Protecting your Clients' Appellate Rights in Family Court and Other Appeals

Thursday, September 15, 2016

Albany Marriott

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New York State Bar Association

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

New York State Bar Association

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

You MUST turn in this form at the end of the program for your MCLE credit.

Protecting your Clients' Appellate Rights in Family Court and Other Appeals | Thursday, September, 15, 2016 | New York State Bar Association's Committee on Legal Aid, Albany Marriott, Albany, NY

Name:

(Please print)

I certify that I was present for the entire presentation of this program

Signature: Date:

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NEW YORK STATE BAR ASSOCIATION

Live Program Evaluation (Attending In Person)
Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name: Protecting your Clients' Appellate Rights in Family Court and Other Appeals

Program Code: THLLI6

Program Location: Albany Marriott - Albany, NY

Program Date: September 15th 2016

1. What is your overall evaluation of this program? Please include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments____

____

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
	Excellent	Good	Fair	Poor	Excellent	Good	Fair	Poor
Cynthia Feathers	☐	☐	☐	☐	☐	☐	☐	☐
Alexandra Lewis-Reisen	☐	☐	☐	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐	☐	☐	☐
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(please turn over)

Additional comments (CONTENT)

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Additional comments (ABILITY)

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_____

3. Please rate the program materials and include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional comments

_____

_____

4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.
☐ Yes – Expanded ☐ Yes – Shortened ☐ No – Fine as is

Additional comments

_____

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5. Please rate the following aspects of the program: **REGISTRATION**; **ORGANIZATION**; **ADMINISTRATION**; **MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
Registration	☐	☐	☐	☐	☐
Organization	☐	☐	☐	☐	☐
Administration	☐	☐	☐	☐	☐
Meeting Site (if applicable)	☐	☐	☐	☐	☐

Additional comments

_____

_____

6. How did you learn about this program?
☐ Ad in legal publication ☐ NYSBA web site ☐ Brochure or Postcard
☐ Social Media (Facebook / Google) ☐ Email ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered

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Protecting your Clients' Appellate Rights in Family Court and Other Appeals

Alexandra Lewis-Reisen, New York Legal Assistance Group

1.5 MCLE creditsin Areas of Professional Practice for both experienced and newly-admitted attorneys

I. Introduction

a. NYLAG Domestic Violence Appellate Representation Project: represent DV victims in appeals in family law cases, mostly family court but also supreme if there's a custody, visitation, family offense, or neglect involving DV

b. project exists in order to push the trial courts better to implement the statutes and appellate case law we have on DV

Appellate Procedure

II. Can appeal a "final" order:

a. Family Court Act § 1112(a): "An appeal may be taken as of right from any order of disposition and, in the discretion of the appropriate appellate division, from any other order under this act."
b. "order of disposition" is a final order disposing of the case
    i. NOT a fact-finding order
    j. Order of disposition is a final order, not a provisional order
    k. Must be final order by judge (or by referee if parties have agreed to hear and determine, but not hear and report)
    l. final order in child support cases means by a judge, not FCSM
c. CPLR 5501(a)(3): "An appeal from a final judgment brings up for review any ruling to which the appellant [1] objected or [2] had no opportunity to object or [3] which was a refusal or failure to act as requested by the appellant." Order must be one that aggrieved you, one where you didn't get something you wanted
    1. Examples: MTD, trial decision, limited OP instead of full
    2. Detail: order must be one that is still in effect or that has continuing consequences for appeallant, see, e.g., Samora v. Coutsoukis, 292 A.D.2d 390, 391, 739 N.Y.S.2d 721 (2d Dep't 2002) (respondent's appeal from expired order of protection moot, but appeal from finding that he committed family offense was not moot, because of ongoing consequences in custody actions)
d. (article 10 is different: any intermediate or final order may be appealed as of right)
e. But cannot appeal: final orders on consent, because no party is aggrieved (CPLR 5501(a)(3)); and orders issued on default (CPLR 5511) – must make motion to vacate default (merit & excuse), then appeal denial of motion

III. Interim Appeals and Stays

A. Obtaining Leave to Appeal from a Temporary Order of the Family Court

f. Family Court Act § 1112(a): "in the discretion of the appropriate appellate division, from any other order under this act." see also CPLR 5701(c). Such grants are properly made where they implicate novel issues of law, important public policies, or the interests of justice.

g. File by Motion or by Order to Show Cause, possibly also requesting a stay of the lower court's order (or can ask Family Court to make the effective date of its order weeks away)

h. Generally, focus on legal, not credibility errors. You should also ideally demonstrate that the trial court's error cannot be remedied through a speedy trial.
    1. Example (dangerous visitation ordered against the case law)

IV. Filing a Notice of Appeal from a Final Order of the Family Court
- a. Family Court Act § 1113: time: "An appeal under this article must be taken no later than [1] thirty days after the service by a party or the law guardian upon the appellant of any order from which the appeal is taken, [2] thirty days from receipt of the order by the appellant in court or [3] thirty-five days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest." Note: order is sometimes issued/mailed later than judge's oral ruling.
- b. What to include with Notice of Appeal (varies by Department)
- c. Trial attorney has to file the NOA; filing the notice of appeal does not obligate the trial attorney to represent the client on appeal; the retainer agreement governs whether you must represent the client on appeal
- d. NOTE: support magistrate determinations must first be "objected" to the Family Court Judge within 30 days, and can only be appealed from that Judge's decision.
- e. Next steps after NOA: poor person, assignment, transcripts, record, briefs, service, argument.

B. How to Preserve an Objection for an Appeal
- a. Orally
    1. CPLR 5501(a)(3): "An appeal from a final judgment brings up for review any ruling to which the appellant [1] objected or [2] had no opportunity to object or [3] which was a refusal or failure to act as requested by the appellant."
    2. CPLR 5501(a)(4): "An appeal from a final judgment brings up for review any remark made by the judge to which the appellant objected."
- b. Motions to Preclude/Include Evidence (Motions in Limine)
    1. Evidentiary decisions relating to the admission or preclusion of potentially prejudicial or irrelevant evidence can be made through pretrial motions such as motions in limine
        a. Whether made at or before hearing
        b. Whether in writing or oral

c. Motions to Reargue/Renew: When you think the trial or appellate court would benefit from having all your arguments and proof in writing (law, exhibits). Remember that you usually cannot submit anything to the appellate court that the trial court has not seen, so this is your chance to set up your appeal.

1. Motion for Leave to Reargue – facts or law "overlooked or misapprehended" by the trial court, no new facts. Within 30 days. CPLR 2221(d)(2)-(3).
2. Motion for Leave to Renew: "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . [and] shall contain reasonable justification for the failure to present such facts on the prior motion. CPLR 2221(e)(2)-(3).

V. Stays

a. Pending Appeal/Pending Interim Appeal: Family Court Act § 1114(a) notice of appeal does not stay the order from which the appeal is taken. (except d), an Appellate Justice may stay execution of the underlying order "on such conditions, if any, as may be appropriate."
b. An application for a stay of enforcement pending appeal under the CPLR section 5519(c), which is analogous to the stays provision of the Family Court Act section 1114(b), is a matter for the discretion of the court, and to obtain one a movant must demonstrate that he or she has a meritorious case on appeal.

VI. Discussion

A. When to think about an appeal (always)
B. Sample transcripts & appeals
C. Hypotheticals

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Protecting your Clients' Appellate Rights in Family Court and Other Appeals

Part 1

NYSBA PARTNERSHIP CONFERENCE

Albany, NY, September 15, 2016
Protecting your clients' appellate rights
in Family Court and other appeals
Cynthia Feathers, Esq., Rural Law Center of NY (RLC)
cfeathers@rurallawcenter.org

SELECTED STATUTES

CPLR 2002. Error in ruling of court
An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced.

CPLR 4017. Objections
Formal exceptions to rulings of the court are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court. Failure to so make known objections, as prescribed in this section or in section 4110-b, may restrict review upon appeal in accordance with paragraphs three and four of subdivision (a) of section 5501.

CPLR 5501. Scope of review
(a) Generally, from final judgment. An appeal from a final judgment brings up for review:
1. any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken;
2. any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken;
3. any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected;
4. any remark made by the judge to which the appellant objected; and
5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.
(b) Court of appeals. The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered. On an appeal pursuant to subdivision (d) of section fifty-six hundred one, or subparagraph (ii) of paragraph one of subdivision (a) of section fifty-six hundred two, or subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the non-final determination of the appellate division shall be reviewed.

(c) Appellate division. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. The notice of appeal from an order directing summary judgment, or directing judgment on a motion addressed to the pleadings, shall be deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal, without however affecting the taxation of costs upon the appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.
(d) Appellate term. The appellate term shall review questions of law and questions of fact

CPLR 5015. Relief from judgment or order
(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or
3. fraud, misrepresentation, or other misconduct of an adverse party; or
4. lack of jurisdiction to render the judgment or order; or
5. reversal, modification or vacatur of a prior judgment or order upon which it is based.
(b) On stipulation. The clerk of the court may vacate a default judgment entered pursuant to section 3215 upon the filing with him of a stipulation of consent to such vacatur by the parties personally or by their attorneys.
(c) On application of an administrative judge. An administrative judge, upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities or where such default judgments were obtained in cases in which those defendants would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses, and where such default judgments have been obtained in a number deemed sufficient by him to justify such action as set forth herein, and upon appropriate notice to counsel for the respective parties, or to the parties themselves, may bring a proceeding to relieve a party or parties from them upon such terms as may be just. The disposition of any proceeding so instituted shall be determined by a judge other than the administrative judge.
(d) Restitution. Where a judgment or order is set aside or vacated, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal.

CPLR 5511. Permissible appellant and respondent
An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party. He shall be designated as the appellant and the adverse party as the respondent.

CPLR 5513. Time to take appeal, cross-appeal or move for permission to appeal
(a) Time to take appeal as of right. An appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.
(b) Time to move for permission to appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party seeking permission to appeal has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.
(c) Additional time where adverse party takes appeal or moves for permission to appeal. A party upon whom the adverse party has served a notice of appeal or motion papers on a motion for permission to appeal may take an appeal or make a motion for permission to appeal within ten days after such service or within the time limited by subdivision (a) or (b) of this section, whichever is longer, if such appeal or motion is otherwise available to such party.
(d) Additional time where service of judgment or order and notice of entry is served by mail or overnight delivery service. Where service of the judgment or order to be appealed from and written notice of its entry is made by mail pursuant to paragraph two of subdivision (b) of rule twenty-one hundred three or by overnight delivery service pursuant to paragraph six of subdivision (b) of rule twenty-one hundred three of this chapter, the additional days provided by such paragraphs shall apply to this action, regardless of which party serves the judgment or order with notice of entry.

CPLR 5515. Taking an appeal; notice of appeal
1. An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered except that where an order granting permission to appeal is made, the appeal is taken when such order is entered. A notice shall designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken.
2. Whenever an appeal is taken to the court of appeals, a copy of the notice of appeal shall be sent forthwith to the clerk of the court of appeals by the clerk of the office where the notice of appeal is required to be filed pursuant to this section.
3. Where leave to appeal to the court of appeals is granted by permission of the appellate division, a copy of the order granting such permission to appeal shall be sent forthwith to the clerk of the court of appeals by the clerk of the appellate division

CPLR 5519. Stay of enforcement

(a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

1. the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state; provided that where a court, after considering an issue specified in question four of section seventy-eight hundred three of this chapter, issues a judgment or order directing reinstatement of a license held by a corporation with no more than five stockholders and which employs no more than ten employees, a partnership with no more than five partners and which employs no more than ten employees, a proprietorship or a natural person, the stay provided for by this paragraph shall be for a period of fifteen days; or

2. the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed; or

3. the judgment or order directs the payment of a sum of money, to be paid in fixed installments, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party shall pay each installment which becomes due pending the appeal and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay any installments or part of installments then due or the part of them as to which the judgment or order is affirmed; or

4. the judgment or order directs the assignment or delivery of personal property, and the property is placed in the custody of an officer designated by the court of original instance to abide the direction of the court to which the appeal is taken, or an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will obey the direction of the court to which the appeal is taken; or

5. the judgment or order directs the execution of any instrument, and the instrument is executed and deposited in the office where the original judgment or order is entered to abide the direction of the court to which the appeal is taken; or

6. the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency; or

7. the judgment or order directs the performance of two or more of the acts specified in subparagraphs two through six and the appellant or moving party complies with each applicable subparagraph.

(b) Stay in action defended by insurer. If an appeal is taken from a judgment or order entered against an insured in an action which is defended by an insurance corporation, or other insurer, on behalf of the insured under a policy of insurance the limit of liability of which is less than the

amount of said judgment or order, all proceedings to enforce the judgment or order to the extent of the policy coverage shall be stayed pending the appeal, and no action shall be commenced or maintained against the insurer for payment under the policy pending the appeal, where the insurer:
1. files with the clerk of the court in which the judgment or order was entered a sworn statement of one of its officers, describing the nature of the policy and the amount of coverage together with a written undertaking that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the insurer shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed, to the extent of the limit of liability in the policy, plus interest and costs;
2. serves a copy of such sworn statement and undertaking upon the judgment creditor or his attorney; and
3. delivers or mails to the insured at the latest address of the insured appearing upon the records of the insurer, written notice that the enforcement of such judgment or order, to the extent that the amount it directs to be paid exceeds the limit of liability in the policy, is not stayed in respect to the insured. A stay of enforcement of the balance of the amount of the judgment or order may be imposed by giving an undertaking, as provided in paragraph two of subdivision (a), in an amount equal to that balance.
(c) Stay and limitation of stay by court order. The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).
(d) Undertaking. On an appeal from an order affirming a judgment or order, the undertaking shall secure both the order and the judgment or order which is affirmed.

CPLR 5521. Preferences
(a) Preferences in the hearing of an appeal may be granted in the discretion of the court to which the appeal is taken.
(b) Consistent with the provisions of section one thousand one hundred twelve of the family court act, appeals from orders, judgments or decrees in proceedings brought pursuant to articles three, seven, ten and ten-A and parts one and two of article six of the family court act, and pursuant to sections three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, and three hundred eighty-four-b of the social services law, shall be given preference and may be brought on for argument on such terms and conditions as the court may direct without the necessity of a motion.

Family Court Act § 1112. Appealable orders
a. An appeal may be taken as of right from any order of disposition and, in the discretion of the appropriate appellate division, from any other order under this act. An appeal from an intermediate or final order in a case involving abuse or neglect may be taken as of right to the appellate division of the supreme court. Pending the determination of such appeal, such order shall be stayed where the effect of such order would be to discharge the child, if the family court or the court before which such appeal is pending finds that such a stay is necessary to avoid

imminent risk to the child's life or health. A preference in accordance with rule five thousand five hundred twenty-one of the civil practice law and rules shall be afforded, without the necessity of a motion, for appeals under article three; parts one and two of article six; articles seven, ten, and ten-A of this act; and sections three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, and three hundred eighty-four-b of the social services law.
b. In any proceeding pursuant to article ten of this act or in any proceeding pursuant to article ten-A of this act that originated as a proceeding under article ten of this act where the family court issues an order which will result in the return of a child previously remanded or placed by the family court in the custody of someone other than the respondent, such order shall be stayed until five p.m. of the next business day after the day on which such order is issued unless such stay is waived by all parties to the proceeding by written stipulation or upon the record in family court. Nothing herein shall be deemed to affect the discretion of a judge of the family court to stay an order returning a child to the custody of a respondent for a longer period of time than set forth in this subdivision.

Family Court Act § 1113. Time of appeal

An appeal under this article must be taken no later than thirty days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, thirty days from receipt of the order by the appellant in court or thirty-five days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest.
All such orders shall contain the following statement in conspicuous print: “Pursuant to section 1113 of the family court act, an appeal must be taken within thirty days of receipt of the order by appellant in court, thirty-five days from the mailing of the order to the appellant by the clerk of the court, or thirty days after service by a party or attorney for the child upon the appellant, whichever is earliest.” When service of the order is made by the court, the time to take an appeal shall not commence unless the order contains such statement and there is an official notation in the court record as to the date and the manner of service of the order.

Family Court Act § 1114. Effect of appeal; stay

(a) The timely filing of a notice of appeal under this article does not stay the order from which the appeal is taken.
(b) Except as provided in subdivision (d) of this section, a justice of the appellate division to which an appeal is taken may stay execution of the order from which the appeal is taken on such conditions, if any, as may be appropriate.
(c) If the order appealed from is an order of support under articles four or five, the stay may be conditioned upon the giving of sufficient surety by a written undertaking approved by such judge of the appellate division, that during the pendency of the appeal, the appellant will pay the amount specified in the order to the family court from whose order the appeal is taken. The stay may further provide that the family court (i) shall hold such payments in escrow, pending determination of the appeal or (ii) shall disburse such payments or any part of them for the support of the petitioner or other person for whose benefit the order was made.
(d) Any party to a child protective proceeding, or the attorney for the child, may apply to a justice of the appellate division for a stay of an order issued pursuant to part two of article ten of this chapter returning a child to the custody of a respondent. The party applying for the stay shall notify the attorneys for all parties and the attorney for the child of the time and place of such application. If requested by any party present, oral argument shall be had on the application,

except for good cause stated upon the record. The party applying for the stay shall state in the application the errors of fact or law allegedly committed by the family court. A party applying to the court for the granting or continuation of such stay shall make every reasonable effort to obtain a complete transcript of the proceeding before the family court.
If a stay is granted, a schedule shall be set for an expedited appeal.

Family Court Act § 1115. Notices of appeal
An appeal as of right shall be taken by filing the original notice of appeal with the clerk of the family court in which the order was made and from which the appeal is taken.
A notice of appeal shall be served on any adverse party as provided for in subdivision one of section five thousand five hundred fifteen of the civil practice law and rules and upon the child's attorney, if any. The appellant shall file two copies of such notice, together with proof of service, with the clerk of the family court who shall forthwith transmit one copy of such notice to the clerk of the appropriate appellate division or as otherwise required by such appellate division.

Family Court Act § 1120. Counsel for parties and children on appeal
(a) Upon an appeal in a proceeding under this act, the appellate division to which such appeal is taken, or is sought to be taken, shall assign counsel to any person upon a showing that such person is one of the persons described in section two hundred sixty-two of this act and is financially unable to obtain independent counsel or upon certification by an attorney in accordance with section eleven hundred eighteen of this article. The appellate division to which such appeal is taken, or is sought to be taken, may in its discretion assign counsel to any party to the appeal. Counsel assigned under this section shall be compensated and shall receive reimbursement for expenses reasonably incurred in the same manner provided by section seven hundred twenty-two-b of the county law. The appointment of counsel by the appellate division shall continue for the purpose of filing a notice of appeal or motion for leave to appeal to the court of appeals. Counsel may be relieved of his or her representation upon application to the court to which the appeal is taken for termination of the appointment, by the court on its own motion or, in the case of a motion for leave to appeal to the court of appeals, upon application to the appellate division. Upon termination of the appointment of counsel for an indigent party the court shall promptly appoint another attorney.
(b) Whenever an attorney has been appointed by the family court pursuant to section two hundred forty-nine of this act to represent a child in a proceeding described therein, the appointment shall continue without further court order or appointment where (i) the attorney on behalf of the child files a notice of appeal, or (ii) where a party to the original proceeding files a notice of appeal. The attorney for the child may be relieved of his representation upon application to the court to which the appeal is taken for termination of the appointment. Upon approval of such application the court shall appoint another attorney for the child.
(c) An appellate court may appoint an attorney to represent a child in an appeal in a proceeding originating in the family court where an attorney was not representing the child at the time of the entry of the order appealed from or at the time of the filing of the motion for permission to appeal and when independent legal representation is not available to such child.
(d) Nothing in this section shall be deemed to relieve attorneys for children of their duties pursuant to subdivision one of sections 354.2 and seven hundred sixty of this act.

(e) An attorney appointed or continuing to represent a child under this section shall be compensated and shall receive reimbursement for expenses reasonably incurred in the same manner provided by section thirty-five of the judiciary law.
(f) In any case where an attorney is or shall be representing a child in an appellate proceeding pursuant to subdivision (b) or (c) of this section, such attorney shall be served with a copy of the notice of appeal.

RULE OF PROFESSIONAL CONDUCT 3.1
NON-MERITORIOUS CLAIMS AND CONTENTIONS

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.
(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:
(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;
(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or
(3) the lawyer knowingly asserts material factual statements that are false.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.
[2] The filing of a claim or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the action has no reasonable purpose other than to harass or maliciously injure a person, or if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law (which includes the establishment of new judge-made law). The term "knowingly," which is used in Rule 3.1(b)(1) and (b)(3), is defined in Rule 1.0(k).
[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

SELECTED LINKS

Where to find Appellate Division and NY Court of Appeals Rules of Practice and Forms

http://www.nycourts.gov/courts/AD1/Practice&Procedures/rules.shtml
http://www.nycourts.gov/courts/ad2/pdf/rulesofprocedure.pdf
http://www.nycourts.gov/courts/ad2/formsandpracticeaids.shtml
http://www.nycourts.gov/ad3/RULESOFPRACTICEPART800-%202-1-2016.pdf
http://www.nycourts.gov/courts/ad4/Clerk/AD4-RuleBook-web.pdf
http://www.nycourts.gov/courts/ad4/Clerk/Forms/forms-PA.html
http://www.nycourts.gov/ctapps/news/PressRel/500rules.pdf

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431 N.Y.S.2d 400
50 N.Y.2d 707, 409 N.E.2d 876
In the Matter of HEARST CORPORATION et al., Appellants,
v.
John J. CLYNE, as Judge of the County Court of Albany
County, et al., Respondents.
Court of Appeals of New York.
July 3, 1980.

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Peter L. Danziger, Albany, for appellants.

Robert G. Lyman, County Atty. (William J. Conboy, II, Asst. County Atty., of counsel), for John J. Clyne, respondent.

Sol Greenberg, Dist. Atty. (George H. Barber, Albany, of counsel), for Sol Greenberg, respondent.

Robert C. Bernius, Rochester, for Binghamton Press Company, Inc., and others, amici curiae.

OPINION OF THE COURT

WACHTLER, Judge.

The petitioners in this article 78 proceeding are the publisher of the Albany Times-Union, a daily newspaper, and Shirley Armstrong, a reporter for that newspaper. The respondent, John J. Clyne, is a Judge of the Albany County Court.

In March of 1979 Judge Clyne was conducting a joint suppression hearing in the criminal case of Alexander Marathon and William Du Bray, who had been indicted for the crimes of robbery in the first degree, burglary in the first degree and grand larceny in the second degree. The hearings were closed to the public and press on the motion of the defendants, without objection by the prosecutor and without a hearing. Armstrong, the court reporter for the Times-Union, knew the hearings were closed and the courtroom doors locked, but was sufficiently interested in the proceedings to periodically walk by the courtroom to observe whatever she could.

On March 7, during one of these periodic observations, Armstrong noticed the attorney for Du Bray, one of the codefendants, standing outside the courtroom door. On the assumption that something other than a suppression hearing was in progress Armstrong tried the courtroom door but found it locked. She then learned from Du Bray's attorney that Judge Clyne, behind closed doors, had heard and granted a motion to close a proceeding during which Marathon was expected to enter a plea. The reporter, Armstrong, then knocked on the courtroom door. There was no response. After about 15 minutes the doors opened and she learned from Judge Clyne that Marathon had indeed entered a guilty plea. The Judge, however, refused petitioners' request for a transcript of the plea proceeding or to direct the court stenographer to read back the minutes of the proceeding.

On March 12, prior to trial, the other defendant, Du Bray, also entered a plea of guilty before Judge Clyne. Thereafter Judge Clyne permitted the petitioners to obtain a copy of the transcript of the closed plea proceeding; that transcript has now been furnished to them and forms a part of the record on this appeal.

The transcript of the closed proceeding held March 7, which is the sole concern of this appeal, indicates that at the very commencement of the already closed suppression hearing which had been adjourned from March 5, Marathon's attorney orally moved to close the courtroom to all persons except Marathon, his attorney, and court personnel. The District Attorney joined the motion. Without taking evidence or

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hearing argument from anyone Judge Clyne immediately granted the motion, even excluding the codefendant Du Bray and his attorney from the courtroom, and had the doors secured. In sworn testimony Marathon then confessed his own participation in the crime for which he was indicted, inculpated his codefendant Du Bray, and was permitted to enter a plea of guilty to one count of the indictment.

The petitioners brought this proceeding seeking a declaration that the closure of the plea taking was illegal, and for an injunction prohibiting such closures in the future unless members of the press are afforded an opportunity to be heard.

The Appellate Division, 71 A.2d 966, 419 N.Y.S.2d 338 concluded that the closure was a proper exercise of the trial court's discretion and dismissed the petition. Petitioners

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appealed. We conclude that the case is moot and that there is no sufficient reason for this court to consider the merits of the appeal; however, for the reasons which follow, the order of the Appellate Division should be reversed and remitted for dismissal.

It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal (Matter of State Ind. Comm., 224 N.Y. 13, 16, 119 N.E. 1027; California v. San Pablo & Tulare R.R., 149 U.S. 308, 314, 13 S.Ct. 876, 878, 37 L.Ed. 747). This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary.

Our particular concern on this appeal is with that facet of the principle which ordinarily precludes courts from considering questions which, although once live, have become moot by passage of time or change in circumstances. In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment. On the facts of the instant case, where the underlying plea proceeding had been long concluded and the transcript had been furnished to the petitioners at the time this action was commenced (cf. Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 436, 423 N.Y.S.2d 630, 399 N.E.2d 518) we conclude that the rights of the parties cannot be affected by the determination of this appeal and it is therefore moot. Because we conclude that the appeal is moot it may not properly be decided by this court unless it is found to be within the exception to the doctrine which permits the courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable (see Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147).

In this court the exception to the doctrine of mootness has been subject over the years to a variety of formulations. [1] However, examination of the cases in which our court has found an exception to the doctrine discloses three common factors: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i. e., substantial and novel issues. After careful review we are persuaded that the case before us presents no questions the fundamental underlying principles of which have

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not already been declared by this court, and that this case is, therefore, not of the class that should be preserved as an exception to the mootness doctrine.

We acknowledge, as we have before, the very substantial character of the interests represented by the petitioners in this proceeding. We also note that questions such as the one posed may occasionally escape review. It is for this reason that on occasion we have entertained appeals even though the issues in the particular controversy have been resolved. However, as our court only recently has set forth in some detail the requirements that must be fulfilled before a judicial proceeding in this State may be closed to the public and press, no sufficiently useful purpose would be served in this instance but our retaining the appeal notwithstanding that the underlying controversy is now moot.

