional circumstances" (unspecified) could the initial one-year placement be extended. This requirement, which the Joint Legislative Committee saw as a means for holding agencies accountable to the court for their services to children, was more rigorous than the other orders of disposition provided for neglect cases. "This recognizes the difference in the gravity of the different orders and the

greater need in placement situations of reducing the risks of "mistaken judgment" [p. 16]. However, the problems of excessively long placements and agency accountability persist to this day, though they are now seen in the broader context of the State's foster care policies.

The Committee's intent in the law of neglect is summarized in its proposed purpose clause and the accompanying comment:

**S311. Purpose.**

This article is designed to provide a due process of law for determining whether a child is neglected and for so regulating a neglected child's home or, if necessary, removing him from his home that his needs are properly cared for.

**COMMENT:**

This statement of purpose is new and is designed to recognize a legislative responsibility for attempting to provide a due process of law and a judicial responsibility for determining whether the process so provided accords with constitutional requirements....

[Joint Legislative Committee,  
p. 47.]

As key elements of due process, the Committee provided (1) a new definition of neglect that eliminated the "excessively vague language" [pp. 48-49] of the Children's Court and

Domestic Relations Court Acts; (2) judicial review of temporary removals from parental custody; and (3) the right of both child and parent to request legal representation.

The probation service was assigned major responsibilities as an arm of the court: for "intake" (to screen out cases not requiring judicial action), for assisting the court in determining the need for temporary removal, for preparing pre-disposition reports, and for post-disposition supervision. Probation's intake role was designed to limit judicial neglect proceedings to the most serious cases. Because a petition could be initiated by almost any interested person or agency, probation was made responsible for screening out cases that were insufficiently founded or could be voluntarily "adjusted" without the aid of the court. To enhance probation's ability to adjust cases informally, statements made by any of the parties at a preliminary conference would not be admissible as evidence at an adjudicatory hearing (or prior to conviction in a criminal court), in order, said the Joint Committee, "to encourage a free conversation by assuring confidentiality" [p. 55].

If probation was seen as one means of ensuring court intervention "only in situations of serious need ... when methods of persuasion, informal adjustment, and help have

"failed" [p. 14], the court itself was given the means to withdraw from situations it found not worthy of judicial intervention, through a new provision (§351) permitting the dismissal of a founded petition if the court's aid is not required.

In the early years of the new Family Court, the most important changes in the law of child neglect occurred through legislation outside the Family Court Act. (In contrast to some other areas, such as the law of delinquency, the major structural changes in the law of neglect have been the result of legislative change rather than case law, with some notable exceptions, such as the guarantee of counsel for respondents, described below.) In 1964, the State's first child abuse reporting law was enacted. In subsequent years, the legislature expanded the legal duty to report. A statewide central registry for the receipt of child abuse reports was established in 1966, and local county registries in 1967. The creation of a professional duty to report and of a network of registries and records gradually increased the number of child maltreatment allegations coming to probation and to various public and private agencies (including local departments of social services and SPCC's). But the system for investigating reports, providing family services, and preparing cases for judicial proceedings did not significantly change between 1962 and 1973.

The Family Court Act provisions for judicial neglect proceedings were substantially reorganized and revised in 1969 and 1970.

In 1969, following the highly publicized fatal beating of Roxanne Felumero, the legislature enacted a new article of the Family Court Act to deal solely and specifically with child abuse as distinguished from the broad range of neglect situations encompassed under the existing Article 3. The new Article 10 defined child abuse as a distinct form of child maltreatment and created special court procedures for handling such cases. These included the establishment of a special court child abuse part to ensure speedy hearings, the designation of the district attorney to represent the child, and mandatory emergency removal of the child from parental custody. (The last two provisions were dropped in 1970.)

The awkwardness of separating abuse from neglect both substantively and procedurally, and the legislature's failure in 1969 to specify sufficient procedures for abuse hearings, created serious problems for the court. In 1970, the legislature repealed Article 3 of the original Family Court Act and consolidated its subject matter with the new Article 10. This created a single structure for "child protective proceedings," while maintaining some distinctions between abuse

and neglect. But the 1970 legislation was more than a simple recodification: it substantially revised and expanded the substance of the 1962 act.

For example, the 1970 amendments codified rules of evidence specifically tailored to the unique difficulties of proof in child protective cases, in which the principal and often the only witnesses are likely to be incompetent to testify. These rules, which include the res ipsa loquitur test, the abuse of drugs as prima facie evidence, and the abrogation of the privileges of confidential communication, differ from ordinary civil practice and from the practice of the Family Court itself in other kinds of proceedings. The rules of evidence together with the "preponderance of the evidence" standard of proof (§1046) are justified by the special duty of the court in child protective proceedings not only to determine the present existence of abuse or neglect, but also to predict its likelihood in the future. (See, In re Daniel C., 47 A.D.2d 160, 365 N.Y.S.2d 535 (1st Dept., 1975); In re Baby Boy Santos, 71 Misc.2d 789, 336 N.Y.S.2d 817 (1972); In re J., 72 Misc.2d 683, 340 N.Y.S.2d 306 (1972).)

Another important change under the 1970 amendments required the appointment of law guardians for all children who do not have independent counsel. Previously, under the 1962

act, the law guardian was appointed only at the child's or parent's request or on the court's own motion.

The rhetoric and the specific provisions of Article 10, according to Besharov, focussed the court's attention primarily on the needs of the child and produced "a natural tendency to minimize the need to accord to parents the full range of substantive and procedural safeguards." Thus, he believes, "it may be no accident that the New York Court of Appeals held that indigent parents have the right to appointed counsel in child protective proceedings only after the enactment of Article 10." [Practice Commentary §1012, p. 367.]

The Court of Appeals ruling (In re B., 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972)) was codified into §262. In the eyes of some commentators, the resultant emphasis on parental rights and complexity of contested proceedings through legal "maneuvers" has created an overly adversarial atmosphere, which they believe inimical to the court's purpose of protecting the child and assuring "that his needs are properly met" [Purpose clause, §1011]. Whether or not one agrees with that judgment, it is evident that the amount of appellate litigation has increased substantially since respondents have had the right to appointed counsel.

Neglect proceedings were always intended to be purely civil in nature. Their purpose is to provide for the needs of the child [Purpose clauses §§311 and 1011], as opposed to the purpose of criminal prosecution for child abuse and neglect, which is to punish the offending parent. Despite this "non-punitive" role of the Family Court, the legislature has recognized the potentially severe consequences to the parents of judicial intervention in family life, and has attempted to provide safeguards for the rights and interests of parents. (See, for example, §322, requiring a court order for a pre-petition removal, and §328, providing the means for a parent to secure the child's return, both carried over into Article 10.) Reviewing the legislative changes since 1962, Besharov points to

a legislative finding that while the balance between children's rights and parent's rights must be weighted in favor of protecting the child, legal safeguards can be provided to protect parental rights without unreasonably endangering children. Indeed, since In re B., [supra], holding that indigent parents have the right to appointed counsel, the only substantial criminal court rights that parents have not been accorded in Family Court proceedings are (1) the right to a jury, and (2) the right to proof beyond a reasonable doubt.

[Practice Commentary §1011,  
p. 362.]

After 1970, the most important legislative change affecting judicial neglect proceedings was the Child Protective Services Act of 1973 (Social Services Law §§411-428). This statute created in each county a separate public child protective services (CPS) agency with responsibility to receive and investigate reports of child maltreatment, provide services for the protection of children and the rehabilitation of families, determine the need for judicial intervention, and prepare cases for the court. These functions, previously distributed among various public and private child welfare agencies and the probation service, were now centralized in a single statewide system of agencies devoted solely to child protective responsibilities under the direct control of the State Department of Social Services.

The effects of the 1973 statute upon child abuse reporting and the delivery of protective services were immediate and far-reaching. Where fewer than 17,000 reports had been received by the State between 1964 and 1973, just under 30,000 were received in 1974 alone, and nearly 52,000 in 1979 [DSS-CPS 1979 Annual Report, pp. 18-19]. By law, CPS agencies were required to investigate each of these cases and provide services where necessary.

The effects of the 1973 statute upon the court were more subtle. The only substantial changes in the Family Court Act necessitated by the establishment of the new CPS agencies were the limitation of authority to originate a proceeding to a CPS agency (or a person specifically authorized by the court) and the assignment to CPS agencies of most of the functions previously carried out by the probation service and a variety of "authorized agencies." However, despite the enormous increase in the number of reports and investigations, the court's caseload did not increase. In fact, just the opposite occurred:

In the first year after the 1973 amendment ..., the number of new child protective petitions decreased by 15%. This number is startling because it occurred at the time when the statewide total number of reported cases ... increased by over 25%. The difference results from the fact that child protective agencies, the recipients of such reports, typically handle 80% to 90% of their cases without resorting to court action. Although the number of new child protective petitions has begun to rise slowly ... it has not been anything like the continued rapid rise in the total number of cases reported....

[Practice Commentary §1032,  
p. 413.]

Thus, the 1973 legislation effectively accomplished what the Joint Legislative Committee set out to do in 1962: reserve the intervention of the court for situations in which voluntary services have failed.

With the inception of a reporting system in 1964 and more noticeably, with the creation of specialized public child protective service agencies in 1973, the Family Court became one part of a large child protective system that did not exist and was not envisaged when the Family Court Act was passed. The court's responsibilities were now viewed in light of its relationship to this encompassing system dominated by social workers rather than lawyers. Whereas the Joint Legislative Committee's commentary in 1962 focussed on the distinction of purpose between neglect and delinquency proceedings (an issue effectively put to rest by the 1962 act), a major problem for the court today is the distinction of purpose between the functions of child protective workers and the judiciary in neglect cases. This problem is often discussed in terms of the "social work" versus the "adversarial" nature of neglect proceedings.

Douglas Besharov describes the relationship between the court and the social services agencies and the court's role in the total child protective scheme as follows:

**CONTINUED**

**1 OF 3**

...[I]t is the role of the Family Court to impose, in proper cases, and often against the wishes of the parents, a treatment or protective measure when voluntary adjustments are refused, insufficient, or unsatisfactory. ... [E]ven though most child abuse and child neglect cases do not reach the Family Court, the Court is nevertheless the lynch-pin upon which the entire out-of-court system depends. Its processes set the tone and parameters for the activities of all non-judicial agencies that make up the child protection system....

[Practice Commentary §1011,  
pp. 363-64.]

The Family Court's place at the center of a large social welfare system has sharpened the contrast between the "social work" and "legalistic" approaches to child protective proceedings. One of the principal issues for the court today is the problem of melding these two separate disciplines toward their common goal of protecting children.

FAMILY OFFENSES: ARTICLE 8

FAMILY OFFENSES: ARTICLE 8

The terms "family offense" or "family violence" obscure the fact that most intra-family violence is committed by men against their wives (or against their elderly mothers).<sup>1</sup> There was little public discussion of wife abuse until 1970, when the issue became a major concern of womens' groups in Western countries. Now, wife abuse is recognized as a widespread social phenomenon.<sup>2</sup>

Wife abuse existed in ancient times and was pervasive in all patriarchal culture. The historical, economic, physical, or psychological reasons for patriarchy are complex. A brief description of the laws of marriage and the family from the eighteenth century to the present, however, may shed some light on our current legal approach to family offenses.

The eighteenth century marriage presumed that the husband was the absolute ruler of his wife, children, and property. The wife's legal rights were subordinated to the husband after marriage -- she ceased to have any independent legal existence.<sup>3</sup> There was no right to civil divorce. The husband's legal power over the wife was absolute, and his responsibility to support her was permanent. The husband had the right to use force against his wife and children to

obtain obeisance.<sup>4</sup> The law permitted a man to beat his wife as long as he used "a switch no bigger than his thumb," (the original rule of thumb). American case law, as late as 1824, affirmed the husband's right to beat his wife.<sup>5</sup>

Legal condonation of wife beating has a long tradition in American law and society. Wife abuse is therefore not, in the historical sense, a deviant or aberrant act, but an accepted form of behavior that existed for centuries.

By the close of the nineteenth century in England and America, the husband's legal authority over his spouse was less absolute. Married women were given the right to own property, and extreme wife beating was deemed a crime. In New York State in 1890, a married woman gained the right to sue a husband for wrongful or tortious acts.<sup>6</sup> The concepts of male dominance and permanency of marriage persisted, however, into the twentieth century. These concepts were the preponderant influence in the culture and law. Thus, the problems of wife abuse remained closeted during this period.

In the last four decades, the laws of marriage, divorce, and the family have been dramatically transformed. Today, the national trend is toward dissolving marriages when one of the parties chooses to end the relationship; treating marriage as an economic partnership and equalizing rights of parents

concerning custody.<sup>7</sup> The emphasis has shifted away from treating the family as a permanent unit to considering each spouse as an autonomous individual.

This shift is reflected in recent decisions of the United States Supreme Court. For instance, in the 1978 case of Orr v. Orr, 440 U.S. 269 (1979), it was held that statutes requiring payments of child support had to apply equally to men and women. Eisenstadt v. Baird, 405 U.S. 438 (1972), established individual rights in the marriage context at a constitutional level: "The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup...."

By 1978, thirty-five states had "irretrievable breakdown of the marriage" as their sole ground for divorce, and a greater number had statutes providing for distribution of marital property on dissolution of a marriage.<sup>8</sup>

Today, the ideologies of patriarchy and equality co-exist in our cultural norms and laws. As an egalitarian view of men and women in marriage has gained acceptance, wife abuse has emerged as a recognizable social problem. The evolution of the family laws of New York State reflect these changes.

In 1962, when Family Court was established in New York, jurisdiction over marriage dissolution was reserved to the New York Supreme Court. At the time, adultery was the only ground for divorce. By 1966, New York State had liberalized its Domestic Relations Law: cruel and inhuman treatment, abandonment for two years, and a legal separation for two years were added to the grounds for divorce (the time periods have since been reduced to one year). A Conciliation Bureau was established in Supreme Court, but was discontinued after two years. In July 1980, New York enacted an equitable distribution and maintenance statute, which is founded upon the concept that marriage has as one of its components economic partnership. Thus, the Domestic Relations Law has evolved toward easy dissolution of marriages and protection of individual rights, while the Family Court Act is still geared toward the goal or mission of "preservation of the family." The Family Court Act has not undergone a similar revision.

New York's Family Court was established "to consolidate all cases dealing with families and children and to bring available social and psychological services to the aid of troubled families."<sup>9</sup> In the words of the Joint Legislative Committee on Court Reorganization, which drafted the Family Court Act, the Court was to be a "special agency for the

care and protection of the young and the preservation of the family." The Family Court was also to be an accessible legal forum for lay persons. By use of standard forms and informal procedures and elimination of fees, the process was to be made available to the poor. Specifically applied to Article 8, the goal was to prevent criminal prosecution of husbands in situations where services could be provided to preserve the family. Family Court cases hold that family offense proceedings contemplate conciliation procedures to further this goal.<sup>10</sup>

Originally, the Family Court had exclusive jurisdiction over family offenses. If a husband, wife, or other family member was arrested and brought to Criminal Court, the case would be transferred to Family Court for conciliation. This was the rule except in the gravest cases. The judge had discretion to transfer the case to Criminal Court if Family Court was inappropriate, but the basic approach was to try to conciliate the parties -- few cases were sent to Criminal Court. Even after liberalization of the divorce laws, Family Court had no jurisdiction to dissolve a marriage or to suggest the option of divorce to the abused spouse. The role of the court was in keeping with the traditional superiority of the sanctity of the marriage over the rights of the individual marriage partner.

When abused wives would turn to Family Court for help with a family offense matter, they were diverted to Probation (in New York City and various other counties). A probation officer would issue an appointment form to be delivered to the respondent and attempt to have him come in to discuss the problem. It was the job of Probation to help the parties resolve their differences. If mutual promises to cease all violence were made, it would end the matter. Since in many cases the husband did not appear at the scheduled appointment, the wife was then sent to the petition clerk, where a petition was filled out and a court date issued. The summons would then be served by the wife (or sheriff), usually by mail. If the husband did not appear on the return date, a warrant would sometimes issue, but since warrants were often not enforced, that would end the matter. If the husband did appear, the judge would try to have the parties resolve their differences, or a hearing would be held and an order of protection could be issued. Breaches of the order of protection were then very often ignored by police and unenforced by the court.

In 1976, a group of attorneys from Legal Services and the Center for Constitutional Rights, aware of the magnitude of the problem, brought a class action against the New York City Family Court, the Probation Department, and the New York City Police Department, charging that the police and court

were failing to enforce the existing laws on behalf of abused women.<sup>12</sup> Legislative hearings on the issue of domestic violence were held in 1977 and took as their theme "The Battered Spouse: Has the System Failed?" At these hearings, conducted in New York City, Rockland County, Albany, and Buffalo, battered women, police officers, shelter staff, Family and Supreme Court judges, and others testified. The hearing concluded that the procedures for obtaining and enforcing Family Court orders of protection were sadly lacking.<sup>13</sup>

As a result of these hearings and lawsuits, the "concurrent jurisdiction bill" (Chapter 449 L. 1977) gave battered women the choice of pursuing their cases either in Family Court or Criminal Court.<sup>13</sup> Several amendments to concurrent jurisdiction were passed in 1978.

On the recommendation of the Governor's Task Force, a bill was passed in 1980 that gave Criminal Court exclusive jurisdiction over first-degree assaults, authorized Family Court judges to order offenders to participate in a violence prevention and treatment program, and granted Family Court judges authority to award counsel fees to Article 8 petitioners.<sup>14</sup> Despite these amendments, many still consider Article 8 proceedings chaotic and ineffectual. There have been no longitudinal studies made to determine what becomes of Article 8 petitioners and their families after Family Court or Criminal Court proceedings.