It has, of course, long been the law in this State that all judicial proceedings, both civil and criminal, are presumptively open to the public (Judiciary Law, § 4; Lee v. Brooklyn Union Pub. Co., 209 N.Y. 245, 103 N.E. 155) and that a proceeding at which a criminal defendant enters a plea of guilty is indisputedly a substitute for a trial (People ex rel. Carr v. Martin, 286 N.Y. 27, 32, 35 N.E.2d 636). Indeed, in Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544) it was only by distinguishing the pretrial and evidentiary nature of the proceeding at issue that this court could conclude that such a proceeding should ordinarily be closed to the public and press (Gannett, supra, at p. 380, 401 N.Y.S.2d 756, 372 N.E.2d 544). We were careful to note in Gannett at p. 378, 401 N.Y.S.2d at p. 761, 372 N.E.2d at p. 548, that, "In the case now before us, the Trial Judge was not presiding over a trial on the merits".

In Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 423 N.Y.S.2d 630, 399 N.E.2d 518 supra), which was decided by this court after the decision of the Appellate Division in the instant case and which was obviously not available to inform either the trial or the appellate court, the issue was closure of a pretrial competency hearing. In that case even the pretrial nature of the proceeding was considered insufficient to nullify the presumption that all judicial proceedings are to be open. Thus the dissent is flatly incorrect in its statement that by dismissing this appeal for mootness we are disposed to permit trials to be closed to the public on the same basis as pretrial proceedings. On the contrary, we have distinguished between pretrial and trial closures and expressed our consciousness of the danger inherent in permitting too casual a closure of even pretrial proceedings: "At the present time, in fact in most criminal cases, there are only pretrial proceedings. Thus if the public is routinely excluded from all proceedings prior to trial, most of the work of the criminal courts will be done behind closed doors" (Matter of Westchester Rockland Newspapers v. Leggett, supra, at p. 440, 423 N.Y.S.2d at p. 636, 399 N.E.2d at p. 524).

Our decisions in Gannett (supra) and Leggett (supra) laid down the procedural framework within which the possibility of closure must be considered. [2] We conclude, therefore, that inasmuch as the principles governing fair trial-free press issues which might have been developed by consideration of the instant case have already been largely declared by our decisions in Gannett and Leggett, in this instance there is no sufficient reason to depart from the normal jurisprudential principle which calls for judicial restraint when the particular controversy has become moot.

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More than that, we are convinced that there is a good reason in the circumstances of this case not to entertain this appeal for the purpose of extrapolating or refining the principles which we have declared. The closing of the plea hearing here occurred

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while the appeal from our Gannett decision was pending before the United States Supreme Court and some months before our decision in the Leggett case. [3] We cannot conclude that the trial court would have followed the procedures which he did or that he would necessarily have reached the same conclusion had our decision in Leggett preceded the hearing. While we can anticipate that the implementation of the principles that we have declared will not always be easy, we have no reason to question the readiness or capacity of the Judges at nisi prius to seek to implement them appropriately with diligence, faithfulness and imagination. We conceive our jurisprudential role in this field as one of supervising and monitoring the dispositions made by our lower courts after we declare the applicable principles, rather than retrospectively appraising conduct of Trial Judges that preceded our declarations.

Other considerations also support our conclusion that this appeal should not be entertained. We are concerned with the vitality and fundamental soundness of our jurisprudence.

The engine of the common law is inductive reasoning. It proceeds from the particular to the general. It is an experimental method which builds its rules in tiny increments, case-by-case. It is cautious advance always a step at a time. The essence of its method is the continual testing and retesting of its principles in "those great laboratories of the law, the courts of justice" (Smith, Jurisprudence, p. 21). [4]

Conscious judicial restraint is essential-its absence diminishes the craftsmanship of the courts and debases the judicial product. A common-law Judge will not reach to decide a question not properly before him. Nor will he attempt to state a broad rule except when absolutely required-and then it will be cast in terms which permit it to be moulded in light of the experience of those who must work with it. A newly articulated rule should not be immediately recast "for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible" (Smith, Jurisprudence, p. 21).

Finally, it must be explicitly stated that in dismissing the present appeal as moot we express no view on the merits. Our disposition here is not to be read as any withdrawal from, addition to, or elaboration on our opinions in Gannett and Leggett. It is entirely incorrect to suggest otherwise. Nor should our dismissal be interpreted as presaging a disposition to decline on grounds of mootness to entertain appeals in future fair-trial, free-press cases. We recognize, of course, that cases in this area of the law, because of considerations of timing, would often, even usually, evade review if appeals were uniformly to be dismissed for mootness. We shall continue to resolve each case in this field on the basis of its individual characteristics and merits, only one aspect of which will be its mootness, if moot it is.

Concluding as we do that the appeal is moot and not of a character which should be preserved for review, the appeal should be dismissed. In this case, however, because the Appellate Division had no opportunity to consider the matter in light of our decision in Leggett (supra) we should reverse and remit with directions to dismiss solely on the ground of mootness, in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent (see Matter of Adirondack League Club v. Board of Black Riv. Regulating Dist., 301 N.Y. 219, 223, 93

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N.E.2d 647; cf. United States v. Munsingwear, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36; United States v. Alaska S. S. Co., 253 U.S. 113, 115, 40 S.Ct. 448, 64 L.Ed. 808).

MEYER, Judge (concurring).

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I concur fully in Judge Wachtler's opinion and write only because where the dissent finds implications in that opinion which "do not bode well for the future of public trials in this State" (p. 723, p. 408 of 431 N.Y.S.2d, p. 884 of 409 N.E.2d), I find in the dissent suggestions which, if they become the governing rule, may adversely affect the individual's right to a fair trial.

I, of course, do not suggest that the media are to be regularly, or even often, excluded from the courtroom. What I am urging is that the problem must be analyzed not in terms of categories and classifications but of the rights affected, and that, without a very much clearer demonstration that the public's interest cannot be reasonably protected without infringing individual rights than has been made, the rights of the individual on trial may not be subordinated to the rights of the public to know what goes on in a courtroom or how the system of justice is functioning.

The genius of the American constitutional experiment has been the protections it affords individuals against oppression by the majority, whether in the form of star chamber proceedings or of stadium trials, the result of either of which is an equally foregone conclusion. Important as it is that justice appear to the public to be done, in final analysis the public is grossly disserved if it not in fact be done in each individual case.

Resolution of the instant case, were it to be decided on the merits, would turn not on whether the taking of a guilty plea is the equivalent of a trial or more nearly a preliminary proceeding, or whether the fair trial rights at stake were those of the pleading defendant or his codefendant. The fact is, as both we and the United States Supreme Court have recognized, that there are occasions when parts of trials, as well as of pretrial proceedings, may constitutionally be closed (Gannett Co. v. De Pasquale, 443 U.S. 368, 388, n. 19, 99 S.Ct. 2898, 2910, n. 19, 61 L.Ed.2d 608, and cases cited; People v. Jones, 47 N.Y.2d 409, 418 N.Y.S.2d 359, 391 N.E.2d 1335; Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 377-378, 401 N.Y.S.2d 756, 372 N.E.2d 544, affd 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608), though as we have made clear the discretion to do so is to be "sparingly exercised and then, only when unusual circumstances necessitate it" (People v. Hinton, 31 N.Y.2d 71, 76, 334 N.Y.S.2d 885, 889, 286 N.E.2d 265, 267; accord: Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 441, 423 N.Y.S.2d 630, 399 N.E.2d 518). Closure during trial, moreover, will usually be to protect some interest of a third person or the public, rather than of the person on trial [1] (to protect the public interest in not revealing the identity of an informer, People v. Jones, supra; People v. Hinton, supra; see Proposed Code of Evidence for the State of New York, § 510; to protect the life of a witness or shield him or her from embarrassment, People v. Hagan, 24 N.Y.2d 395, 300 N.Y.S.2d 835, 248 N.E.2d 588, cert. den. 396 U.S. 886, 90 S.Ct. 173, 24 L.Ed.2d 161; People v. Smallwood, 31 N.Y.2d 750, 338 N.Y.S.2d 433, 290 N.E.2d 435; United States ex rel. Smallwood v. La Valle, D.C., 377 F.Supp. 1148, affd 2 Cir., 508 F.2d 837, cert. den. 421 U.S. 920, 95 S.Ct. 1586, 43 L.Ed.2d 788; see Judiciary Law, § 4; to protect the interests of the defendant and the public in orderly trial, United States ex rel. Orlando v. Fay, 2 Cir., 350 F.2d 967).

Nor can I accept the dissent's assumption that there is an "absence of prejudice" to codefendant Du Bray in permitting Marathon's guilty plea to be taken in open court. Short of publishing a confession by Du Bray before it has been ruled admissible, nothing could be more devastating to his rights than

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Marathon's accusatory words. Given in a plea proceeding, such words are usually the quid

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pro quo for some favor of the law, generally a lesser sentence. To permit such information to get to potential jurors without the prophylaxis of cross-examination pointedly indicating the self-serving nature of the accusation is materially to disadvantage such a codefendant, for cross-examination when it does occur will be less effective than it would have been had the accusation not come to the jury in advance of trial and with the imprimatur of the press. It is possible to disadvantage such a codefendant in an additional way which cannot be known before trial. It is not unknown for a person in Marathon's position to recant when called to testify at his codefendant's trial. In such a case his statement about the codefendant at his own guilty plea "may be received only for the purpose of impeaching" him "and does not constitute evidence in chief" (CPL 60.35, subd. 2). While the Trial Judge must so instruct the jury (id.), such an instruction, of questionable psychological value in any event, [2] will be even less effective than usual because the accusation came to the jury in advance of trial and with the imprimatur of the press.

The problem that arises when the issue is discussed in terms of categories rather than effect on individual rights is well illustrated by the present case. The dissent sees the closure here involved as casting "a veil of secrecy over the major component of the criminal justice system" (p. 728, p. 412 of 431 N.Y.S.2d, p. 887 of 409 N.E.2d) and the fact that the pleading defendant might implicate his codefendant as insufficient justification for closure (p. 727, p. 411 of 431 N.Y.S.2d, p. 886 of 409 N.E.2d). In my view there is a ready means of protecting the public's interest in the Marathon-Du Bray trials without sacrificing Du Bray's clear right not to have the jury pool for his trial, scheduled to begin a few days later, tainted by media accounts of Marathon's plea statements implicating him, and the number of plea proceedings in which, to protect the rights of a codefendant, closure of part or all of the plea proceeding might occur is an insignificant part of the criminal justice system. So far as the record and briefs reveal (including the brief of amici which catalogues a number of recent closures) this is the first such case.

The tension between public and individual interests that arises over an issue such as whether by closing so much of a plea proceeding as relates to him a codefendant should be protected against revelation in advance of his trial of the pleading defendant's accusations against him, arises not because of the presence of media representatives in the courtroom, but because it is a constitutional absolute that what transpires in open court is public property and may be immediately disseminated. Responsible media often will delay publication nonetheless, [3] but quite properly are unwilling to permit the invasion of First Amendment rights that would be involved in permitting the courts to tell them when they can publish. Yet, just as not all Judges are exemplars of their craft, neither are all editors able to perceive in their highly competitive profession the value to individual rights of delaying publication. The antidote for the nonexemplary Judge is to keep courtrooms open to the fullest extent consistent with individual rights. The antidote for the unresponsive

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or irresponsible editor is to close the courtroom when there is a real probability that publication of what is to be revealed in the courtroom will materially prejudice the defendant on trial, because in no other constitutionally acceptable way can his rights be protected.

I, of course, do not ignore the existence of procedures such as change of venue, change of venire, continuance, waiver of jury, sequestration, discussed by the Supreme Court in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563, 96 S.Ct. 2791, 2804, 49

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L.Ed.2d 683 as alternatives to prior restraint. But I cannot accept the concept that these possibilities, most of which [4] involve denigration of defendant's constitutional protections are acceptable alternatives (cf. Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 444, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra; Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 380, 401 N.Y.S.2d 756, 372 N.E.2d 544, affd 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608, supra).

In my view the Bill of Rights set forth in article I of the New York State Constitution and the first 10 amendments to the United States Constitution become a mockery when, because of publicity, a court must say to a man on trial for his life or for his liberty, you are entitled to a speedy trial, but not yet. You are entitled to trial by a jury, unless you fear that pretrial publicity has so adversely affected the impartiality of those who will be called as potential jurors that you dare not risk the result. You are entitled to a trial by a jury of your neighbors, but not those nearby. You are entitled to confront and cross-examine witnesses, but not those whose testimony is given through the newspapers. You are entitled to exclude improperly seized matter from the jury as evidence, but not as a news story. The more is this so when what we deal with is not prior restraint on publication as in Stuart, but denial of access for a limited time as to a limited part of the proceeding, and when we impose upon the defendant seeking closure not only the burden of showing that such procedures will not "dispel prejudice", but also what impact the prejudicial information will have on the jury pool, in light of its size, the extent of the media coverage and the effect of that coverage on the public at large (see Matter of Westchester Rockland Newspapers v. Leggett, supra, 48 N.Y.2d at p. 447, 423 N.Y.S.2d 630, 399 N.E.2d 518 (Cooke, Ch. J., concurring)). Bearing in mind that "none are more lowly-none more subject to potential abuse-and none with more at stake than those who have been indicted and face criminal prosecution in our courts" (ibid., at p. 444, 423 N.Y.S.2d at p. 638, 399 N.E.2d at p. 526 (WACHTLER, J., majority opn)), I conclude that the required showing presses to the outer limits of, if it does not exceed, due process requirements for all but the wealthy defendant.

Delayed access does not affect the rights of the public or of the media in any similar way. As suggested in Gannett, 43 N.Y.2d, at p. 381, 401 N.Y.S.2d 756, 372 N.E.2d 544 and ordered in Westchester Rockland Newspapers, 48 N.Y.2d, at p. 445, 423 N.Y.S.2d 630, 399 N.E.2d 518, a full transcript of the plea proceeding in this matter was made and was furnished to appellant as soon as the danger to Du Bray's interest was past. Perhaps consideration should be given to (1) equipping one courtroom in each courthouse with videotape equipment so that any closed portion of a trial or pretrial proceeding can be recorded in a way that will make available to the media with all the nuances of voice and gesture exactly what transpired while the courtroom was closed, (2) requiring that any closed proceeding be held in that courtroom and videotaped in its entirety, (3) putting the operation of the videotape equipment and the retention of the tapes in the hands of a public commission independent of the courts or other members of the criminal justice system and subject to court order only as to time of release, which would, in any event, be required

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to be not later than a few days after the trial of defendant or a codefendant ends (cf. Uniform Rules of Criminal Procedure, rule 714, 10 ULA 317). Though no objective evidence of which I am aware indicates the need for the procedure suggested, I recognize the importance of assuring our citizens that the judicial process is above suspicion, and believe any resulting inconvenience to the

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system to be more than offset if we thereby assure the constitutional rights of individuals accused.

Use of the suggested procedure together with the preliminary hearing mandated by the Gannett and Westchester Rockland Newspapers cases will preserve both the rights of the public (and the media in the interest of the public) to the free flow of information about the courts and the "most fundamental of all freedoms," [5] the right of an accused individual to a fair trial.

COOKE, Chief Judge (dissenting).

A majority of the court today in effect sanctions the exclusion of the public and the press from a guilty plea proceeding in a criminal case. Because closure of a plea proceeding is tantamount to closure of a trial itself, and because the tacit implications of the court's decision do not bode well for the future of public trials in this State, I must respectfully dissent. [1]

The present article 78 proceeding stems from a criminal proceeding in Albany County. In September of 1978, Alexander Marathon and William Du Bray were indicted for the crimes of robbery in the first degree, burglary in the first degree and grand larceny in the second degree. Although the case did attract media attention, the publicity does not appear to have been substantial. Nonetheless, when a joint suppression hearing was convened on March 5, 1979, defendants moved for exclusion of the public. The court granted the motion, without objection by the prosecutor, and without conducting a hearing, and ordered the doors to the courtroom locked.

During the course of the closed suppression hearing, defendant Marathon decided to enter a guilty plea. While the courtroom was still locked, and the public and reporters barred, Marathon's counsel moved to close the courtroom during the plea proceeding. The District Attorney joined in the motion, and the Judge again ordered closure, stating only that "In the exercise of discretion and in the interests of justice, I will close the courtroom at this time to all non-Court personnel". Later the court explained that it closed the plea proceeding because it was likely that Marathon would implicate Du Bray, rendering it difficult to select an impartial jury when Du Bray came to trial.

Petitioner Armstrong, a reporter for the Albany Times-Union, was aware of the closed suppression hearing, and allegedly made periodic checks of the courtroom where she believed the hearing was being conducted. She first learned of the closed plea proceeding from the attorney for Du Bray, who was excluded from the proceeding and was standing outside the courtroom.

Ms. Armstrong visited the Judge in his chambers, and he confirmed that a guilty plea had been entered. The Judge indicated that a transcript of the proceeding would be available in a few days, but denied Ms. Armstrong's request to have the stenographer read the minutes to her. The next day, petitioners delivered a letter to the Judge protesting the closure and requested either an immediate transcript or an order directing the court reporter to relate the minutes of the proceeding. This request was denied.

On the following Monday, Du Bray entered a plea of guilty. Ms. Armstrong was then permitted to purchase a copy of the minutes taken at Marathon's plea. Shortly thereafter, this proceeding was instituted.

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At the outset, I cannot agree that the proceeding should be dismissed for mootness. As the court has but recently reaffirmed regarding closure orders, "we have traditionally retained jurisdiction, despite a claim of mootness, because of the importance of the question involved, the possibility of recurrence, and the fact that orders of this

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nature quickly expire and thus typically evade review" (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 436-437, 423 N.Y.S.2d 630, 633, 399 N.E.2d 518, 521). By now rejecting this exception to the mootness doctrine, the majority has provided a precedent to effectively insulate closure orders from legal challenge. Indeed, since we have previously cautioned trial courts against staying the criminal proceeding while collateral review of a closure order proceeds (Matter of Merola v. Bell, 47 N.Y.2d 985, 987-988, 419 N.Y.S.2d 965, 393 N.E.2d 1038), the closure order will be moot and evade review in all but the rarest of instances.

No persuasive reason has been given for now overruling the mootness exception for closure orders so recently recited and recognized in Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544, affd. 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 and Westchester Rockland. [2] Indeed, the majority furnishes no explanation whatsoever as to why the mootness exception applied in those cases falls short of reaching the situation in this matter, but notes somewhat cryptically that future cases may or may not be moot. Perhaps more unsettling is the absence of guidelines by which to evaluate mootness in these proceedings. If the court is unwilling to apply the mootness exception here, where a novel and not insubstantial issue is presented, it is difficult to predict when the exception will again be invoked. Such ad hoc, unexplained decision making is not in harmony with the best interests of our system of jurisprudence.

Nor do I agree that the "principles governing fair trial-free press issues * * * have already been largely declared by our decisions in Gannett " (majority opn, at p. 716, p. 403 of 431 N.Y.S.2d, p. 879 of 409 N.E.2d) and in Westchester Rockland Newspapers v. Leggett (supra, 48 N.Y.2d at pp. 439-442, 423 N.Y.S.2d 630, 399 N.E.2d 518). Undoubtedly, Westchester Rockland and Gannett establish the procedural and substantive rules to be followed when dealing with a motion to close pretrial proceedings. Those guidelines do not cover the situation here, as a guilty plea proceeding is simply not pretrial in nature. Rather, it is a substitute for and the legal and practical equivalent of the trial itself. A plea of guilty establishes "guilt of the crime charged as incontrovertibly as a verdict of a jury upon a trial" (People ex rel. Carr v. Martin, 286 N.Y. 27, 35 N.E.2d 636, 639; see, e. g., People v. Krennen, 264 N.Y. 108, 109, 190 N.E. 167; People ex rel. Hubert v. Kaiser, 206 N.Y. 46, 53, 99 N.E. 195. The plea is in itself a conviction (e. g., People v. Jones, 44 N.Y.2d 76, 82-83, 404 N.Y.S.2d 85, 375 N.E.2d 41, citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274. "Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence" (Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009. Thus, by stating that Westchester Rockland and Gannett are controlling, the court is effectively holding that trials may be closed to the public on the same basis as pretrial proceedings.

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And the court may not sidestep this significant issue by merely asserting that Westchester Rockland recognized a distinction between trial and pretrial proceedings, for the fact remains that Westchester Rockland articulated substantive standards for only pretrial proceedings. Today's decision must be construed as indorsing the application of those same standards to trial closures, and thereby sustaining the constitutionality of excluding the public and press from a trial itself. The fallacy in this holding is demonstrated by the Supreme Court's retention of jurisdiction-at least for the present-in a case where the trial was closed to the public (Richmond Newspapers v. Virginia, 444 U.S. 896, 100 S.Ct. 204, 62 L.Ed.2d 132). That action signals a strong possibility that the closing of a trial presents a substantial Federal

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constitutional question, even after Gannett upheld pretrial closure. It is thus difficult to fathom the majority's efforts to avoid a question with such momentous constitutional and societal impact. [3]

This is especially disturbing because the rationale for excluding the public from pretrial proceedings does not justify closure of plea hearings. [4] This court has a number of times reviewed the serious conflict which gave rise to the pretrial closure controversy. On the one hand, the public is possessed of a right to open judicial proceedings. [5] Not only is this right deeply rooted in our history (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 445, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra (concurring opn)), but it is mandated by the clear long-standing command of the Legislature: "(t)he sittings of every court within this state shall be public, and every citizen may freely attend the same" (Judiciary Law, § 4). At the same time, there are instances, however rare, where pretrial publicity may effectively destroy the accused's right to a fair trial (see Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600). The precise point at which the public right to know must give way to the defendant's right to a fair trial has and will continue to spark lively debate (compare Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 443-444, 423 N.Y.S.2d 630, 399 N.E.2d 518, with id., at pp. 445-448, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra).

But we can all agree as to the possible source of the potential prejudice at pretrial suppression hearings. Because the very purpose of such proceedings is to determine the admissibility of evidence, they "are often a potent source for the revelation of evidence which is both highly prejudicial to the defendant's case and not properly admissible at trial" (Matter of Westchester Rockland Newspapers v. Leggett, supra, at p. 439, 423 N.Y.S.2d at p. 634, 399 N.E.2d at p. 522). If the hearing is open, and the case is well publicized, it is possible that the evidence will be disclosed to potential jurors but ultimately excluded from use at trial. This could subvert the very purpose of the hearing.

By contrast, none of these possible dangers attend when the plea proceeding is opened to public view. Given a defendant's voluntary decision to admit his guilt in open court, and the fact that the plea proceeding will quickly ripen into a conviction, the possibility of a defendant's rights being impaired by the presence of the public and the press is almost nonexistent. And even if it be assumed that concern for a codefendant's

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rights would ever warrant closure of a plea, the mere fact that the pleading defendant might implicate his cohort is insufficient justification. It is true, of course, that the defendant's statements at the plea, if they implicate the codefendant, would be prejudicial. But all evidence which suggests guilt is highly prejudicial. This does not mean that all inculpatory evidence must be enjoined from pretrial disclosure. The narrow rationale for considering closure of the suppression hearing is that the damaging evidence may prove to be inadmissible at trial. There is no reason to suppose that the evidence uncovered at a plea hearing would be inadmissible at the later trial of a codefendant. Indeed, more often than not, the defendant who pleaded can probably be expected to testify at the codefendant's trial-possibly for the prosecution, possibly for the defense. It follows that there is no ipso facto basis for overriding the command of section 4 of the Judiciary Law with respect to plea proceedings.

In addition to the absence of prejudice, the public has a compelling stake in open plea proceedings. "Publicity, not secrecy, in arraignment, plea and judgment is part of our tradition". (Matter of Rudd v. Hazard, 266 N.Y. 302, 307, 194 N.E. 764, 765). Especially in modern times, when guilty pleas account

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for most criminal dispositions, it is particularly egregious to close the courtroom doors on these proceedings. In some areas of the State, guilty pleas make up three fourths of all criminal dispositions (Twenty-Second Ann Report of N.Y. Judicial Conference, 1977, p. 56). And, in any calendar year, guilty pleas may constitute 90-95% of all convictions obtained State-wide (see id., at p. 58). To exclude the public from plea proceedings of codefendants is thus to exclude the public from the workings of a substantial part of the criminal justice system. [6]

The beneficial aspects of an open criminal justice system have been often enough discussed to need no repetition here (see, e. g., Gannett Co. v. De Pasquale, 443 U.S. 368, 407, 421-422, 427-433, 99 S.Ct. 2898, 2919, 2927, 2930-2933, 61 L.Ed.2d 608 supra (Blackmun, J., concurring and dissenting); Friendly, Crime and Publicity; Note, The Right to Attend Criminal Hearings, 78 Col.L.Rev. 1308). But it would not be amiss to note that if the plea is insulated from public view, the public may be deprived of their most effective method of determining whether elected officials are enforcing the law "with vigor and impartiality" (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 437, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra). And, casting a veil of secrecy over the major component of the criminal justice system may well lead our citizens to view the judicial process with a suspicious eye (see People v. Hinton, 31 N.Y.2d 71, 73, 334 N.Y.S.2d 885, 286 N.E.2d 265, supra). It is not enough that justice be done. It must be perceived as being done in the eyes of the public.

Finally, it bears emphasis that the closure motion in the present case was entertained in secret, with no representative of the public or media afforded an opportunity to voice opposition. Moreover, the motion was granted in summary fashion without any showing in support of it. These procedures cannot be sanctioned (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 442, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra). The majority's explanation-that closure occurred prior to the Westchester Rockland case-is unacceptable. Even prior to Westchester Rockland it was clear that closure could not be ordered absent some showing of potential prejudice (Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 376-381, 401 N.Y.S.2d 756, 372 N.E.2d 544, affd 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608, supra). Here, there was none. And, it had also been stated in Gannett that "the courts should of course afford interested members of the news media an opportunity to be heard * * * to determine the magnitude of any genuine public interest" (43 N.Y.2d at p. 381, 401 N.Y.S.2d at p. 762, 372 N.E.2d at p. 550). Since the closure in this case occurred after

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the procedural guidelines in Gannett were promulgated, the majority's explanation of the improprieties does not bear scrutiny. Thus, the procedural irregularities alone would warrant reversal.

Accordingly, the judgment of the Appellate Division should be reversed.

JASEN, GABRIELLI, JONES and FUCHSBERG, JJ., concur with WACHTLER, J.

MEYER, J., concurs in a separate opinion.

COOKE, C. J., dissents and votes to reverse in another opinion.

Judgment reversed, without costs, and matter remitted to the Appellate Division, Third Department, with directions to dismiss the proceeding solely on the ground of mootness.

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1 "(N)ovel and important question of statutory construction" (Le Drugstore Etats Unis v. New York, State Bd. of Pharmacy, 33 N.Y.2d 298, 301, 352 N.Y.S.2d 188, 190, 307 N.E.2d 249, 250); "of a character which is likely to recur not only with respect to the parties before the court but with respect to others as well" (East Meadow Community Concerts Ass'n. v. Board of Educ., 18 N.Y.2d 129, 135, 272 N.Y.S.2d 341, 346, 219 N.E.2d 172, 175); "only exceptional cases, where the urgency of establishing a rule of future conduct is imperative and manifest will justify a departure from our general practice" (Matter of Lyon Co. v. Morris, 261 N.Y. 497, 499, 185 N.E. at 111); question of "importance and interest and because of the likeliness that they will recur" (Matter of Jones v. Berman, 37 N.Y.2d 42, 57, 371 N.Y.S.2d 422, 433, 332 N.E.2d 303, 311); "question of general interest and substantial public importance is likely to recur" (People ex rel. Guggenheim v. Mucci, 32 N.Y.2d 307, 310, 344 N.Y.S.2d 944, 946, 298 N.E.2d 109, 110); question "of major importance and (that) will arise again and again" (Matter of Rosenbluth v. Finkelstein, 300 N.Y. 402, 404, 91 N.E.2d at 581); questions of "general interest, substantial public importance and likely to arise with frequency" (Matter of Gold v. Lomenzo, 29 N.Y.2d 468, 476, 329 N.Y.S.2d 805, 810, 280 N.E.2d 640, 643); "importance of the question involved, the possibility of recurrence, and the fact that orders of this nature quickly expire and thus typically evade review" (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 437, 423 N.Y.S.2d 630, 633, 399 N.E.2d 518, 521); "crystalizes a recurring and delicate issue of concrete significance" (Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 376, 401 N.Y.S.2d 756, 759, 372 N.E.2d 544, 547.)

2 In Gannett we stated that in determining the propriety of closure in a particular case the court "should of course afford interested members of the news media an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest" (43 N.Y.2d 370, 381, 401 N.Y.S.2d 756, 762, 372 N.E.2d 544, 550). That precatory language in Gannett was the foundation for the mandate of Leggett (supra, 48 N.Y.2d at p. 442, 423 N.Y.S.2d 630, 399 N.E.2d 518) which spelled out in as much detail as a common-law court may, the procedure to be followed by a trial court which is confronted with a request for closure of a criminal proceeding.

3 We also note that the appeal in Richmond Newspapers v. Virginia, 444 U.S. 896, 100 S.Ct. 204, 62 L.Ed.2d 132 is now pending before the Supreme Court.

4 (Cf. Cardozo, The Nature of the Judicial Process, p. 25: "This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seem to have behind them the power and pressure of the moving glacier.")

1 Hearings preliminary in nature (e. g., suppression) are sometimes permitted during trial. For purposes of present discussion they should be classed as preliminary, but as indicated in the text the difference is not determinative. What is determinative is the effect on individual rights of what will be revealed.

2 For Mr. Justice Jackson that such an instruction could overcome the prejudice involved was a "naive assumption" which "all practicing lawyers know to be unmitigated fiction" (Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (concurring opn); see, also, Bruton v. United States, 391 U.S. 123, 128-136, 88 S.Ct. 1620, 1624-1628, 20 L.Ed.2d 476; Jackson v. Denno, 378 U.S. 368, 388, 84 S.Ct. 1774, 1786, 12 L.Ed.2d 908; Kalven & Zeisel, American Jury, p. 128).

3 That effective news reporting is possible notwithstanding delay is clear from the New York Times' handling of the Franzese case

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(United States v. Franzese, 2 Cir., 392 F.2d 954, vacated in part and remanded sub nom. Giordano v. United States, 394 U.S. 310, 89 S.Ct. 1163, 22 L.Ed.2d 297). In that case the Times honored the Trial Judge's request and withheld until conclusion of the trial reporting on what occurred in the courtroom out of the presence of the jury. It then printed a roundup story concerning the trial, including the material earlier withheld (New York Times, March 4, 1967, p. 28, cols. 4-8).

4 Sequestration is the exception, but it involves a potential of jury resentment at being locked up for the duration of the trial which makes it likewise unacceptable as an alternative (cf. Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 444, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra).

5 (Estes v. Texas, 381 U.S. 532, 540, 85 S.Ct. 1628, 1631, 14 L.Ed.2d 543: "We have always held that the atmosphere essential to the preservation of a fair trial-the most fundamental of all freedoms-must be maintained at all costs.")

1 It should never be forgotten that the concept of a public trial has its genesis in concern for protection of the accused (see People v. Hinton, 31 N.Y.2d 71, 334 N.Y.S.2d 885, 286 N.E.2d 265; Gannett Co. v. De Pasquale, 443 U.S. 368, 406, 99 S.Ct. 2898, 2919, 61 L.Ed.2d 608 (Blackmun, J., concurring and dissenting)).

2 As the majority correctly notes, the mootness exception recognized in Gannett and Leggett applies in instances where an important issue is capable of recurring while evading review (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 436-437, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra; Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 376, 401 N.Y.S.2d 756, 372 N.E.2d 544 supra; see Matter of Carr v. New York State Bd. of Elections, 40 N.Y.2d 556, 559, 388 N.Y.S.2d 87, 356 N.E.2d 713; see also, Matter of United Press Assns. v. Valente, 308 N.Y. 71, 76, 123 N.E.2d 777). Since Leggett presented an issue substantially similar to Gannett, the retention of jurisdiction in Leggett apparently represents a policy decision by the court to continue to apply the mootness exception in closure cases. Alternatively, the court may have viewed Leggett as presenting a novel question, even after Gannett. Under either rationale, the mootness exception applies here.

3 It is also difficult to understand how the majority can find this proceeding moot and yet effectively rule on the merits of the trial closure. By finding Westchester Rockland controlling, as discussed, the majority has held that a trial may constitutionally be closed, in instances not previously permitted.

4 The two are not the same but are separate and distinct and they do not mix or merge. A justifiable closure of the suppression hearing did not envelop the plea for by nature and law there was a cessation of the former before the initiation of the latter.

5 In People v. Hinton, 31 N.Y.2d 71, 334 N.Y.S.2d 885, 286 N.E.2d 265, supra), it was well stated at page 73, 334 N.Y.S.2d at page 887, 286 N.E.2d at page 266; "Public trials, of necessity, serve a twofold purpose. They safeguard an accused's right to be dealt with fairly and not to be unjustly condemned * * * and concomitantly serve to instill a sense of public trust in our judicial process by preventing the abuses of secret tribunals as exemplified by the Inquisition, Star Chamber and lettre de cachet * * *. Not only the defendant himself, but also the public at large has a vital stake in the concept of a public trial."

6 Even more troubling is the possibility of closure of a plenary trial where one defendant is to be tried separately from and before his codefendant.

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590 N.Y.S.2d 60
80 N.Y.2d 299, 604 N.E.2d 122
In the Matter of MICHAEL B., Catholic Child Care Society of Diocese of Brooklyn et al., Respondents; Marvin B., Appellant; Maggie W.L., Intervenor-Respondent.
Court of Appeals of New York.
Oct. 29, 1992.

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[80 N.Y.2d 300] [604 N.E.2d 124] Patterson, Belknap, Webb & Tyler, New York City (Stephen P. Younger, Eileen J. Shields and Ellen A. Rothschild, of [80 N.Y.2d 301] counsel), for appellant.

Lenore Gittis, New York City (Marcia Egger, of counsel), for respondent Law Guardian, for Michael B.

[80 N.Y.2d 302] Wallman & Wechsler, P.C., New York City (Lori Ehrlich, of counsel), for intervenor-respondent.

[80 N.Y.2d 303] O. Peter Sherwood, Corp. Counsel, New York City (Francis F. Caputo, Alan G. Krams and Stephen J. McGrath, of counsel), for Com'r of the New York City Dept. of Social Services, amicus curiae.

John C. Gray, Jr., Wanyong Lai Austin, James G. Newman, Martha Raimon, Florence Roberts and Jane Greengold Stevens, Brooklyn, and Martin Guggenheim and Madeleine Kurtz, New York City, for Brooklyn Legal Services Corp. B and another, amici curiae.

OPINION OF THE COURT

KAYE, Judge.

This appeal from a custody determination, pitting a child's foster parents against his biological father, centers on the meaning of the statutory term "best interest of the child," and particularly on the weight to be given a child's bonding with his long-time foster family in deciding what placement is in his best interest. The biological father (appellant) on one side, [80 N.Y.2d 304] and respondent foster parents (joined by respondent Law Guardian) on the other, each contend that a custody determination in their favor is in the best interest of the child, as that term is used in Social Services Law § 392(6), the statute governing dispositions with respect to children in foster care.

The subject of this protracted battle is Michael B., born July 29, 1985 with a positive toxicology for cocaine. Michael was voluntarily placed in foster care from the hospital by his mother, who was unmarried at the time of the birth and listed no father on the birth certificate. Michael's four siblings were then also in foster care, residing in different homes. At three months, before

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[604 N.E.2d 125] the identity of his father was known, Michael--needing extraordinary care--was placed in the home of intervenor Maggie W.L., a foster parent certified by respondent Catholic Child Care Society (the agency), and the child remained with the L.'s for more than five years, until December 1990. It is undisputed that the agency initially assured Mrs. L. this was a "preadoptive" placement.

Legal proceedings began in May 1987, after appellant had been identified as Michael's father. The agency sought to terminate the rights of both biological parents and free the child for adoption, alleging that for more than a year following Michael's placement the parents had failed to substantially, continuously or repeatedly maintain contact with Michael and plan for

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his future, although physically and financially able to do so (Social Services Law § 384-b[7]. Michael's mother (since deceased) never appeared in the proceeding, and a finding of permanent neglect as to her was made in November 1987. Appellant did appear and in September 1987 consented to a finding of permanent neglect, and to committing custody and guardianship to the agency on condition that the children be placed with their two godmothers. That order was later vacated, on appellant's application to withdraw his pleas and obtain custody, because the agency had not in fact placed the children with their godmothers. In late 1987, appellant--a long-time alcohol and substance abuser--entered an 18-month residential drug rehabilitation program and first began to visit Michael.

In August 1988, appellant, the agency and the Law Guardian agreed to reinstatement of the permanent neglect finding, with judgment suspended for 12 months, on condition that appellant: (1) enroll in a program teaching household management and parenting skills; (2) cooperate by attending and [80 N.Y.2d 305] complying with the program; (3) remain drug-free, and periodically submit to drug testing, with test results to be delivered to the agency; (4) secure and maintain employment; (5) obtain suitable housing; and (6) submit a plan for the children's care during his working day (see, Family Ct. Act § 631[b]; § 633). The order recited that it was without prejudice to the agency recalendaring the case for a de novo hearing on all allegations of the petition should appellant fail to satisfy the conditions, and otherwise said nothing more of the consequences that would follow on appellant's compliance or noncompliance.

As the 12-month period neared expiration, the agency sought a hearing to help "determine the status and placement of the children." Although appellant was unemployed (he was on public assistance) and had not submitted to drug testing during the year, Family Court at the hearing held October 24, 1989 was satisfied that "there seem[ed] to be substantial compliance" with the conditions of the suspended judgment. Because the August 1988 order was unclear as to who had responsibility for initiating the drug tests, the court directed that the agency arrange three successive blood and urine tests, and if the tests proved negative, "all subject children may be released to father except Jemel [a 'special needs' child]." The matter was adjourned to December 21, when it was joined with respondents' application for a dispositional order with respect to Michael, whose long residence with the L.'s, they said, raised special concerns.

On December 21, 1989, the Law Guardian presented a report indicating that Michael might suffer severe psychological damage if removed from his foster home, and argued for a "best interests" hearing pursuant to Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277, based on Michael's bonding with the L.'s and, by contrast, his lack of bonding with appellant, who had visited him infrequently. Family Court questioned whether it even had authority for such a hearing, but stayed the order directing Michael's discharge to appellant pending its determination. Michael's siblings, then approximately twelve, eight, seven and six years old, were released to appellant in January and July 1990. Litigation continued as to Michael.

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[604 N.E.2d 126] In November 1990, Family Court directed Michael's discharge to appellant, concluding that it was without "authority or jurisdiction" to rehear the issue of custody based on the child's best interest, and indeed that Michael had been wrongfully[80 N.Y.2d 306] held in foster care. The court noted, additionally, that the Law Guardian's arguments as to Michael's best interest went to issues of bonding with his temporary custodians rather than

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appellant's insufficiency as a parent--bonding that had been reinforced by the agency's failure to ensure sufficient contacts with appellant during the proceedings. Appellant "should not be denied custody simply because of the actions of the [agency] and the lengthy litigation following final disposition has resulted in the foster parents enjoying a stronger emotional tie to the child than the [appellant]." The court directed that Michael commence immediate weekend visitation with appellant, with a view to transfer within 60 days. Michael was discharged to appellant in December 1990.

The Appellate Division reversed and remitted for a new hearing and new consideration of Michael's custody, concluding that dismissal of a permanent neglect petition cannot divest Family Court of its continuing jurisdiction over a child until there has been a "best interests" custody disposition (171 A.D.2d 790, 567 N.Y.S.2d 511). As for the relevance of bonding, the Appellate Division held that, given the "extraordinary circumstances" (Matter of Bennett v. Jeffreys, 40 N.Y.2d, at 544, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra)--referring particularly to Michael's long residence with his foster parents--Family Court should have conducted a hearing to consider issues such as the impact on the child of a change in custody. There having been no question of appellant's fitness, however, the Appellate Division permitted Michael to remain with his father pending the new determination.

On remittal, Family Court heard extensive testimony--including testimony from appellant, the foster parents, the agency (having changed its goal to discharge to appellant), and psychological, psychiatric and social work professionals (who overwhelmingly favored continued foster care over discharge to appellant)--but adhered to its determination that Michael should be released to his father. Family Court found appellant "fit, available and capable of adequately providing for the health, safety and welfare of the subject child, and * * * it is in the child's best interest to be returned to his father."

Again the Appellate Division reversed Family Court's order, this time itself awarding custody to the foster parents under Social Services Law § 392(6)(b), and remitting the matter to a different Family Court Judge solely to determine appellant's visitation rights (180 A.D.2d 792, 580 N.Y.S.2d 430). Exercising its own authority--as broad as that of the hearing court--to assess the credibility[80 N.Y.2d 307] of witnesses and character and temperament of the parents, the court reviewed the evidence and, while pointing up appellant's many deficiencies, significantly stopped short of finding him an unfit parent, as it had the power to do. Rather, the court looked to Michael's lengthy stay and psychological bonding with the foster family, which it felt gave rise to extraordinary circumstances meriting an award of custody to the foster parents. According to the Appellate Division, the evidence "overwhelmingly demonstrate[d] that Michael's foster parents are better able than his natural father to provide for his physical, emotional, and intellectual needs." (180 A.D.2d, at 794, 580 N.Y.S.2d 430.) Since early 1992, Michael has once again resided with the L.'s.

While prolonged, inconclusive proceedings and seesawing custody of a young child--all in the name of Michael's best interest--could not conceivably serve his interest at all, we granted appellant father's motion for leave to appeal, and now reverse the Appellate Division's central holdings. The opinions of Family Court specifying deficiencies of the agency and foster parents, and the opinions of the Appellate Division specifying inadequacies of the biological parent, leave little question that the only blameless person is the child. But rather than assess fault, our review will address the legal

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standards that have twice divided Family Court and the Appellate

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[604 N.E.2d 127] Division, hopefully minimizing recurrences, for this child and others, of the tragic scenario now before us.

Analysis

Appellant no longer disputes that Family Court retained jurisdiction to consider the child's best interest in connection with an award of custody even after the finding that he had substantially satisfied the conditions of the suspended judgment. All parties agree with the correctness of the Appellate Division determination that, despite appellant's apparent compliance with the conditions of the suspended judgment, Family Court retained jurisdiction to consider the best interest of the children in foster care until a final order of disposition (171 A.D.2d, at 791, 567 N.Y.S.2d 511; Social Services Law § 392[6], [9]; Matter of Sheila G., 61 N.Y.2d 368, 389, 474 N.Y.S.2d 421, 462 N.E.2d 1139). [1]

What remains the bone of contention in this Court is the [80 N.Y.2d 308] scope of the requisite "best interest" inquiry under Social Services Law § 392(6). Appellant urges that in cases of foster care, so long as the biological parent is not found unfit--and he underscores that neither Family Court nor the Appellate Division found him unfit--"best interest of the child" is only a limited inquiry addressed to whether the child will suffer grievous injury if transferred out of foster care to the biological parent. Respondents, by contrast, maintain that extraordinary circumstances--such as significant bonding with foster parents, after inattention and even admitted neglect by the biological parent--trigger a full inquiry into the more suitable placement as between the biological and foster parents. Subsidiarily, appellant challenges the Appellate Division's outright award of custody to the foster parents, claiming that disposition was beyond the Court's authority under Social Services Law § 392(6).

We conclude, first, that neither party advances the correct "best interest" test in the context of temporary foster care placements, but that appellant's view is more consistent with the statutory scheme than the broad-gauge inquiry advocated by respondents and applied by the Appellate Division. Second, we hold that the award of custody to the foster parents was impermissible as we interpret Social Services Law § 392(6).

The Foster Care Scheme

This being a case of voluntary placement in foster care--a subject controlled by statute--analysis must begin with the legislative scheme, which defines and balances the parties' rights and responsibilities. An understanding of how the system is designed to operate--before the design is complicated, and even subverted, by human actors and practical realities--is essential to resolving the questions before us.

New York's foster care scheme is built around several fundamental social policy choices that have been explicitly declared by the Legislature and are binding on this Court (Social Services Law § 384-b[1]. Under the statute, operating as written, appellant should have received the active support of both the agency in overcoming his parental deficiencies and the foster parents in solidifying his relationship with Michael, [80 N.Y.2d 309] and as soon as return to the biological parent proved unrealistic, the child should have been freed for adoption.

A biological parent has a right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood, even though the State perhaps could find "better" parents (Social Services Law § 384-b[1][a][ii]; Matter

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of Male Infant L., 61 N.Y.2d 420, 426, 474 N.Y.S.2d 447, 462 N.E.2d 1165; Matter of Sanjivini K., 47

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[604 N.E.2d 128] N.Y.2d 374, 382, 418 N.Y.S.2d 339, 391 N.E.2d 1316; Matter of Corey L. v. Martin L., 45 N.Y.2d 383, 391, 408 N.Y.S.2d 439, 380 N.E.2d 266. A child is not the parent's property, but neither is a child the property of the State; Matter of Sanjivini K., 47 N.Y.2d at 382, 418 N.Y.S.2d 339, 391 N.E.2d 1316, supra [citing Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070; and Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551]. Looking to the child's rights as well as the parents' rights to bring up their own children, the Legislature has found and declared that a child's need to grow up with a "normal family life in a permanent home" is ordinarily best met in the child's "natural home" (Social Services Law § 384-b[1][a][i], [ii].

Parents in temporary crisis are encouraged to voluntarily place their children in foster care without fear that they will thereby forfeit their parental rights (Social Services Law § 384-a; Matter of Mehl, 114 Misc.2d 55, 60, 450 N.Y.S.2d 703). The State's first obligation is to help the family with services to prevent its break-up, or to reunite the family if the child is out of the home (Social Services Law § 384-b[1][a][iii]; Santosky v. Kramer, 455 U.S. 745, 748, 102 S.Ct. 1388, 1392, 71 L.Ed.2d 599). While a child is in foster care, the State must use diligent efforts to strengthen the relationship between parent and child, and work with the parent to regain custody (Social Services Law § 384-a[2][c][iv]; Matter of Sheila G., 61 N.Y.2d, at 385, 474 N.Y.S.2d 421, 462 N.E.2d 1139, supra).

Because of the statutory emphasis on the biological family as best serving a child's long-range needs, the legal rights of foster parents are necessarily limited (see, Smith v. Organization of Foster Families, 431 U.S. 816, 846, 97 S.Ct. 2094, 2110, 53 L.Ed.2d 14). Legal custody of a child in foster care remains with the agency that places the child, not with the foster parents (Social Services Law § 383[2]. Foster parents enter into this arrangement with the express understanding that the placement is temporary, and that the agency retains the right to remove the child upon notice at any time (People ex rel. Ninesling v. Nassau County Dept. of Social Servs., 46 N.Y.2d 382, 387, 413 N.Y.S.2d 626, 386 N.E.2d 235, rearg. denied, 46 N.Y.2d 836, 414 N.Y.S.2d 1055, 386 N.E.2d 1105). As made clear in Matter of Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 324 N.Y.S.2d 937, 274 N.E.2d 431, "foster care custodians must [80 N.Y.2d 310] deliver on demand not 16 out of 17 times, but every time, or the usefulness of foster care assignments is destroyed. To the ordinary fears in placing a child in foster care should not be added the concern that the better the foster care custodians the greater the risk that they will assert, out of love and affection grown too deep, an inchoate right to adopt." (Id., at 205, 324 N.Y.S.2d 937, 274 N.E.2d 431.) Foster parents, moreover, have an affirmative obligation--similar to the obligation of the State--to attempt to solidify the relationship between biological parent and child. While foster parents may be heard on custody issues (see, Social Services Law § 383[3], they have no standing to seek permanent custody absent termination of parental rights (see, Matter of Rivers v. Womack, 178 A.D.2d 532, 577 N.Y.S.2d 322).

Fundamental also to the statutory scheme is the preference for providing children with stable, permanent homes as early as possible (see, Matter of Peter L., 59 N.Y.2d 513, 519, 466 N.Y.S.2d 251, 453 N.E.2d 480). "[W]hen it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought" (Social

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Services Law § 384-b[1][a][iv]. Extended foster care is not in the child's best interest, because it deprives a child of a permanent, nurturing family relationship (see, Matter of Gregory B., 74 N.Y.2d 77, 90, 544 N.Y.S.2d 535, 542 N.E.2d 1052, rearg. denied sub nom. Matter of Willie John B., 74 N.Y.2d 880, 547 N.Y.S.2d 841, 547 N.E.2d 96; Matter of Joyce T., 65 N.Y.2d 39, 47-48, 489 N.Y.S.2d 705, 478 N.E.2d 1306). Where it appears that the child may

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[604 N.E.2d 129] never be reunited with the biological parents, the responsible agency should institute a proceeding to terminate parental rights and free the child for adoption (Social Services Law § 384-b[1][b]; [3][b]; § 392[6][c].

Parental rights may be terminated only upon clear and convincing proof of abandonment, inability to care for the child due to mental illness or retardation, permanent neglect, or severe or repeated child abuse (Social Services Law § 384-b[3][g]; [4]. [2] Of the permissible dispositions in a termination [80 N.Y.2d 311] proceeding based on permanent neglect (see, Family Ct. Act § 631), the Legislature--consistent with its emphasis on the importance of biological ties, yet mindful of the child's need for early stability and permanence--has provided for a suspended judgment, which is a brief grace period designed to prepare the parent to be reunited with the child (Family Ct. Act § 633). Parents found to have permanently neglected a child may be given a second chance, where the court determines it is in the child's best interests (Family Ct. Act § 631), but that opportunity is strictly limited in time. Parents may have up to one year (and a second year only where there are "exceptional circumstances") during which they must comply with terms and conditions meant to ameliorate the difficulty (see, 22 NYCRR 205.50 [spelling out terms and conditions]. Noncompliance may lead to revocation of the judgment and termination of parental rights. Compliance may lead to dismissal of the termination petition with the child remaining subject to the jurisdiction of the Family Court until a determination is made as to the child's disposition pursuant to Social Services Law § 392(6) (see, Matter of Sheila G., 61 N.Y.2d, at 390, 474 N.Y.S.2d 421, 462 N.E.2d 1139, supra).

Where parental rights have not been terminated, Social Services Law § 392 promotes the objectives of stability and permanency by requiring periodic review of foster care placements. The agency having custody must first petition for review after a child has been in continuous foster care for 18 months (Social Services Law § 392[2], and if no change is made, every 24 months thereafter (Social Services Law § 392[9]. While foster parents who have been caring for such child for the prior 12 months are entitled to notice (Social Services Law § 392[4], and may also petition for review on their own initiative (Social Services Law § 392[2], a petition under section 392 (captioned "Foster care status; periodic family court review") is not an avenue to permanent custody for foster parents where the child has not been freed for adoption.

Upon such review, the court must consider the appropriateness of the agency's plan for the child, what services have been offered to strengthen and reunite the family, efforts to plan for other modes of care, and other further efforts to promote the child's welfare (see, Social Services Law § 392[5-a], and in accordance with the best interest of the child, make one of the following dispositions: (1) continue the child in foster care (which may include continuation with the current foster parents) (Social Services Law § 392[6][a]; (2) direct [80 N.Y.2d 312] that the child "be returned to the parent, guardian or relative, or [direct] that the child be placed in the custody of a relative or other suitable person or persons" (Social Services Law § 392[6][b]; or (3) require the agency (or foster

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parents upon the agency's default) to institute a parental rights termination proceeding (Social Services Law § 392[6][c].

The key element in the court's disposition is the best interest of the child (Social

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[604 N.E.2d 130] Services Law § 392[6]--the statutory term that is at the core of this appeal, and to which we now turn.

"Best Interest" in the Foster Care Scheme

"Best interest(s) of the child" is a term that pervades the law relating to children--appearing innumerable times in the pertinent statutes, judicial decisions and literature--yet eludes ready definition. Two interpretations are advanced, each vigorously advocated.

Appellant would read the best interest standard of Social Services Law § 392(6) narrowly, urging that Family Court should inquire only into whether the biological parent is fit, and whether the child will suffer grievous harm by being returned to the parent. Appellant urges affirmance of the Family Court orders, which (1) defined the contest as one between foster care agency and biological parent, rather than foster parent and biological parent; (2) focused first on "the ability of the father to care for the subject child," and then on whether "the child's emotional health will be so seriously impaired as to require continuance in foster care;" and (3) concluded that appellant was fit, and that Michael would not suffer irreparable emotional harm if returned to him. Wider inquiry, appellant insists, creates an "unwinnable beauty contest" the biological parent will inevitably lose where foster placement has continued for any substantial time.

Respondents take a broader view, urging that because of extraordinary circumstances largely attributable to appellant, the Appellate Division correctly compared him with the foster parents in determining Michael's custody and concluded that the child's best interest was served by the placement that better provided for his physical, emotional and intellectual needs. Respondents rely on Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra, this Court's landmark decision recognizing that a child's prolonged separation from a biological parent may be considered, among other factors, to be extraordinary [80 N.Y.2d 313] circumstances permitting the court to inquire into which family situation would be in the child's best interests (id., at 548, 551, 387 N.Y.S.2d 821, 356 N.E.2d 277).