#### THE CURRENT STATUTORY SCHEME

Family Court and Criminal Court now have concurrent, but mutually exclusive, jurisdiction over family offenses (except for assault in the first degree and attempted homicide, which are reserved for criminal prosecution). The petitioner/complainant has seventy-two hours from the time a proceeding is commenced before she is bound by her choice of forum. A potential petitioner must be advised of this dual jurisdiction and told that "Family Court is a civil proceeding and is for the purpose of attempting to keep the family unit intact" and that "Criminal Court is for prosecuting the offender." Family Court judges still have discretion to transfer cases to Criminal Court, but most cases are heard in Family Court.

Many petitioners come to court without attorneys. In New York City, all complainants are directed to the Department of Probation. N.Y.C.R.R. §2508.2 provides authority for the Department of Probation to conciliate cases where it appears there would be Family Court jurisdiction. The procedure is voluntary, and Probation has no power to issue summonses or orders. Petitioners have the right to bypass Probation and commence a proceeding by filing a petition, but they are

invariably directed to Probation. At a preliminary conference, which may be scheduled days or weeks after a petitioner first arrives at court, Probation advises the parties of their rights and the limitation of its authority: the idea is to relieve court congestion, prevent stigmatization, and provide for immediate crisis intervention.<sup>16</sup> Probation attempts to talk to both parties and have them come to an agreement. Unofficial figures suggest that out of over 11,000 cases, only between 1,000 and 2,000 cases are adjusted in New York City in Probation each year. In upstate counties, New York State Probation reports adjustments in only four percent of the cases.<sup>17</sup> Most other cases are sent on to the petition clerks the same day that their first interview with Probation takes place.

Some critics say that the probation procedure discourages petitioners who have finally overcome their own fears to act. They say that the goal of "conciliation" is a legally sanctioned procedure for placing pressure on a battered woman to withdraw her case.<sup>18</sup> In some upstate counties, there is no probation intake, and potential petitioners are advised by intake clerks. Intake clerks are also criticized for discouraging petitioners from filing.<sup>19</sup>

Neither Probation nor intake clerks have the duty or responsibility to advise petitioners what relief to request in the petition, what remedies might exist outside of Family

Court other than criminal prosecution (i.e., divorce or tort remedies), or what to include in a petition. They are not expected to act as attorneys or advocates for the individual rights of the petitioner, but to view the matter as a family problem that might still be reconciled.

The formal proceeding in Family Court is commenced by filing a petition containing the necessary allegations of wrongdoing, the relationship of the parties, and a prayer for relief by an order of protection or conciliation. (Other particular requests must be specified by the petitioner, e.g., to keep the respondent away from home or limit his visitation with the children.) If a criminal proceeding was previously commenced and seventy-two hours has passed, no petition can be filed in Family Court.

After a petition is filed, a summons for the respondent is issued. Some counties serve by mail initially; if the respondent does not appear, the summons is then sent to the sheriff. Others have the sheriff serve the summons.<sup>20</sup> In New York City, the petitioner is responsible for having someone personally serve the respondent. If personal service is not effected or the respondent does not appear (which is often the case), a warrant may issue. Many judges will not enter defaults even after personal service. In the counties where there is initial mail service, petitioners often end up in court on three or four return dates without the respondent. Often, the warrants

expire, and the petitioners give up until the next incident of violence.<sup>21</sup>

Probation may advise a petitioner to file other petitions (i.e., Articles 4 and 5) and intake clerks may refer petitioners to the child protective services agency for investigation if there is an indication of child abuse or neglect.<sup>22</sup> If a spouse also seeks support for herself or children, the Family Court will classify the case as an Article 4 support matter and subsume the family offense. The New York City Probation Department categorizes dual petitions as family offenses. Unmarried co-habitants are not covered by Article 8, so potential petitioners sometimes file paternity proceedings to acquire jurisdiction.<sup>23</sup>

At a fact-finding hearing, the allegations of the petition must be proven by a fair preponderance of the evidence (\$832). After a fact-finding hearing, the court holds a dispositional hearing in which a probation report may be considered. The court may suspend judgment for up to six months, grant probation for a year, or issue an order of protection. The order of protection is for up to one year and may set forth reasonable conditions of behavior. Such an order may require persons:

- a. to stay away from home, the other spouse, or child;
- b. to permit a parent to visit;

- c. to abstain from offensive conduct;
- d. to give proper attention to the home; and
- e. to refrain from acts that make home not a proper place for child. (§841.)

The court may also award counsel fees and custody of a child during the term of the order of protection. Notice of the order is to be filed with the sheriff or police department. If there is a subsequent offense, the petitioner may treat it as a new offense and elect to initiate a new petition, a criminal proceeding, or a violation. There is no provision for accelerating proceedings and no standards for increased sanctions after repeated violations.

In New York County, a study revealed that only one-fifth of the persons who came to Family Court seeking help with a family offense matter ever receive an order of protection.<sup>24</sup> Delays and discouragement experienced by petitioners and/or the ineffectiveness of the relief have been offered as possible explanations for the small percentage of petitioners who complete the process. Others have argued that the petitioners themselves change their minds and reconcile with the offenders. No follow-up studies are available to verify the reasons why so few petitioners receive permanent orders.

Petitioners who do receive orders of protection have great difficulty getting them enforced. In October 1978, a

consent decree requiring police to answer domestic dispute calls promptly and to make arrests when a felony has been committed or an order of protection has been violated, was entered into in settlement of the case of Bruno v. Codd.

Despite this, police still rarely make arrests on orders of protection.<sup>25</sup> Family Court judges are not available evenings or weekends for contempt proceedings if there has been a violation.

Family Court Act §156, enacted in 1975, gives the court all powers of contempt for willful disobedience to its orders and the power to commit the defendant for six months; however, respondents are rarely, if ever, jailed for family offenses.<sup>26</sup>

Section 530.11 of the Criminal Procedure Law provides that when a criminal action is pending involving a complaint charging a family offense, the Criminal Court may issue a temporary order of protection as a condition of pre-trial release. Upon conviction, the Criminal Court may add to the sentence or disposition a permanent protective order.

Very few cases are being prosecuted in Criminal Court, however, despite recent changes in the Act and the persistent problems in Family Court. In New York County, only 299 family offense cases were heard in Criminal Court the year following the concurrent jurisdiction bill.<sup>27</sup>

The numbers may be increasing, but reliable statistics are not available despite a Judiciary Law amendment that requires the courts to maintain data.<sup>28</sup> Observations of forty family offense cases in Bronx Criminal Court revealed that all defendants were either diverted to dispute resolution centers or dismissed.<sup>29</sup>

DRL §252, added in 1977, provides that in an action for divorce, separation, or annulment, the State Supreme Court shall entertain an application for permanent or temporary orders of protection. No provisions were made to link this with the new concurrent jurisdiction between Family Court and Criminal Court (enacted the same year), and it is unclear whether it contemplates simultaneous Supreme Court and Criminal Court proceedings. Family Court sometimes refuses to take jurisdiction in family offense proceedings if a divorce action has been commenced between the parties. The divorce action, however, does not technically exclude Family Court from jurisdiction.<sup>30</sup>

The petitioner in Family Court faces a difficult task in obtaining injunctive relief. Petitioners are not made aware of all legal options (e.g., divorce), she submits to attempts at conciliation by Probation, and by seeking such help, she may subject herself to investigation by a child protective services agency. Serving the respondent with the summons can become a major obstacle, as are repeated trips to Family Court.

If there were prior violations, petitioner still has to go through the same tiresome routine. When a spouse finally obtains an order of protection, the police may refuse to respond to the call, and the judge may refuse to hold respondent in contempt. There appears to be little evidence indicating that the process is very effective either in curtailing family offenses or aiding victims. Therefore, consideration should be given to the re-evaluation of the goals of Family Court in family offense situations.

#### RECOMMENDATIONS FOR REVISIONS OF ARTICLE 8

The original goals of Article 8, to keep the parties out of the criminal justice system and thereby preserve the family -- often the marriage -- may be an unnecessarily limited view of the needs of victims of family violence. Simply preventing criminal prosecution does not necessarily restore family harmony, nor does Family Court now offer effective treatment programs for offenders and victims: indeed, no effective treatment programs have been developed by the legal, social services, or medical professions.

It is suggested that the goals of Article 8 be directed toward the protection of individual rights and granting meaningful relief not currently available in Family Court. In doing

this, the Act may very well serve to strengthen the ability of family members to stay together -- with or without the offender. And of course, this would not preclude anyone from seeking effective treatment or conciliation. Possible alternatives for consideration include broadening jurisdictional options for victims, expanding access and availability of relief and services in Family Court, providing effective legal counseling and/or representation, and formalizing practices and procedures.

#### CRIMINAL COURT/FAMILY COURT -- THE ELECTION

In many states, assaults, harassment, etc., between adult family members are prosecuted in Criminal Courts and are not distinguished as family offenses. These states never decriminalized family offenses and never had separate family court jurisdiction. Some states have enacted specific penal law provisions defining family offenses and treat them solely in Criminal Court. Other states have both criminal treatment or respondents and civil procedures in courts of general jurisdiction.<sup>31</sup> For example, in California, orders of protection are issued in any proceeding in the Domestic Relations Court, a court of general jurisdiction (the orders are then filed with law

enforcement officials). Until 1962, family offenses in New York State were treated as minor crimes. From 1962 to 1977, the New York statute and practice favored civil treatment of family offenses in Family Court. New York Family Court's orientation toward counseling and conciliation services for family offenses was part of a general movement and belief that family violence of all kinds could be "treated." The establishment of probation conciliation efforts at intake was the practical enactment of this idea for Article 8 cases.

The national trend for family offenses in the 1970's has been toward criminalization. Those state legislatures that have made conscious efforts to reform their family offense statutes during this decade have enacted more stringent penal laws and penalties. Certain states have enunciated specific crimes of spouse abuse with higher degrees of seriousness than assault statutes.<sup>32</sup> Other states have made second or third offenses automatic felonies.<sup>33</sup> As yet, there are no studies or data from which to judge the effectiveness of this trend; however, these efforts continue. (Along with these changes, there has also been movement toward exploring diversion and treatment techniques. All these efforts are in their initial stages.) New York State has responded to this movement. The 1977 amendment to the New York Family Court Act provided

a kind of dual jurisdiction of Criminal Court and Family Court over family offenses, giving petitioners seventy-two hours after filing an accusatory instrument to change forum.

The idea behind limiting petitioners to choosing either Criminal Court or Family Court appears to be a recognition of the seriousness of the offenses while preventing "court shopping" and "duplication of effort." Some feared petitioners would use the Criminal Court maliciously, however, since District Attorneys have discretion to refuse to prosecute, this possibility is limited.

The mandatory choice between Criminal Court and Family Court seems to be an unnecessary, if not arbitrary rule.

Article 10 of the Family Court Act, which deals with child abuse, and Article 4, support, require no such election between criminal prosecution and Family Court jurisdiction. In fact, no other criminal prosecution forecloses civil suit. According to one study, Criminal Court judges did not believe that the seventy-two hour rule had been conceptualized properly: "Other criminal proceedings need judicial consent before they can be diverted to conflict resolution, a Family Court equivalent."<sup>34</sup>

Criminal jurisdiction has been resisted by some law enforcement officials altogether. The commentaries to the Criminal Procedure Law aptly express this point of view: "Putting family offense into Criminal Court is like mixing oil and water."<sup>35</sup> This attitude may be explained in part by a

continuing belief that family violence is a private matter and in part by current Criminal Court congestion. (For example, New York City Criminal Court handles 250,000 cases per year.<sup>36</sup>) The Criminal Court itself is investigating and experimenting with various diversion projects, including a dispute resolution center, because of its inability to prosecute all serious offenses. Most commentators agree, however, that the fact that the criminal justice system is itself overburdened does not justify decriminalization of family offenses.

Some experiments and efforts are underway in the criminal courts. Special family offense units have been established in the prosecutors' offices in some counties: the Criminal Court and the penal laws may eventually direct more energy and attention to family offenses.<sup>37</sup> However, the history of wife beating, the low priority still afforded family offenses by law enforcement officials, and the fact that victims often do not wish to pursue criminal remedies necessitate continued attention to Family Court treatment of the issue. Additionally, and perhaps more relevant, is the fact that Criminal Court and Family Court serve fundamentally different functions. The fundamental objective of prosecution in the Criminal Court is punishment of the wrongdoer. In contrast, the basic

purpose of the Family Court is civil in nature: to preserve the family, offer counseling, and most important, to grant injunctive relief in the form of an order of protection.

In Family Court, the petitioner's burden of proof for civil relief is a preponderance of the evidence, whereas in Criminal Court, the charge must be proven beyond a reasonable doubt. Less than 2% of Family Court cases are dismissed because the charges could not be substantiated.<sup>38</sup> The percentage in Criminal Court would be much higher. A district attorney must decide to prosecute a case in Criminal Court and may decide to drop a matter at any time, whereas a petitioner is in control of the decision in Family Court. The goal in Criminal Court is defined narrowly: punishment by fine, probation, or jail.<sup>39</sup> In Family Court, specific injunctions may be sought along with collateral relief for spouses, i.e., support and custody.

Ohio and many other states have recognized that victims should not be forced to elect only one of several possibly useful remedies.<sup>40</sup> A number of state statutes specifically forbid compelled choice of remedies. Connecticut's statute is typical: "An action under this section [seeking a civil order of protection] shall not preclude the applicant from seeking any other civil or criminal relief."<sup>41</sup> New York is the

only state that requires a mutually exclusive election between civil and criminal remedies.

#### REMEDIES

The remedy available to those who file family offense petitions in Family Court is injunctive relief in the form of an order of protection. Orders of protection under the Family Court Act may contain orders "to stay away from home, permit a parent to visit, give proper attention to the home, and refrain from acts that make home not a proper place for children." This limited list of prohibitions does not always address the needs of victims in family offense situations. Although some judges use other specifics in their orders, Family Court is a statutory court, and Family Court judges sometimes express that they do not have general equity jurisdiction to frame orders as they might wish. (Supreme Court judges, on the other hand, have greater flexibility to meet particular situations.) Also, since Family Court petitioners are often unrepresented, they may not think of requesting proper and needed relief. To be an effectual remedy, the order of protection, at the very least, should protect the victim from the particular offense and threats of the respondent and be responsive to the victim's individual needs.

Finally, the current list appears oriented toward spouses with children, and not toward the elderly, siblings, parents, or other relatives. We suggest that an expanded list of injunctive relief be explicitly set forth, along with a provision granting judges the power to grant "such other and further relief as may be fair and equitable under the circumstances." (Orders of protection need to be particularized for each article of the Family Court Act.)

Consideration should be given to the following proposed modifications and additions for protective orders under Article 8:

- Refraining from prohibited behavior, specifically, hitting, pushing, threatening, menacing, etc.;
- Refraining from disrupting the household by removing or damaging property;
- Temporarily dividing real and personal property;<sup>42</sup>
- Requiring respondents to pay their share of any mortgage, taxes, heat, and other expenses of the home;<sup>43</sup>
- Permitting petitioner to return to the residence for personal belongings;<sup>44</sup>
- Requiring respondent to make available all essential documents;<sup>45</sup>
- Permitting petitioner to keep his or her address a secret in all cases involving violence;<sup>46</sup>
- Restoring funds or property to the petitioner, or its equivalent in necessary food, shelter, and medical treatment,<sup>47</sup> and
- Further relief as hereafter specified.

Empowering Family Court to grant such further relief may require a constitutional amendment (N.Y. Const. Art. 6) and the effects of such jurisdictional expansion need further consideration.

This list, while not exhaustive, sets forth specific needs that have been expressed by petitioners. Also, particular prohibitions will serve to properly notify respondents exactly what behavior is proscribed. For example, when the respondent is ordered to "stay away from home" and there is joint ownership or respondent is the owner of the house or apartment, a respondent might sell, mortgage, or otherwise encumber the residence or personality within the residence while an order of protection ordering him "to stay away from home" is outstanding. If it is jointly owned property, he may refuse to pay his share of taxes or to contribute to mortgage payments, endangering the petitioner's continued occupancy of the household and thereby rendering the order of protection meaningless.<sup>48</sup> Thus, specific orders dealing with property matters are helpful regardless of the petitioner's need for support. In the case of the elderly, a household member or relative might cash a social security check but fail to provide care. A specific injunction to return the funds or provide the care might serve to rectify the situation.

Judges are often reluctant to grant orders that respondents "stay away from home" until a second or third violation is proven. They often view such an order as drastic. Yet

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if a petitioner were to prove the same facts (e.g., a physical blow) in a matrimonial action, she would be granted a divorce and exclusive possession of the marital home. It is suggested that a substantial violation of an order of protection be automatic grounds for requesting and receiving such relief. This would provide a deterrent to further violations and a substantive remedy.

Illness, disability, missed work, and medical bills are not uncommon consequences of family violence. Tort and negligence actions are often impractical remedies for petitioners because they take years to litigate, and attorneys will often not litigate unless the injuries suffered are permanent. Utah, Massachusetts, and California have recently passed statutes providing monetary compensation for losses suffered as a result of abuse.<sup>49</sup> The compensation includes out-of-pocket moving expenses, medical bills, and lost wages. Compensatory damages would alleviate immediate economic strain on victims whose spouses (or other offenders) are able to pay. Tort actions could be reserved, except for the compensatory damages previously collected.

Another suggestion is that fines be imposed for violations of orders of protection in Family Court. This may be an appropriate interim remedy short of jail for contempt. Finally, the 1980

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amendments to the Family Court Act (FCA §841(c) Chap. 531, L. 1980) now provide for the court to order a respondent found to have committed an offense to participate in an educational program. Such programs have not yet been developed and could be made available in Family Court. The creation of these additional remedies and programs warrant serious consideration.

#### COUNSEL

Providing counsel to petitioners in family offense cases (as in other family matters) would go a long way in facilitating access to all available remedies and eliminating repeated appearances. In one experiment in the New York City Family Court, the Family Abuse Project, where advocates were provided for some petitioners, it was found that over twice the normal percentage obtained orders of protection after just one or two hearing dates, and that the clients were more likely to obtain special provisions in their orders of protection. Finally, project clients were less likely to file new petitions.<sup>50</sup> The Legal Aid Domestic Violence Unit representing victims of family offenses in Albany, Schenectady, and Rensselaer Counties reports similar successes.<sup>51</sup>

Respondents in Article 8 proceedings are currently provided with assigned counsel. The Governor's Task Force,

along with almost all other interested groups, has recommended that counsel be provided for petitioners as well.

The Task Force estimates that 18-B counsel could be provided for family offense petitioners at a cost of \$50,000.00 per year.<sup>52</sup> This, however, would only be at hearing and, for the most part, would be limited to situations where respondents have already requested counsel. Others have suggested a new "family law legal services" equivalent to CALS. This means counsel would be provided to petitioners at intake. Petitioners would be advised of all the options in the various jurisdictions; petitioner could more intelligently choose the relief sought. Bureaucratic obstacles would be less formidable and delays less likely. The quality and effectiveness of assigned counsel in all Family Court proceedings is a broader issue that the Commission will have to resolve. A family offense proceeding, however, would be a far more efficacious proceeding if the parties were properly represented.

#### PROBATION

The Department of Probation is involved in family offense cases in a number of different capacities. In New York City, Probation acts as intake. When potential petitioners come to Probation, they are presented with a printed form informing them of their right to choose between Family Court and Criminal Court. According to officials, the right to by-pass Probation

is then explained orally by the probation intake officer, as is the purpose of Probation -- to help conciliate the parties.<sup>53</sup> If the potential petitioners do not insist on going directly to the petition clerk, they are given an interview. If petitioners have returned to Family Court because of a violation of an order of protection or temporary order of protection, they are automatically directed to Probation for an interview on the status of the case, although no authorization for this appears in the statute. The interview report is placed in a court file and a probation officer may, if requested at an appearance, inform the court of the findings. The petitioner is then taken to the petition clerk to file a new petition or a violation petition. A judge may -- but rarely does -- order an investigation by Probation before deciding the disposition of a case, or may order a respondent to report to Probation as part of the disposition of a case.

According to many observers, the interview acts to discourage some petitioners, delays the process for others, and is only rarely useful in adjusting cases. Many women who go to Family Court report that they encounter an attitude of resistance by intake officers.<sup>54</sup> They complain that they are often told to return another day or that they are given vague or incorrect information.<sup>55</sup> Family Court Act §823(b) and N.Y.C.R.R. §2508(c)(3) prohibits Probation from discouraging petitions from filing. But even though probation officers may not intentionally discourage petitioners, the intake interview stresses conciliation and is thereby an "official" indication that conciliation is

the preferred solution. Secondly, since most respondents do not appear at second scheduled conferences, those petitioners who agree to schedule such conferences, more often than not, are merely postponing filing a petition for one or two weeks.

Statistics in New York County indicate that over one-half of the cases are referred to petition clerks from Probation after the initial interview. Of those cases that are scheduled for a second probation interview, many do not return. Two-thirds of those who return are sent to petition clerks. Of those cases marked adjusted by Probation, which include non-appearances and cases where petitioners request the case be dropped, two-fifths subsequently return to Family Court.<sup>56</sup> Overall New York City statistics are not available.

Studies have also shown that the two-step intake process involving both Probation and petition clerks is repetitive and adds to the excessive number of interviews and appearances made by petitioners before getting an order.<sup>57</sup>

Probation intake no longer plays a significant function: it conciliates very few cases and does not serve to reduce congestion. It is therefore suggested that the Department of Probation be eliminated from the family offense intake process. We need a simpler intake system for family offenses, geared to encouraging petitioners to seek all applicable

remedies. If counsel or advocates are provided for both petitioners and respondents, the need for the probation intake function would become even more obscure.

#### PRACTICE AND PROCEDURES

One of the recurring issues for the Commission will be formalization of the rules of procedure in Family Court. If Article 8 is to authorize broader numbers of civil remedies and to involve counsel at earlier stages, the issue becomes essential. We recognize that procedural problems in all articles must be addressed. Under Article 8, changes that would conform Family Court practice to civil practice in New York would go a long way in making family offense cases less frustrating for petitioner and respondent.

Venue in civil actions (including matrimonial actions) under the CPLR and the DRL is "where either party resides."<sup>58</sup> Venue under the Family Court Act has been limited by rules that vary from article to article. Proceedings under Article 8 may only be originated in the county in which the acts occurred or the family or household resides. This presents particular difficulties when the Family Court refuses to accept a matter in the county to which an abused person has fled and established a new residence. It is suggested that venue be in a county "where either party resides" and that the removal and change of venue procedures provided for in the CPLR be incorporated in the Family Court Act.

The practice with regard to service now varies from county to county in New York State: in some upstate counties, sheriffs serve all Family Court processes; in other counties, summonses are mailed, and if the respondent does not appear, then the sheriff will serve; in New York City and surrounding counties, mail service is attempted or service is left up to the petitioners. Petitioners are not advised of the consequences of mail service, nor does mail service assure respondents of proper notice.

The too-frequent reliance on the service of summons by mail is deemed to preclude the entry of orders on default in appearance of respondents. This results in repeated court appearances by petitioners, who receive no meaningful relief, and in wasted judicial and administrative staff-time recalendaring cases. Since personal service is mandated by the statute, either it could be provided by the counties, or at the very least, petitioners could be advised of the modes of service and the fact that informal service might result in non-appearance of the respondent and extra trips to Family Court. When personal service or court-ordered alternative service is accomplished, then a provision for inquests and entry of default judgments is in order. Although some judges will enter defaults based on the CPLR, others will not, necessitating a specific authorization. Entry of defaults would reduce the number of arrests and warrants needed to force respondents to appear. Respondents

would also be more likely to obtain proper notice as service would come under judicial scrutiny.

Requiring service of orders of protection on respondents and providing copies of warrants to petitioners would also improve notice and service practice.

Although Family Court is supposed to be a statewide court, many complain that forms, rules, and enforcement vary from county to county. Some examples are that some counties refuse to enforce orders granted in Family Courts of other counties; that Family Courts of some counties refuse petitions after 3:00 p.m. and others after 5:00 p.m.; that Family Courts of some counties refuse to have petition clerks fill out petitions if there is a lawyer involved, and others will not accept legal papers prepared by lawyers.

#### RELATED STATUTORY ISSUES

##### Custody and Visitation

An Illinois custody statute includes consideration of physical violence witnessed by the child in custody and visitation considerations.<sup>59</sup> A recent case indicated the problem: A mother was beaten by her husband; in desperation, she left the home and the children. When she brought an action for custody, the court held that since the children were in their

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home environment and getting along, the court would leave them there. The husband's violence resulted in his keeping the children and the house. The fact that he beat the mother in the children's presence did not seem to influence the court.

The test in awarding custody in most American and in New York State courts is the "best interests of the child." Just what this means is a matter of debate; however, spouse abuse may very well be relevant. In recent years, joint custody has been gaining recognition as a preferred alternative. We recommend that the Commission follow Illinois' lead in making provision for consideration of physical violence witnessed by the child in deciding custody whether under a "best interests" test or other statutory criteria.

Similarly, in granting visitation, the effects of previous parental violent behavior should be a mandatory factor for consideration not only for the safety of the children -- but also to prevent respondents from using mandated visitation to learn the petitioner's address or gain access and opportunities for further abuse.

#### Supreme Court/Family Court Concurrent Jurisdiction

We now have two civil systems for family offenses, the Supreme Court and the Family Court. Generally, Supreme Court is available to middle class spouses, whereas Family Court is

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for the poor. An example of how this works might be helpful. A woman with a job and some savings is battered by her husband for twelve years. When he breaks her jaw in front of their two children, she decides to leave. She stays with some friends, hires an attorney, and commences treatment with a psychologist. These are difficult and painful events, but she does have some support. When the husband threatens to come after her, she calls her attorney, who seeks a temporary order of protection in Supreme Court, along with an order of support. The attorney takes three to five days to file the proper papers for an order of protection in Supreme Court, and meanwhile, the husband has returned to beat the wife again. The attorney also requests the court to order the husband to pay the psychologist's bills, under a general equity theory of law. A tort suit is commenced since the woman will have a permanent deformity of the jaw. When the husband harasses the wife in the middle of the night, the police are called and criminal charges are pressed. The divorce is granted on the basis of the blow, on cruelty grounds, and custody of the children is granted to the wife. Of course, this costs her \$2,000-\$5,000 or more, and takes six months to one year. But her problems are fewer than those of a woman without money.

When the poor woman's jaw is broken, she calls the police, who read her a card with her options (Criminal Court or Family Court), but indicate that Family Court is where she belongs. She attempts to get a legal services attorney, but there is a one to two year wait for family matters. In Family Court, she is told she can by-pass Probation and see a judge, but Probation is strongly urged. Probation schedules an appointment for her and her husband for two weeks later. At the probation intake interview, she is questioned about the beatings and is also asked about her children. When she cries and says they are suffering too, she is referred to the child protective agency for investigation of the home, pursuant to the Child Protective Services Law. When she comes back for a second appointment at Probation, her husband does not appear, and she is sent to the petition clerk and given a court date. The woman finally gets a temporary order of protection and does not return to pursue the matter. A year-and-one-half later, she borrows money and goes to Supreme Court for a divorce. When her husband becomes angry and threatens her, she returns to Family Court. However, probation intake informs her no petition will be accepted since there is a pending divorce action. She hasn't enough money for the additional fees to pay her

attorney to get a Supreme Court order of protection, so she gives up. Eventually, she is granted the divorce; however, there are no monetary damages awarded, and the issues of support and custody are referred back to Family Court. She is in two different courts for two to three years. The difficulties and frustrations experienced in this example are typical.

The duplications in concurrent jurisdiction under Articles 8, 4, 5, and 6 of the Family Court Act have been debated since before the enactment of Family Court. The Tweed Commission, in 1952, recommended consolidation of divorce jurisdiction of the Supreme Court with the support and custody jurisdiction of Family Court. The Association of Family Court Judges and the Bar of the City of New York have both argued for merger of the jurisdictions:

The jurisdictional allocation of authority over family matters between family court and supreme court can result in litigants appearing in family court on a family offense matter, being jurisdictionally required to go to supreme court for a divorce, returning to family court by referral from supreme court with respect to questions of support and custody, returning to supreme court for a determination of title to marital property and then reappearing in family court for modification or enforcement proceedings

with respect to the support award. Tragically, this frustrating, confusing, and wasteful process is carried out in the context of proceedings which are often highly emotional and deeply personal in nature. Factual examples of these problems can be found in Matter of Rand v. Rand, 56 Misc.2d 997, Matter of Lazar v. Lazar, 61 Misc.2d 36, Matter of Shirley M. v. Gregg M., 70 Misc.2d 974. <sup>61</sup>

Family offenses particularly bring out the paradoxes in concurrent jurisdiction since the same proof is required to prove a family offense and cruel and inhuman treatment, which are grounds for legal separation or divorce. And the same remedies collateral to divorces may also be granted, i.e., ordering respondent to stay away from home, support, and custody.

Supreme Court was specifically granted concurrent jurisdiction over family offenses in 1977 despite the fact it always had general equity jurisdiction. This has created confusion and a lack of uniformity in the different counties: some Family Courts will refuse to entertain a family offense petition if a divorce action has been commenced. Supreme Court, on the other hand, has made no provision for plaintiffs to get orders of protection pro se.<sup>62</sup> An attorney must proceed under ordinary motion practice, which may take days.

In other counties, Family Court will hear the case despite the pending divorce, and Supreme Court clerks are virtually unaware of the provision and have never seen a family offense case filed. Since Family Court is equipped for pro se filing and fast response, a pending divorce action should not preclude the Family Court family offense jurisdiction.

Many women claim their best protection from abuse is divorce. Since they are poor and unrepresented, they have no access to Supreme Court and simply seek orders of protection as the only available remedy. Both legal services attorneys and the private bar indicate that many women seeking orders of protection would pursue a divorce if it were available to them at the time. Although there is no data to verify this claim, there are indications that this is the case. Nearly two-thirds of all women seeking shelter referrals from AWAIC in New York City were already separated from their husbands; approximately 10%-13% of cases dismissed in New York City Family Court were dismissed because divorce actions had been instituted.<sup>63</sup> In California, where jurisdiction over divorces and family offenses is in the Superior Court, many women seeking protection orders are also seeking divorces.<sup>64</sup>

Not only are poor women deprived of options, but the victims who pursue remedies in Family Court are also subject to a greater number of special rules and public controls not

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inflicted on those seeking orders of protection or other civil relief in Supreme Court. Petitioners in Family Court may be referred to the child protective agency, whereas those in Supreme Court are not referred for investigation. Petitioners in Family Court are directed to Probation, where their problem is treated as a family problem; Supreme Court plaintiffs go through no conciliation procedures, and their individual rights are considered paramount. In addition, necessities, property division, and even expenses incurred by victims as a result of an assault or threat (e.g., hotel bills) may be sought in Supreme Court under general equity jurisdiction, but not in Family Court.

Some critics suggest that the confusion in jurisdictional overlap, duplication of effort, and disparity of access and treatment available to the middle class and the poor could be remedied by the merger of Family Court jurisdiction over matrimonial/spousal disputes and offenses into a special Supreme Court part. Pro se clerks could be provided under this plan so that the original purpose of Family Court, to provide access to the legal system for those who cannot afford counsel, could be maintained.

Others suggest that if representation is provided to the indigent in family matters and if the Family Court Act is revised to provide easy access, broader remedies, due process, and strong enforcement remedies, merger would be unnecessary.

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In most states, there is no separate Family Court, and jurisdiction is in courts of general jurisdiction, where civil remedies are available. Obviously, these facts raise just a few of the many elements involved in considering merger of Supreme Court and Family Court or merging all matrimonial matters into Supreme Court: support, custody, and spouse abuse. Even under the present concurrent jurisdiction, however, clarification of jurisdictional lines would be helpful as the debate over merger goes on.

#### THE EXTENSION OF JURISDICTION TO CO-HABITANTS

The social phenomenon of "wife beating" and other family offenses persists in informal family situations as it does in legal marriages. Should the state provide a remedy to this group?

Some say that Family Court is so ineffectual for spouses and other relatives that other co-habiting adults should not be subjected to Family Court jurisdiction. However, as the numbers of co-habiting adults increase, an alternative to criminal prosecution may be sought by unmarried household members. Case law in New York interprets the statute as excluding unmarried co-habitants, including

informal couples, the elderly living with unrelated adults, or roommates.<sup>65</sup> If and when Family Court becomes an effective court in which to seek civil remedies against assaultive household members, legislative extension of jurisdiction to co-habitants should be considered.

Studies have shown that co-habitors are as likely to be victims of abuse as legally married spouses.<sup>66</sup> Such victims suffer the same difficulties in obtaining police aid as the legally married. There are no special statistics kept in Criminal Court to indicate what cases involve co-habiting adults. However, the fact that eight to ten million people in the United States live in families that have not been legally sanctioned and the fact that one-third to one-half of women in shelters are not legally married are indicative that the problem crosses the boundaries of legal marriage.<sup>67</sup>

Social attitudes and family law have moved toward greater recognition and regulation of informal marriages. The problems arising from such de facto marriages are found in the legal arena in ever-increasing numbers and variations. The case of Marvin v. Marvin, 18 Ca.3d 660, 3 F.L.R. 2157, in California, where an award was granted in a meritricious relationship, gained great notoriety. In the recent case of

Morone v. Morone, N.Y.L.J. 6/10/80, the New York Court of Appeals held that an express agreement between unmarried co-habitors for support was enforceable, even though it was an oral agreement.

Illegitimate children have steadily gained the right to equal treatment through a series of U.S. Supreme Court cases from 1968 to 1977. Fathers of illegitimate children have been recognized as having legitimate, legal interest in their biological offspring, although the relationship spawning them was informal.<sup>68</sup>

Article 10 of the Family Court Act recognizes the reality of co-habitation and includes all members of the household under its jurisdiction.

Many states cover unmarried and unrelated parties in their family offense statutes. Some examples of alternative statutes in other states follow:

1. "Acts ... between family or household members who reside together or who formerly resided together ..."

"Family or household members means spouses, persons living as spouses, persons who formerly resided as spouses...." West Virginia.

2. "Persons living as spouses." Pennsylvania.

3. "Spouses, former spouses ... sexual partners who are or recently were co-residents...." California.

4. "Present and past co-residents...." Nevada.

5. "Persons co-habiting with each other...."

Oregon.

6. "A person who is married or who is cohabiting with a person as husband and wife at the present or at some time in the past...." Washington.

None of the states appears to be having particular problems with these definitions.<sup>69</sup>

The social goal of Family Court in regulating family offenses becomes particularly relevant around the issue of extending coverage to the unmarried. If the goal of Family Court is defined narrowly and is simply to preserve a legal marriage, co-habitants would not be included. If the goal is to prevent violence and to protect a victim's right to personal health and happiness, it bears serious consideration. We now limit a family member's access to Criminal Court prosecutions by the seventy-two hour election process. It would not seem appropriate to so limit a co-habitant's access; so the extension of the Family Court jurisdiction to co-habitants should be considered only insofar as prosecution in Criminal Court is not curtailed.