In that Matter of Bennett v. Jeffreys concerned an unsupervised private placement, where there was no directly applicable legislation, that case is immediately distinguishable from the matter before us, which is controlled by a detailed statutory scheme (Matter of Bennett v. Jeffreys, 40 N.Y.2d, at 545, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra). Our analysis must begin at a different point--not whether there are extraordinary circumstances, but what the Legislature intended by the words "best interest of the child" in Social Services Law § 392(6).

Necessarily, we look first to the statute itself. The question is in part answered by Social Services Law §§ 383 and 384-b, which encourage voluntary placements, with the provision that they will not result in the termination of parental rights so long as the parent is fit. To use the period during which a child lives with a foster family, and emotional ties that naturally eventuate, as a ground for comparing the biological parent with the foster parent undermines the very objective of voluntary foster care as a resource for parents in temporary crisis, who are then at risk of losing their children once a bond arises with the foster families.

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Other portions of the statute support this conclusion. Significantly, after an adjudication of permanent neglect, the statute directs the disposition to be made "solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular disposition" (Family Ct. Act § 631 [emphasis added]; Matter of Star Leslie W., 63 NY2d 136, 147-148). As against this provision, Social Services Law § 392(6) states only that a disposition should be made "in accordance with the best interest of the child."

Absent an explicit legislative directive--such as that found in Family Court Act § 631--we are not free to overlook the legislative policies that underlie temporary

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[604 N.E.2d 131] foster care, including the preeminence of the biological family. Indeed, the legislative history of Social Services Law § 392(5-a), which specifies factors that must be considered in determining the child's best interests, states "this bill clearly advises the Family Court of certain considerations before making an order of disposition. These factors establish a clear policy of exploring all available means of reuniting the child with his family [80 N.Y.2d 314] before the Court decides to continue his foster care or to direct a permanent adoptive placement." (Mem. Accompanying Comments on Bill, N.Y. State Bd. of Social Welfare, A 12801-B, July 9, 1976, Governor's Bill Jacket, L.1976, ch. 667.)

We therefore cannot endorse a pure "best interests" hearing, where biological parent and foster parents stand on equal footing and the child's interest is the sole consideration (see, Matter of Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d, at 204, 324 N.Y.S.2d 937, 274 N.E.2d 431, supra; People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 469, 113 N.E.2d 801). In cases controlled by Social Services Law § 392(6), analysis of the child's "best interest" must begin not by measuring biological parent against foster parent but by weighing past and continued foster care against discharge to the biological parent, or other relative or suitable person within Social Services Law § 392(6)(b) (see, Matter of Sheila G., 61 N.Y.2d, at 389-390, 474 N.Y.S.2d 421, 462 N.E.2d 1139, supra; see also, Mem. Accompanying Comments on Bills, N.Y. State Dept. of Social Servs., A Int 12801-B, July 14, 1976, Governor's Bill Jacket, L.1976, ch. 667).

While the facts of Matter of Bennett v. Jeffreys fell outside the statute, and the Court was unrestrained by legislative prescription in defining the scope of the "best interests" inquiry, principles underlying that decision are also relevant here. It is plainly the case, for example, that a "child may be so long in the custody of the nonparent that, even though there has been no abandonment or persisting neglect by the parent, the psychological trauma of removal is grave enough to threaten destruction of the child" (id., 40 N.Y.2d at 550, 387 N.Y.S.2d 821, 356 N.E.2d 277), and we cannot discount evidence that a child may have bonded with someone other than the biological parent. In such a case, continued foster care may be appropriate although the parent has not been found unfit.

Under Social Services Law § 392, where a child has not been freed for adoption, the court must determine whether it is nonetheless appropriate to continue foster care temporarily, or whether the child should be permanently discharged to the biological parent (or a relative or "other suitable person"). In determining the best interest of a child in that situation, the fitness of the biological parent must be a primary factor. The court is also statutorily mandated to consider the agency's plan for the child, what services have been offered to strengthen and reunite the family, what reasonable efforts have been made to make it possible for the child to return to the natural home, and if return home is not likely, what [80 N.Y.2d

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315] efforts have been or should be made to evaluate other options (Social Services Law § 392[5-a]. Finally, the court should consider the more intangible elements relating to the emotional well-being of the child, among them the impact on the child of immediate discharge versus an additional period of foster care.

While it is doubtful whether it could be found to be in the child's best interest to deny the parent's persistent demands for custody simply because it took so long to obtain it legally (Matter of Sanjivini K., 47 N.Y.2d, at 382, 418 N.Y.S.2d 339, 391 N.E.2d 1316, supra), neither is a lapse of time necessarily without significance in determining custody. The child's emotional well-being must be part of the equation, parental rights notwithstanding (Matter of Sheila G., 61 N.Y.2d, at 390, 474 N.Y.S.2d 421, 462 N.E.2d 1139, supra). However, while emotional well-being may encompass bonding to someone other than the biological parent, it includes as well a recognition that, absent termination of parental rights, the nonparent cannot adopt the child, and a child in continued custody

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[604 N.E.2d 132] with a nonparent remains in legal--and often emotional--limbo (see, Matter of Bennett v. Jeffreys, 40 N.Y.2d, at 551, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra). [3]

The Appellate Division, applying an erroneous "best interest" test, seemingly avoided that result when it awarded legal custody to the foster parents. We next turn to why that disposition was improper.

[80 N.Y.2d 316] Award of Legal Custody to Foster Parents

The Appellate Division awarded legal custody of Michael to the foster parents pursuant to Social Services Law § 392(6)(b), noting that the statute "permits a court to enter an order of disposition directing, inter alia, that a child, whose custody and care have temporarily been transferred to an authorized agency, be placed in the custody of a suitable person or persons." (180 A.D.2d, at 796, 580 N.Y.S.2d 430.) The Court correctly looked to section 392 as the predicate for determining custody, but erroneously relied on paragraph (b) of subdivision (6) in awarding custody to the foster parents.

As set forth above, there are three possible dispositions after foster care review with respect to a child not freed for adoption: continued foster care; release to a parent, guardian, relative or other suitable person; and institution of parental termination proceedings (Social Services Law § 392[6][a]-[c].

As the first dispositional option, paragraph (a) contemplates the continuation of foster care, with the child remaining in the custody of the authorized agency, and the arrangement remaining subject to periodic review. As a result of 1989 amendments, disposition under paragraph (a) can include an order that the child be placed with (or remain with) a particular foster family until the next review (L.1989, ch. 744). Under the statutory scheme, however, foster care is temporary, contractual and supervised.

Paragraph (b), by contrast, contemplates removal of the child from the foster care system by return to "the parent, guardian or relative, or direct[ion] that the child be placed in the custody of a relative or other suitable person or persons." The 1989 statutory revision added as a permissible disposition the placement of children with relatives or other suitable persons. The purpose of this amendment was to promote family stability by allowing placement with relatives, extended family members or persons like them, as an alternative to foster care (see, Sponsor's Mem. in Support of Amended Bill, L.1989, ch. 744, and 10 Day Bill Budget Report, A 7216-A, Governor's Bill Jacket; see

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also, Matter of Peter L., 59 N.Y.2d, at 519, 466 N.Y.S.2d 251, 453 N.E.2d 480, supra).

Plainly, the scheme does not envision also including the foster parents--who were the subject of the amendment to paragraph (a)--as "other suitable persons." Indeed, reading paragraph (b) as the Appellate Division did, to permit removal of the

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[604 N.E.2d 133] child from foster care and an award of legal custody to [80 N.Y.2d 317] the foster parents, exacerbates the legal limbo status. The child is left without a placement looking to the establishment of a permanent parental relationship through adoption, or the prospect of subsequent review of foster care status with the possibility of adoption placement at that time (see, Social Services Law § 384-b[4]; Matter of Peter L., 59 N.Y.2d, at 519, 466 N.Y.S.2d 251, 453 N.E.2d 480, supra), yet has no realistic chance of return to the biological parent.

The terms of paragraph (c), providing for an order that the agency institute a parental termination proceeding, further buttress the conclusion that foster parents are not included in paragraph (b). Pursuant to paragraph (c), if the court finds reasonable cause to believe there are grounds for termination of parental rights, it may order the responsible agency to institute such proceedings. If the agency fails to do so within 90 days, the foster parents themselves may bring the proceeding, unless the court believes their subsequent petition to adopt would not be approved. Thus, in the statutory scheme the Legislature has provided a means for foster parents to secure a temporary arrangement under paragraph (a) and a permanent arrangement under paragraph (c)--both of which specifically mention foster parents. They are not also implicitly included in paragraph (b), which addresses different interests.

We therefore conclude that the Appellate Division erred in interpreting Social Services Law § 392(6) to permit the award of legal custody to respondent foster parents.

Need for Further Inquiry

We have no occasion to apply the proper legal test to the facts at hand, as the parties urge. New circumstances require remittal to Family Court for an expedited hearing and determination of whether appellant is a fit parent and entitled to custody of Michael.

The Court has been informed that, during the pendency of the appeal, appellant was charged with--and admitted--neglect of the children in his custody (not Michael), and that those children have been removed from his home and are again in the custody of the Commissioner of the Social Services. The neglect petitions allege that appellant abused alcohol and controlled substances including cocaine, and physically abused the children. Orders of fact finding have been entered by Family Court, Queens County, recognizing appellant's[80 N.Y.2d 318] admission in open court to "substance abuse, alcohol and cocaine abuse." Moreover, an Order of Protection was entered prohibiting appellant from visiting the children while under the influence of drugs or alcohol.

Appellant's request that we ignore these new developments and simply grant him custody, because matters outside the record cannot be considered by an appellate court, would exalt the procedural rule--important though it is--to a point of absurdity, and "reflect no credit on the judicial process." (Cohen and Karger, Powers of the New York Court of Appeals § 168, at 640.) Indeed, changed circumstances may have particular significance in child custody matters (see, e.g., Braiman v. Braiman, 44 N.Y.2d 584, 587, 590, 407 N.Y.S.2d 449, 378 N.E.2d 1019; Matter of Angela D., 175 A.D.2d 244, 245, 572 N.Y.S.2d 710; Matter of Kelly Ann M., 40 A.D.2d 546, 334 N.Y.S.2d 204). This Court

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would therefore take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining appellant's fitness and right to custody of Michael, and remit the matter to Family Court for a new hearing and determination of those issues. The Appellate Division concluded that the hearing should take place before a different Judge of that court (180 A.D.2d, at 796, 580 N.Y.S.2d 430), and we see no basis to disturb that determination. Pending the hearing, Michael should physically remain with his current foster parents, but legal custody should be returned to the foster care agency.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the matter remitted to Family Court,

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[604 N.E.2d 134] Kings County, for further proceedings in accordance with this opinion.

BELLACOSA, Judge (concurring).

I agree with Judge Kaye's opinion for the Court that Social Services Law § 392(6)(b) cannot be used to award permanent custody to foster parents within that statute's intended operation and integrated structure. I concur in the reversal result in this case solely for that reason, noting additionally that a contrary interpretation of that key provision, as used by the Appellate Division, would have internally contradictory implications in the field of temporary foster child placement. While I prefer an affirmance result because that might more likely conclude the litigation and allow Michael B., the 7 1/2-year-old subject of this custody battle, to get on with his life in a more settled and constructive way, I can discern no principled route to that desirable result without sacrificing the correct application of legal principles[80 N.Y.2d 319] and engendering fundamentally troublesome precedential consequences.

This separate concurrence is necessary to express my difference of degree and analytical progression with respect to the best interests analysis and test, as adopted by the Court, for purposes of the remittal of this case and as the controlling guidance for countless other proceedings in the future. I would not relegate Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 essentially to general relevance only, would not limit the beginning of the analysis to the statutory setting, and would allow for appropriate flexibility as to the range and manner of exercising discretion in the application of the best interests test by the Family Courts and Appellate Divisions.

I believe courts, in the fulfillment of the parens patriae responsibility of the State, should, as a general operating principle, have an appropriately broad range of power to act in the best interests of children. We agree that the teachings of Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra are still excellent and have served the process and the affected subjects and combatants in custody disputes very well. While the common-law origination in Bennett is a distinguishing feature from the instant case, I do not view that aspect as subordinated to or secondary in the use of its wisdom, even in a predominantly statutory setting, where this case originates. I am not persuaded that there is any support or positive authority for the view that the Legislature meant anything different when it adopted the phrase "best interest of the child" in Social Services Law § 392(6) from the meaning of that phrase articulated in Matter of Bennett v. Jeffreys, supra. Courts must exercise common-law authority in all these circumstances, and the Legislature has not, as far as I can tell, displaced that uniquely judicial function and plenary role. Since the best of Matter of Bennett v. Jeffreys' best interest analysis enjoys continued vitality therefore, it should serve as a cogent, coequal common-law building block. In my view, it provides helpful understanding for and

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intertwined supplementation to the Social Services Law provisions as applied in these extraordinary circumstances, defined in one aspect of Matter of Bennett v. Jeffreys as "prolonged separation" of parent and child "for most of the child's life" (40 N.Y.2d, at 544, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra). The child in that case was eight years of age and none of the other serious and disquieting features of this case were apparent there.

[80 N.Y.2d 320] The nuances, complexity and variations of human situations make the development and application of the general axiom--best interests of the child--exceedingly difficult. As a matter of degree and perspective, however, the Court's test is concededly more limiting than Matter of Bennett v. Jeffreys, supra, and therefore I believe it is more narrow than it should be in this case since I discern no compelling authority for the narrower approach. This 7 1/2-year-old child, born of a long since deceased crack-cocaine mother, has yet to be permanently placed and has suffered a continuing, lengthy, bad trip through the maze of New York's legal system. His father has an extended history of significant

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[604 N.E.2d 135] substance addiction and other problems, and the child has spent much of his 7 1/2 years with the same foster parents. These graphic circumstances surely present an exceptionally extraordinary and compelling case requiring significant flexibility by the courts in resolving his best interests (see, Matter of Bennett v. Jeffreys, supra). On this aspect of the case, therefore, I agree with the Appellate Division in its two decisions in this case, at least with respect to its best interests analysis and handling of this difficult case. On March 18, 1991, it said:

"In view of the extraordinary circumstances present in this case, the Family Court should have conducted a hearing to consider, among other things, the impact that a change of custody will have on the child in view of the bonding which has occurred between Michael and his foster parents, who have raised him since infancy. It is, therefore, necessary to remit this matter for a hearing and a custody determination to be made in accordance with Michael's best interests (see, Matter of Sheila G., supra; Matter of Bennett v. Jeffreys, 40 NY2d 543, 550 [387 N.Y.S.2d 821, 356 N.E.2d 277]; Matter of Jonathan D., 62 AD2d 947 [403 N.Y.S.2d 750]." (171 A.D.2d 790, 791, 567 N.Y.S.2d 511.)

After the proper, broad, "pure" Matter of Bennett v. Jeffreys-type best interests hearing was held in Family Court, the Appellate Division on February 24, 1992 added in the order now before us:

"In light of the lengthy period of time during which Michael resided with and psychologically bonded to his foster parents and given the potential for emotional as well as physical harm to [80 N.Y.2d 321] Michael should permanent custody be awarded to his natural father, we find that the requisite extraordinary circumstances are present (see, Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 545 [387 N.Y.S.2d 821, 356 N.E.2d 277], and conclude that the best interests of this child will be served by allowing him to return to his foster parents. "In view of the testimony presented during the best interests hearing, this court concludes that Michael's natural father is incapable of giving him the emotional support so vital to his well-being (see, Matter of Bennett v. Marrow, 59 A.D.2d 492 [399 N.Y.S.2d 697]. The testimony presented by Dr. Sullivan and Mr. Falco indicated that an emotional void still existed between Michael and his father despite the eight to nine months during which they resided together prior to the best interests hearing and that this void showed no signs of being bridged." (180 A.D.2d 792, 795-796, 580 N.Y.S.2d 430.)

In sum, I cannot agree that the important and pervasive legal axiom "best interests of

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the child" is or was meant to be as constricted as it is in the Court's application to this case. The governing phrase and test even in this statutory scheme ought to be as all-encompassing as in Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra, despite the difference in the procedural origin and setting of the two cases. The approach I urge, not unlike that of the Appellate Division in this respect, better serves the objectives of finality and certainty in these matters, more realistically takes into account the widely varying human conditions, and allows the Family Courts to achieve more uniformity and evenness of application of the rules. That is a better way to promote the best interests of this youngster with reasonable finality and the best interests of all others affected by the operation of these rules.

WACHTLER, C.J., and SIMONS, TITONE and HANCOCK, JJ., concur with KAYE, J.

BELLACOSA, J., concurs in result in a separate opinion.

SMITH, J., taking no part.

Order reversed, etc.

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1 What is before us is an appeal from foster care review under Social Services Law § 392. While there should have been an order disposing of the suspended judgment upon its expiration (see, 22 NYCRR 205.50[d][4], in this case appellant's "substantial compliance" with the conditions of the suspended judgment necessarily resolved the permanent neglect issue, since Family Court concluded the hearing by directing release of children to appellant after three negative drug tests.

2 Several model statutes would authorize termination of parental rights based on a child's absence from the biological home for a substantial period, with the period depending on the child's age. Such provisions were based on the notion, in circulation prior to and during the formulation of our current parental termination statute, that once a child under the age of three has been in the continuous care of the same adult for a year, it is unreasonable to presume that the child's ties with biological parents are more significant than ties with long-term caretakers (see, Taub, Assessing the Impact of Goldstein, Freud and Solnit's Proposals: An Introductory Overview, 12 NYU Rev.L. & Soc.Change 485, 490). Our Legislature did not recognize prolonged separation as an additional ground for termination of parental rights.

3 Although the concurrence underscores the extraordinary nature of this case, widely publicized failures of the foster care system indicate that this situation is, regrettably, all too common. To the extent the courts have a role, heartbreak can perhaps be avoided and the statutory goals of early permanence and stability advanced by clear standards and by promptness in addressing child custody matters; no custody determination should be permitted to languish for years. The clear (by no means "constricting") standard set forth by the Court, incorporating all of the relevant considerations, helps to assure that these unfortunate cases will not be caught in an endless loop between trial and appellate courts such as we have here.

The concurrence agrees that this case must be reversed on the section 392(6)(b) ground because "a contrary interpretation of that key provision, as used by the Appellate Division, would have internally contradictory implications in the field of temporary foster child placement." (Concurring opn. at 318, at 72 of 590 N.Y.S.2d, at 134 of 604 N.E.2d). The same is true of the "best interest" test in that same section, which must be read in the context of our statutory scheme requiring parents and the State to work together toward the preferred goal (so long as it remains realistic) of keeping biological families together. Given that foster parents cannot

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obtain permanent custody under Social Services Law § 392(6) absent termination of parental rights, the concurrence's call for even greater "flexibility," comparing foster parent to biological parent (see, Matter of Bennett v. Jeffreys, supra), obviously could not further the objectives of finality and certainty in custody determinations.

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Biographies

CYNTHIA FEATHERS, ESQ.

Cynthia Feathers has 25 years of appellate experience and has done 500 appeals on varied civil and criminal topics, as appellate counsel at the Appeals & Opinions Bureau of the State Attorney General's Office and the Center for Appellate Litigation in New York City; as retained counsel; as Second Circuit C.J.A. counsel and pro bono counsel; and as 18B counsel.

Currently, Ms. Feathers serves as Legal Director for the Rural Law Center of New York, a nonprofit organization dedicated to improving and expanding legal services in the state's 44 rural counties. RLC's appeals program handles more than 100 mandated appeals each year for indigent Family Court and criminal defendants in four upstate counties. Feathers also serves on the New York CLE Board and the Third Department's Committee on Character and Fitness and its Civil Appeals Settlement Program Advisory Panel. She is a member of the State Bar Family Law Section Executive Committee, co-chair of the State Bar Seniors Section Pro Bono Committee, and co-chair of the Albany County Bar Association Moot Court Program.

A magna cum laude of Northwestern University School (B.S.J. 1976), Feathers spent many years in corporate communications in Boston and Chicago before graduating cum laude from Boston College Law School (J.D. 1987) and clerking at the Appellate Division, Third Department. In recent years, she has served as an Adjunct Professor of Appellate Practice at Albany Law School; has chaired the State Bar Association's appeals committee and Pro Bono Appeals Program and the ABA Appellate Section Pro Bono Committee; and has been a member of the State Office of Indigent Legal Services Working Groups on Appellate Standards and Family Court Representation. She was the State Bar's Pro Bono Affairs Director from 2003 to 2008.

Alexandra Lewis-Reisen

Alexandra Lewis-Reisen is a senior staff attorney for the Matrimonial and Family Law Unit, LegalHealth, and the Domestic Violence Appellate Representation Project. Alexandra represents domestic-violence survivors in divorce, custody, orders of protection, and support cases, at both trial and appellate levels. Prior to joining NYLAG, Alexandra was a litigation associate and counsel at O'Melveny & Myers, which is where she started her relationship with NYLAG, working on pro bono family law appeals. Now, part of her work at NYLAG is mentoring its pro bono partners in their trial and appellate representation of domestic-violence survivors.

Alexandra graduated from Georgetown University Law Center, cum laude in 2001.

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431 N.Y.S.2d 400
50 N.Y.2d 707, 409 N.E.2d 876
In the Matter of HEARST CORPORATION et al., Appellants,
v.
John J. CLYNE, as Judge of the County Court of Albany
County, et al., Respondents.
Court of Appeals of New York.
July 3, 1980.

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Peter L. Danziger, Albany, for appellants.

Robert G. Lyman, County Atty. (William J. Conboy, II, Asst. County Atty., of counsel), for John J. Clyne, respondent.

Sol Greenberg, Dist. Atty. (George H. Barber, Albany, of counsel), for Sol Greenberg, respondent.

Robert C. Bernius, Rochester, for Binghamton Press Company, Inc., and others, amici curiae.

OPINION OF THE COURT

WACHTLER, Judge.

The petitioners in this article 78 proceeding are the publisher of the Albany Times-Union, a daily newspaper, and Shirley Armstrong, a reporter for that newspaper. The respondent, John J. Clyne, is a Judge of the Albany County Court.

In March of 1979 Judge Clyne was conducting a joint suppression hearing in the criminal case of Alexander Marathon and William Du Bray, who had been indicted for the crimes of robbery in the first degree, burglary in the first degree and grand larceny in the second degree. The hearings were closed to the public and press on the motion of the defendants, without objection by the prosecutor and without a hearing. Armstrong, the court reporter for the Times-Union, knew the hearings were closed and the courtroom doors locked, but was sufficiently interested in the proceedings to periodically walk by the courtroom to observe whatever she could.

On March 7, during one of these periodic observations, Armstrong noticed the attorney for Du Bray, one of the codefendants, standing outside the courtroom door. On the assumption that something other than a suppression hearing was in progress Armstrong tried the courtroom door but found it locked. She then learned from Du Bray's attorney that Judge Clyne, behind closed doors, had heard and granted a motion to close a proceeding during which Marathon was expected to enter a plea. The reporter, Armstrong, then knocked on the courtroom door. There was no response. After about 15 minutes the doors opened and she learned from Judge Clyne that Marathon had indeed entered a guilty plea. The Judge, however, refused petitioners' request for a transcript of the plea proceeding or to direct the court stenographer to read back the minutes of the proceeding.

On March 12, prior to trial, the other defendant, Du Bray, also entered a plea of guilty before Judge Clyne. Thereafter Judge Clyne permitted the petitioners to obtain a copy of the transcript of the closed plea proceeding; that transcript has now been furnished to them and forms a part of the record on this appeal.

The transcript of the closed proceeding held March 7, which is the sole concern of this appeal, indicates that at the very commencement of the already closed suppression hearing which had been adjourned from March 5, Marathon's attorney orally moved to close the courtroom to all persons except Marathon, his attorney, and court personnel. The District Attorney joined the motion. Without taking evidence or

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hearing argument from anyone Judge Clyne immediately granted the motion, even excluding the codefendant Du Bray and his attorney from the courtroom, and had the doors secured. In sworn testimony Marathon then confessed his own participation in the crime for which he was indicted, inculpated his codefendant Du Bray, and was permitted to enter a plea of guilty to one count of the indictment.

The petitioners brought this proceeding seeking a declaration that the closure of the plea taking was illegal, and for an injunction prohibiting such closures in the future unless members of the press are afforded an opportunity to be heard.

The Appellate Division, 71 A.2d 966, 419 N.Y.S.2d 338 concluded that the closure was a proper exercise of the trial court's discretion and dismissed the petition. Petitioners

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appealed. We conclude that the case is moot and that there is no sufficient reason for this court to consider the merits of the appeal; however, for the reasons which follow, the order of the Appellate Division should be reversed and remitted for dismissal.

It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal (Matter of State Ind. Comm., 224 N.Y. 13, 16, 119 N.E. 1027; California v. San Pablo & Tulare R.R., 149 U.S. 308, 314, 13 S.Ct. 876, 878, 37 L.Ed. 747). This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary.

Our particular concern on this appeal is with that facet of the principle which ordinarily precludes courts from considering questions which, although once live, have become moot by passage of time or change in circumstances. In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment. On the facts of the instant case, where the underlying plea proceeding had been long concluded and the transcript had been furnished to the petitioners at the time this action was commenced (cf. Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 436, 423 N.Y.S.2d 630, 399 N.E.2d 518) we conclude that the rights of the parties cannot be affected by the determination of this appeal and it is therefore moot. Because we conclude that the appeal is moot it may not properly be decided by this court unless it is found to be within the exception to the doctrine which permits the courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable (see Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147).

In this court the exception to the doctrine of mootness has been subject over the years to a variety of formulations. [1] However, examination of the cases in which our court has found an exception to the doctrine discloses three common factors: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i. e., substantial and novel issues. After careful review we are persuaded that the case before us presents no questions the fundamental underlying principles of which have

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not already been declared by this court, and that this case is, therefore, not of the class that should be preserved as an exception to the mootness doctrine.

We acknowledge, as we have before, the very substantial character of the interests represented by the petitioners in this proceeding. We also note that questions such as the one posed may occasionally escape review. It is for this reason that on occasion we have entertained appeals even though the issues in the particular controversy have been resolved. However, as our court only recently has set forth in some detail the requirements that must be fulfilled before a judicial proceeding in this State may be closed to the public and press, no sufficiently useful purpose would be served in this instance but our retaining the appeal notwithstanding that the underlying controversy is now moot.