#### CONCLUSION

People coming to Family Court are overcoming fear, passivity, and historic societal norms to seek help and should be afforded prompt, uncompromising relief and aid in asserting individual rights. In our complex pluralistic society, varied responses may be in order. For the purposes of discussion, it may be beneficial to focus upon the following topics: concurrent jurisdiction with Criminal Court rather than election, expansion of remedies and services in Family Court, possible elimination of the Department of Probation intake function, the provision of counsel to petitioners and respondents, and statewide uniform procedures.

FOOTNOTES

1. Second Annual Report of the Chief Administrator of the Courts for Calendar Year January 1, 1979 through December 31, 1979. (OCA Report) Table 3-68. [In ninety-three percent of family offense matters, the respondents were men.] cf.: The National Commission on the Causes and Prevention of Violence. Wash., D.C. 1967. [Seventy-five percent of domestic assaults are committed by men.]
2. Unofficial OCA 1979 statistics: 19,068 new family offense petitions filed in 1979. Katen Burstein and Marjorie Fields, Domestic Violence: Report to the Governor and the Legislature, 1980. p. 5. [Estimated 144,000 spouse assaults in New York State each year.] See, Del Martin, Battered Wives, New York: Pocket Books 1976; Murray Straus, "Wife Beating: How Common and Why?" Victimology: An International Journal, vol. 2, 1977-1978, numbers 3-4, pp. 443-458; Leonore Walker, The Battered Woman, Harper, New York, 1980.
3. Eleanor Flexner, Centuries of Struggle. p. 3.
4. Blackstone's Commentaries. p. 445.
5. Bradley v. State, 2 Miss. 156 (1824).
6. Leo Kanowitz, Women and the Law. New Mex.: New Mexico Press. p. 77.
7. Mary Ann Glendon. State Law and Family. North Holland. 1977. pp. 148, 234, 321.
8. Henry Foster and Doris Freed, "Divorce in the Fifty States: An Overview as of 1978." Family Law Quarterly 13:105-28, Spring 1978.
9. Committee commentaries. p. 3420, cited in Family Court Act, Art. 1 commentaries, p. 5.
10. Best v. Macklin, 46 Misc.2d 622, 260 N.Y.S.2d 219 (1965).
11. Bruno v. Codd, 9 Misc. 1047, 396 N.Y.S.2d 974, rev'd 64 A.D.2d 582, 407 N.Y.S.2d 165 (1977).
12. Governor's Task Force, supra, note 2.

13. Supra, note 2 at 5-11.
14. Ibid.
15. Interviews with court clerks and legal services attorneys, 7/22/80.
16. Exec. §354.3; N.Y.C.R.R. §2508.2.
17. New York City Department of Probation unofficial statistics. NYS Division of Probation, Statistical Supplement 1976 Annual Report. 367 of 1,257 cases adjusted after 1st interview, 1977.
18. Julie E Hamos. State Domestic Violence Laws and How to Pass Them, A Manual for Lobbyists. National Clearinghouse on Domestic Violence. Maryland, 1980. p. 17.
19. Interview with attorneys, Domestic Violence Legal Unit, Albany, New York, 7/28/80.
20. Ibid.
21. Interviews with advocates.
22. Interviews with court clerks, 7/22/80.
23. Supra, note 20.
24. Stephen J. Leeds and Arthur Schiff. Helping Battered Women in New York City. Henry Street Settlement. 1980. p. 59.
25. Laurie Woods, "Litigation on Behalf of Battered Women," Women's Rights Law Reporter. cf.: Bruno v. Codd, Supreme Court of New York. Index #21946/76. Pleadings, affidavits, and memorandum; interviews.
26. OCA Reports, Table 3-69.
27. Stephen J. Leeds. Family Offense Cases in the Family Court System: A Statistical Description. Henry Street Settlement (1978).
28. OCA Reports, Table 3-70.
29. Interview with observers in Bronx Criminal Court.

30. Hrab v. Hrab, 332 N.Y.S.2d 91, 39 A.D.2d 745.
31. Nadine Taub and Ann Boylen, Recent Domestic Violence Legislation and Civil Remedies for Domestic Violence. CALS Research Institute. (Unpublished paper, 1980.)
32. Ibid.
33. Ibid.
34. Supra, note 27.
35. CPL §530.
36. Supra, note 27.
37. LEAA has funded a demonstration project in Rockland County for a special prosecutor for family offenses. Interviews.
38. OCA Report, Table 3-69.
39. Supra, note 25.
40. Supra, note 18 p. S72. (Indiana, Minnesota, Iowa, Utah, and California.)
41. Ibid., cf.: Conn. Fam. Law §46b-38(e).
42. 19 M.R.S.A. Chap. 14 (1979). Maine.
43. Supra, note 18.
44. Maryland Art. Courts Sess. 3-603(b) (1977).
45. Arizona.
46. Illinois (1979 Ill. Law P.A. 81-418 §708), Washington (10 R.C. Wash. Ch. 105 §4(c)), an Oregon (Ore. R. S. 184.890(4)).
47. Marilyn R. Block, Jan D. Sinnott. The Battered Elder Syndrome, An Exploratory Study. Center on Aging, U. of Maryland, November 1979. p. 78. Misuse of money or property occurs in 46% of abuse cases.

- 48. Supra, note 31.
- 49. State Legislation on Domestic Violence, Chart, 2  
Response 3. Center for Women in Policy Studies 1979.
- 50. Supra, note 27 at 70.
- 51. Supra, note 19.
- 52. Governor's Report, supra, note 2.
- 53. Interviews with officials.
- 54. Supra, note 25.
- 55. Ibid.
- 56. Stephen Leeds, Family Offense Cases in the Family Court System: A Statistical Description. Henry Street Settlement. 1978.
- 57. Richard F. Coyne, Chairman. The Economic Development Council Family Court Task Force: Report on Family Court Operations in the City of New York (June 1976). pp. 23-25.
- 58. CPLR §503(a).
- 59. Supra, note 18 at 35.
- 60. Jennifer Baker Fleming. Stopping Wife Abuse: A Guide to the Emotional, Psychological and Legal Implications for the Abused Woman and Those Helping Her. Anchor, Doubleday. 1979.
- 61. Report of Action Unit No. 4 (Court Reorganization) to the House of Delegates on Trial Court Merger and Judicial Selection; cf.: Memorandum of the Association of Judges Support of a Constitutional Provision Assigning Jurisdiction of all Matrimonial Actions and all Family Related Matters to a Single Court to the Constitutional Convention. 4/15/67.
- 62. Telephone interviews with clerks in various counties.
- 63. Supra, note 27.

- 64. Interview with California legal services attorney.
- 65. Jeffrey Allister and Sue Schleifer. The Impact of the New Family Offense Legislation. NY State Bar Journal, Dec. 1978.
- 66. Richard M. Gelles. Family Violence. California Sage. 1979. p. 73.
- 67. Supra, note 27.
- 68. Robert Stenger. The Supreme Court and Illegitimacy: 1968-1977. Family Law Quarterly, Vol. XI, No. 4, Winter 1978; cf.: Stanley v. Illinois, 405 U.S. 645, 925 S. Ct. 1208 (1971); Caban v. Mohammed, 99 S. Ct. 1760 (1980).
- 69. Supra, note 31 at 539.

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REPORT ON PUBLIC HEARINGS ON ARTICLE 8:  
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Persons testifying at the public hearings concerning family offenses represented over thirty-six counties and twenty-five organizations. The organizations included the Department of Probation, the Legal Aid Society, legal services, volunteer and government domestic violence programs, advocacy groups, and the private bar. The major points made at the hearings concerned forum, counsel, intake, enforcement, procedure, cohabitants, and remedies. A synopsis of the testimony follows. Numbered references are made to each person's written testimony, which is provided as Appendix A. The testimony has been organized in the order in which it was orally presented. A cross-reference indicating the geographical area and county of the group or agency has also been provided (Appendix B).

FORUM

Many of the people who testified specifically stated that they favored unrestricted (without the seventy-two hour election requirement) concurrent jurisdiction of Criminal Court

and Family Court (1, 5, 8, 10, 14, 19, 21, 32, 34, 38, 39, 43). Others assumed some form of concurrent jurisdiction would continue, but did not discuss the merits of the current procedure (3, 9, 11, 12, 13, 15, 16, 17, 25, 26, 29, 30, 31, 35, 36, 37). However, both these groups and others stated that victims were not properly advised of their jurisdictional options by the police, the Department of Probation, or court personnel (1, 5, 6, 7, 8, 19, 31, 32, 43). Only one probation officer suggested that exclusive jurisdiction over family offenses be restored to Family Court (1), while one administrative judge and a sociologist suggested Article 8 be repealed and all domestic violence be handled in Criminal Court (18, 33).

#### PROBATION INTAKE

The role of the Department of Probation as the agency responsible for intake in many counties was the subject of great criticism. Many felt that probation interviews unnecessarily delayed the process (16, 24, 30, 31, 36, 39, 47). Others stated that probation should be removed from the intake function (9, 15, 17, 41). It was pointed out that petitioners viewed probation as part of the judicial system and not as a helping agency (5, 20). Other concerns with the probation function were: personnel were untrained (31), they do not make use of available referral agencies

in the community (43); they were unsuccessful in diverting cases (13). As was previously mentioned, most speakers felt probation did not properly inform or explain options to petitioners concerning remedies, the right to bypass probation intake, the availability of emergency relief, or choice of forum (1, 5, 6, 7, 8, 19, 31, 32, 43). Others did not discuss probation intake, but strongly urged assignment of counsel at intake. (See, Counsel section). It was suggested that probation act as a resource for service or community referrals after an Order of Protection had been issued (9, 13, 29, 32) or to monitor mandated treatment at disposition (29). However, some felt treatment needed to be long term to be effective (20) and was better left to the mental health services (14). Another original suggestion was that probation be provided with cameras to photograph injuries of petitioners (10).

#### COUNSEL

There was complete consensus that counsel should be provided for indigent petitioners. Everyone strongly urged provision of counsel as necessary for an improved system (1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 14, 15, 21, 25, 27, 28, 29, 30, 32,

33, 34, 35, 37, 38, 39, 40, 41, 43, 44, 45, 47). Some of the arguments in support of providing counsel to indigent petitioners were:

- family law has become too complex for the pro se petitioner to master (45);
- petitions should be framed by counsel (14, 45);
- waiting time would be reduced (45);
- counsel would insure that petitioner was fully aware of options (34, 45);
- issues would be fully and clearly defined for judges (40, 45);
- all ancillary issues could be discussed from the beginning (e.g., support, paternity) (40, 45);
- an added dimension of enforcement would be introduced if respondent knows petitioner's counsel will act on a violation (45); and
- it is grossly unfair to grant respondents counsel and not the victims (24).

A number of people felt that if it were impossible to get counsel, then at least lay advocates should be provided (4, 15). Most people who considered the issue felt counsel should be assigned at intake (9, 25, 30, 33, 43, 45). Others mentioned the first court appearance (32), when a Temporary Order was issued (8), and at the hearing (29). One person felt lay advocates were preferable (17) and another that

petitioners should secure private counsel (19). Assignment of 18B counsel or legal aid was most often mentioned (9, 25, 31), while two witnesses suggested county attorneys be assigned (not included in their written reports).

#### ENFORCEMENT

There was great frustration expressed about the failure of Family Court or the police to enforce Orders of Protection. It was universally observed that enforcement of Orders of Protection is sadly lacking and that there are no serious consequences to the respondent for violations (4, 6, 12, 14, 19, 24, 25, 26, 29, 30, 31, 32, 36, 40, 41, 44, 46, 47). Many felt there must be serious penalties attendant on violations, but that even when appropriate, jail was not presently ordered by the judges (36, 39, 40). Some suggestions for changes in Family Court enforcement were:

- mandatory arrest and jail to replace optional penalties (4, 25, 31);
- requiring judges to give reasons when jail is not imposed (12);
- arrest and jail on first offenses, not just violations of an Order of Protection (10); and
- week-end jail so that respondents do not lose their jobs (41).

Other speakers supported remedies short of jail when possible, but clearly and decisively imposed by Family Court. (See, section on Remedies).

Some comments concerning enforcement indicated that police enforcement is the main problem (7) and that the only way there will be reasonable enforcement is when emphasis is on criminal sanctions in the criminal courts (7, 33). One witness argued that "the cycle of reluctance to treat these offenses seriously necessitated exclusive jurisdiction in the Criminal Court." (33).

#### PRACTICE AND PROCEDURE

The most pressing problem to the speakers was failure of Family Court to provide for service of summons (an/or Temporary Orders of Protection). Most commentators recommended that the police, sheriff's office, or court personnel serve respondents personally (3, 8, 10, 14, 16, 21, 27, 32, 47) and that if respondents do not appear, defaults be granted (16, 17, 47). Other suggestions for improved procedures were that:

- petitions be drawn to include multiple allegations: a problem exists as to who should draw petitions, neither probation (1), clerks (35), nor petitioners (38) are qualified to do so. (See, sections on Counsel and Probation.);

- procedure for adjournments be established other than by appearance (16);
- emergency hearing procedures be established (16);
- twenty-four hour access to Ex Parte Orders of Protection be made available (14, 19);
- hearings be held within two weeks (see, section on Probation Intake);
- petitioners be provided with copies of petitions and Temporary Orders of Protection immediately (10, 31);
- Cross or Mutual Orders of Protection only be issued when warranted and when a cross-petition exists;
- reconciliation agreements or settlements be in writing on a form provided by court (14);
- a uniform statewide centralized filing system for Orders of Protection be established (14, 26);
- bi-lingual court personnel be made available (21); and
- a written information guide be provided to all victims (47).

One issue not raised by the Commission, but repeatedly discussed by the speakers, was a necessity for on-going training and education for Town Justices, Judges, Magistrates, and police, many of whom are uninformed on the current law and insensitive to the problems (14, 19, 23, 30, 32, 42).

REMEDIES

A number of speakers supported the idea of Family Court having a full range of dispositional options, including fines and compensation for loss of earnings, medical and moving expenses (12, 31, 32, 33, 34, 40, 47). Some suggested the use of fines to fund shelters (8, 10, 12, 31, 34, 44, 47). There was support for encouraging judges to order temporary evictions (8, 14, 16) and temporary divisions of personal property (38). Restitution or community service concepts could also be used (2). One researcher pointed out that middle-range remedies are important because they let abusers know, without going to the full and punitive extent of jail, that their behavior is unacceptable (23).

COHABITANTS

Most speakers favored the inclusion of cohabitants under Article 8 (1, 2, 3, 4, 6, 9, 14, 15, 22, 23, 25, 27, 28, 30, 31, 32, 33, 40, 41, 42, 44, 45, 47, 48). It was pointed out that in some counties, approximately one-half of calls for help to the police are from unmarried cohabitants in long-term relationships (6, 23). All speakers who addressed the issue, including those not favoring the extension to Family Court, concluded

that cohabitants are not presently receiving adequate protection (5, 17, 33, 38). Of this group, two stated that cohabitants should be included only after Family Court services are improved (17, 33). Other speakers thought cohabitants should receive Orders of Protection only in Criminal Courts or City Courts (5, 38). Another group urged that the definition of cohabitants include those who are divorced or separated (14, 23, 29, 31), while another thought only unmarrieds having children in common should have access to Family Court (32).

GOALS OF THE FAMILY COURT ACT ARTICLE 8

The speakers, for the most part, wanted a change in emphasis from "preservation of the family" to "protection of the victim" as the paramount goal for Article 8 (4, 8, 23, 27, 29, 33, 40). Some felt that Family Court should not even be involved in reconciliation efforts (8, 23, 40). Only two persons favored continuation the current goal (1, 2).

VISITATION AND CUSTODY

It was generally the position of witnesses that the battering of a spouse should be a factor when determining visitation and custody cases (12, 34, 38, 40, 47). It was repeatedly stated that defendants often use visitation as a vehicle for

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retaliation against the custodial parent (8, 10, 28, 30, 40).

Speakers opted for supervised visitation as a possible solution (8, 10, 12, 30, 43). Many felt that witnessing domestic violence is detrimental to the children's well-being (6, 12, 28, 30, 34, 40). The curtailment of visitation rights when an Order of Protection is violated was suggested by one witness (15).

WRITTEN STATEMENTS SUBMITTED TO  
THE NEW YORK STATE TEMPORARY COMMISSION TO  
RECODIFY THE FAMILY COURT ACT

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155.

1. Thomas Callanan  
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Albany, NY 12223
2. Harold Baer, Esq.  
Community Service Society  
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3. Lois Cowan, Chairwoman  
Mental Health Association of Westchester County  
Advisory Committee  
Abused Spouse Assistance Service  
29 Sterling Avenue  
White Plains, NY
4. Dean Waller, Director  
Victim Services Agency  
Family Court Programs  
Two Lafayette Street  
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5. Dr. Carolyn Lansberry  
Domestic Violence Program  
Middletown Community Health Center  
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Middletown, NY 10940
6. Stephen Crystal, Director  
HRA Office of Legislative Coordination  
Management Systems and Research  
Family Adult Services  
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New York, NY 10013

7. Ray Allman, Chief Clerk  
Family Court  
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8. Judith Brown, Shelter Director  
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9. Harriet Cohen, Esq.  
Nechama Masliansky, Esq.  
Committee on Matrimonial and Family Law  
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10. Margaret McLaughlin, Former Chairwoman  
Rockland Family Shelter, Inc.  
90 North Broadway  
Nyack, NY
11. Barbara Schweid  
Long Island-Jewish Hospital  
Abused Spouse Counseling Program  
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12. Carolyn Fish, Executive Director  
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13. William P. Benjamin, Deputy Director  
Suffolk County Probation Department  
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14. Barbara Handschu  
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15. Laura Norman, Director  
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16. Susan V. Demers (for Archibald Murray)  
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17. Stephen Leeds, Arthur Schiff  
LEAA Robert Sterling Clark Project:  
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18. Sharon Grosfeld  
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19. Rosemary F. Byron, Esq.  
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20. Norman Sugarman, Director  
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21. Patricia Dohrenwend (for Madeline Hendricks)  
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22. Edward Jones, Assistant Director  
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Westbury, NY
23. Beverly Houghton  
Volunteer Counseling Services  
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24. Joan Genchi (for Karen Russano)  
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Wheatley Heights, NY

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25. Judy Reichler, Esq.  
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Accord, NY 12404
26. Alaine Espenscheid, Managing Attorney  
Legal Assistance of the Finger Lakes  
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Geneva, NY
27. Betsy Swan  
Monroe County Legal Assistance Corporation,  
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80 W. Main Street  
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28. Marion D. Scipioni, Task Force Leader  
Task Force Against Domestic Violence of the  
Unitarian Church  
80 E. Clintwood Court  
Rochester, NY 14620
29. Karen K. Peters, Counsel to the Director  
NYS Division of Alcoholism and Alcohol Abuse  
44 Holland Avenue  
Albany, NY 12229
30. Anne Burlingham  
Vera House, Inc.  
124 Clarence Avenue  
Syracuse, NY
31. Julia Morris  
517 Orchard Street  
Fayetteville, NY 13066  
Previously of the Domestic Violence Legal Unit
32. Robert J. Dunning, Director  
Monroe County Probation Department  
99 Exchange Street  
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159.

33. Honorable Edward McLaughlin  
Administrative Judge  
Family Court -- Onondaga County  
Family Court of the State of New York  
Onondaga County
34. Jean L. Fragakis, Coordinator  
Hotline for Battered Women  
P.O. Box 573  
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35. Fern S. Adelstein, Legal Assistant  
Southern Tier Legal Services  
201 S. Union Street  
Olean, NY 14760
36. Tina Vail, Domestic Violence Coordinator  
Cattaraugus Community Action  
262 Broad Street  
Salamanca, NY 14779
37. Roberta Heppy, Sr. Probation Officer  
Chemung County Probation Department  
203-205 Lake Street  
Elmira, NY 14901
38. Deirdre Parke, Staff Attorney  
Legal Aid Society of Oneida County  
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39. Patricia Valls, Director  
Tompkins County Task Force for Battered Women  
P.O. Box 164  
Ithaca, NY 14850
40. Karen Sauer, Coordinator  
Family Abuse Task Force of Herkimer County, Inc.  
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41. Carl J. Costantino, Director  
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42. Bonnie Maurer, Program Director  
Family of Woodstock, Inc.  
Family Adult Shelter  
16 Rock City Road  
Woodstock, NY 12498
43. Beverly Kaufman, Program Director  
YWCA of Dutchess County  
Battered Women's Program  
18 Bancroft Road  
Poughkeepsie, NY 12601
44. Jane Moran and William Gibney  
Tioga County Office  
Chemung County Neighborhood Legal Services, Inc.  
63 North Avenue  
Oswego, NY 13827
45. Honorable Francis T. Murphy, Jr.  
Presiding Justice  
Supreme Court, Appellate Division  
First Judicial Department  
27 Madison Avenue  
New York, NY 10010
46. Doris Moss, Executive Director  
Abused Women's Aid in Crisis  
G.P.O. Box 1699  
New York, NY 10116
47. Rape Crisis Center  
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Binghamton, NY 13901
48. Rebecca Rolland, Counsel  
Manhattan Family  
Office of Assistant Corporation Counsel  
60 Lafayette Street  
New York, NY 10013

BREAKDOWN OF WRITTEN STATEMENTS  
BY GEOGRAPHICAL AREA

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The written statements submitted to the Commission are organized below according to geographical areas. The Arabic Numerals correspond to those assigned statements in Appendix A.

STATEWIDE

1. Thomas Callanan  
NYS Department of Probation  
Albany
6. Stephen Crystal  
HRA Office of Legislative Coordination  
New York City
29. Karen K. Peters  
NYS Division of Alcoholism and Alcohol Abuse  
Albany
45. Honorable Francis T. Murphy, Jr.  
Supreme Court, Appellate Division  
First Judicial Department  
New York City
46. Doris Moss  
Abused Women's Aid in Crisis  
New York City

GEOGRAPHICAL AREA I: Bronx, Kings, New York, Queens, and Richmond Counties.

2. Harold Baer, Esq.  
Community Service Society  
New York City Area
4. Dean Waller  
Victim Services Agency  
New York City Area
7. Ray Allman  
Family Court  
New York City Area
9. Harriet Cohen, Nechama Masliansky  
Committee on Matrimonial and Family Law  
New York City Area
15. Laura Norman  
Morningside Heights Legal Services  
New York City Area
16. Susan V. Demers  
The Legal Aid Society  
Bronx County
17. Stephen Leeds  
LEAA Robert Sterling Clark Project:  
Helping Battered Women in New York City  
New York County
18. Sharon Grosfeld  
Bronx County
20. Norman Sugarman  
Family Court Services  
Richmond County
48. Rebecca Rolland  
Manhattan Family Court --  
Office of the Assistant Corporation Counsel  
New York City Area

GEOGRAPHICAL AREA II: Nassau and Suffolk Counties.

11. Barbara Schweid  
Long Island-Jewish Hospital  
Nassau County
13. William P. Benjamin  
Suffolk County Probation Department  
Suffolk County
22. Edward Jones  
Nassau County Probation  
Nassau County
24. Joan Genghi  
Long Island Women's Coalition, Inc.  
Suffolk

GEOGRAPHICAL AREA III: Rockland and Westchester Counties.

3. Lois Cowan  
Mental Health Association of Westchester County  
Westchester County
8. Judith Brown  
Yonkers Women's Task Force, Inc.  
Westchester County
10. Margaret McLaughlin  
Rockland Family Shelter, Inc.  
Rockland County
12. Carolyn Fish  
Rockland Family Shelter, Inc.  
Rockland County
21. Madeline Hendricks  
Yonkers Court Assistance Program for Abused Spouses  
Westchester County
23. Beverly Houghton  
Volunteer Counseling Services  
Rockland County

GEOGRAPHICAL AREA IV: Columbia, Delaware, Dutchess, Greene, Orange, Putnam, Sullivan, and Ulster Counties.

- 5. Carolyn Lansberry  
Domestic Violence Program  
Orange County
- 19. Rosemary F. Byron  
Greene County
- 25. Judy Reichler  
Mid-Hudson Legal Services  
Ulster County
- 42. Bonnie Maurer  
Family of Woodstock, Inc.  
Ulster County
- 43. Beverly Kaufman  
YWCA of Dutchess County  
Dutchess County

GEOGRAPHICAL AREA V: Albany, Clinton, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Montgomery, Oneida, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Warren, and Washington Counties.

- 31. Julia Morris  
Domestic Violence Legal Unit  
Albany County
- 38. Deirdre Parke  
Legal Aid Society of Oneida County  
Oneida County
- 40. Karen Sauer  
Family Abuse Task Force of Herkimer County  
Herkimer County

GEOGRAPHICAL AREA VI: Broome, Cayuga, Chenango, Cortland, Madison, Onondaga, Oswego, Tioga, Tompkins, Schuyler, Seneca, and Wayne Counties

- 30. Anne Burlingham  
Vera House, Inc.  
Onondaga County
- 33. Honorable Edward McLaughlin  
Family Court -- Onondaga County  
Onondaga County
- 39. Patricia Valls  
Tompkins County Task Force for Battered Women  
Tompkins County
- 44. Jane Moran, William Gibney  
Tioga County Office, Chemung County Neighborhood  
Legal Services, Inc.  
Tioga County
- 47. Rape Crisis Center  
Broome County

GEOGRAPHICAL AREA VII: Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Steuben, Wyoming, and Yates Counties

- 14. Barbara Handschu  
National Lawyers Guild  
Erie County
- 26. Alaine Espenscheid  
Legal Assistance of the Finger Lakes  
Ontario County
- \*27. Betsy Swan  
Monroe County Legal Assistance Corporation,  
Alternatives for Battered Women  
Monroe County

GEOGRAPHICAL AREA VII (Cont'd)

- \*28. Marion D. Scipioni  
Task Force Against Domestic Violence of the  
Unitarian Church  
Monroe County
- \*32. Robert J. Dunning  
Monroe County Probation Department  
Monroe County
- 34. Jean L. Fragakis  
Hotline for Battered Women  
Chautauqua County
- 35. Fern Adelstein  
Southern Tier Legal Services  
Cattaraugus County
- 36. Tina Vail  
Cattaraugus Community Action  
Cattaraugus County
- 37. Roberta Heppy  
Chemung County Probation Department  
Chemung County
- 41. Carol J. Costantino  
Niagara County Probation Department  
Niagara County

QUESTIONNAIRE TO FAMILY COURT

JUDGES: ARTICLE 8

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\* Rochester, NY.

QUESTIONNAIRE ON ARTICLE 8: FAMILY OFFENSES

FORUM

1. Many witnesses at our hearings were critical of the present 72-hour exclusive election of forum requirement. Suggested alternatives were: creating unrestricted concurrent jurisdiction by the Criminal and Family Courts, or extending the time period in which the petitioner must choose from 72 hours to 2-3 weeks.
  - (a) What is your opinion of the proposal to provide unrestricted concurrent jurisdiction by the Family and Criminal Courts? What do you see as the advantages or disadvantages?
  - (b) What do you see as the advantages or disadvantages of extending the time in which petitioners must make an exclusive choice of forum?
  - (c) If the present 72-hours exclusive election provision is retained, can you suggest measures that would help the petitioner in selecting the proper forum?
2. It has been suggested that Article 8 be repealed and that Criminal Court be given exclusive jurisdiction over family offenses. Do you agree? Why? Or do you think that Family Court jurisdiction should be retained? Or expanded? Why?

INTAKE AND COUNSEL

3. Many witnesses at our hearings urged that Article 8 probation intake be abolished, that 18b counsel be appointed for indigent petitioners when they first come to court, and that Article 8 petitions be prepared either by petitioner's counsel or by petition clerks.

- (a) What is your opinion regarding the proposal that probation intake be eliminated in Article 8 proceedings?
- (b) What percentage of Article 8 petitioners in your court are presently represented by counsel? Do you think that the appointment of 18b counsel for indigent petitioners would improve the handling of Article 8 cases?
- (c) If probation should no longer perform Article 8 intake, would you support the proposal that where the petitioner is represented by counsel, counsel be permitted to prepare the petitioner rather than the petitioner clerk?

SERVICE

- 4. It has been suggested that service by police, sheriff's office, or court personnel be required. Do you agree? Do you foresee any problems?
- 5. Who serves summonses and temporary orders of protection upon respondents in your court? Are there problems with this system?

DEFAULTS AND WARRANTS

- 6. How do you handle cases in which the respondent fails to appear? Under what conditions would you (or do you) grant default judgments? If you are reluctant to do so, is it because of problems with proof of service?
- 7. Is there a problem with devising alternative methods of service? If petitioner claims personal service cannot be made on respondent, do you hold a hearing on this question? If there is satisfactory proof or service (personal or alternative service) what are the problems associated with granting permanent orders of protection on default?

- 8. Do you issue warrants when the respondent fails to appear? Do you have difficulty with the execution of warrants in your county? Have you any suggestions for improving this system? What, if any, documentation is required before a warrant is issued?

EVIDENCE AND PROOF

- 9. Have you encountered any difficulties with the rules of evidence and proof under Article 8? Would you suggest any changes?

ANCILLARY ISSUES

- 10. How do you handle ancillary issues (support, custody, paternity, visitation) that arise in the course of an Article 8 case? Do you find there are procedural problems hindering the consolidation of these issues? Do you have suggestions for improving procedure?

REMEDIES AND DISPOSITION

- 11. The following have been suggested as specific conditions of behavior that might be provided for inclusion, at the judge's discretion, in orders of protection issued under Article 8: (a) refrain from prohibited behavior, specifically, hitting, pushing, threatening, menacing; (b) refrain from disrupting the household by removing or damaging property; (c) permit petitioner to return to the residence for personal belongings; (d) produce essential documents or records for petitioner; (e) permit a parent to visit the child at stated periods (such visits may be ordered under supervision of an appropriate third party or the Department of Probation); and (f) move out of the home.

Do you foresee any problems? Can you suggest any others that might be helpful?

Do you order respondents to stay away from home? Do you have any problems with making such an order?

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12. The following have been suggested as further remedies that might be ordered, at the judge's discretion, under Article 8: (a) pay for expenses incurred for medical care and treatment required as a result of the offense; (b) pay for moving expenses or the expense of temporary shelter necessitated as a result of the offense; (c) restore to petitioner wages lost as a result of the offense; and (d) pay their share of any mortgage, taxes, heat for the home.

Do you foresee any problems? Can you suggest any others that might be helpful?

13. The following have been suggested as specific orders of disposition that might be issued, at the judge's discretion, under Article 8: (a) pay a fine (to be used for a shelter fund); (b) report at regular intervals for supervision by the probation service; (c) participate in an educational program; (d) participate in a therapeutic session or sessions; and (e) pay for costs of the education or therapy ordered.

Do you foresee any problems? Can you suggest any others that might be helpful?

#### MUTUAL ORDERS OF PROTECTION

14. Under what conditions would you (or do you) grant mutual orders of protection? Do you require that the respondent have previously filed and served a cross-petition?

#### SERVICES

15. Are there services in your community to which you can refer Article 8 offenders for counseling or treatment? Please describe any programs or agencies that you feel have been particularly helpful.

173.

#### PROBATION

16. Do you ever order a pre-disposition investigation by probation? Post-disposition supervision? If so, is the Department of Probation effective? What role played by the Department of Probation in Article 8 proceedings is most helpful? Why?

17. Do you believe that the Department of Probation can or should play a stronger post-disposition role? In what ways?

#### ENFORCEMENT

18. The witnesses at our hearings were virtually unanimous in their complaints about the lack of enforcement of orders of protection.

- (a) What are the major problems of enforcement you have encountered? Do you have any suggestions for solutions?
- (b) What penalties do you generally impose for violations of orders? Do you think there are any additional alternative penalties that should be added to the statute? What do you think about the imposition of jail sentences?

#### COHABITANTS

19. Many witnesses at our public hearings urged that the jurisdiction of Article 8 be broadened to include persons formerly married, persons living as spouses, and persons formerly living as spouses who have children in common. Do you agree? Which groups?

#### OTHER

20. Are there other issues and problems arising under Article 8 that you believe could be addressed by statute or court rules (e.g., calendars, parts, etc.)?

In 1979 the New York State Child Abuse and Maltreatment Register received over 51,000 reports of suspected abuse and neglect, and recorded more than 44,000 cases for investigation involving nearly 76,000 children.<sup>1</sup> In that same year the Family Court handled fewer than 7,400<sup>2</sup> child protective petitions alleging abuse or neglect, and made findings in only 4,962 cases.<sup>3</sup>

These figures indicate that most child protective work in New York State proceeds without judicial involvement. Nevertheless, the Family Court plays a crucial role in child protective service, a role that can be properly understood only in the context of the elaborate structure for child maltreatment reporting, investigation, and services created by the legislature under the Child Protective Services Act of 1973.<sup>4</sup> This statute gave New York one of the most extensive child protection systems in the nation, the culmination of a century of shifting trends in public policy, law, and social work theory and practice regarding intervention on behalf of abused and neglected children.

CHILD ABUSE AND NEGLECT: ARTICLE 10

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A BRIEF HISTORY OF CHILD PROTECTION IN NEW YORK

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From the earliest days of colonial settlement in America, following customary practice established by the English Poor Laws of the sixteenth century, children of the poor were taken from their families and bound out, to earn their keep as servants and apprentices. (The separation of children from their parents was a practice common to all classes: the children of the rich were often sent to other households to be educated.) The purpose, of course, was not to save them from parental abuse or neglect or from the disadvantages of poverty, but rather to relieve the tax burden on the parish -- what we would now call the welfare rolls; indeed, no one questioned parental treatment of children, and the law acknowledged the absolute right of the father to decide how to raise, support, and discipline his children. Throughout the eighteenth and most of the nineteenth centuries, abandoned infants and children were thrown on the mercies of private and religious charities, and they, along with the children of the destitute, were boarded as servants with private families, or sent to workhouses, or apprenticed, or transported west to labor on farms.

In England, a gradual and cautious development of the legal doctrine of "parens patriae" -- in due course imported to the American colonies -- created justification for state intervention to protect children from exploitation (initially, not of their bodies, but only of their property) by their guardians, and later by their own parents. This intervention did not extend to what we would now call "child-rearing practices." In both England and America, the law gave parents a free hand to discipline their children, although in 1837 an American court did draw the line at the infliction of permanent injury or endangerment of child's life through "correction."<sup>6</sup>

The later nineteenth and early twentieth centuries brought numerous and rapid changes in attitudes, laws, and practices regarding children and family life: early (but sporadically enforced) child labor and compulsory education statutes; the various manifestations of the "child-saving" movement -- including establishment of the first juvenile courts -- that sought to protect children from the moral as well as the physical depredations of poverty, often by removing them to "better" environments; an expansion of the state's authority to intervene (as parens patriae) in family life; and, later in the present century, the growth of new

attitudes regarding parents' responsibility for the emotional as well as the physical health of their children. Of particular pertinence to child protection were the establishment, in the last quarter of the nineteenth century, of societies for the prevention of cruelty to children and the enactment of statutes prohibiting specific acts of child maltreatment.