It has, of course, long been the law in this State that all judicial proceedings, both civil and criminal, are presumptively open to the public (Judiciary Law, § 4; Lee v. Brooklyn Union Pub. Co., 209 N.Y. 245, 103 N.E. 155) and that a proceeding at which a criminal defendant enters a plea of guilty is indisputedly a substitute for a trial (People ex rel. Carr v. Martin, 286 N.Y. 27, 32, 35 N.E.2d 636). Indeed, in Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544) it was only by distinguishing the pretrial and evidentiary nature of the proceeding at issue that this court could conclude that such a proceeding should ordinarily be closed to the public and press (Gannett, supra, at p. 380, 401 N.Y.S.2d 756, 372 N.E.2d 544). We were careful to note in Gannett at p. 378, 401 N.Y.S.2d at p. 761, 372 N.E.2d at p. 548, that, "In the case now before us, the Trial Judge was not presiding over a trial on the merits".

In Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 423 N.Y.S.2d 630, 399 N.E.2d 518 supra), which was decided by this court after the decision of the Appellate Division in the instant case and which was obviously not available to inform either the trial or the appellate court, the issue was closure of a pretrial competency hearing. In that case even the pretrial nature of the proceeding was considered insufficient to nullify the presumption that all judicial proceedings are to be open. Thus the dissent is flatly incorrect in its statement that by dismissing this appeal for mootness we are disposed to permit trials to be closed to the public on the same basis as pretrial proceedings. On the contrary, we have distinguished between pretrial and trial closures and expressed our consciousness of the danger inherent in permitting too casual a closure of even pretrial proceedings: "At the present time, in fact in most criminal cases, there are only pretrial proceedings. Thus if the public is routinely excluded from all proceedings prior to trial, most of the work of the criminal courts will be done behind closed doors" (Matter of Westchester Rockland Newspapers v. Leggett, supra, at p. 440, 423 N.Y.S.2d at p. 636, 399 N.E.2d at p. 524).

Our decisions in Gannett (supra) and Leggett (supra) laid down the procedural framework within which the possibility of closure must be considered. [2] We conclude, therefore, that inasmuch as the principles governing fair trial-free press issues which might have been developed by consideration of the instant case have already been largely declared by our decisions in Gannett and Leggett, in this instance there is no sufficient reason to depart from the normal jurisprudential principle which calls for judicial restraint when the particular controversy has become moot.

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More than that, we are convinced that there is a good reason in the circumstances of this case not to entertain this appeal for the purpose of extrapolating or refining the principles which we have declared. The closing of the plea hearing here occurred

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while the appeal from our Gannett decision was pending before the United States Supreme Court and some months before our decision in the Leggett case. [3] We cannot conclude that the trial court would have followed the procedures which he did or that he would necessarily have reached the same conclusion had our decision in Leggett preceded the hearing. While we can anticipate that the implementation of the principles that we have declared will not always be easy, we have no reason to question the readiness or capacity of the Judges at nisi prius to seek to implement them appropriately with diligence, faithfulness and imagination. We conceive our jurisprudential role in this field as one of supervising and monitoring the dispositions made by our lower courts after we declare the applicable principles, rather than retrospectively appraising conduct of Trial Judges that preceded our declarations.

Other considerations also support our conclusion that this appeal should not be entertained. We are concerned with the vitality and fundamental soundness of our jurisprudence.

The engine of the common law is inductive reasoning. It proceeds from the particular to the general. It is an experimental method which builds its rules in tiny increments, case-by-case. It is cautious advance always a step at a time. The essence of its method is the continual testing and retesting of its principles in "those great laboratories of the law, the courts of justice" (Smith, Jurisprudence, p. 21). [4]

Conscious judicial restraint is essential-its absence diminishes the craftsmanship of the courts and debases the judicial product. A common-law Judge will not reach to decide a question not properly before him. Nor will he attempt to state a broad rule except when absolutely required-and then it will be cast in terms which permit it to be moulded in light of the experience of those who must work with it. A newly articulated rule should not be immediately recast "for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible" (Smith, Jurisprudence, p. 21).

Finally, it must be explicitly stated that in dismissing the present appeal as moot we express no view on the merits. Our disposition here is not to be read as any withdrawal from, addition to, or elaboration on our opinions in Gannett and Leggett. It is entirely incorrect to suggest otherwise. Nor should our dismissal be interpreted as presaging a disposition to decline on grounds of mootness to entertain appeals in future fair-trial, free-press cases. We recognize, of course, that cases in this area of the law, because of considerations of timing, would often, even usually, evade review if appeals were uniformly to be dismissed for mootness. We shall continue to resolve each case in this field on the basis of its individual characteristics and merits, only one aspect of which will be its mootness, if moot it is.

Concluding as we do that the appeal is moot and not of a character which should be preserved for review, the appeal should be dismissed. In this case, however, because the Appellate Division had no opportunity to consider the matter in light of our decision in Leggett (supra) we should reverse and remit with directions to dismiss solely on the ground of mootness, in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent (see Matter of Adirondack League Club v. Board of Black Riv. Regulating Dist., 301 N.Y. 219, 223, 93

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N.E.2d 647; cf. United States v. Munsingwear, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36; United States v. Alaska S. S. Co., 253 U.S. 113, 115, 40 S.Ct. 448, 64 L.Ed. 808).

MEYER, Judge (concurring).

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I concur fully in Judge Wachtler's opinion and write only because where the dissent finds implications in that opinion which "do not bode well for the future of public trials in this State" (p. 723, p. 408 of 431 N.Y.S.2d, p. 884 of 409 N.E.2d), I find in the dissent suggestions which, if they become the governing rule, may adversely affect the individual's right to a fair trial.

I, of course, do not suggest that the media are to be regularly, or even often, excluded from the courtroom. What I am urging is that the problem must be analyzed not in terms of categories and classifications but of the rights affected, and that, without a very much clearer demonstration that the public's interest cannot be reasonably protected without infringing individual rights than has been made, the rights of the individual on trial may not be subordinated to the rights of the public to know what goes on in a courtroom or how the system of justice is functioning.

The genius of the American constitutional experiment has been the protections it affords individuals against oppression by the majority, whether in the form of star chamber proceedings or of stadium trials, the result of either of which is an equally foregone conclusion. Important as it is that justice appear to the public to be done, in final analysis the public is grossly disserved if it not in fact be done in each individual case.

Resolution of the instant case, were it to be decided on the merits, would turn not on whether the taking of a guilty plea is the equivalent of a trial or more nearly a preliminary proceeding, or whether the fair trial rights at stake were those of the pleading defendant or his codefendant. The fact is, as both we and the United States Supreme Court have recognized, that there are occasions when parts of trials, as well as of pretrial proceedings, may constitutionally be closed (Gannett Co. v. De Pasquale, 443 U.S. 368, 388, n. 19, 99 S.Ct. 2898, 2910, n. 19, 61 L.Ed.2d 608, and cases cited; People v. Jones, 47 N.Y.2d 409, 418 N.Y.S.2d 359, 391 N.E.2d 1335; Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 377-378, 401 N.Y.S.2d 756, 372 N.E.2d 544, affd 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608), though as we have made clear the discretion to do so is to be "sparingly exercised and then, only when unusual circumstances necessitate it" (People v. Hinton, 31 N.Y.2d 71, 76, 334 N.Y.S.2d 885, 889, 286 N.E.2d 265, 267; accord: Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 441, 423 N.Y.S.2d 630, 399 N.E.2d 518). Closure during trial, moreover, will usually be to protect some interest of a third person or the public, rather than of the person on trial [1] (to protect the public interest in not revealing the identity of an informer, People v. Jones, supra; People v. Hinton, supra; see Proposed Code of Evidence for the State of New York, § 510; to protect the life of a witness or shield him or her from embarrassment, People v. Hagan, 24 N.Y.2d 395, 300 N.Y.S.2d 835, 248 N.E.2d 588, cert. den. 396 U.S. 886, 90 S.Ct. 173, 24 L.Ed.2d 161; People v. Smallwood, 31 N.Y.2d 750, 338 N.Y.S.2d 433, 290 N.E.2d 435; United States ex rel. Smallwood v. La Valle, D.C., 377 F.Supp. 1148, affd 2 Cir., 508 F.2d 837, cert. den. 421 U.S. 920, 95 S.Ct. 1586, 43 L.Ed.2d 788; see Judiciary Law, § 4; to protect the interests of the defendant and the public in orderly trial, United States ex rel. Orlando v. Fay, 2 Cir., 350 F.2d 967).

Nor can I accept the dissent's assumption that there is an "absence of prejudice" to codefendant Du Bray in permitting Marathon's guilty plea to be taken in open court. Short of publishing a confession by Du Bray before it has been ruled admissible, nothing could be more devastating to his rights than

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Marathon's accusatory words. Given in a plea proceeding, such words are usually the quid

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pro quo for some favor of the law, generally a lesser sentence. To permit such information to get to potential jurors without the prophylaxis of cross-examination pointedly indicating the self-serving nature of the accusation is materially to disadvantage such a codefendant, for cross-examination when it does occur will be less effective than it would have been had the accusation not come to the jury in advance of trial and with the imprimatur of the press. It is possible to disadvantage such a codefendant in an additional way which cannot be known before trial. It is not unknown for a person in Marathon's position to recant when called to testify at his codefendant's trial. In such a case his statement about the codefendant at his own guilty plea "may be received only for the purpose of impeaching" him "and does not constitute evidence in chief" (CPL 60.35, subd. 2). While the Trial Judge must so instruct the jury (id.), such an instruction, of questionable psychological value in any event, [2] will be even less effective than usual because the accusation came to the jury in advance of trial and with the imprimatur of the press.

The problem that arises when the issue is discussed in terms of categories rather than effect on individual rights is well illustrated by the present case. The dissent sees the closure here involved as casting "a veil of secrecy over the major component of the criminal justice system" (p. 728, p. 412 of 431 N.Y.S.2d, p. 887 of 409 N.E.2d) and the fact that the pleading defendant might implicate his codefendant as insufficient justification for closure (p. 727, p. 411 of 431 N.Y.S.2d, p. 886 of 409 N.E.2d). In my view there is a ready means of protecting the public's interest in the Marathon-Du Bray trials without sacrificing Du Bray's clear right not to have the jury pool for his trial, scheduled to begin a few days later, tainted by media accounts of Marathon's plea statements implicating him, and the number of plea proceedings in which, to protect the rights of a codefendant, closure of part or all of the plea proceeding might occur is an insignificant part of the criminal justice system. So far as the record and briefs reveal (including the brief of amici which catalogues a number of recent closures) this is the first such case.

The tension between public and individual interests that arises over an issue such as whether by closing so much of a plea proceeding as relates to him a codefendant should be protected against revelation in advance of his trial of the pleading defendant's accusations against him, arises not because of the presence of media representatives in the courtroom, but because it is a constitutional absolute that what transpires in open court is public property and may be immediately disseminated. Responsible media often will delay publication nonetheless, [3] but quite properly are unwilling to permit the invasion of First Amendment rights that would be involved in permitting the courts to tell them when they can publish. Yet, just as not all Judges are exemplars of their craft, neither are all editors able to perceive in their highly competitive profession the value to individual rights of delaying publication. The antidote for the nonexemplary Judge is to keep courtrooms open to the fullest extent consistent with individual rights. The antidote for the unresponsive

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or irresponsible editor is to close the courtroom when there is a real probability that publication of what is to be revealed in the courtroom will materially prejudice the defendant on trial, because in no other constitutionally acceptable way can his rights be protected.

I, of course, do not ignore the existence of procedures such as change of venue, change of venire, continuance, waiver of jury, sequestration, discussed by the Supreme Court in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563, 96 S.Ct. 2791, 2804, 49

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L.Ed.2d 683 as alternatives to prior restraint. But I cannot accept the concept that these possibilities, most of which [4] involve denigration of defendant's constitutional protections are acceptable alternatives (cf. Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 444, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra; Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 380, 401 N.Y.S.2d 756, 372 N.E.2d 544, affd 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608, supra).

In my view the Bill of Rights set forth in article I of the New York State Constitution and the first 10 amendments to the United States Constitution become a mockery when, because of publicity, a court must say to a man on trial for his life or for his liberty, you are entitled to a speedy trial, but not yet. You are entitled to trial by a jury, unless you fear that pretrial publicity has so adversely affected the impartiality of those who will be called as potential jurors that you dare not risk the result. You are entitled to a trial by a jury of your neighbors, but not those nearby. You are entitled to confront and cross-examine witnesses, but not those whose testimony is given through the newspapers. You are entitled to exclude improperly seized matter from the jury as evidence, but not as a news story. The more is this so when what we deal with is not prior restraint on publication as in Stuart, but denial of access for a limited time as to a limited part of the proceeding, and when we impose upon the defendant seeking closure not only the burden of showing that such procedures will not "dispel prejudice", but also what impact the prejudicial information will have on the jury pool, in light of its size, the extent of the media coverage and the effect of that coverage on the public at large (see Matter of Westchester Rockland Newspapers v. Leggett, supra, 48 N.Y.2d at p. 447, 423 N.Y.S.2d 630, 399 N.E.2d 518 (Cooke, Ch. J., concurring)). Bearing in mind that "none are more lowly-none more subject to potential abuse-and none with more at stake than those who have been indicted and face criminal prosecution in our courts" (ibid., at p. 444, 423 N.Y.S.2d at p. 638, 399 N.E.2d at p. 526 (WACHTLER, J., majority opn)), I conclude that the required showing presses to the outer limits of, if it does not exceed, due process requirements for all but the wealthy defendant.

Delayed access does not affect the rights of the public or of the media in any similar way. As suggested in Gannett, 43 N.Y.2d, at p. 381, 401 N.Y.S.2d 756, 372 N.E.2d 544 and ordered in Westchester Rockland Newspapers, 48 N.Y.2d, at p. 445, 423 N.Y.S.2d 630, 399 N.E.2d 518, a full transcript of the plea proceeding in this matter was made and was furnished to appellant as soon as the danger to Du Bray's interest was past. Perhaps consideration should be given to (1) equipping one courtroom in each courthouse with videotape equipment so that any closed portion of a trial or pretrial proceeding can be recorded in a way that will make available to the media with all the nuances of voice and gesture exactly what transpired while the courtroom was closed, (2) requiring that any closed proceeding be held in that courtroom and videotaped in its entirety, (3) putting the operation of the videotape equipment and the retention of the tapes in the hands of a public commission independent of the courts or other members of the criminal justice system and subject to court order only as to time of release, which would, in any event, be required

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to be not later than a few days after the trial of defendant or a codefendant ends (cf. Uniform Rules of Criminal Procedure, rule 714, 10 ULA 317). Though no objective evidence of which I am aware indicates the need for the procedure suggested, I recognize the importance of assuring our citizens that the judicial process is above suspicion, and believe any resulting inconvenience to the

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system to be more than offset if we thereby assure the constitutional rights of individuals accused.

Use of the suggested procedure together with the preliminary hearing mandated by the Gannett and Westchester Rockland Newspapers cases will preserve both the rights of the public (and the media in the interest of the public) to the free flow of information about the courts and the "most fundamental of all freedoms," [5] the right of an accused individual to a fair trial.

COOKE, Chief Judge (dissenting).

A majority of the court today in effect sanctions the exclusion of the public and the press from a guilty plea proceeding in a criminal case. Because closure of a plea proceeding is tantamount to closure of a trial itself, and because the tacit implications of the court's decision do not bode well for the future of public trials in this State, I must respectfully dissent. [1]

The present article 78 proceeding stems from a criminal proceeding in Albany County. In September of 1978, Alexander Marathon and William Du Bray were indicted for the crimes of robbery in the first degree, burglary in the first degree and grand larceny in the second degree. Although the case did attract media attention, the publicity does not appear to have been substantial. Nonetheless, when a joint suppression hearing was convened on March 5, 1979, defendants moved for exclusion of the public. The court granted the motion, without objection by the prosecutor, and without conducting a hearing, and ordered the doors to the courtroom locked.

During the course of the closed suppression hearing, defendant Marathon decided to enter a guilty plea. While the courtroom was still locked, and the public and reporters barred, Marathon's counsel moved to close the courtroom during the plea proceeding. The District Attorney joined in the motion, and the Judge again ordered closure, stating only that "In the exercise of discretion and in the interests of justice, I will close the courtroom at this time to all non-Court personnel". Later the court explained that it closed the plea proceeding because it was likely that Marathon would implicate Du Bray, rendering it difficult to select an impartial jury when Du Bray came to trial.

Petitioner Armstrong, a reporter for the Albany Times-Union, was aware of the closed suppression hearing, and allegedly made periodic checks of the courtroom where she believed the hearing was being conducted. She first learned of the closed plea proceeding from the attorney for Du Bray, who was excluded from the proceeding and was standing outside the courtroom.

Ms. Armstrong visited the Judge in his chambers, and he confirmed that a guilty plea had been entered. The Judge indicated that a transcript of the proceeding would be available in a few days, but denied Ms. Armstrong's request to have the stenographer read the minutes to her. The next day, petitioners delivered a letter to the Judge protesting the closure and requested either an immediate transcript or an order directing the court reporter to relate the minutes of the proceeding. This request was denied.

On the following Monday, Du Bray entered a plea of guilty. Ms. Armstrong was then permitted to purchase a copy of the minutes taken at Marathon's plea. Shortly thereafter, this proceeding was instituted.

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At the outset, I cannot agree that the proceeding should be dismissed for mootness. As the court has but recently reaffirmed regarding closure orders, "we have traditionally retained jurisdiction, despite a claim of mootness, because of the importance of the question involved, the possibility of recurrence, and the fact that orders of this

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nature quickly expire and thus typically evade review" (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 436-437, 423 N.Y.S.2d 630, 633, 399 N.E.2d 518, 521). By now rejecting this exception to the mootness doctrine, the majority has provided a precedent to effectively insulate closure orders from legal challenge. Indeed, since we have previously cautioned trial courts against staying the criminal proceeding while collateral review of a closure order proceeds (Matter of Merola v. Bell, 47 N.Y.2d 985, 987-988, 419 N.Y.S.2d 965, 393 N.E.2d 1038), the closure order will be moot and evade review in all but the rarest of instances.

No persuasive reason has been given for now overruling the mootness exception for closure orders so recently recited and recognized in Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544, affd. 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 and Westchester Rockland. [2] Indeed, the majority furnishes no explanation whatsoever as to why the mootness exception applied in those cases falls short of reaching the situation in this matter, but notes somewhat cryptically that future cases may or may not be moot. Perhaps more unsettling is the absence of guidelines by which to evaluate mootness in these proceedings. If the court is unwilling to apply the mootness exception here, where a novel and not insubstantial issue is presented, it is difficult to predict when the exception will again be invoked. Such ad hoc, unexplained decision making is not in harmony with the best interests of our system of jurisprudence.

Nor do I agree that the "principles governing fair trial-free press issues * * * have already been largely declared by our decisions in Gannett " (majority opn, at p. 716, p. 403 of 431 N.Y.S.2d, p. 879 of 409 N.E.2d) and in Westchester Rockland Newspapers v. Leggett (supra, 48 N.Y.2d at pp. 439-442, 423 N.Y.S.2d 630, 399 N.E.2d 518). Undoubtedly, Westchester Rockland and Gannett establish the procedural and substantive rules to be followed when dealing with a motion to close pretrial proceedings. Those guidelines do not cover the situation here, as a guilty plea proceeding is simply not pretrial in nature. Rather, it is a substitute for and the legal and practical equivalent of the trial itself. A plea of guilty establishes "guilt of the crime charged as incontrovertibly as a verdict of a jury upon a trial" (People ex rel. Carr v. Martin, 286 N.Y. 27, 35 N.E.2d 636, 639; see, e. g., People v. Krennen, 264 N.Y. 108, 109, 190 N.E. 167; People ex rel. Hubert v. Kaiser, 206 N.Y. 46, 53, 99 N.E. 195. The plea is in itself a conviction (e. g., People v. Jones, 44 N.Y.2d 76, 82-83, 404 N.Y.S.2d 85, 375 N.E.2d 41, citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274. "Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence" (Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009. Thus, by stating that Westchester Rockland and Gannett are controlling, the court is effectively holding that trials may be closed to the public on the same basis as pretrial proceedings.

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And the court may not sidestep this significant issue by merely asserting that Westchester Rockland recognized a distinction between trial and pretrial proceedings, for the fact remains that Westchester Rockland articulated substantive standards for only pretrial proceedings. Today's decision must be construed as indorsing the application of those same standards to trial closures, and thereby sustaining the constitutionality of excluding the public and press from a trial itself. The fallacy in this holding is demonstrated by the Supreme Court's retention of jurisdiction-at least for the present-in a case where the trial was closed to the public (Richmond Newspapers v. Virginia, 444 U.S. 896, 100 S.Ct. 204, 62 L.Ed.2d 132). That action signals a strong possibility that the closing of a trial presents a substantial Federal

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constitutional question, even after Gannett upheld pretrial closure. It is thus difficult to fathom the majority's efforts to avoid a question with such momentous constitutional and societal impact. [3]

This is especially disturbing because the rationale for excluding the public from pretrial proceedings does not justify closure of plea hearings. [4] This court has a number of times reviewed the serious conflict which gave rise to the pretrial closure controversy. On the one hand, the public is possessed of a right to open judicial proceedings. [5] Not only is this right deeply rooted in our history (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 445, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra (concurring opn)), but it is mandated by the clear long-standing command of the Legislature: "(t)he sittings of every court within this state shall be public, and every citizen may freely attend the same" (Judiciary Law, § 4). At the same time, there are instances, however rare, where pretrial publicity may effectively destroy the accused's right to a fair trial (see Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600). The precise point at which the public right to know must give way to the defendant's right to a fair trial has and will continue to spark lively debate (compare Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 443-444, 423 N.Y.S.2d 630, 399 N.E.2d 518, with id., at pp. 445-448, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra).

But we can all agree as to the possible source of the potential prejudice at pretrial suppression hearings. Because the very purpose of such proceedings is to determine the admissibility of evidence, they "are often a potent source for the revelation of evidence which is both highly prejudicial to the defendant's case and not properly admissible at trial" (Matter of Westchester Rockland Newspapers v. Leggett, supra, at p. 439, 423 N.Y.S.2d at p. 634, 399 N.E.2d at p. 522). If the hearing is open, and the case is well publicized, it is possible that the evidence will be disclosed to potential jurors but ultimately excluded from use at trial. This could subvert the very purpose of the hearing.

By contrast, none of these possible dangers attend when the plea proceeding is opened to public view. Given a defendant's voluntary decision to admit his guilt in open court, and the fact that the plea proceeding will quickly ripen into a conviction, the possibility of a defendant's rights being impaired by the presence of the public and the press is almost nonexistent. And even if it be assumed that concern for a codefendant's

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rights would ever warrant closure of a plea, the mere fact that the pleading defendant might implicate his cohort is insufficient justification. It is true, of course, that the defendant's statements at the plea, if they implicate the codefendant, would be prejudicial. But all evidence which suggests guilt is highly prejudicial. This does not mean that all inculpatory evidence must be enjoined from pretrial disclosure. The narrow rationale for considering closure of the suppression hearing is that the damaging evidence may prove to be inadmissible at trial. There is no reason to suppose that the evidence uncovered at a plea hearing would be inadmissible at the later trial of a codefendant. Indeed, more often than not, the defendant who pleaded can probably be expected to testify at the codefendant's trial-possibly for the prosecution, possibly for the defense. It follows that there is no ipso facto basis for overriding the command of section 4 of the Judiciary Law with respect to plea proceedings.

In addition to the absence of prejudice, the public has a compelling stake in open plea proceedings. "Publicity, not secrecy, in arraignment, plea and judgment is part of our tradition". (Matter of Rudd v. Hazard, 266 N.Y. 302, 307, 194 N.E. 764, 765). Especially in modern times, when guilty pleas account

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for most criminal dispositions, it is particularly egregious to close the courtroom doors on these proceedings. In some areas of the State, guilty pleas make up three fourths of all criminal dispositions (Twenty-Second Ann Report of N.Y. Judicial Conference, 1977, p. 56). And, in any calendar year, guilty pleas may constitute 90-95% of all convictions obtained State-wide (see id., at p. 58). To exclude the public from plea proceedings of codefendants is thus to exclude the public from the workings of a substantial part of the criminal justice system. [6]

The beneficial aspects of an open criminal justice system have been often enough discussed to need no repetition here (see, e. g., Gannett Co. v. De Pasquale, 443 U.S. 368, 407, 421-422, 427-433, 99 S.Ct. 2898, 2919, 2927, 2930-2933, 61 L.Ed.2d 608 supra (Blackmun, J., concurring and dissenting); Friendly, Crime and Publicity; Note, The Right to Attend Criminal Hearings, 78 Col.L.Rev. 1308). But it would not be amiss to note that if the plea is insulated from public view, the public may be deprived of their most effective method of determining whether elected officials are enforcing the law "with vigor and impartiality" (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 437, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra). And, casting a veil of secrecy over the major component of the criminal justice system may well lead our citizens to view the judicial process with a suspicious eye (see People v. Hinton, 31 N.Y.2d 71, 73, 334 N.Y.S.2d 885, 286 N.E.2d 265, supra). It is not enough that justice be done. It must be perceived as being done in the eyes of the public.

Finally, it bears emphasis that the closure motion in the present case was entertained in secret, with no representative of the public or media afforded an opportunity to voice opposition. Moreover, the motion was granted in summary fashion without any showing in support of it. These procedures cannot be sanctioned (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 442, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra). The majority's explanation-that closure occurred prior to the Westchester Rockland case-is unacceptable. Even prior to Westchester Rockland it was clear that closure could not be ordered absent some showing of potential prejudice (Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 376-381, 401 N.Y.S.2d 756, 372 N.E.2d 544, affd 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608, supra). Here, there was none. And, it had also been stated in Gannett that "the courts should of course afford interested members of the news media an opportunity to be heard * * * to determine the magnitude of any genuine public interest" (43 N.Y.2d at p. 381, 401 N.Y.S.2d at p. 762, 372 N.E.2d at p. 550). Since the closure in this case occurred after

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the procedural guidelines in Gannett were promulgated, the majority's explanation of the improprieties does not bear scrutiny. Thus, the procedural irregularities alone would warrant reversal.

Accordingly, the judgment of the Appellate Division should be reversed.

JASEN, GABRIELLI, JONES and FUCHSBERG, JJ., concur with WACHTLER, J.

MEYER, J., concurs in a separate opinion.

COOKE, C. J., dissents and votes to reverse in another opinion.

Judgment reversed, without costs, and matter remitted to the Appellate Division, Third Department, with directions to dismiss the proceeding solely on the ground of mootness.

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1 "(N)ovel and important question of statutory construction" (Le Drugstore Etats Unis v. New York, State Bd. of Pharmacy, 33 N.Y.2d 298, 301, 352 N.Y.S.2d 188, 190, 307 N.E.2d 249, 250); "of a character which is likely to recur not only with respect to the parties before the court but with respect to others as well" (East Meadow Community Concerts Ass'n. v. Board of Educ., 18 N.Y.2d 129, 135, 272 N.Y.S.2d 341, 346, 219 N.E.2d 172, 175); "only exceptional cases, where the urgency of establishing a rule of future conduct is imperative and manifest will justify a departure from our general practice" (Matter of Lyon Co. v. Morris, 261 N.Y. 497, 499, 185 N.E. at 111); question of "importance and interest and because of the likeliness that they will recur" (Matter of Jones v. Berman, 37 N.Y.2d 42, 57, 371 N.Y.S.2d 422, 433, 332 N.E.2d 303, 311); "question of general interest and substantial public importance is likely to recur" (People ex rel. Guggenheim v. Mucci, 32 N.Y.2d 307, 310, 344 N.Y.S.2d 944, 946, 298 N.E.2d 109, 110); question "of major importance and (that) will arise again and again" (Matter of Rosenbluth v. Finkelstein, 300 N.Y. 402, 404, 91 N.E.2d at 581); questions of "general interest, substantial public importance and likely to arise with frequency" (Matter of Gold v. Lomenzo, 29 N.Y.2d 468, 476, 329 N.Y.S.2d 805, 810, 280 N.E.2d 640, 643); "importance of the question involved, the possibility of recurrence, and the fact that orders of this nature quickly expire and thus typically evade review" (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 437, 423 N.Y.S.2d 630, 633, 399 N.E.2d 518, 521); "crystalizes a recurring and delicate issue of concrete significance" (Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 376, 401 N.Y.S.2d 756, 759, 372 N.E.2d 544, 547.)

2 In Gannett we stated that in determining the propriety of closure in a particular case the court "should of course afford interested members of the news media an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest" (43 N.Y.2d 370, 381, 401 N.Y.S.2d 756, 762, 372 N.E.2d 544, 550). That precatory language in Gannett was the foundation for the mandate of Leggett (supra, 48 N.Y.2d at p. 442, 423 N.Y.S.2d 630, 399 N.E.2d 518) which spelled out in as much detail as a common-law court may, the procedure to be followed by a trial court which is confronted with a request for closure of a criminal proceeding.

3 We also note that the appeal in Richmond Newspapers v. Virginia, 444 U.S. 896, 100 S.Ct. 204, 62 L.Ed.2d 132 is now pending before the Supreme Court.

4 (Cf. Cardozo, The Nature of the Judicial Process, p. 25: "This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seem to have behind them the power and pressure of the moving glacier.")

1 Hearings preliminary in nature (e. g., suppression) are sometimes permitted during trial. For purposes of present discussion they should be classed as preliminary, but as indicated in the text the difference is not determinative. What is determinative is the effect on individual rights of what will be revealed.

2 For Mr. Justice Jackson that such an instruction could overcome the prejudice involved was a "naive assumption" which "all practicing lawyers know to be unmitigated fiction" (Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (concurring opn); see, also, Bruton v. United States, 391 U.S. 123, 128-136, 88 S.Ct. 1620, 1624-1628, 20 L.Ed.2d 476; Jackson v. Denno, 378 U.S. 368, 388, 84 S.Ct. 1774, 1786, 12 L.Ed.2d 908; Kalven & Zeisel, American Jury, p. 128).

3 That effective news reporting is possible notwithstanding delay is clear from the New York Times' handling of the Franzese case

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(United States v. Franzese, 2 Cir., 392 F.2d 954, vacated in part and remanded sub nom. Giordano v. United States, 394 U.S. 310, 89 S.Ct. 1163, 22 L.Ed.2d 297). In that case the Times honored the Trial Judge's request and withheld until conclusion of the trial reporting on what occurred in the courtroom out of the presence of the jury. It then printed a roundup story concerning the trial, including the material earlier withheld (New York Times, March 4, 1967, p. 28, cols. 4-8).

4 Sequestration is the exception, but it involves a potential of jury resentment at being locked up for the duration of the trial which makes it likewise unacceptable as an alternative (cf. Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 444, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra).

5 (Estes v. Texas, 381 U.S. 532, 540, 85 S.Ct. 1628, 1631, 14 L.Ed.2d 543: "We have always held that the atmosphere essential to the preservation of a fair trial-the most fundamental of all freedoms-must be maintained at all costs.")

1 It should never be forgotten that the concept of a public trial has its genesis in concern for protection of the accused (see People v. Hinton, 31 N.Y.2d 71, 334 N.Y.S.2d 885, 286 N.E.2d 265; Gannett Co. v. De Pasquale, 443 U.S. 368, 406, 99 S.Ct. 2898, 2919, 61 L.Ed.2d 608 (Blackmun, J., concurring and dissenting)).

2 As the majority correctly notes, the mootness exception recognized in Gannett and Leggett applies in instances where an important issue is capable of recurring while evading review (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 436-437, 423 N.Y.S.2d 630, 399 N.E.2d 518, supra; Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 376, 401 N.Y.S.2d 756, 372 N.E.2d 544 supra; see Matter of Carr v. New York State Bd. of Elections, 40 N.Y.2d 556, 559, 388 N.Y.S.2d 87, 356 N.E.2d 713; see also, Matter of United Press Assns. v. Valente, 308 N.Y. 71, 76, 123 N.E.2d 777). Since Leggett presented an issue substantially similar to Gannett, the retention of jurisdiction in Leggett apparently represents a policy decision by the court to continue to apply the mootness exception in closure cases. Alternatively, the court may have viewed Leggett as presenting a novel question, even after Gannett. Under either rationale, the mootness exception applies here.

3 It is also difficult to understand how the majority can find this proceeding moot and yet effectively rule on the merits of the trial closure. By finding Westchester Rockland controlling, as discussed, the majority has held that a trial may constitutionally be closed, in instances not previously permitted.

4 The two are not the same but are separate and distinct and they do not mix or merge. A justifiable closure of the suppression hearing did not envelop the plea for by nature and law there was a cessation of the former before the initiation of the latter.

5 In People v. Hinton, 31 N.Y.2d 71, 334 N.Y.S.2d 885, 286 N.E.2d 265, supra), it was well stated at page 73, 334 N.Y.S.2d at page 887, 286 N.E.2d at page 266; "Public trials, of necessity, serve a twofold purpose. They safeguard an accused's right to be dealt with fairly and not to be unjustly condemned * * * and concomitantly serve to instill a sense of public trust in our judicial process by preventing the abuses of secret tribunals as exemplified by the Inquisition, Star Chamber and lettre de cachet * * *. Not only the defendant himself, but also the public at large has a vital stake in the concept of a public trial."

6 Even more troubling is the possibility of closure of a plenary trial where one defendant is to be tried separately from and before his codefendant.

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590 N.Y.S.2d 60
80 N.Y.2d 299, 604 N.E.2d 122
In the Matter of MICHAEL B., Catholic Child Care Society of Diocese of Brooklyn et al., Respondents; Marvin B., Appellant; Maggie W.L., Intervenor-Respondent.
Court of Appeals of New York.
Oct. 29, 1992.

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[80 N.Y.2d 300] [604 N.E.2d 124] Patterson, Belknap, Webb & Tyler, New York City (Stephen P. Younger, Eileen J. Shields and Ellen A. Rothschild, of [80 N.Y.2d 301] counsel), for appellant.

Lenore Gittis, New York City (Marcia Egger, of counsel), for respondent Law Guardian, for Michael B.

[80 N.Y.2d 302] Wallman & Wechsler, P.C., New York City (Lori Ehrlich, of counsel), for intervenor-respondent.

[80 N.Y.2d 303] O. Peter Sherwood, Corp. Counsel, New York City (Francis F. Caputo, Alan G. Krams and Stephen J. McGrath, of counsel), for Com'r of the New York City Dept. of Social Services, amicus curiae.

John C. Gray, Jr., Wanyong Lai Austin, James G. Newman, Martha Raimon, Florence Roberts and Jane Greengold Stevens, Brooklyn, and Martin Guggenheim and Madeleine Kurtz, New York City, for Brooklyn Legal Services Corp. B and another, amici curiae.

OPINION OF THE COURT

KAYE, Judge.

This appeal from a custody determination, pitting a child's foster parents against his biological father, centers on the meaning of the statutory term "best interest of the child," and particularly on the weight to be given a child's bonding with his long-time foster family in deciding what placement is in his best interest. The biological father (appellant) on one side, [80 N.Y.2d 304] and respondent foster parents (joined by respondent Law Guardian) on the other, each contend that a custody determination in their favor is in the best interest of the child, as that term is used in Social Services Law § 392(6), the statute governing dispositions with respect to children in foster care.

The subject of this protracted battle is Michael B., born July 29, 1985 with a positive toxicology for cocaine. Michael was voluntarily placed in foster care from the hospital by his mother, who was unmarried at the time of the birth and listed no father on the birth certificate. Michael's four siblings were then also in foster care, residing in different homes. At three months, before

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[604 N.E.2d 125] the identity of his father was known, Michael--needing extraordinary care--was placed in the home of intervenor Maggie W.L., a foster parent certified by respondent Catholic Child Care Society (the agency), and the child remained with the L.'s for more than five years, until December 1990. It is undisputed that the agency initially assured Mrs. L. this was a "preadoptive" placement.

Legal proceedings began in May 1987, after appellant had been identified as Michael's father. The agency sought to terminate the rights of both biological parents and free the child for adoption, alleging that for more than a year following Michael's placement the parents had failed to substantially, continuously or repeatedly maintain contact with Michael and plan for

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his future, although physically and financially able to do so (Social Services Law § 384-b[7]. Michael's mother (since deceased) never appeared in the proceeding, and a finding of permanent neglect as to her was made in November 1987. Appellant did appear and in September 1987 consented to a finding of permanent neglect, and to committing custody and guardianship to the agency on condition that the children be placed with their two godmothers. That order was later vacated, on appellant's application to withdraw his pleas and obtain custody, because the agency had not in fact placed the children with their godmothers. In late 1987, appellant--a long-time alcohol and substance abuser--entered an 18-month residential drug rehabilitation program and first began to visit Michael.

In August 1988, appellant, the agency and the Law Guardian agreed to reinstatement of the permanent neglect finding, with judgment suspended for 12 months, on condition that appellant: (1) enroll in a program teaching household management and parenting skills; (2) cooperate by attending and [80 N.Y.2d 305] complying with the program; (3) remain drug-free, and periodically submit to drug testing, with test results to be delivered to the agency; (4) secure and maintain employment; (5) obtain suitable housing; and (6) submit a plan for the children's care during his working day (see, Family Ct. Act § 631[b]; § 633). The order recited that it was without prejudice to the agency recalendaring the case for a de novo hearing on all allegations of the petition should appellant fail to satisfy the conditions, and otherwise said nothing more of the consequences that would follow on appellant's compliance or noncompliance.

As the 12-month period neared expiration, the agency sought a hearing to help "determine the status and placement of the children." Although appellant was unemployed (he was on public assistance) and had not submitted to drug testing during the year, Family Court at the hearing held October 24, 1989 was satisfied that "there seem[ed] to be substantial compliance" with the conditions of the suspended judgment. Because the August 1988 order was unclear as to who had responsibility for initiating the drug tests, the court directed that the agency arrange three successive blood and urine tests, and if the tests proved negative, "all subject children may be released to father except Jemel [a 'special needs' child]." The matter was adjourned to December 21, when it was joined with respondents' application for a dispositional order with respect to Michael, whose long residence with the L.'s, they said, raised special concerns.

On December 21, 1989, the Law Guardian presented a report indicating that Michael might suffer severe psychological damage if removed from his foster home, and argued for a "best interests" hearing pursuant to Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277, based on Michael's bonding with the L.'s and, by contrast, his lack of bonding with appellant, who had visited him infrequently. Family Court questioned whether it even had authority for such a hearing, but stayed the order directing Michael's discharge to appellant pending its determination. Michael's siblings, then approximately twelve, eight, seven and six years old, were released to appellant in January and July 1990. Litigation continued as to Michael.

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[604 N.E.2d 126] In November 1990, Family Court directed Michael's discharge to appellant, concluding that it was without "authority or jurisdiction" to rehear the issue of custody based on the child's best interest, and indeed that Michael had been wrongfully[80 N.Y.2d 306] held in foster care. The court noted, additionally, that the Law Guardian's arguments as to Michael's best interest went to issues of bonding with his temporary custodians rather than

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appellant's insufficiency as a parent--bonding that had been reinforced by the agency's failure to ensure sufficient contacts with appellant during the proceedings. Appellant "should not be denied custody simply because of the actions of the [agency] and the lengthy litigation following final disposition has resulted in the foster parents enjoying a stronger emotional tie to the child than the [appellant]." The court directed that Michael commence immediate weekend visitation with appellant, with a view to transfer within 60 days. Michael was discharged to appellant in December 1990.

The Appellate Division reversed and remitted for a new hearing and new consideration of Michael's custody, concluding that dismissal of a permanent neglect petition cannot divest Family Court of its continuing jurisdiction over a child until there has been a "best interests" custody disposition (171 A.D.2d 790, 567 N.Y.S.2d 511). As for the relevance of bonding, the Appellate Division held that, given the "extraordinary circumstances" (Matter of Bennett v. Jeffreys, 40 N.Y.2d, at 544, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra)--referring particularly to Michael's long residence with his foster parents--Family Court should have conducted a hearing to consider issues such as the impact on the child of a change in custody. There having been no question of appellant's fitness, however, the Appellate Division permitted Michael to remain with his father pending the new determination.

On remittal, Family Court heard extensive testimony--including testimony from appellant, the foster parents, the agency (having changed its goal to discharge to appellant), and psychological, psychiatric and social work professionals (who overwhelmingly favored continued foster care over discharge to appellant)--but adhered to its determination that Michael should be released to his father. Family Court found appellant "fit, available and capable of adequately providing for the health, safety and welfare of the subject child, and * * * it is in the child's best interest to be returned to his father."

Again the Appellate Division reversed Family Court's order, this time itself awarding custody to the foster parents under Social Services Law § 392(6)(b), and remitting the matter to a different Family Court Judge solely to determine appellant's visitation rights (180 A.D.2d 792, 580 N.Y.S.2d 430). Exercising its own authority--as broad as that of the hearing court--to assess the credibility[80 N.Y.2d 307] of witnesses and character and temperament of the parents, the court reviewed the evidence and, while pointing up appellant's many deficiencies, significantly stopped short of finding him an unfit parent, as it had the power to do. Rather, the court looked to Michael's lengthy stay and psychological bonding with the foster family, which it felt gave rise to extraordinary circumstances meriting an award of custody to the foster parents. According to the Appellate Division, the evidence "overwhelmingly demonstrate[d] that Michael's foster parents are better able than his natural father to provide for his physical, emotional, and intellectual needs." (180 A.D.2d, at 794, 580 N.Y.S.2d 430.) Since early 1992, Michael has once again resided with the L.'s.

While prolonged, inconclusive proceedings and seesawing custody of a young child--all in the name of Michael's best interest--could not conceivably serve his interest at all, we granted appellant father's motion for leave to appeal, and now reverse the Appellate Division's central holdings. The opinions of Family Court specifying deficiencies of the agency and foster parents, and the opinions of the Appellate Division specifying inadequacies of the biological parent, leave little question that the only blameless person is the child. But rather than assess fault, our review will address the legal

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standards that have twice divided Family Court and the Appellate

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[604 N.E.2d 127] Division, hopefully minimizing recurrences, for this child and others, of the tragic scenario now before us.

Analysis

Appellant no longer disputes that Family Court retained jurisdiction to consider the child's best interest in connection with an award of custody even after the finding that he had substantially satisfied the conditions of the suspended judgment. All parties agree with the correctness of the Appellate Division determination that, despite appellant's apparent compliance with the conditions of the suspended judgment, Family Court retained jurisdiction to consider the best interest of the children in foster care until a final order of disposition (171 A.D.2d, at 791, 567 N.Y.S.2d 511; Social Services Law § 392[6], [9]; Matter of Sheila G., 61 N.Y.2d 368, 389, 474 N.Y.S.2d 421, 462 N.E.2d 1139). [1]

What remains the bone of contention in this Court is the [80 N.Y.2d 308] scope of the requisite "best interest" inquiry under Social Services Law § 392(6). Appellant urges that in cases of foster care, so long as the biological parent is not found unfit--and he underscores that neither Family Court nor the Appellate Division found him unfit--"best interest of the child" is only a limited inquiry addressed to whether the child will suffer grievous injury if transferred out of foster care to the biological parent. Respondents, by contrast, maintain that extraordinary circumstances--such as significant bonding with foster parents, after inattention and even admitted neglect by the biological parent--trigger a full inquiry into the more suitable placement as between the biological and foster parents. Subsidiarily, appellant challenges the Appellate Division's outright award of custody to the foster parents, claiming that disposition was beyond the Court's authority under Social Services Law § 392(6).

We conclude, first, that neither party advances the correct "best interest" test in the context of temporary foster care placements, but that appellant's view is more consistent with the statutory scheme than the broad-gauge inquiry advocated by respondents and applied by the Appellate Division. Second, we hold that the award of custody to the foster parents was impermissible as we interpret Social Services Law § 392(6).

The Foster Care Scheme

This being a case of voluntary placement in foster care--a subject controlled by statute--analysis must begin with the legislative scheme, which defines and balances the parties' rights and responsibilities. An understanding of how the system is designed to operate--before the design is complicated, and even subverted, by human actors and practical realities--is essential to resolving the questions before us.

New York's foster care scheme is built around several fundamental social policy choices that have been explicitly declared by the Legislature and are binding on this Court (Social Services Law § 384-b[1]. Under the statute, operating as written, appellant should have received the active support of both the agency in overcoming his parental deficiencies and the foster parents in solidifying his relationship with Michael, [80 N.Y.2d 309] and as soon as return to the biological parent proved unrealistic, the child should have been freed for adoption.

A biological parent has a right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood, even though the State perhaps could find "better" parents (Social Services Law § 384-b[1][a][ii]; Matter

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of Male Infant L., 61 N.Y.2d 420, 426, 474 N.Y.S.2d 447, 462 N.E.2d 1165; Matter of Sanjivini K., 47

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[604 N.E.2d 128] N.Y.2d 374, 382, 418 N.Y.S.2d 339, 391 N.E.2d 1316; Matter of Corey L. v. Martin L., 45 N.Y.2d 383, 391, 408 N.Y.S.2d 439, 380 N.E.2d 266. A child is not the parent's property, but neither is a child the property of the State; Matter of Sanjivini K., 47 N.Y.2d at 382, 418 N.Y.S.2d 339, 391 N.E.2d 1316, supra [citing Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070; and Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551]. Looking to the child's rights as well as the parents' rights to bring up their own children, the Legislature has found and declared that a child's need to grow up with a "normal family life in a permanent home" is ordinarily best met in the child's "natural home" (Social Services Law § 384-b[1][a][i], [ii].

Parents in temporary crisis are encouraged to voluntarily place their children in foster care without fear that they will thereby forfeit their parental rights (Social Services Law § 384-a; Matter of Mehl, 114 Misc.2d 55, 60, 450 N.Y.S.2d 703). The State's first obligation is to help the family with services to prevent its break-up, or to reunite the family if the child is out of the home (Social Services Law § 384-b[1][a][iii]; Santosky v. Kramer, 455 U.S. 745, 748, 102 S.Ct. 1388, 1392, 71 L.Ed.2d 599). While a child is in foster care, the State must use diligent efforts to strengthen the relationship between parent and child, and work with the parent to regain custody (Social Services Law § 384-a[2][c][iv]; Matter of Sheila G., 61 N.Y.2d, at 385, 474 N.Y.S.2d 421, 462 N.E.2d 1139, supra).

Because of the statutory emphasis on the biological family as best serving a child's long-range needs, the legal rights of foster parents are necessarily limited (see, Smith v. Organization of Foster Families, 431 U.S. 816, 846, 97 S.Ct. 2094, 2110, 53 L.Ed.2d 14). Legal custody of a child in foster care remains with the agency that places the child, not with the foster parents (Social Services Law § 383[2]. Foster parents enter into this arrangement with the express understanding that the placement is temporary, and that the agency retains the right to remove the child upon notice at any time (People ex rel. Ninesling v. Nassau County Dept. of Social Servs., 46 N.Y.2d 382, 387, 413 N.Y.S.2d 626, 386 N.E.2d 235, rearg. denied, 46 N.Y.2d 836, 414 N.Y.S.2d 1055, 386 N.E.2d 1105). As made clear in Matter of Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 324 N.Y.S.2d 937, 274 N.E.2d 431, "foster care custodians must [80 N.Y.2d 310] deliver on demand not 16 out of 17 times, but every time, or the usefulness of foster care assignments is destroyed. To the ordinary fears in placing a child in foster care should not be added the concern that the better the foster care custodians the greater the risk that they will assert, out of love and affection grown too deep, an inchoate right to adopt." (Id., at 205, 324 N.Y.S.2d 937, 274 N.E.2d 431.) Foster parents, moreover, have an affirmative obligation--similar to the obligation of the State--to attempt to solidify the relationship between biological parent and child. While foster parents may be heard on custody issues (see, Social Services Law § 383[3], they have no standing to seek permanent custody absent termination of parental rights (see, Matter of Rivers v. Womack, 178 A.D.2d 532, 577 N.Y.S.2d 322).

Fundamental also to the statutory scheme is the preference for providing children with stable, permanent homes as early as possible (see, Matter of Peter L., 59 N.Y.2d 513, 519, 466 N.Y.S.2d 251, 453 N.E.2d 480). "[W]hen it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought" (Social

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Services Law § 384-b[1][a][iv]. Extended foster care is not in the child's best interest, because it deprives a child of a permanent, nurturing family relationship (see, Matter of Gregory B., 74 N.Y.2d 77, 90, 544 N.Y.S.2d 535, 542 N.E.2d 1052, rearg. denied sub nom. Matter of Willie John B., 74 N.Y.2d 880, 547 N.Y.S.2d 841, 547 N.E.2d 96; Matter of Joyce T., 65 N.Y.2d 39, 47-48, 489 N.Y.S.2d 705, 478 N.E.2d 1306). Where it appears that the child may

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[604 N.E.2d 129] never be reunited with the biological parents, the responsible agency should institute a proceeding to terminate parental rights and free the child for adoption (Social Services Law § 384-b[1][b]; [3][b]; § 392[6][c].

Parental rights may be terminated only upon clear and convincing proof of abandonment, inability to care for the child due to mental illness or retardation, permanent neglect, or severe or repeated child abuse (Social Services Law § 384-b[3][g]; [4]. [2] Of the permissible dispositions in a termination [80 N.Y.2d 311] proceeding based on permanent neglect (see, Family Ct. Act § 631), the Legislature--consistent with its emphasis on the importance of biological ties, yet mindful of the child's need for early stability and permanence--has provided for a suspended judgment, which is a brief grace period designed to prepare the parent to be reunited with the child (Family Ct. Act § 633). Parents found to have permanently neglected a child may be given a second chance, where the court determines it is in the child's best interests (Family Ct. Act § 631), but that opportunity is strictly limited in time. Parents may have up to one year (and a second year only where there are "exceptional circumstances") during which they must comply with terms and conditions meant to ameliorate the difficulty (see, 22 NYCRR 205.50 [spelling out terms and conditions]. Noncompliance may lead to revocation of the judgment and termination of parental rights. Compliance may lead to dismissal of the termination petition with the child remaining subject to the jurisdiction of the Family Court until a determination is made as to the child's disposition pursuant to Social Services Law § 392(6) (see, Matter of Sheila G., 61 N.Y.2d, at 390, 474 N.Y.S.2d 421, 462 N.E.2d 1139, supra).

Where parental rights have not been terminated, Social Services Law § 392 promotes the objectives of stability and permanency by requiring periodic review of foster care placements. The agency having custody must first petition for review after a child has been in continuous foster care for 18 months (Social Services Law § 392[2], and if no change is made, every 24 months thereafter (Social Services Law § 392[9]. While foster parents who have been caring for such child for the prior 12 months are entitled to notice (Social Services Law § 392[4], and may also petition for review on their own initiative (Social Services Law § 392[2], a petition under section 392 (captioned "Foster care status; periodic family court review") is not an avenue to permanent custody for foster parents where the child has not been freed for adoption.

Upon such review, the court must consider the appropriateness of the agency's plan for the child, what services have been offered to strengthen and reunite the family, efforts to plan for other modes of care, and other further efforts to promote the child's welfare (see, Social Services Law § 392[5-a], and in accordance with the best interest of the child, make one of the following dispositions: (1) continue the child in foster care (which may include continuation with the current foster parents) (Social Services Law § 392[6][a]; (2) direct [80 N.Y.2d 312] that the child "be returned to the parent, guardian or relative, or [direct] that the child be placed in the custody of a relative or other suitable person or persons" (Social Services Law § 392[6][b]; or (3) require the agency (or foster

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parents upon the agency's default) to institute a parental rights termination proceeding (Social Services Law § 392[6][c].

The key element in the court's disposition is the best interest of the child (Social

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[604 N.E.2d 130] Services Law § 392[6]--the statutory term that is at the core of this appeal, and to which we now turn.

"Best Interest" in the Foster Care Scheme

"Best interest(s) of the child" is a term that pervades the law relating to children--appearing innumerable times in the pertinent statutes, judicial decisions and literature--yet eludes ready definition. Two interpretations are advanced, each vigorously advocated.

Appellant would read the best interest standard of Social Services Law § 392(6) narrowly, urging that Family Court should inquire only into whether the biological parent is fit, and whether the child will suffer grievous harm by being returned to the parent. Appellant urges affirmance of the Family Court orders, which (1) defined the contest as one between foster care agency and biological parent, rather than foster parent and biological parent; (2) focused first on "the ability of the father to care for the subject child," and then on whether "the child's emotional health will be so seriously impaired as to require continuance in foster care;" and (3) concluded that appellant was fit, and that Michael would not suffer irreparable emotional harm if returned to him. Wider inquiry, appellant insists, creates an "unwinnable beauty contest" the biological parent will inevitably lose where foster placement has continued for any substantial time.