The first society for the prevention of cruelty to children (SPCC) was founded in New York in 1875 in reaction to the notorious case of Mary Ellen, rescued from brutal beatings at the hands of her guardian through the intervention of an official of the local society for the prevention of cruelty to animals. The handling of Mary Ellen's case typified the pattern of child protection for many decades to come: the guardian was convicted and sent to jail for assault, Mary Ellen was sent to an institution. SPCC's proliferated rapidly throughout the country: by the turn of the century, there were 150, and thirty years later, 500, including many (known as humane societies) that ministered to both children and animals. The SPCC's saw themselves as law enforcement rather than social welfare agencies, their officers empowered by statute to arrest and aid in the prosecution of parents and guardians who committed offenses against children. In New York these offenses were described

in the Anti-Cruelty Act of 1881: abandonment; failure to provide food, shelter, clothing, medical care; willful endangerment of a child's life, health, or morals. The role of the judiciary was to convict and sentence offending adults; the primary service to victimized children continued to be removal and placement.

A new trend in child protection emerged around the turn of the century: the "decriminalization" of child maltreatment, which sought the prevention of child abuse and neglect and the preservation and rehabilitation of families through the provision of supportive services. Gradually, some SPCC's, and eventually the New York society itself, embraced this philosophy, although the society's investigative and enforcement roles remain to this day, reinforced by the SPCC agent's continued status as a peace officer, licensed to carry a gun.

The judicial function in child protection reflected the changing social work trends from prosecution to prevention, from removal of children to preservation and rehabilitation of the family, from criminalization to service provision. As the role of the child protective worker was redefined, so too was the role of the court. The 1962 recodification of the New York Children's Court and Domestic Relations

Court Acts into the new Family Court Act established the provision of services and family preservation as the stated purposes of judicial neglect proceedings. Perhaps nowhere else in the Family Court Act was the "social services" model of the judicial role so clearly expressed as in Article 3. By that time, primary responsibility for child protection and family services had passed from private organizations like the SPCC to public welfare agencies, including state and local departments of social services and, as adjuncts of the Family Court, departments of probation.

One further development must be noted as background to the 1973 Child Protective Services Act: the emergence of the medical model of child maltreatment. Beginning with the published description of the "battered-baby syndrome" just after the Second World War, professionals in medicine and child development identified certain kinds of child maltreatment that they believed could, like a physical disease, be "diagnosed" through the recognition and interpretation of particular symptoms in the child's appearance and behavior, and, in some cases, "cured" through treatment of the parent.

The medical approach to child maltreatment, especially as manifested in such forms as violent physical abuse, sex abuse,

and certain types of persistent physical and emotional neglect, redefined the problem as a phenomenon endemic (the word "epidemic" was often used) throughout society, rooted in aberrant patterns of human psychology and behavior. From this redefinition of child maltreatment as a public health problem came the impetus to create reporting systems, so that doctors, teachers, social workers, and other child care professionals confronted with the symptoms of possible maltreatment could report suspected cases for investigation. New York's first reporting law was enacted in 1964. (Between 1963 and 1967, every state in the nation adopted a reporting statute.) The duty to report created the need for a structured, state-wide system for the receipt and investigation of reports, the provision of protective, preventive, and rehabilitative services, and the preparation of cases for judicial proceedings. That system was established by the Child Protective Services Act of 1973.

#### HOW NEW YORK'S CHILD PROTECTIVE SYSTEM WORKS

Under the Family Court Act of 1962, child neglect proceedings (including acts now defined as abuse) were governed by Article 3.<sup>7</sup> Any "interested person" could file a petition:

**CONTINUED**

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a parent or other relative, social worker or SPCC agent, police officer, or indeed any person having information on which to base the belief that a child was neglected. The department of probation was directed to examine the allegations and evidence presented by the petitioner, contact the parents, and attempt to adjust some cases informally, for example, by arranging for voluntary placement of the child in foster care or for the provision of services to the family by a public or private agency. Probation was also empowered to investigate cases for the court, and to supervise the family and arrange for services following a judicial finding of neglect.

Several intermediate steps occurred between the 1962 Act and the 1973 Child Protective Services Act.<sup>8</sup> In 1964, physicians and certain other medical professionals were placed under a statutory duty to report suspected cases of abuse to their local public social services officials. Thereafter, the reporting obligation was extended to other professional groups, and to suspected cases of neglect as well as abuse. The legislature established the first state-wide abuse and maltreatment register in 1966, and local registers the following year. Until 1973, however, the lines of authority and responsibility for receiving and investigating reports were

unclear, and the burdens were divided in different parts of the state among various social services, probation, and SPCC officials.

Also during this period, some important changes were made in the Family Court Act.<sup>9</sup> Following the highly publicized death of a severely abused child in 1969, the legislature enacted Article 10, providing special judicial procedures for the urgent hearing of abuse cases. In 1970, the legislature added a revised version of Article 3 neglect procedures to the abuse procedures of the new Article 10, thereby repealing Article 3 but maintaining some significant distinctions between abuse and neglect cases. The method of investigating and bringing cases before the court remained the same until the Child Protective Services Act was passed in 1973.

The Child Protective Services statute, enacted "to encourage more complete reporting" and to set up a child protective service in each county "capable of investigating such reports swiftly and competently" and of providing protective and rehabilitative services, established the structure of New York's child protective system as it operates today:<sup>10</sup>

- Every county department of social services must have a child protective service (CPS), which is the sole public agency for receiving and investigating reports of suspected child maltreatment.

The CPS may arrange with a local SPCC to investigate some reports.

- The state register in Albany is open to accept reports around the clock seven days a week, through a state-wide toll-free telephone number. (Three localities -- New York City and Monroe and Onandaga Counties -- are presently authorized to receive reports on local numbers, but such reports must be transmitted immediately to Albany. New York City is making preparations to merge with the state-wide system as of October 1, 1980.) When a report is received, the register notifies the local CPS, which must begin an investigation within twenty-four hours and submit a preliminary report to the register within seven days. Within ninety days, the CPS must notify the register whether the report was "indicated" or "unfounded." An indicated report is one for which "some credible evidence" of abuse or neglect has been found. Unfounded reports are expunged from the register.

- Anyone can make a report to the register, but practitioners in specified professions are designated as "mandated reporters," liable to civil and criminal penalties if they do not report suspected abuse or neglect. A telephone report to the state register must be followed within forty-eight hours by a written report to the local CPS. A written report from a mandated reporter is admissible as evidence in a judicial proceeding under Article 10. Any mandated reporter may take photographs and x-rays, which must be sent to the local CPS and are admissible as evidence in an Article 10 proceeding.
- Police, SPCC, and county department of social services officials may take children into protective custody, and physicians may hold children in custody even if medical treatment is not required, in order to remove them from imminent danger to life or health. The director of a hospital, "where he believes the facts so warrant," may hold a child until the next

regular weekday session of the Family Court, at which time the CPS must bring the matter before the court.

- Any person making a report or taking a child into protective custody in good faith is immune from civil or criminal liability. The good faith of mandated reporters is presumed.
- Physicians confronted with a possible case of maltreatment, and persons authorized to take children into protective custody, may call the state register to determine the existence of prior reports if such information is necessary to evaluate the condition of a particular child or the need for protective custody. The statute specifies other persons who may have access to records in the register, among them the subjects of abuse and neglect reports. There is a procedure by which report subjects may request the amendment or expungement of records. When it begins its investigation, the CPS is required to give written notice to the parents of their rights to examine, amend, and expunge reports.

Records of indicated reports must be sealed no later than ten years after the child's eighteenth birthday.

- Among the duties of the local CPS are: to receive reports of suspected maltreatment around the clock; to maintain records of local cases; to investigate reports of suspected maltreatment within twenty-four hours and transmit preliminary and follow-up reports of investigations to the state register; to provide protective custody; to initiate and assist in Article 10 proceedings in the Family Court; to coordinate and provide services to families.

In its functions related to Family Court proceedings, the CPS assumes the roles formerly played by the department of probation. In fact, the Family Court Act was amended by the Child Protective Services Act to permit the filing of Article 10 petitions only by a child protective agency; for any other person to do so requires the special authorization of the court. <sup>12</sup>

In a typical case of reported child maltreatment, a school or hospital official, police officer, or family member or neighbor calls the state register to report a suspected incident of abuse or neglect. When the register notifies the county CPS, a caseworker is assigned to contact the family and begin an investigation. Depending upon the circumstances, the person making the report or the CPS caseworker may remove the child from the home and parental custody, immediately or at any time during the investigation,  
<sup>13</sup> whether or not an Article 10 petition has been filed.

From the moment the CPS caseworker first makes contact with the family, the variety of possible "scenarios" is almost endless. The family may refuse to speak to the worker or open the door; in such instances the seriousness of the reported allegations may lead the caseworker to seek police assistance in order to gain entry and perhaps to remove the child. Or the family may admit the caseworker, who finds such clear signs of severe maltreatment that an Article 10 petition is filed immediately. Or the caseworker may quickly dispell the allegations of the report (perhaps a malicious accusation by a disgruntled relative or neighbor), but find a family clearly overwhelmed by problems and in need of help; in such instances, the worker would designate

the report "unfounded" but attempt to seek assistance for the family from other social services agencies. Or the allegations may appear to be "indicated" by "some credible evidence," but the parents -- perhaps eagerly, perhaps grudgingly, but in any event voluntarily -- agree to let the worker assist them. In some voluntary cases, however, the worker, after dealing with the family for a period of time, may find that though the parents are cooperating, the condition of the home is not improving or may even be deteriorating; in such an instance, the worker may eventually seek recourse to the Family Court. Or the parents may refuse to accept any services voluntarily, and the worker may decide that Family Court assistance is necessary in order to foster parental cooperation.

Some representative statistics describing the scope of New York's child protective services activities are presented in Appendix A.

#### PROBLEMS IN CHILD PROTECTION

The Child Protective Services Act has successfully implemented the consensus -- which remains firm today -- that child protection in most instances is more appropriately the province of social

workers than of the police and the courts. But the present child protective system has serious shortcomings, and these must be understood if the Commission is to clarify the child protective role of the Family Court. The structure created by the 1973 act was grafted onto the then-existing jurisdiction and procedures of the Family Court, which were modified only to the extent of designating the CPS agency to assume responsibilities previously assigned to probation. No one has yet reappraised the functions of the court in light of the seven years of experience with child protective services.

Some recent studies of the administration of child protective services in New York State describe problems in the system that could have a significant effect on child protective proceedings in the Family Court.<sup>14</sup>

It has been found, for example, that child protective workers are, for the most part, poorly qualified, untrained, lacking in experience, badly paid, virtually unsupervised, burdened with unmanageable caseloads, and lacking in professional status and opportunities for career advancement. The typical CPS worker -- who performs what is generally conceded to be the most demanding, dangerous, stressful job in social work -- makes \$11,000, comes into child protective work just

out of school or from another branch of social work and is sent into the field without any training whatsoever, and carries an active caseload of thirty, or fifty, or even more. These are, of course, common failings suffered by other public agencies as well, but they take on special significance in child protective work because the rationale for the creation of a special child protective service was the need for highly skilled, specialized staff trained to act decisively in life-and-death crises, to make difficult investigations into the affairs of disorganized, uncooperative families, at the same time to win the confidence and minister to the needs of those families, and to understand the complex legal issues involved in taking cases into court. But the poor training and supervision, heavy caseloads, rapid turnover, and low morale and "burnout" that characterize so much of the CPS staff frequently produce flawed decision-making and incomplete investigations that do not hold up in court, to say nothing of inadequate service to children in dire need of attention. These failings are readily acknowledged by CPS workers themselves,<sup>15</sup> and are a source of tremendous frustration for everyone involved in child protective proceedings. Insofar as the 1973 act was supposed to create an expert investigative component to serve the Family Court, the goals of the legislation have not been fully realized.<sup>16</sup>

Equally troublesome is the lack of state-wide policy in such matters as investigative procedures, the form and content of case reports submitted by local CPS units to the central register, the sufficiency of evidence required for designating "indicated" reports, and operational definitions of the terms "abuse" and "neglect."<sup>17</sup> County-by-county inconsistencies in child protective practice have obvious implications for the building of cases for the Family Court, and may foster similar inconsistencies in the standards that govern judicial proceedings from county to county.

Blame for the shortcomings of the child protective system has been laid to a combination of administrative problems, a lack of legislative clarity, a shortage of resources and services, outmoded Civil Service regulations, and other such factors unrelated to the operation of the Family Court.<sup>18</sup> But there are some problems that may be inherent in the relationship between the Family Court and the social services structure created by the Child Protective Services Act. One of these certainly is the underlying tension between social work and legal definitions of child maltreatment, and between social work and judicial approaches to child maltreatment.

One of the most pervasive themes in all the literature on child protection is the conflict between social workers and lawyers.<sup>19</sup> Many social workers feel strongly that, by virtue of their training and experience, they know how to recognize inadequate parenting, protect endangered children, and select appropriate services to change conditions in the home. They are frequently resentful to find their professional judgments deprecated by lawyers and judges. They are frustrated at seeing their cases founder on the formalities of due process, and their good faith efforts to serve families twisted by the legalistic rituals of an adversarial confrontation. They may feel that they alone understand the interests of the child, while the lawyers quibble over rules and technicalities.

Many lawyers, for their part, may become impatient with "soft" evidence that falls short of the definitional and evidentiary requirements for an adjudication. They dispute the notion that a concern for the legal rights of the parties and an adherence to procedural formalities are a disservice to the child's interests. Conversely, they resent the need to step into the vacuum left by a poorly prepared CPS caseworker. They deplore what they see as the social worker's undue reliance upon the authority of the court and overly hasty removal of children from the home.

Some of these antagonisms can be addressed by efforts to educate each profession about the needs, language, and premises of the other. In particular, social workers are making sincere efforts to learn how to prepare Article 10 proceedings properly, to testify effectively, and to meet and understand the due process requirements of judicial proceedings.<sup>20</sup> But an underlying conflict remains. The child protective system created by the 1973 statute rests on the consensus that child protective services are primarily a social work, not a judicial, function. Only about 16% of child protective investigations ever reach the court, and it is natural that the treatment of these few cases, like all the rest of the CPS caseload, will reflect the social worker's rather than the lawyer's approach. Moreover, the law itself sets two separate standards for CPS and court intervention in family life: the former, merely on the basis of "some credible evidence" of child maltreatment, the latter only after a "preponderance" of evidence has been shown.<sup>21</sup>

The social worker-lawyer conflict does not arise only in court. It is a dilemma that faces caseworkers in their daily routine.<sup>22</sup> When the worker arrives at the home to investigate a reported abuse or neglect situation, he presents himself in a dual capacity: as friend, helper, a source of

support to a family in distress, but also as investigator, potentially an accuser and prosecutor, who has the power to take the children away and drag the parents into Family Court, perhaps even Criminal Court. On the one hand, the worker tries to win the family's trust, encourage them to speak freely, convince them to accept voluntarily the worker's benevolent intervention in the family's affairs. On the other, the worker is a potential adversary and a threat, eliciting hostility, hardening the family's resistance.

This dichotomy of purpose is reflected in the statute law. The Child Protective Services Act requires the caseworker to make it clear to the family that their acceptance of the worker's preferred assistance is purely voluntary; at the same time, the worker must inform the family that he has the authority to take them to court.<sup>23</sup> The act establishes a clear preference for a voluntary, mutually cooperative relationship between worker and client, yet Article 10 explicitly abrogates the statutory privilege between social worker and client (among others), so that anything the parents say to the worker can be introduced as evidence against them in a child protective proceeding: there are no "Miranda" warnings. Both the Child Protective Services Act and Article 10 envisage continuing efforts on the part of the CPS agency to

work constructively with the family even after a case reaches the court, yet once a petition has been filed, the role of the caseworker is clearly that of witness for the prosecution. The conflict of roles is keenly felt by CPS workers, and is much discussed in the social work literature.<sup>25</sup> A wavering between one posture and the other in the course of a single investigation can easily affect the kind of case the worker brings into court.

The duality of the social worker's view of his own role is matched by the worker's view of the role of Family Court. There are two reasons that lead the child protective worker to take a case to court.<sup>26</sup> The first is that the worker has a clear objective -- to sanction the emergency removal of an imminently endangered child, to place the child, or to impose treatment or supervision of the parents as a condition of their continued custody. The second is that the worker turns to the court out of pure desperation, when a family remains intractable despite his best efforts to assist them on a voluntary basis. Here, the worker does not seek or need a formal adjudication; rather, he desires to enlist the authority of the court to enhance his own power and effectiveness vis-a-vis the family. In such circumstances, the court is used as a kind of "muscle" for the social worker,

or as an arbitrator or mediator among the parties. As it is presently written, Article 10 does not distinguish between these two very different purposes for court participation in child protective service.