Respondents take a broader view, urging that because of extraordinary circumstances largely attributable to appellant, the Appellate Division correctly compared him with the foster parents in determining Michael's custody and concluded that the child's best interest was served by the placement that better provided for his physical, emotional and intellectual needs. Respondents rely on Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra, this Court's landmark decision recognizing that a child's prolonged separation from a biological parent may be considered, among other factors, to be extraordinary [80 N.Y.2d 313] circumstances permitting the court to inquire into which family situation would be in the child's best interests (id., at 548, 551, 387 N.Y.S.2d 821, 356 N.E.2d 277).

In that Matter of Bennett v. Jeffreys concerned an unsupervised private placement, where there was no directly applicable legislation, that case is immediately distinguishable from the matter before us, which is controlled by a detailed statutory scheme (Matter of Bennett v. Jeffreys, 40 N.Y.2d, at 545, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra). Our analysis must begin at a different point--not whether there are extraordinary circumstances, but what the Legislature intended by the words "best interest of the child" in Social Services Law § 392(6).

Necessarily, we look first to the statute itself. The question is in part answered by Social Services Law §§ 383 and 384-b, which encourage voluntary placements, with the provision that they will not result in the termination of parental rights so long as the parent is fit. To use the period during which a child lives with a foster family, and emotional ties that naturally eventuate, as a ground for comparing the biological parent with the foster parent undermines the very objective of voluntary foster care as a resource for parents in temporary crisis, who are then at risk of losing their children once a bond arises with the foster families.

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Other portions of the statute support this conclusion. Significantly, after an adjudication of permanent neglect, the statute directs the disposition to be made "solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular disposition" (Family Ct. Act § 631 [emphasis added]; Matter of Star Leslie W., 63 NY2d 136, 147-148). As against this provision, Social Services Law § 392(6) states only that a disposition should be made "in accordance with the best interest of the child."

Absent an explicit legislative directive--such as that found in Family Court Act § 631--we are not free to overlook the legislative policies that underlie temporary

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[604 N.E.2d 131] foster care, including the preeminence of the biological family. Indeed, the legislative history of Social Services Law § 392(5-a), which specifies factors that must be considered in determining the child's best interests, states "this bill clearly advises the Family Court of certain considerations before making an order of disposition. These factors establish a clear policy of exploring all available means of reuniting the child with his family [80 N.Y.2d 314] before the Court decides to continue his foster care or to direct a permanent adoptive placement." (Mem. Accompanying Comments on Bill, N.Y. State Bd. of Social Welfare, A 12801-B, July 9, 1976, Governor's Bill Jacket, L.1976, ch. 667.)

We therefore cannot endorse a pure "best interests" hearing, where biological parent and foster parents stand on equal footing and the child's interest is the sole consideration (see, Matter of Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d, at 204, 324 N.Y.S.2d 937, 274 N.E.2d 431, supra; People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 469, 113 N.E.2d 801). In cases controlled by Social Services Law § 392(6), analysis of the child's "best interest" must begin not by measuring biological parent against foster parent but by weighing past and continued foster care against discharge to the biological parent, or other relative or suitable person within Social Services Law § 392(6)(b) (see, Matter of Sheila G., 61 N.Y.2d, at 389-390, 474 N.Y.S.2d 421, 462 N.E.2d 1139, supra; see also, Mem. Accompanying Comments on Bills, N.Y. State Dept. of Social Servs., A Int 12801-B, July 14, 1976, Governor's Bill Jacket, L.1976, ch. 667).

While the facts of Matter of Bennett v. Jeffreys fell outside the statute, and the Court was unrestrained by legislative prescription in defining the scope of the "best interests" inquiry, principles underlying that decision are also relevant here. It is plainly the case, for example, that a "child may be so long in the custody of the nonparent that, even though there has been no abandonment or persisting neglect by the parent, the psychological trauma of removal is grave enough to threaten destruction of the child" (id., 40 N.Y.2d at 550, 387 N.Y.S.2d 821, 356 N.E.2d 277), and we cannot discount evidence that a child may have bonded with someone other than the biological parent. In such a case, continued foster care may be appropriate although the parent has not been found unfit.

Under Social Services Law § 392, where a child has not been freed for adoption, the court must determine whether it is nonetheless appropriate to continue foster care temporarily, or whether the child should be permanently discharged to the biological parent (or a relative or "other suitable person"). In determining the best interest of a child in that situation, the fitness of the biological parent must be a primary factor. The court is also statutorily mandated to consider the agency's plan for the child, what services have been offered to strengthen and reunite the family, what reasonable efforts have been made to make it possible for the child to return to the natural home, and if return home is not likely, what [80 N.Y.2d

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315] efforts have been or should be made to evaluate other options (Social Services Law § 392[5-a]. Finally, the court should consider the more intangible elements relating to the emotional well-being of the child, among them the impact on the child of immediate discharge versus an additional period of foster care.

While it is doubtful whether it could be found to be in the child's best interest to deny the parent's persistent demands for custody simply because it took so long to obtain it legally (Matter of Sanjivini K., 47 N.Y.2d, at 382, 418 N.Y.S.2d 339, 391 N.E.2d 1316, supra), neither is a lapse of time necessarily without significance in determining custody. The child's emotional well-being must be part of the equation, parental rights notwithstanding (Matter of Sheila G., 61 N.Y.2d, at 390, 474 N.Y.S.2d 421, 462 N.E.2d 1139, supra). However, while emotional well-being may encompass bonding to someone other than the biological parent, it includes as well a recognition that, absent termination of parental rights, the nonparent cannot adopt the child, and a child in continued custody

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[604 N.E.2d 132] with a nonparent remains in legal--and often emotional--limbo (see, Matter of Bennett v. Jeffreys, 40 N.Y.2d, at 551, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra). [3]

The Appellate Division, applying an erroneous "best interest" test, seemingly avoided that result when it awarded legal custody to the foster parents. We next turn to why that disposition was improper.

[80 N.Y.2d 316] Award of Legal Custody to Foster Parents

The Appellate Division awarded legal custody of Michael to the foster parents pursuant to Social Services Law § 392(6)(b), noting that the statute "permits a court to enter an order of disposition directing, inter alia, that a child, whose custody and care have temporarily been transferred to an authorized agency, be placed in the custody of a suitable person or persons." (180 A.D.2d, at 796, 580 N.Y.S.2d 430.) The Court correctly looked to section 392 as the predicate for determining custody, but erroneously relied on paragraph (b) of subdivision (6) in awarding custody to the foster parents.

As set forth above, there are three possible dispositions after foster care review with respect to a child not freed for adoption: continued foster care; release to a parent, guardian, relative or other suitable person; and institution of parental termination proceedings (Social Services Law § 392[6][a]-[c].

As the first dispositional option, paragraph (a) contemplates the continuation of foster care, with the child remaining in the custody of the authorized agency, and the arrangement remaining subject to periodic review. As a result of 1989 amendments, disposition under paragraph (a) can include an order that the child be placed with (or remain with) a particular foster family until the next review (L.1989, ch. 744). Under the statutory scheme, however, foster care is temporary, contractual and supervised.

Paragraph (b), by contrast, contemplates removal of the child from the foster care system by return to "the parent, guardian or relative, or direct[ion] that the child be placed in the custody of a relative or other suitable person or persons." The 1989 statutory revision added as a permissible disposition the placement of children with relatives or other suitable persons. The purpose of this amendment was to promote family stability by allowing placement with relatives, extended family members or persons like them, as an alternative to foster care (see, Sponsor's Mem. in Support of Amended Bill, L.1989, ch. 744, and 10 Day Bill Budget Report, A 7216-A, Governor's Bill Jacket; see

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also, Matter of Peter L., 59 N.Y.2d, at 519, 466 N.Y.S.2d 251, 453 N.E.2d 480, supra).

Plainly, the scheme does not envision also including the foster parents--who were the subject of the amendment to paragraph (a)--as "other suitable persons." Indeed, reading paragraph (b) as the Appellate Division did, to permit removal of the

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[604 N.E.2d 133] child from foster care and an award of legal custody to [80 N.Y.2d 317] the foster parents, exacerbates the legal limbo status. The child is left without a placement looking to the establishment of a permanent parental relationship through adoption, or the prospect of subsequent review of foster care status with the possibility of adoption placement at that time (see, Social Services Law § 384-b[4]; Matter of Peter L., 59 N.Y.2d, at 519, 466 N.Y.S.2d 251, 453 N.E.2d 480, supra), yet has no realistic chance of return to the biological parent.

The terms of paragraph (c), providing for an order that the agency institute a parental termination proceeding, further buttress the conclusion that foster parents are not included in paragraph (b). Pursuant to paragraph (c), if the court finds reasonable cause to believe there are grounds for termination of parental rights, it may order the responsible agency to institute such proceedings. If the agency fails to do so within 90 days, the foster parents themselves may bring the proceeding, unless the court believes their subsequent petition to adopt would not be approved. Thus, in the statutory scheme the Legislature has provided a means for foster parents to secure a temporary arrangement under paragraph (a) and a permanent arrangement under paragraph (c)--both of which specifically mention foster parents. They are not also implicitly included in paragraph (b), which addresses different interests.

We therefore conclude that the Appellate Division erred in interpreting Social Services Law § 392(6) to permit the award of legal custody to respondent foster parents.

Need for Further Inquiry

We have no occasion to apply the proper legal test to the facts at hand, as the parties urge. New circumstances require remittal to Family Court for an expedited hearing and determination of whether appellant is a fit parent and entitled to custody of Michael.

The Court has been informed that, during the pendency of the appeal, appellant was charged with--and admitted--neglect of the children in his custody (not Michael), and that those children have been removed from his home and are again in the custody of the Commissioner of the Social Services. The neglect petitions allege that appellant abused alcohol and controlled substances including cocaine, and physically abused the children. Orders of fact finding have been entered by Family Court, Queens County, recognizing appellant's[80 N.Y.2d 318] admission in open court to "substance abuse, alcohol and cocaine abuse." Moreover, an Order of Protection was entered prohibiting appellant from visiting the children while under the influence of drugs or alcohol.

Appellant's request that we ignore these new developments and simply grant him custody, because matters outside the record cannot be considered by an appellate court, would exalt the procedural rule--important though it is--to a point of absurdity, and "reflect no credit on the judicial process." (Cohen and Karger, Powers of the New York Court of Appeals § 168, at 640.) Indeed, changed circumstances may have particular significance in child custody matters (see, e.g., Braiman v. Braiman, 44 N.Y.2d 584, 587, 590, 407 N.Y.S.2d 449, 378 N.E.2d 1019; Matter of Angela D., 175 A.D.2d 244, 245, 572 N.Y.S.2d 710; Matter of Kelly Ann M., 40 A.D.2d 546, 334 N.Y.S.2d 204). This Court

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would therefore take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining appellant's fitness and right to custody of Michael, and remit the matter to Family Court for a new hearing and determination of those issues. The Appellate Division concluded that the hearing should take place before a different Judge of that court (180 A.D.2d, at 796, 580 N.Y.S.2d 430), and we see no basis to disturb that determination. Pending the hearing, Michael should physically remain with his current foster parents, but legal custody should be returned to the foster care agency.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the matter remitted to Family Court,

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[604 N.E.2d 134] Kings County, for further proceedings in accordance with this opinion.

BELLACOSA, Judge (concurring).

I agree with Judge Kaye's opinion for the Court that Social Services Law § 392(6)(b) cannot be used to award permanent custody to foster parents within that statute's intended operation and integrated structure. I concur in the reversal result in this case solely for that reason, noting additionally that a contrary interpretation of that key provision, as used by the Appellate Division, would have internally contradictory implications in the field of temporary foster child placement. While I prefer an affirmance result because that might more likely conclude the litigation and allow Michael B., the 7 1/2-year-old subject of this custody battle, to get on with his life in a more settled and constructive way, I can discern no principled route to that desirable result without sacrificing the correct application of legal principles[80 N.Y.2d 319] and engendering fundamentally troublesome precedential consequences.

This separate concurrence is necessary to express my difference of degree and analytical progression with respect to the best interests analysis and test, as adopted by the Court, for purposes of the remittal of this case and as the controlling guidance for countless other proceedings in the future. I would not relegate Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 essentially to general relevance only, would not limit the beginning of the analysis to the statutory setting, and would allow for appropriate flexibility as to the range and manner of exercising discretion in the application of the best interests test by the Family Courts and Appellate Divisions.

I believe courts, in the fulfillment of the parens patriae responsibility of the State, should, as a general operating principle, have an appropriately broad range of power to act in the best interests of children. We agree that the teachings of Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra are still excellent and have served the process and the affected subjects and combatants in custody disputes very well. While the common-law origination in Bennett is a distinguishing feature from the instant case, I do not view that aspect as subordinated to or secondary in the use of its wisdom, even in a predominantly statutory setting, where this case originates. I am not persuaded that there is any support or positive authority for the view that the Legislature meant anything different when it adopted the phrase "best interest of the child" in Social Services Law § 392(6) from the meaning of that phrase articulated in Matter of Bennett v. Jeffreys, supra. Courts must exercise common-law authority in all these circumstances, and the Legislature has not, as far as I can tell, displaced that uniquely judicial function and plenary role. Since the best of Matter of Bennett v. Jeffreys' best interest analysis enjoys continued vitality therefore, it should serve as a cogent, coequal common-law building block. In my view, it provides helpful understanding for and

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intertwined supplementation to the Social Services Law provisions as applied in these extraordinary circumstances, defined in one aspect of Matter of Bennett v. Jeffreys as "prolonged separation" of parent and child "for most of the child's life" (40 N.Y.2d, at 544, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra). The child in that case was eight years of age and none of the other serious and disquieting features of this case were apparent there.

[80 N.Y.2d 320] The nuances, complexity and variations of human situations make the development and application of the general axiom--best interests of the child--exceedingly difficult. As a matter of degree and perspective, however, the Court's test is concededly more limiting than Matter of Bennett v. Jeffreys, supra, and therefore I believe it is more narrow than it should be in this case since I discern no compelling authority for the narrower approach. This 7 1/2-year-old child, born of a long since deceased crack-cocaine mother, has yet to be permanently placed and has suffered a continuing, lengthy, bad trip through the maze of New York's legal system. His father has an extended history of significant

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[604 N.E.2d 135] substance addiction and other problems, and the child has spent much of his 7 1/2 years with the same foster parents. These graphic circumstances surely present an exceptionally extraordinary and compelling case requiring significant flexibility by the courts in resolving his best interests (see, Matter of Bennett v. Jeffreys, supra). On this aspect of the case, therefore, I agree with the Appellate Division in its two decisions in this case, at least with respect to its best interests analysis and handling of this difficult case. On March 18, 1991, it said:

"In view of the extraordinary circumstances present in this case, the Family Court should have conducted a hearing to consider, among other things, the impact that a change of custody will have on the child in view of the bonding which has occurred between Michael and his foster parents, who have raised him since infancy. It is, therefore, necessary to remit this matter for a hearing and a custody determination to be made in accordance with Michael's best interests (see, Matter of Sheila G., supra; Matter of Bennett v. Jeffreys, 40 NY2d 543, 550 [387 N.Y.S.2d 821, 356 N.E.2d 277]; Matter of Jonathan D., 62 AD2d 947 [403 N.Y.S.2d 750]." (171 A.D.2d 790, 791, 567 N.Y.S.2d 511.)

After the proper, broad, "pure" Matter of Bennett v. Jeffreys-type best interests hearing was held in Family Court, the Appellate Division on February 24, 1992 added in the order now before us:

"In light of the lengthy period of time during which Michael resided with and psychologically bonded to his foster parents and given the potential for emotional as well as physical harm to [80 N.Y.2d 321] Michael should permanent custody be awarded to his natural father, we find that the requisite extraordinary circumstances are present (see, Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 545 [387 N.Y.S.2d 821, 356 N.E.2d 277], and conclude that the best interests of this child will be served by allowing him to return to his foster parents. "In view of the testimony presented during the best interests hearing, this court concludes that Michael's natural father is incapable of giving him the emotional support so vital to his well-being (see, Matter of Bennett v. Marrow, 59 A.D.2d 492 [399 N.Y.S.2d 697]. The testimony presented by Dr. Sullivan and Mr. Falco indicated that an emotional void still existed between Michael and his father despite the eight to nine months during which they resided together prior to the best interests hearing and that this void showed no signs of being bridged." (180 A.D.2d 792, 795-796, 580 N.Y.S.2d 430.)

In sum, I cannot agree that the important and pervasive legal axiom "best interests of

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the child" is or was meant to be as constricted as it is in the Court's application to this case. The governing phrase and test even in this statutory scheme ought to be as all-encompassing as in Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277, supra, despite the difference in the procedural origin and setting of the two cases. The approach I urge, not unlike that of the Appellate Division in this respect, better serves the objectives of finality and certainty in these matters, more realistically takes into account the widely varying human conditions, and allows the Family Courts to achieve more uniformity and evenness of application of the rules. That is a better way to promote the best interests of this youngster with reasonable finality and the best interests of all others affected by the operation of these rules.

WACHTLER, C.J., and SIMONS, TITONE and HANCOCK, JJ., concur with KAYE, J.

BELLACOSA, J., concurs in result in a separate opinion.

SMITH, J., taking no part.

Order reversed, etc.

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1 What is before us is an appeal from foster care review under Social Services Law § 392. While there should have been an order disposing of the suspended judgment upon its expiration (see, 22 NYCRR 205.50[d][4], in this case appellant's "substantial compliance" with the conditions of the suspended judgment necessarily resolved the permanent neglect issue, since Family Court concluded the hearing by directing release of children to appellant after three negative drug tests.

2 Several model statutes would authorize termination of parental rights based on a child's absence from the biological home for a substantial period, with the period depending on the child's age. Such provisions were based on the notion, in circulation prior to and during the formulation of our current parental termination statute, that once a child under the age of three has been in the continuous care of the same adult for a year, it is unreasonable to presume that the child's ties with biological parents are more significant than ties with long-term caretakers (see, Taub, Assessing the Impact of Goldstein, Freud and Solnit's Proposals: An Introductory Overview, 12 NYU Rev.L. & Soc.Change 485, 490). Our Legislature did not recognize prolonged separation as an additional ground for termination of parental rights.

3 Although the concurrence underscores the extraordinary nature of this case, widely publicized failures of the foster care system indicate that this situation is, regrettably, all too common. To the extent the courts have a role, heartbreak can perhaps be avoided and the statutory goals of early permanence and stability advanced by clear standards and by promptness in addressing child custody matters; no custody determination should be permitted to languish for years. The clear (by no means "constricting") standard set forth by the Court, incorporating all of the relevant considerations, helps to assure that these unfortunate cases will not be caught in an endless loop between trial and appellate courts such as we have here.

The concurrence agrees that this case must be reversed on the section 392(6)(b) ground because "a contrary interpretation of that key provision, as used by the Appellate Division, would have internally contradictory implications in the field of temporary foster child placement." (Concurring opn. at 318, at 72 of 590 N.Y.S.2d, at 134 of 604 N.E.2d). The same is true of the "best interest" test in that same section, which must be read in the context of our statutory scheme requiring parents and the State to work together toward the preferred goal (so long as it remains realistic) of keeping biological families together. Given that foster parents cannot

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obtain permanent custody under Social Services Law § 392(6) absent termination of parental rights, the concurrence's call for even greater "flexibility," comparing foster parent to biological parent (see, Matter of Bennett v. Jeffreys, supra), obviously could not further the objectives of finality and certainty in custody determinations.

NYSBA PARTNERSHIP CONFERENCE

Albany, NY, September 15, 2016
Protecting your client's appellate rights
in Family Court and other appeals

Cynthia Feathers, Esq., Rural Law Center of NY (RLC)
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SELECTED STATUTES

CPLR 2002. Error in ruling of court
An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced.

CPLR 4017. Objections
Formal exceptions to rulings of the court are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court. Failure to so make known objections, as prescribed in this section or in section 4110-b, may restrict review upon appeal in accordance with paragraphs three and four of subdivision (a) of section 5501.

CPLR 5501. Scope of review
(a) Generally, from final judgment. An appeal from a final judgment brings up for review:
1. any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken;
2. any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken;
3. any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected;
4. any remark made by the judge to which the appellant objected; and
5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.
(b) Court of appeals. The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered. On an appeal pursuant to subdivision (d) of section fifty-six hundred one, or subparagraph (ii) of paragraph one of subdivision (a) of section fifty-six hundred two, or subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the non-final determination of the appellate division shall be reviewed.

(c) Appellate division. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. The notice of appeal from an order directing summary judgment, or directing judgment on a motion addressed to the pleadings, shall be deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal, without however affecting the taxation of costs upon the appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.
(d) Appellate term. The appellate term shall review questions of law and questions of fact

CPLR 5015. Relief from judgment or order

(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or
3. fraud, misrepresentation, or other misconduct of an adverse party; or
4. lack of jurisdiction to render the judgment or order; or
5. reversal, modification or vacatur of a prior judgment or order upon which it is based.

(b) On stipulation. The clerk of the court may vacate a default judgment entered pursuant to section 3215 upon the filing with him of a stipulation of consent to such vacatur by the parties personally or by their attorneys.

(c) On application of an administrative judge. An administrative judge, upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities or where such default judgments were obtained in cases in which those defendants would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses, and where such default judgments have been obtained in a number deemed sufficient by him to justify such action as set forth herein, and upon appropriate notice to counsel for the respective parties, or to the parties themselves, may bring a proceeding to relieve a party or parties from them upon such terms as may be just. The disposition of any proceeding so instituted shall be determined by a judge other than the administrative judge.

(d) Restitution. Where a judgment or order is set aside or vacated, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal.

CPLR 5511. Permissible appellant and respondent
An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party. He shall be designated as the appellant and the adverse party as the respondent.

CPLR 5513. Time to take appeal, cross-appeal or move for permission to appeal
(a) Time to take appeal as of right. An appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.
(b) Time to move for permission to appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party seeking permission to appeal has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.
(c) Additional time where adverse party takes appeal or moves for permission to appeal. A party upon whom the adverse party has served a notice of appeal or motion papers on a motion for permission to appeal may take an appeal or make a motion for permission to appeal within ten days after such service or within the time limited by subdivision (a) or (b) of this section, whichever is longer, if such appeal or motion is otherwise available to such party.
(d) Additional time where service of judgment or order and notice of entry is served by mail or overnight delivery service. Where service of the judgment or order to be appealed from and written notice of its entry is made by mail pursuant to paragraph two of subdivision (b) of rule twenty-one hundred three or by overnight delivery service pursuant to paragraph six of subdivision (b) of rule twenty-one hundred three of this chapter, the additional days provided by such paragraphs shall apply to this action, regardless of which party serves the judgment or order with notice of entry.

CPLR 5515. Taking an appeal; notice of appeal
1. An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered except that where an order granting permission to appeal is made, the appeal is taken when such order is entered. A notice shall designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken.
2. Whenever an appeal is taken to the court of appeals, a copy of the notice of appeal shall be sent forthwith to the clerk of the court of appeals by the clerk of the office where the notice of appeal is required to be filed pursuant to this section.
3. Where leave to appeal to the court of appeals is granted by permission of the appellate division, a copy of the order granting such permission to appeal shall be sent forthwith to the clerk of the court of appeals by the clerk of the appellate division

CPLR 5519. Stay of enforcement

(a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

1. the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state; provided that where a court, after considering an issue specified in question four of section seventy-eight hundred three of this chapter, issues a judgment or order directing reinstatement of a license held by a corporation with no more than five stockholders and which employs no more than ten employees, a partnership with no more than five partners and which employs no more than ten employees, a proprietorship or a natural person, the stay provided for by this paragraph shall be for a period of fifteen days; or

2. the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed; or

3. the judgment or order directs the payment of a sum of money, to be paid in fixed installments, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party shall pay each installment which becomes due pending the appeal and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay any installments or part of installments then due or the part of them as to which the judgment or order is affirmed; or

4. the judgment or order directs the assignment or delivery of personal property, and the property is placed in the custody of an officer designated by the court of original instance to abide the direction of the court to which the appeal is taken, or an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will obey the direction of the court to which the appeal is taken; or

5. the judgment or order directs the execution of any instrument, and the instrument is executed and deposited in the office where the original judgment or order is entered to abide the direction of the court to which the appeal is taken; or

6. the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency; or

7. the judgment or order directs the performance of two or more of the acts specified in subparagraphs two through six and the appellant or moving party complies with each applicable subparagraph.

(b) Stay in action defended by insurer. If an appeal is taken from a judgment or order entered against an insured in an action which is defended by an insurance corporation, or other insurer, on behalf of the insured under a policy of insurance the limit of liability of which is less than the

amount of said judgment or order, all proceedings to enforce the judgment or order to the extent of the policy coverage shall be stayed pending the appeal, and no action shall be commenced or maintained against the insurer for payment under the policy pending the appeal, where the insurer:
1. files with the clerk of the court in which the judgment or order was entered a sworn statement of one of its officers, describing the nature of the policy and the amount of coverage together with a written undertaking that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the insurer shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed, to the extent of the limit of liability in the policy, plus interest and costs;
2. serves a copy of such sworn statement and undertaking upon the judgment creditor or his attorney; and
3. delivers or mails to the insured at the latest address of the insured appearing upon the records of the insurer, written notice that the enforcement of such judgment or order, to the extent that the amount it directs to be paid exceeds the limit of liability in the policy, is not stayed in respect to the insured. A stay of enforcement of the balance of the amount of the judgment or order may be imposed by giving an undertaking, as provided in paragraph two of subdivision (a), in an amount equal to that balance.
(c) Stay and limitation of stay by court order. The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).
(d) Undertaking. On an appeal from an order affirming a judgment or order, the undertaking shall secure both the order and the judgment or order which is affirmed.

CPLR 5521. Preferences
(a) Preferences in the hearing of an appeal may be granted in the discretion of the court to which the appeal is taken.
(b) Consistent with the provisions of section one thousand one hundred twelve of the family court act, appeals from orders, judgments or decrees in proceedings brought pursuant to articles three, seven, ten and ten-A and parts one and two of article six of the family court act, and pursuant to sections three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, and three hundred eighty-four-b of the social services law, shall be given preference and may be brought on for argument on such terms and conditions as the court may direct without the necessity of a motion.