Finally, both child protective services and the court have been criticized for a propensity to intervene in situations in which they are unlikely to produce any tangible improvement.<sup>27</sup> With the growing emphasis upon the reporting of suspected child maltreatment (the steady burgeoning of the register's statistics is thought to be less the result of an increasing incidence of parental abuse than of better reporting),<sup>28</sup> CPS workers are being thrown into more and more family problems for which they have little to offer. In part, this is because there is some doubt that the "state of the art" has produced effective "cures" for the abusive parent; removal of the child is the single most frequent "cure," and there is growing agreement that foster care or institutionalization is almost always worse for a child than living with "bad" parents, except in extreme circumstances. The state's intervention in an already disordered home may only increase the strain on the family, especially when the intervention is performed by relatively inexperienced and

poorly trained caseworkers who may be alienated from their clients by vast differences in social and economic status, education, cultural values, and life style. And perhaps most important, the state does not provide a sufficient range of services to give families meaningful assistance. Foster care and counseling are the most frequently used services; very little else is available that will permit families to stay intact and yet measurably improve their ability to cope with the stresses of child-rearing and (in most cases) poverty. There is some hope that the preventive services mandated by the Child Welfare Reform Act of 1979 will produce new options for child protective service.<sup>30</sup> This remains to be seen, for the act will not be fully in effect until April 1, 1981.

It is likely to remain true for some time to come that the child protective system will be far more active in reporting and investigating than in providing service. If that is so, the traditional rationale for the Family Court's participation in the child protective system may be in need of re-examination. The purpose of an Article 10 proceeding is to "protect children" and "help safeguard their physical, mental, and emotional well-being," but if the court is in fact unable to improve the child's situation, the rationale for its

intervention is debatable. This suggests two possible approaches to the design of the court's role in child protection: first, to limit the court's intervention to those circumstances in which it can make a meaningful difference; second, to give the court the means to encourage the delivery of effective services to children and families.

#### THE ROLES OF FAMILY COURT IN CHILD PROTECTION

The caseworker's view of the dual role of Family Court reflects a tension between two concepts: the adversarial, due process, "judicial" model, which has grown out of Kent, Gault, Winship, et al.; and the traditional juvenile court treatment-oriented, informal, "social services" model. The tension is inherent in Article 10, which attempts both to provide formal procedures for removals, adjudications, and dispositions that honor the due process rights of parents and children, and yet retain a flexibility that furthers the caseworker's and the court's ability to serve the family.

Article 10 has its origins in Article 3 of the Family Court Act of 1962. A reading of the original Article 3, along with the commentary of the Joint Legislative Committee on Court Reorganization, which drafted the 1962 act, makes clear that the "social services" model of the court was uppermost in the legislators' minds, yet the importance of due process -- even at this pre-Gault date -- was not slighted. The purpose clause of Article 3 stated that the law was intended to provide due process for determining when a child was neglected and for regulating the home or removing the child in order to see that its needs were properly met.<sup>32</sup> Neglect (there was no separate category of abuse) was defined as parental failure to supply adequate food, shelter, medical care, education, etc., though financially able to do so; serious harm or likelihood of serious harm to the child due to improper guardianship, including lack of moral supervision; and parental abandonment or desertion.<sup>33</sup> The Joint Legislative Committee regarded Article 3 as a complement to Article 7, noting the frequency with which delinquency and incorrigibility were associated with the kind of parental neglect defined in Article 3, and establishing consistent provisions under both articles, such as age limits (boys up to sixteen, girls to eighteen) and case intake by the department of probation.<sup>34</sup>

Any official or private person could bring a neglect petition; probation was authorized to confer with the petitioner and the parents and attempt to adjust cases when appropriate, but could not block the petitioner's access to the court.<sup>35</sup> (In an interesting twist by which the pre-Gault law of 1962 appears to have placed greater emphasis on the respondent's rights than does the present law, statements made by the parties to probation at a preliminary conference were not admissible at an adjudicatory hearing, whereas today, under Article 10, statements made to the CPS worker are admissible. The Joint Legislative Committee cited Article 3's guarantee of confidentiality as an encouragement to uninhibited conversation between the parents and the intake officer.)<sup>36</sup> Despite numerous later amendments, Article 3's provisions for removal hearings, adjudicatory hearings, and dispositions would look familiar to today's practitioners, and like the present Article 10, encouraged judicial discretion to assist the family without recourse to full-scale adversarial proceedings. One major difference, however, is that Article 3 provided only that respondent parents be notified of their right to be represented by counsel of their choice and that a law guardian be appointed at the parents' request or on the court's own motion.<sup>37</sup> The court's appointment of counsel for any indigent parent was not required.

until 1976; the appointment of law guardians was made mandatory in 1970.<sup>38</sup> The frequent absence of counsel for either parent or child under Article 3 of course enlarged the scope of judicial discretion and procedural flexibility; the courtroom was less "adversarial" than it is today.

Article 10 originated in an accident of history. In 1969, a young girl was beaten to death by her drug-addicted parent. The legislature quickly enacted a new article of the Family Court Act to deal solely with cases of physical abuse. It established a special child abuse part of the Family Court, required emergency protective custody in all abuse cases, and added parental drug use as an element of the definition of abuse.<sup>39</sup> Like many hasty legislative responses to public outrage over shocking events, the new law proved unworkable -- for one reason, because it gave the court no guidance on procedures to govern abuse cases. In 1970, Article 3 was repealed, its substance revised and moved to Article 10 to create the double-track system for abuse and neglect cases that we have today. But the tracks are not quite so clearly separated in practice as they might seem from a reading of the statute, and the blurring of the distinctions throws light on the Family Court's function as a resource for casework in the child protective system.

Under Article 10, when a petition raises an allegation of abuse, even if other allegations regarding the same child or other children in the household are for neglect, the case is defined as one "involving abuse."<sup>40</sup> Such a case must be introduced into the child abuse part, and the court must give it priority in calendaring and investigations over all other cases. Summons and warrants in abuse cases are specially flagged, and must be served and executed within specified time limits.<sup>41</sup> Thus, where the social worker seeks speed and priority attention by the court, an abuse case has some advantages.

However, social workers often prefer to file neglect petitions instead, even if grounds for an abuse case may exist. The procedural requirements for abuse cases are more rigorous -- for example, a child removed from the home may be returned only by the court, not at the worker's discretion, and the court must hold a hearing to determine the need for a preliminary order of protection and must order a physical examination of the child -- and therefore remove some flexibility in the worker's handling of the case. But more significant, it is widely believed, by parents and social workers alike, that neglect is a "lesser" allegation than abuse, less

stigmatizing and frightening to the parents, easier to sustain, and equally as useful to the caseworker.<sup>43</sup> These perceived advantages of neglect petitions have given rise to certain common "plea bargaining" practices in child protective cases: the substitution of neglect for abuse allegations in the course of the proceedings, a practice explicitly provided in Article 10 at the discretion of the court; and the admission of "involuntary neglect," a concept not found in the statute but one that is much used to allow the parents to accede to the court's jurisdiction and supervision without admitting guilt.<sup>44</sup> Such practices of course emphasize the "social services" role of the court, placing greater importance on the court's availability to assist the worker in obtaining services than on the process of adjudication.

The usefulness of "plea bargaining" is suggested by statistics for Family Court cases involving abuse in 1979.<sup>45</sup> Of 891 petitions alleging abuse only, 33% resulted in a finding of abuse, but 29% resulted in a finding of neglect rather than abuse, and 53% of all findings were based on the consent of all the parties. Of 249 petitions alleging both abuse and neglect, 33% sustained any of the allegations of abuse, but 42% resulted in findings of neglect only, and 43% of all findings were based on the consent of all the parties. These statistics naturally do not reflect adjustments that preceded the filing of petitions -- that is,

the CPS agency's decision to bring neglect rather than abuse petitions even where there might be foundation for abuse charges.

Recalling the earlier discussion of the process of child protective casework, in which the worker may seek the court's assistance after repeated attempts to improve conditions in the home have been unsuccessful, it is not difficult to understand the attractions of "plea bargaining," if the court's intervention will force the parents to cooperate with the worker. Despite its use in facilitating casework with uncooperative families, however, "plea bargaining" has been severely criticized. It is not universally agreed that neglect is but a lesser, vaguer form of abuse. Some experts believe not only that child neglect is a distinct form of behavior, but also that it may be more intractable to treatment than some kinds of physical or sexual abuse, and may actually have more profound and enduring harmful effects upon a child.<sup>46</sup> It has also been argued that a "no fault" admission or a "lesser" charge, by relieving the parent of the necessity to recognize full responsibility for his behavior, may impede the effectiveness of rehabilitative efforts.<sup>47</sup> In fact, the statute itself appears to play down the significance of neglect allegations: before imposing a

disposition, the court must find, in addition to facts constituting neglect, the further condition that its aid is required,<sup>49</sup> a provision that has, by some interpretations, perpetuated the popular view that a finding of neglect is not in and of itself a particularly serious matter.

From a different perspective, "plea bargaining" has been criticized as a violation of the rights of the parents.<sup>50</sup> If a case is too weak to be proved, according to this view, it should be dismissed, and the family should remain beyond the court's reach -- while always free, of course, to accept proffered assistance and services voluntarily, without judicial intervention. On the other hand, if the child is really endangered, the CPS agency should be able to sustain proof of facts necessary for an adjudication, particularly in light of the relaxed evidentiary rules that apply to child protective proceedings.

Of special concern is the adjournment in contemplation of dismissal -- ACD.<sup>51</sup> This allows for the adjournment of a case at any time prior to adjudication for up to one year upon conditions set by the court, with extensions of the adjournment and supervision permitted as agreed by all parties. However, if the respondent "has failed substantially to observe the terms and conditions" of the ACD or "to cooperate with the

supervising child protective agency, ... neglect shall be deemed to exist" -- in other words, a parental violation of the ACD is treated as an automatic finding of neglect, without the need for a fact-finding hearing, or even a parental "no fault" admission. This circumvention of the parents' right to a due process adjudication troubled Governor Carey when he signed the provision into law and has been criticized by many other commentators since that time,<sup>52</sup> and its constitutionality has been placed in doubt in at least one appellate court.<sup>53</sup> Beyond concern for this specific aspect of the ACD, however, there are more general objections to this particular form of "plea bargaining," once again because it may slight both the rights of the parents and the child's need for protection in the interests of a quick and uncomplicated resolution. Nonetheless, the ACD is a commonly used disposition: in 1979, in about 17% of cases upstate and 11% of cases in New York City.<sup>54</sup>

It is difficult to estimate what proportion of child protective petitions are brought primarily to reinforce the caseworker's service to the family. It is virtually impossible to measure how effective the court has been in fulfilling this role. In one recent longitudinal study of 181 New York City proceedings, the child protective agency had worked with

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the family for at least a month in 35% of the cases before asking its lawyers to prepare a petition, and in 10% of the cases had still not asked for a petition after four months of casework. However, the percentage of the total Article 10 caseload in which the decision to go to court is delayed for several months is probably very much higher, since this particular study examined only cases carried to disposition, and did not include petitions that may have been withdrawn after the worker reached an "understanding" with the family.

The same study shows that casework was most intense between the filing of a petition and disposition,<sup>56</sup> which could be taken to indicate that CPS workers find the court's involvement conducive to better service to the family even before a disposition. But CPS experts often report precisely the opposite effect: that the initiation of court action and its attendant "adversarial" atmosphere merely intensify tension between caseworker and parent and harden the parent's resistance.<sup>57</sup> Therefore, while more services may have been offered after petition, we do not know if they produced any appreciable improvement in the family's situation. The most frequently used services were foster care, counseling, medical care, and psychological and psychiatric services. The deleterious

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effects of foster care on both child and family have been well documented; the efficacy of counseling (which usually means the CPS worker talking with the family) is exceedingly difficult to measure; psychiatric services provided during court proceedings tend to be diagnostic rather than rehabilitative, often in response to the court's request for a psychiatric evaluation. Day care, homemakers, child care training, legal services, and housing services were rarely used. It is interesting to note that by the time of disposition, the CPS workers agreed with the court's handling in only 44% of the cases.<sup>58</sup> If the workers represented in the study were looking to Family Court to support their casework, the court apparently disappointed them more than half the time.

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The "other side" of Family Court, its adversarial, more strictly "judicial" nature, is illuminated by such issues as the role of advocates for the parties, procedures for taking children into protective custody, rules of evidence, and standards of proof. It is a common complaint of social workers, and indeed of some lawyers and judges as well, that child protective proceedings have become "too adversarial," a feeling that the courtroom presence of so many lawyers, a growing emphasis upon the rights of the parents, and a strict adherence to formal rules of procedure and evidence may obscure the needs of the child and hamper progress toward a compassionate solution to serve the child's best interests.<sup>60</sup> Nevertheless, Article 10 clearly reflects changes in law and attitudes that have occurred since the early 1960's concerning representation by counsel, rights of notice, confrontation, and cross-examination, rules of evidence and proof -- all in recognition that child protective proceedings, while civil and supposedly "non-punitive" in nature, directly affect fundamental rights, and in many instances may result in a temporary or even permanent separation of parent and child. New York was, and still is, far ahead of many other states in acknowledging the adversarial,

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"due process" aspects of child protective cases.<sup>61</sup> Even so, Article 10 tempers a strict interpretation of due process with an attempt to accommodate the special problems of child protection, for example, the difficulties of obtaining evidence from witnesses who may be too young or too confused to testify, and the need to act swiftly in placing children into protective custody under emergency conditions.

Part 2 of Article 10 establishes procedures to be followed by police, child protective workers, hospital personnel, doctors, and the court in removing children from the custody of their parents. Section 1021 provides for removal with parental consent. Sections 1022 and 1023 specify procedures for a temporary emergency order of removal by the Family Court before an abuse or neglect petition has been filed, when there is imminent risk to the child's life or health and insufficient time to hold a formal hearing to decide if protective custody is necessary. A §1022 order can be obtained by telephone, if necessary -- for example, at night and weekends when court is not in session. Sections 1024 and 1026 provide rules for emergency removals by police, doctors, and CPS workers in situations so urgent that there is not even time for a §1022 court order. Procedures for a court hearing after the filing of an abuse or neglect

petition, to decide whether to continue protective custody or return the child home -- perhaps subject to CPS supervision or other court-imposed conditions -- are outlined in §1027. Section 1028 allows the parents to petition the court and have a hearing for the return of a child.

The removal of a child with parental consent, under §1021, may cut short further Article 10 proceedings if the parents simply agree to place their child voluntarily in foster care. The assumption is that for the duration of the placement, the parents will receive services designed to improve conditions in the home and thus make possible the child's return. Although consensual removal was apparently favored by the legislature,<sup>62</sup> it is widely believed that a certain number -- perhaps many -- of such consensual removals are in fact coerced by the CPS worker's threats of instituting an abuse or neglect proceeding.<sup>63</sup> The danger to the family is that the court will not examine the agency's judgment and performance until at least eighteen months later, in a §392 foster care review hearing, by which time the primary focus may well have shifted to the issue of termination of parental rights.

The post-petition preliminary hearing provided under §1027 (to review all abuse cases as well as all removals without a court order) is almost always ex parte.<sup>64</sup> Appearance

by counsel for the parents is a rare event -- usually counsel is not appointed until a later stage of the proceedings. A law guardian may be present, although not necessarily so. The caseworker is often the only person to testify. The court hears only the state's prima facie case for the existence of an imminent risk necessitating the child's continued removal. The worker's testimony is unsworn and may include hearsay evidence that would not be admissible at a fact-finding hearing. Because no other party is ordinarily present to challenge the state's case, unless the judge chooses to put some hard questions to the caseworker -- in effect to take an active adversarial role -- the §1027 hearing may simply "rubber stamp" the CPS agency's unilateral decision to remove a child from the home.<sup>65</sup> And, as one-sided as a §1027 hearing may be, there is not even a guarantee that it will be held at all: the initiative lies with the CPS agency, and the statute provides no mechanism to monitor the agency's diligence in assuring timely application to the court.

All parties are present with counsel at a §1028 hearing, but since this procedure must be initiated by the parent and many parents do not have the advice of a court-appointed attorney for some time after the removal of a child, §1028 is not as useful as it might appear from a simple reading of

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the statute. When a §1028 hearing does take place, however, the court has the opportunity to weigh the evidence concerning the imminent risk to the child. A §1027 hearing is so structured as to create a presumption in favor of the caseworker's judgment for removal; at a §1028 hearing, however, the burden is upon the worker to show why the child should not be returned to the parents. To meet that burden, the worker must show either an imminent risk to the child's life or health, or a "substantial probability" that the child will be found to be abused or neglected and that the court's order of disposition will be placement.

A great many children are removed from their homes for considerable periods of time in the course of abuse and neglect proceedings -- not even counting those whose parents "voluntarily" surrender them to foster care under explicit or implied threats of an Article 10 petition. Of the approximately 5,000 cases reaching disposition in 1979, there were nearly 2,800 removals: over 800 children remained in temporary placement, prior to disposition, from one to three months, over 650 from three to six months, and over 600 from six months to more than two years.<sup>66</sup> See Appendix B for some representative statistics on removals.

Quite apart from the numbers of children affected, the issue of removal is important because of our increasing recognition of the profound and perhaps irreparable psychological harm to children caused by forced separation from their parents.<sup>67</sup>

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In child protective cases, the child's removal is often sudden and without preparation, and may be based on very little concrete information and perhaps a great deal of personal bias. Of course, it is easy to understand why caseworkers follow "hunches" and may err on the side of too much caution: the fear of abandoning an endangered child to serious injury or even death haunts every conscientious CPS worker, and the horror of learning that a child left at home was later beaten or starved to death is something no worker ever wants to face. Nonetheless, there appears to be little agreement even among acknowledged experts about the circumstances that "add up" to a clear case for removal,<sup>68</sup> and it has already been pointed out that the average CPS worker in New York State is anything but a practiced expert.

It has also been suggested that the trauma of losing custody of their children may itself impair the parents' ability to solve their personal and family problems. Application of the label "child abuser" has even been argued to produce precisely those traits of personality that are often cited as the causes of child abuse.<sup>69</sup>

All of this argues not for the abolition of protective custody, but for a re-examination of the mechanisms we now have for the judicial review of protective custody, to determine if more timely and effective methods for review can be devised.

Closely related to the issue of removal hearings is the problem of providing effective counsel for all parties in a child protective case. In New York City, law guardians for children are supplied by the Legal Aid Society; court-appointed counsel for the parents are 18-B attorneys. Elsewhere, both children and parents are represented by 18-B attorneys. Whereas both Legal Aid and CPS attorneys have access to considerable resources -- for example, social workers to conduct investigations -- and accumulated expertise in child protective litigation, 18-B attorneys are generally untrained and inexperienced in this specialized field, do not have investigative and other support services, and in some communities may be subject to strong pressures from the court and the CPS agency.<sup>70</sup>

Although questions have been raised about the relative proficiency of CPS counsel and Legal Aid attorneys in certain aspects of child protective litigation,<sup>71</sup> clearly the most serious problem state-wide is the timely provision of adequate counsel for the respondents and, where Legal Aid is not available, of law guardians for the children. Timeliness is a crucial question: as has been described, parents, caseworker, and the court itself may be forced to make serious decisions before advocates for the various parties have been brought

into the proceedings. Among other issues facing the Commission is the determination of the point at which each party must have access to the advice of and representation by counsel. Because the participation of lawyers is generally seen as an "adversarial" element, this determination will therefore rest in part on the Commission's judgment about the balance between the "social services" and "judicial" aspects of child protective proceedings.

The Commission must also address the definition of the role of the law guardian, and re-examine the rules of evidence and proof in child protective cases. As to the first, there is a question regarding the point in an Article 10 proceeding at which the presumption that parents speak for the best interests of their children is overcome, and thus the part to be played by the law guardian before and after that point.<sup>72</sup> Questions of evidence and proof arise from the statute's adaptation of traditional rules of civil procedure to the child protective goal of Article 10.<sup>73</sup> These include: the res ipsa loquitur test, by which injuries or a condition that could ordinarily occur only through a parental act or failure to act are prima facie evidence of abuse or neglect; proof of abuse or neglect of one child as admissible evidence regarding the abuse or neglect of other children; abrogation

of statutory privileges of confidential communication, except for the attorney-client privilege; drug use as prima facie evidence of neglect; and "preponderance of the evidence" as the standard of proof in fact-finding hearings.

Statistics on New York's Child Protective Services System <sup>74</sup>

In 1974, its first full year of operation under the Child Protective Services Act, the state register received just under 30,000 reports; in 1978 it received 45,337, and in 1979, 51,842. In 1979, abuse reports constituted 15% of the total, the lowest proportion since the act was passed. New York City accounted for 36% of all reports, and over 27% of the reports from New York City were for abuse, compared with just over 8% of the reports from upstate. (The five counties of New York City are consolidated into one CPS agency administered by Special Services for Children. In the rest of the state each county is a separate social services district with its own CPS.) However, when the state's social services districts are ranked by population of children under fifteen, New York City is only forty-eighth out of fifty-eight in the number of reports submitted per capita. Of 44,090 cases opened in 1979 for which a determination was made by the end of the year, 42.6% were indicated, 57.4% unfounded. The number of confirmed deaths attributable to child maltreatment during 1979 was ninety-two, fifty-eight of which were in New York City. Of the total of reports submitted in 1979, the single most frequently allegation was lack of

supervision (19.4%), followed by excessive corporal punishment (17%), lack of food, clothing, and shelter (10.5%), and lacerations, welts, and bruises (10.4%). Emotional neglect represented 6.9%, lack of medical care 4.8%, educational neglect 4.3%, and sexual abuse 2.7%.

In 1979, mandated reporters accounted for about 40% of the cases opened for investigation. School personnel reported the greatest number of cases, followed by law enforcement officers, hospital staff, and social services workers. Upon investigation by a CPS, about 56% of reports from mandated reporters were found to be indicated; fewer than 34% of reports from non-mandated sources were found to be indicated, although non-mandated reporters submitted over 60% of the reports. A fair number of reports from non-mandated sources arise out of custody and other family disputes, and 7% of them were submitted anonymously.

In 1978, there were 1,137 CPS workers state-wide; in 1979, the numbers were essentially unchanged, but the number of reports in 1979 was 14.4% higher than in 1978. From October 1, 1978 through September 30, 1979, New York State spent nearly \$42 million in federal, state, and local funds for child protective services.

#### APPENDIX B

#### STATISTICS ON CHILD PROTECTIVE (ARTICLE 10) PROCEEDINGS IN FAMILY COURT 75

During the calendar year 1979, the New York State Family Court received 7,387 Article 10 petitions, of which 6,888 were new cases. Findings were made in 4,962 cases. Only 11 Article 10 petitions arose out of Article 7 (delinquency and PINS) proceedings; only 5 out of Article 8 (family offenses).

Impairment of the child's mental, emotional, or physical health was the most frequent reason for petition; it was specified as the principal allegation in 2,750 petitions. The next most frequently specified allegations were inadequate food, shelter, and clothing (983); inadequate education (535); inadequate medical care (407); parental alcoholism (353); abandonment (295); physical abuse (263); parental mental illness (213); parental use of drugs (209); and sex offenses (126).

The public social services agency (CPS) was the petitioner in the overwhelming majority of proceedings.

Of the cases reaching disposition in 1979, placement was the disposition for 1,731 petitions: in 80 cases, the children were placed with relatives; in the remainder, with other persons or with public or private agencies. In 757 cases

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the child was released to the parent at disposition, under supervision by a public or private agency or probation. Six-hundred-and-one petitions were withdrawn, 1,434 dismissed.

Allegations of neglect by impairment of mental, emotional, or physical health accounted for the greatest number of temporary removals both before and after the filing of a petition, and for the longest periods in pre-disposition placement. About 15% of children involved in Article 10 proceedings were removed prior to the filing of a petition; of these, the majority were in placement from one to seven days. About 52% of children involved in Article 10 proceedings were removed after the filing of a petition; of these, the majority were in placement from one to six months.

In cases involving abuse, 236 of 1,196 cases took less than a week to move from the filing of a petition to the initial fact-finding hearing, but 244 cases took from one to three months, and 191 cases took up to six months. In cases involving allegations of neglect only, 744 of 3,827 moved from filing to initial fact-finding in one week, but 691 took from one to three months, and 489 up to six months. In 140 cases, the length of time between the filing of a petition and the initial fact-finding hearing was over a year, in a few such cases, over two years.

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In cases involving abuse, 280 of 1,196 cases took less than a week to move from the initial fact-finding hearing to a dispositional hearing; 236 cases took from one to three months. In cases involving allegations of neglect only, 885 of 3,827 cases moved from initial fact-finding to a dispositional hearing in one week; 592 took from one to three months, 526 from three to six months, and 543 from six months to a year. In 297 cases, the length of time between the fact-finding hearing and a dispositional hearing was over a year, in a few such cases, over two years.

1. New York State Department of Social Services, 1979 Annual Report, CHILD PROTECTIVE SERVICES IN NEW YORK STATE, pp. 21 and 23 (hereafter cited DSS Report).
2. State of New York, Second Annual Report of the Chief Administrator of the Courts, 1980 (unpublished draft), table 3-33 (hereafter cited OCA Report). Only 6,888 of these were new petitions.
3. Ibid., table 3-34.
4. Title 6, §§411-428 of the Social Services Law, enacted as Chapter 1039 of the Laws of 1973, subsequently amended 1974, 1975, 1976, 1977, 1978, 1979.
5. Sources for the history of child protection described in this section: J.C. Furnas, THE AMERICANS: A SOCIAL HISTORY OF THE UNITED STATES, 1587-1914, G.P. Putnam's Sons, New York, 1969; Temporary State Commission on Child Welfare, CHILD PROTECTIVE SERVICES IN NEW YORK STATE, May 1980, pp. 3-13; Judith Areen, Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Abuse and Neglect Cases, 63 GEORGETOWN LAW JOURNAL 887-938 (March 1975); A Reappraisal of New York's Child Abuse Law: How Far Have We Come? 13 COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS 91-136 (1977); Eli Newberger and Richard Bourne, The Medicalization and Legalization of Child Abuse, 48 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 4 (October 1978) 593-607.
6. State v. Pendergrass, 19 N.C. 365 (1837).
7. Article 3 of the Family Court Act of 1962, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, Vol. 29A, 1963 edition.
8. DSS Report, p. 1.
9. Douglas J. Besharov, Introductory Practice Commentary, Article 10, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, Vol. 29A, 1975 edition, supplementary pamphlet 1976 to 1979 (hereafter cited Practice Commentary).
10. Sections 411-428 Social Services Law.

11. DSS Report, p. 26; City of New York, Human Resources Administration, Special Services for Children, Annual Plan for the Delivery of Child Protective Services, 1979 (hereafter cited SSC Annual Plan).
12. Section 1032 Family Court Act, added by Chapter 1039 of the Laws of 1973. In some counties the SPCC may be considered a child protective agency for this purpose.
13. Sections 1021-1029 Family Court Act.
14. New York State Assembly Child Care Committee, Sub-Committee on Child Abuse, THE CHILDREN ARE WAITING: CRITICAL ISSUES IN NEW YORK STATE'S CHILD PROTECTIVE SERVICES, prepared by Gloria Cuccurullo, August 1, 1980; Temporary State Commission on Child Welfare, op. cit.; Jacob G. Wiener and Myrtle Jasspe, THE CHILD PROTECTORS: A STUDY OF CHILD PROTECTIVE AND COURT SERVICES IN NEW YORK CITY, prepared for Human Resources Administration, April 30, 1979; SSC Annual Plan; Citizens' Committee for Children of New York, ABUSED/NEGLECTED CHILDREN IN THE FAMILY COURT (A REVIEW OF FIFTY CASES), January 1979; New York State Select Committee on Child Abuse, THE STATUS OF CHILD PROTECTION: THE IMPLEMENTATION OF THE CHILD PROTECTIVE SERVICES ACT OF 1973, September 1, 1978.
15. Temporary State Commission on Child Welfare, op. cit., especially Chapters III and V.
16. Ibid.
17. New York State Assembly Child Care Committee, op. cit.
18. Ibid., and Temporary State Commission on Child Welfare, op. cit.
19. See, for example, Michael Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 STANFORD LAW REVIEW 985-1040 (April 1975); Vincent De Francis, THE COURT AND PROTECTIVE SERVICES: THEIR RESPECTIVE ROLES, Children's Division of the American Humane Association, n.d.; Citizens' Committee for Children, op. cit., pp. 5-6.

20. See, for example, Barbara A. Caulfield, CHILD ABUSE AND THE LAW: A LEGAL PRIMER FOR SOCIAL WORKERS, National Committee for Prevention of Child Abuse, 1979; Marion C. Katzive, TAKING A CASE TO COURT: A GUIDE FOR CHILD PROTECTIVE STAFF, City of New York, Special Services for Children, 1978; Cynthia Bell and Wallace J. Mlyniec, Preparing for a Neglect Proceeding: A Guide for the Social Worker, PUBLIC WELFARE (Fall 1974).
21. Section 412 Social Services Law; §1046 Family Court Act.
22. See, for example, Barbara Caulfield, Legal Questions Raised by Privacy of Families and Treatment of Child Abuse and Neglect, 1 CHILD ABUSE AND NEGLECT 1 (November 1977) 159-166; Edward Rolde, Negative Effects of Child Abuse Legislation, 1 CHILD ABUSE AND NEGLECT 1 (November 1977) 167-171; Caulfield, CHILD ABUSE AND THE LAW, op. cit.; Iris Albstein, Child Abuse and Maltreatment: The Development of New York's Child Protection Laws, 5 FORDHAM URBAN LAW JOURNAL 533-547 (1977).
23. Section 424(9) Social Services Law.
24. Section 1046(a)(vii) Family Court Act.
25. See Katzive, op. cit.; Caulfield, CHILD ABUSE AND THE LAW, op. cit.
26. Ibid.
27. For a good summary and references to helpful sources see Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project, STANDARDS RELATING TO ABUSE AND NEGLECT (tentative draft), 1977, commentaries to Parts I and II, pp. 37-64 (hereafter cited IJA/ABA).
28. New York State Select Committee on Child Abuse, op. cit. Contrary views have also been expressed: that the incidence of abuse is tied to poverty and economic hardship and thus rises as the economy slumps, Leroy Pelton, Child Abuse and Neglect: The Myth of Classlessness, 48 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 4 (October 1978) 608-617; and that the increasing numbers of single teenage mothers may increase the incidence of child maltreatment, DSS Report, p. 29. Nonetheless, the

- effect of New York State's legislative and administrative efforts since 1973 has been to increase caseloads by improving the efficiency and broadening the reach of the reporting system.
29. Wiener and Jasspe, op. cit.; Rolde, op. cit.; Wald, op. cit.; Stephen Bricker, Summary Removal of Children in Abuse and Neglect Cases: The Need for Due Process Protections, 2 FAMILY LAW REPORTER 4037-4041.
  30. New York State Assembly Child Care Committee, op. cit., pp. 33-37.
  31. Section 1011 Family Court Act.
  32. Section 311 Family Court Act, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, Vol. 29A, 1963 edition.
  33. Section 312 Family Court Act, ibid.
  34. Committee Comments to §§312, 323, ibid.
  35. Sections 332, 333 Family Court Act, ibid.
  36. Section 334 Family Court Act and Committee Comments, ibid.
  37. Section 343 Family Court Act, ibid.
  38. Section 262 Family Court Act, Chapter 682 of the Laws of 1975, effective January 1, 1976; §249 Family Court Act, Chapter 962 of the Laws of 1970.
  39. See note 9, above; also Robert Burt, Forcing Protection on Children and Their Parents: The Impact of Wyman v. James, 69 MICHIGAN LAW REVIEW 1259-1310 (June 1971). Section 171 Family Court Act, Chapter 962 of the Laws of 1970, establishes the child abuse part.
  40. Section 1012(c) Family Court Act.
  41. Sections 117, 1035-1037, 1049 Family Court Act.
  42. Sections 1026, 1027 Family Court Act.

43. For example, see Practice Commentary to §1031.
44. Section 1031(c) Family Court Act.
45. Practice Commentaries to §§1031 and 1039; Jose D. Alfaro, Four Unresolved Issues Family Court Judges Face in Abuse and Neglect Cases (unpublished draft report of Family Court Judges Conference on Child Abuse and Neglect, April 17-19, 1980); interviews with experienced practitioners in child protection proceedings. (The legal and social work professionals whom we interviewed, referred to in this and succeeding notes as "practitioners," asked that their comments to us remain informal and anonymous at this stage, since many of them may later testify or submit formal comments to the Commission on behalf of the agencies and organizations they represent. Their affiliations include organizations representing parents and children in Article 10 proceedings, child protective agencies, state and national child abuse centers, and private practitioners and consultants. All have extensive courtroom experience.)
46. OCA Report, tables 3-51 and 3-52.
47. Ray E. Helfer and C. Henry Kempe, eds., CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY, Ballinger Publishing Company, Cambridge, Mass., 1976; Pelton, op. cit.
48. Alfaro, op. cit., pp. 15-16.
49. Section 1051(c) Family Court Act.
50. Alfaro, op. cit., p. 15.
51. Section 1039 Family Court Act.
52. See excerpts from Governor's message in Practice Commentary to §1039; Alfaro, op. cit., pp. 18-20; Adjournment in Contemplation of Dismissal (papers presented to a seminar on §1039 sponsored by the Family Life Development Center, December 10, 1976).
53. In re Paul X, 57 A.D.2d 216, 393 N.Y.S.2d 1005 (3rd Dept., 1977).

- 54. Unpublished statistics supplied by the Office of Court Administration.
- 55. Wiener and Jasspe, op. cit., table 11, p. 33.
- 56. Ibid., table 12, p. 36.
- 57. Katzive, op. cit., p. 9; Rolde, op. cit.; Albstein, op. cit.; Caulfield, CHILD ABUSE AND THE LAW, op. cit., pp. 10-12; Leroy Schultz, The Child Sex Victim: Social, Psychological and Legal Perspectives, 52 CHILD WELFARE 3 (March 1973) 147-157; interviews with practitioners.
- 58. Wiener and Jasspe, op. cit., pp. 35-44.
- 59. Ibid., table 16, p. 52.
- 60. See, for example, Alfaro, op. cit., especially pp. 3-8; A Reappraisal of New York's Child Abuse Law, op. cit.
- 61. A Reappraisal of New York's Child Abuse Law, op. cit.; The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings, 68 GEORGETOWN LAW JOURNAL 213-248 (October 1979).
- 62. Practice Commentary to §1021.
- 63. IJA/ABA, commentaries to Part X, pp. 166-179; interviews with practitioners.
- 64. Practice Commentary to §1027; Katzive, op. cit., pp. 10-15; interviews with practitioners.
- 65. Interviews with practitioners.
- 66. OCA Report, tables 3-41 and 3-42, and unpublished statistics supplied by the Office of Court Administration.
- 67. A summary of the arguments and valuable references to sources are given in Bricker, op. cit..
- 68. Ibid.
- 69. Ibid.
- 70. Interviews with practitioners.

- 71. Ibid.
- 72. Joseph Goldstein, Anna Freud, and Albert J. Solnit, BEFORE THE BEST INTERESTS OF THE CHILD, The Free Press, New York, 1979, Chapter 7.
- 73. Section 1046 Family Court Act.
- 74. DSS Report, supra.
- 75. Unpublished statistics supplied by the Office of Court Administration.

**END**