Family Court Act § 1112. Appealable orders
a. An appeal may be taken as of right from any order of disposition and, in the discretion of the appropriate appellate division, from any other order under this act. An appeal from an intermediate or final order in a case involving abuse or neglect may be taken as of right to the appellate division of the supreme court. Pending the determination of such appeal, such order shall be stayed where the effect of such order would be to discharge the child, if the family court or the court before which such appeal is pending finds that such a stay is necessary to avoid

imminent risk to the child's life or health. A preference in accordance with rule five thousand five hundred twenty-one of the civil practice law and rules shall be afforded, without the necessity of a motion, for appeals under article three; parts one and two of article six; articles seven, ten, and ten-A of this act; and sections three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, and three hundred eighty-four-b of the social services law.
b. In any proceeding pursuant to article ten of this act or in any proceeding pursuant to article ten-A of this act that originated as a proceeding under article ten of this act where the family court issues an order which will result in the return of a child previously remanded or placed by the family court in the custody of someone other than the respondent, such order shall be stayed until five p.m. of the next business day after the day on which such order is issued unless such stay is waived by all parties to the proceeding by written stipulation or upon the record in family court. Nothing herein shall be deemed to affect the discretion of a judge of the family court to stay an order returning a child to the custody of a respondent for a longer period of time than set forth in this subdivision.

Family Court Act § 1113. Time of appeal

An appeal under this article must be taken no later than thirty days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, thirty days from receipt of the order by the appellant in court or thirty-five days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest.
All such orders shall contain the following statement in conspicuous print: “Pursuant to section 1113 of the family court act, an appeal must be taken within thirty days of receipt of the order by appellant in court, thirty-five days from the mailing of the order to the appellant by the clerk of the court, or thirty days after service by a party or attorney for the child upon the appellant, whichever is earliest.” When service of the order is made by the court, the time to take an appeal shall not commence unless the order contains such statement and there is an official notation in the court record as to the date and the manner of service of the order.

Family Court Act § 1114. Effect of appeal; stay

(a) The timely filing of a notice of appeal under this article does not stay the order from which the appeal is taken.
(b) Except as provided in subdivision (d) of this section, a justice of the appellate division to which an appeal is taken may stay execution of the order from which the appeal is taken on such conditions, if any, as may be appropriate.
(c) If the order appealed from is an order of support under articles four or five, the stay may be conditioned upon the giving of sufficient surety by a written undertaking approved by such judge of the appellate division, that during the pendency of the appeal, the appellant will pay the amount specified in the order to the family court from whose order the appeal is taken. The stay may further provide that the family court (i) shall hold such payments in escrow, pending determination of the appeal or (ii) shall disburse such payments or any part of them for the support of the petitioner or other person for whose benefit the order was made.
(d) Any party to a child protective proceeding, or the attorney for the child, may apply to a justice of the appellate division for a stay of an order issued pursuant to part two of article ten of this chapter returning a child to the custody of a respondent. The party applying for the stay shall notify the attorneys for all parties and the attorney for the child of the time and place of such application. If requested by any party present, oral argument shall be had on the application,

except for good cause stated upon the record. The party applying for the stay shall state in the application the errors of fact or law allegedly committed by the family court. A party applying to the court for the granting or continuation of such stay shall make every reasonable effort to obtain a complete transcript of the proceeding before the family court.
If a stay is granted, a schedule shall be set for an expedited appeal.

Family Court Act § 1115. Notices of appeal

An appeal as of right shall be taken by filing the original notice of appeal with the clerk of the family court in which the order was made and from which the appeal is taken.
A notice of appeal shall be served on any adverse party as provided for in subdivision one of section five thousand five hundred fifteen of the civil practice law and rules and upon the child's attorney, if any. The appellant shall file two copies of such notice, together with proof of service, with the clerk of the family court who shall forthwith transmit one copy of such notice to the clerk of the appropriate appellate division or as otherwise required by such appellate division.

Family Court Act § 1120. Counsel for parties and children on appeal

(a) Upon an appeal in a proceeding under this act, the appellate division to which such appeal is taken, or is sought to be taken, shall assign counsel to any person upon a showing that such person is one of the persons described in section two hundred sixty-two of this act and is financially unable to obtain independent counsel or upon certification by an attorney in accordance with section eleven hundred eighteen of this article. The appellate division to which such appeal is taken, or is sought to be taken, may in its discretion assign counsel to any party to the appeal. Counsel assigned under this section shall be compensated and shall receive reimbursement for expenses reasonably incurred in the same manner provided by section seven hundred twenty-two-b of the county law. The appointment of counsel by the appellate division shall continue for the purpose of filing a notice of appeal or motion for leave to appeal to the court of appeals. Counsel may be relieved of his or her representation upon application to the court to which the appeal is taken for termination of the appointment, by the court on its own motion or, in the case of a motion for leave to appeal to the court of appeals, upon application to the appellate division. Upon termination of the appointment of counsel for an indigent party the court shall promptly appoint another attorney.
(b) Whenever an attorney has been appointed by the family court pursuant to section two hundred forty-nine of this act to represent a child in a proceeding described therein, the appointment shall continue without further court order or appointment where (i) the attorney on behalf of the child files a notice of appeal, or (ii) where a party to the original proceeding files a notice of appeal. The attorney for the child may be relieved of his representation upon application to the court to which the appeal is taken for termination of the appointment. Upon approval of such application the court shall appoint another attorney for the child.
(c) An appellate court may appoint an attorney to represent a child in an appeal in a proceeding originating in the family court where an attorney was not representing the child at the time of the entry of the order appealed from or at the time of the filing of the motion for permission to appeal and when independent legal representation is not available to such child.
(d) Nothing in this section shall be deemed to relieve attorneys for children of their duties pursuant to subdivision one of sections 354.2 and seven hundred sixty of this act.

(e) An attorney appointed or continuing to represent a child under this section shall be compensated and shall receive reimbursement for expenses reasonably incurred in the same manner provided by section thirty-five of the judiciary law.
(f) In any case where an attorney is or shall be representing a child in an appellate proceeding pursuant to subdivision (b) or (c) of this section, such attorney shall be served with a copy of the notice of appeal.

RULE OF PROFESSIONAL CONDUCT 3.1
NON-MERITORIOUS CLAIMS AND CONTENTIONS

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.
(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:
(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;
(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or
(3) the lawyer knowingly asserts material factual statements that are false.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.
[2] The filing of a claim or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the action has no reasonable purpose other than to harass or maliciously injure a person, or if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law (which includes the establishment of new judge-made law). The term "knowingly," which is used in Rule 3.1(b)(1) and (b)(3), is defined in Rule 1.0(k).
[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

SELECTED LINKS

Where to find Appellate Division and NY Court of Appeals Rules of Practice and Forms

http://www.nycourts.gov/courts/AD1/Practice&Procedures/rules.shtml
http://www.nycourts.gov/courts/ad2/pdf/rulesofprocedure.pdf
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http://www.nycourts.gov/ctapps/news/PressRel/500rules.pdf

SELECTED DECISIONS

80 N.Y.2d 299, 604 N.E.2d 122, 590 N.Y.S.2d 60

In the Matter of Michael B. Catholic Child Care Society of Diocese of Brooklyn et al., Respondents; Marvin B., Appellant; Maggie W. L., Intervenor-Respondent.

1992

OPINION OF THE COURT

Kaye, J.

This appeal from a custody determination, pitting a child's foster parents against his biological father, centers on the meaning of the statutory term "best interest of the child," and particularly on the weight to be given a child's bonding with his long-time foster family in deciding what placement is in his best interest. The biological father (appellant) on one side, ***304** and respondent foster parents (joined by respondent Law Guardian) on the other, each contend that a custody determination in their favor is in the best interest of the child, as that term is used in Social Services Law § 392 (6), the statute governing dispositions with respect to children in foster care.

The subject of this protracted battle is Michael B., born July 29, 1985 with a positive toxicology for cocaine. Michael was voluntarily placed in foster care from the hospital by his mother, who was unmarried at the time of the birth and listed no father on the birth certificate. Michael's four siblings were then also in foster care, residing in different homes. At three months, before the identity of his father was known, Michael--needing extraordinary care--was placed in the home of intervenor Maggie W. L., a foster parent certified by respondent Catholic Child Care Society (the agency), and the child remained with the L.'s for more than five years, until December 1990. It is undisputed that the agency initially assured Mrs. L. this was a "preadoptive" placement.

Legal proceedings began in May 1987, after appellant had been identified as Michael's father. The agency sought to terminate the rights of both biological parents and free the child for adoption, alleging that for more than a year following Michael's placement the parents had failed to substantially, continuously or repeatedly maintain contact with Michael and plan for his future, although physically and financially able to do so (Social Services Law § 384-b [7]). Michael's mother (since deceased) never appeared in the proceeding, and a finding of permanent neglect as to her was made in November 1987. Appellant did appear and in September 1987 consented to a finding of permanent neglect, and to committing custody and guardianship to the agency on condition that the children be placed with their two godmothers. That order was later vacated, on appellant's application to withdraw his pleas and obtain custody, because the agency had not in fact placed the children with their godmothers. In late 1987, appellant--a long-time alcohol and substance abuser-- entered an 18-month residential drug rehabilitation program and first began to visit Michael.

In August 1988, appellant, the agency and the Law Guardian agreed to reinstatement of the permanent neglect finding, with judgment suspended for 12 months, on condition that appellant: (1) enroll in a program teaching household management and parenting skills; (2) cooperate by attending and ***305** complying with the program; (3) remain drug-free, and periodically submit to drug testing, with test results to be delivered to the agency; (4) secure and maintain employment; (5) obtain suitable housing; and (6) submit a plan for the children's care during his working day *(see,* Family Ct Act § 631 [b]; § 633). The order recited that it was without prejudice to the agency recalendaring the case for a de novo hearing on all allegations of the petition should appellant fail to satisfy the conditions, and otherwise said nothing more of the consequences that would follow on appellant's compliance or noncompliance.

As the 12-month period neared expiration, the agency sought a hearing to help "determine the status and placement of the children." Although appellant was unemployed (he was on public assistance) and had not submitted to drug testing during the year, Family Court at the hearing held October 24, 1989 was satisfied that "there seem[ed] to be substantial compliance" with the conditions of the suspended judgment. Because the August 1988 order was unclear as to who had responsibility for initiating the drug tests, the court directed that the agency arrange three successive blood and urine tests, and if the tests proved negative, "all subject children may be released to father except Jemel [a 'special needs' child]." The matter was adjourned to December 21, when it was joined with respondents' application for a dispositional order with respect to Michael, whose long residence with the L.'s, they said, raised special concerns.

On December 21, 1989, the Law Guardian presented a report indicating that Michael might suffer severe psychological damage if removed from his foster home, and argued for a "best interests" hearing pursuant to *Matter of Bennett v Jeffreys* (40 NY2d 543), based on Michael's bonding with the L.'s and, by contrast, his lack of bonding with appellant, who had visited him infrequently. Family Court questioned whether it even had authority for such a hearing, but stayed the order directing Michael's discharge to appellant pending its determination. Michael's siblings, then approximately twelve, eight, seven and six years old, were released to appellant in January and July 1990. Litigation continued as to Michael.

In November 1990, Family Court directed Michael's discharge to appellant, concluding that it was without "authority or jurisdiction" to rehear the issue of custody

based on the child's best interest, and indeed that Michael had been wrongfully ***306** held in foster care. The court noted, additionally, that the Law Guardian's arguments as to Michael's best interest went to issues of bonding with his temporary custodians rather than appellant's insufficiency as a parent--bonding that had been reinforced by the agency's failure to ensure sufficient contacts with appellant during the proceedings. Appellant "should not be denied custody simply because of the actions of the [agency] and the lengthy litigation following final disposition has resulted in the foster parents enjoying a stronger emotional tie to the child than the [appellant]." The court directed that Michael commence immediate weekend visitation with appellant, with a view to transfer within 60 days. Michael was discharged to appellant in December 1990.

The Appellate Division reversed and remitted for a new hearing and new consideration of Michael's custody, concluding that dismissal of a permanent neglect petition cannot divest Family Court of its continuing jurisdiction over a child until there has been a "best interests" custody disposition (171 AD2d 790). As for the relevance of bonding, the Appellate Division held that, given the "extraordinary circumstances" *(Matter of Bennett v Jeffreys,* 40 NY2d, at 544, *supra)*--referring particularly to Michael's long residence with his foster parents--Family Court should have conducted a hearing to consider issues such as the impact on the child of a change in custody. There having been no question of appellant's fitness, however, the Appellate Division permitted Michael to remain with his father pending the new determination.

On remittal, Family Court heard extensive testimony--including testimony from appellant, the foster parents, the agency (having changed its goal to discharge to appellant), and psychological, psychiatric and social work professionals (who overwhelmingly favored continued foster care over discharge to appellant)--but adhered to its determination that Michael should be released to his father. Family Court found appellant "fit, available and capable of adequately providing for the health, safety and welfare of the subject child, and ... it is in the child's best interest to be returned to his father."

Again the Appellate Division reversed Family Court's order, this time itself awarding custody to the foster parents under Social Services Law § 392 (6) (b), and remitting the matter to a different Family Court Judge solely to determine appellant's visitation rights (180 AD2d 792). Exercising its own authority--as broad as that of the hearing court--to assess the credibility ***307** of witnesses and character and temperament of the parents, the court reviewed the evidence and, while pointing up appellant's many deficiencies, significantly stopped short of finding him an unfit parent, as it had the power to do. Rather, the court looked to Michael's lengthy stay and psychological bonding with the foster family, which it felt gave rise to extraordinary circumstances meriting an award of custody to the foster parents. According to the Appellate Division, the evidence "overwhelmingly demonstrate[d] that Michael's foster parents are better able than his natural father to provide for his physical, emotional, and intellectual needs." (180 AD2d, at 794.) Since early 1992, Michael has once again resided with the L.'s.

While prolonged, inconclusive proceedings and seesawing custody of a young child--all in the name of Michael's best interest--could not conceivably serve his interest at all, we granted appellant father's motion for leave to appeal, and now reverse the Appellate Division's central holdings. The opinions of Family Court specifying deficiencies of the agency and foster parents, and the opinions of the Appellate Division specifying inadequacies of the biological parent, leave little question that the only blameless person is the child. But rather than assess fault, our review will address the legal standards that have twice divided Family Court and the Appellate Division, hopefully minimizing recurrences, for this child and others, of the tragic scenario now before us.

ANALYSIS

Appellant no longer disputes that Family Court retained jurisdiction to consider the child's best interest in connection with an award of custody even after the finding that he had substantially satisfied the conditions of the suspended judgment. All parties agree with the correctness of the Appellate Division determination that, despite appellant's apparent compliance with the conditions of the suspended judgment, Family Court retained jurisdiction to consider the best interest of the children in foster care until a final order of disposition (171 AD2d, at 791; Social Services Law § 392 [6], [9]; *Matter of Sheila G.,* 61 NY2d 368, 389).[1]

What remains the bone of contention in this Court is the ***308** scope of the requisite "best interest" inquiry under Social Services Law § 392 (6). Appellant urges that in cases of foster care, so long as the biological parent is not found unfit--and he underscores that neither Family Court nor the Appellate Division found him unfit--"best interest of the child" is only a limited inquiry addressed to whether the child will suffer grievous injury if transferred out of foster care to the biological parent. Respondents, by contrast, maintain that extraordinary circumstances--such as significant bonding with foster parents, after inattention and even admitted neglect by the biological parent--trigger a full inquiry into the more suitable placement as between the biological and foster parents. Subsidiarily, appellant challenges the Appellate Division's outright award of custody to the foster parents, claiming that disposition was beyond the Court's authority under Social Services Law § 392 (6).

We conclude, first, that neither party advances the correct "best interest" test in the context of temporary foster care placements, but that appellant's view is more consistent

with the statutory scheme than the broad-gauge inquiry advocated by respondents and applied by the Appellate Division. Second, we hold that the award of custody to the foster parents was impermissible as we interpret Social Services Law § 392 (6).

THE FOSTER CARE SCHEME

This being a case of voluntary placement in foster care--a subject controlled by statute--analysis must begin with the legislative scheme, which defines and balances the parties' rights and responsibilities. An understanding of how the system is designed to operate--before the design is complicated, and even subverted, by human actors and practical realities--is essential to resolving the questions before us.

New York's foster care scheme is built around several fundamental social policy choices that have been explicitly declared by the Legislature and are binding on this Court (Social Services Law § 384-b [1]). Under the statute, operating as written, appellant should have received the active support of both the agency in overcoming his parental deficiencies and the foster parents in solidifying his relationship with Michael, ***309** and as soon as return to the biological parent proved unrealistic, the child should have been freed for adoption.

A biological parent has a right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood, even though the State perhaps could find "better" parents (Social Services Law § 384-b [1] [a] [ii]; *Matter of Male Infant L.*, 61 NY2d 420, 426; *Matter of Sanjivini K.*, 47 NY2d 374, 382; *Matter of Corey L v Martin L*, 45 NY2d 383, 391). A child is not the parent's property, but neither is a child the property of the State *(Matter of Sanjivini K.*, 47 NY2d, at 382, *supra* [citing *Pierce v Society of Sisters*, 268 US 510, 535; and *Stanley v Illinois*, 405 US 645]). Looking to the *child's* rights as well as the parents' rights to bring up their own children, the Legislature has found and declared that a child's need to grow up with a "normal family life in a permanent home" is ordinarily best met in the child's "natural home" (Social Services Law § 384-b [1] [a] [i], [ii]).

Parents in temporary crisis are encouraged to voluntarily place their children in foster care without fear that they will thereby forfeit their parental rights (Social Services Law § 384-a; *Matter of Mehl*, 114 Misc 2d 55, 60). The State's first obligation is to help the family with services to prevent its break-up, or to reunite the family if the child is out of the home (Social Services Law § 384-b [1] [a] [iii]; *Santosky v Kramer*, 455 US 745, 748). While a child is in foster care, the State must use diligent efforts to strengthen the relationship between parent and child, and work with the parent to regain custody (Social Services Law § 384-a [2] [c] [iv]; *Matter of Sheila G.*, 61 NY2d, at 385, *supra).*

Because of the statutory emphasis on the biological family as best serving a child's long-range needs, the legal rights of foster parents are necessarily limited *(see, Smith v Organization of Foster Families*, 431 US 816, 846). Legal custody of a child in foster care remains with the agency that places the child, not with the foster parents (Social Services Law § 383 [2]). Foster parents enter into this arrangement with the express understanding that the placement is temporary, and that the agency retains the right to remove the child upon notice at any time *(People ex rel. Ninesling v Nassau County Dept. of Social Servs.*, 46 NY2d 382, 387, *rearg denied* 46 NY2d 836). As made clear in *Matter of Spence-Chapin Adoption Serv. v Polk* (29 NY2d 196), "foster care custodians must ***310** deliver on demand not 16 out of 17 times, but every time, or the usefulness of foster care assignments is destroyed. To the ordinary fears in placing a child in foster care should not be added the concern that the better the foster care custodians the greater the risk that they will assert, out of love and affection grown too deep, an inchoate right to adopt." *(Id.*, at 205.) Foster parents, moreover, have an affirmative obligation--similar to the obligation of the State--to attempt to solidify the relationship between biological parent and child. While foster parents may be heard on custody issues *(see*, Social Services Law § 383 [3]), they have no standing to seek permanent custody absent termination of parental rights *(see, Matter of Rivers v Womack*, 178 AD2d 532).

Fundamental also to the statutory scheme is the preference for providing children with stable, permanent homes as early as possible *(see, Matter of Peter L.*, 59 NY2d 513, 519). "[W]hen it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought" (Social Services Law § 384-b [1] [a] [iv]). Extended foster care is not in the child's best interest, because it deprives a child of a permanent, nurturing family relationship *(see, Matter of Gregory B.*, 74 NY2d 77, 90, *rearg denied sub nom. Matter of Willie John B.*, 74 NY2d 880; *Matter of Joyce T.*, 65 NY2d 39, 47-48). Where it appears that the child may never be reunited with the biological parents, the responsible agency should institute a proceeding to terminate parental rights and free the child for adoption (Social Services Law § 384-b [1] [b]; [3] [b]; § 392 [6] [c]).

Parental rights may be terminated only upon clear and convincing proof of abandonment, inability to care for the child due to mental illness or retardation, permanent neglect, or severe or repeated child abuse (Social Services Law § 384-b [3] [g]; [4]).[2] Of the permissible dispositions in a termination ***311** proceeding based on permanent neglect *(see,* Family Ct Act § 631), the Legislature--consistent with its emphasis on the importance of biological ties, yet mindful of the child's need for early stability and permanence--has provided for a suspended

judgment, which is a brief grace period designed to prepare the parent to be reunited with the child (Family Ct Act § 633). Parents found to have permanently neglected a child may be given a second chance, where the court determines it is in the child's best interests (Family Ct Act § 631), but that opportunity is strictly limited in time. Parents may have up to one year (and a second year only where there are "exceptional circumstances") during which they must comply with terms and conditions meant to ameliorate the difficulty *(see,* 22 NYCRR 205.50 [spelling out terms and conditions]). Noncompliance may lead to revocation of the judgment and termination of parental rights. Compliance may lead to dismissal of the termination petition with the child remaining subject to the jurisdiction of the Family Court until a determination is made as to the child's disposition pursuant to Social Services Law § 392 (6) *(see, Matter of Sheila G.,* 61 NY2d, at 390, *supra).*

Where parental rights have not been terminated, Social Services Law § 392 promotes the objectives of stability and permanency by requiring periodic review of foster care placements. The agency having custody must first petition for review after a child has been in continuous foster care for 18 months (Social Services Law § 392 [2]), and if no change is made, every 24 months thereafter (Social Services Law § 392 [9]). While foster parents who have been caring for such child for the prior 12 months are entitled to notice (Social Services Law § 392 [4]), and may also petition for review on their own initiative (Social Services Law § 392 [2]), a petition under section 392 (captioned "Foster care status; periodic family court review") is not an avenue to permanent custody for foster parents where the child has not been freed for adoption.

Upon such review, the court must consider the appropriateness of the agency's plan for the child, what services have been offered to strengthen and reunite the family, efforts to plan for other modes of care, and other further efforts to promote the child's welfare *(see,* Social Services Law § 392 [5a]), and in accordance with the best interest of the child, make one of the following dispositions: (1) continue the child in foster care (which may include continuation with the current foster parents) (Social Services Law § 392 [6] [a]); (2) direct ***312** that the child "be returned to the parent, guardian or relative, or [direct] that the child be placed in the custody of a relative or other suitable person or persons" (Social Services Law § 392 [6] [b]); or (3) require the agency (or foster parents upon the agency's default) to institute a parental rights termination proceeding (Social Services Law § 392 [6] [c]).

The key element in the court's disposition is the best interest of the child (Social Services Law § 392 [6])--the statutory term that is at the core of this appeal, and to which we now turn.

"BEST INTEREST" IN THE FOSTER CARE SCHEME

"Best interest(s) of the child" is a term that pervades the law relating to children--appearing innumerable times in the pertinent statutes, judicial decisions and literature--yet eludes ready definition. Two interpretations are advanced, each vigorously advocated.

Appellant would read the best interest standard of Social Services Law § 392 (6) narrowly, urging that Family Court should inquire only into whether the biological parent is fit, and whether the child will suffer grievous harm by being returned to the parent. Appellant urges affirmance of the Family Court orders, which (1) defined the contest as one between foster care agency and biological parent, rather than foster parent and biological parent; (2) focused first on "the ability of the father to care for the subject child," and then on whether "the child's emotional health will be so seriously impaired as to require continuance in foster care;" and (3) concluded that appellant was fit, and that Michael would not suffer irreparable emotional harm if returned to him. Wider inquiry, appellant insists, creates an "unwinnable beauty contest" the biological parent will inevitably lose where foster placement has continued for any substantial time.

Respondents take a broader view, urging that because of extraordinary circumstances largely attributable to appellant, the Appellate Division correctly compared him with the foster parents in determining Michael's custody and concluded that the child's best interest was served by the placement that better provided for his physical, emotional and intellectual needs. Respondents rely on *Matter of Bennett v Jeffreys* (40 NY2d 543, *supra),* this Court's landmark decision recognizing that a child's prolonged separation from a biological parent may be considered, among other factors, to be extraordinary ***313** circumstances permitting the court to inquire into which family situation would be in the child's best interests *(id.,* at 548, 551).

In that *Matter of Bennett v Jeffreys* concerned an unsupervised private placement, where there was no directly applicable legislation, that case is immediately distinguishable from the matter before us, which is controlled by a detailed statutory scheme *(Matter of Bennett v Jeffreys,* 40 NY2d, at 545, *supra).* Our analysis must begin at a different point--not whether there are extraordinary circumstances, but what the Legislature intended by the words "best interest of the child" in Social Services Law § 392 (6).

Necessarily, we look first to the statute itself. The question is in part answered by Social Services Law §§ 383 and 384-b, which encourage voluntary placements, with the provision that they will not result in the termination of parental rights so long as the parent is fit. To use the period during which a child lives with a foster family, and

emotional ties that naturally eventuate, as a ground for comparing the biological parent with the foster parent undermines the very objective of voluntary foster care as a resource for parents in temporary crisis, who are then at risk of losing their children once a bond arises with the foster families.

Other portions of the statute support this conclusion. Significantly, after an adjudication of permanent neglect, the statute directs the disposition to be made "solely on the basis of the best interests of the child, *and there shall be no presumption that such interests will be promoted by any particular disposition"* (Family Ct Act § 631 [emphasis added]; *Matter of Star Leslie W.*, 63 NY2d 136, 147-148). As against this provision, Social Services Law § 392 (6) states only that a disposition should be made "in accordance with the best interest of the child."

Absent an explicit legislative directive--such as that found in Family Court Act § 631--we are not free to overlook the legislative policies that underlie temporary foster care, including the preeminence of the biological family. Indeed, the legislative history of Social Services Law § 392 (5-a), which specifies factors that must be considered in determining the child's best interests, states "this bill clearly advises the Family Court of certain considerations before making an order of disposition. These factors establish a clear policy of exploring all available means of reuniting the child with his family ***314** before the Court decides to continue his foster care or to direct a permanent adoptive placement." (Mem Accompanying Comments on Bill, NY State Bd of Social Welfare, A 12801-B, July 9, 1976, Governor's Bill Jacket, L 1976, ch 667.)

([1]) We therefore cannot endorse a pure "best interests" hearing, where biological parent and foster parents stand on equal footing and the child's interest is the sole consideration *(see, Matter of Spence-Chapin Adoption Serv. v Polk*, 29 NY2d, at 204, *supra; People ex rel. Kropp v Shepsky*, 305 NY 465, 469). In cases controlled by Social Services Law § 392 (6), analysis of the child's "best interest" must begin not by measuring biological parent against foster parent but by weighing past and continued foster care against discharge to the biological parent, or other relative or suitable person within Social Services Law § 392 (6) (b) *(see, Matter of Sheila G.*, 61 NY2d, at 389-390, *supra; see also*, Mem Accompanying Comments on Bills, NY State Dept of Social Servs, A Int 12801-B, July 14, 1976, Governor's Bill Jacket, L 1976, ch 667).

While the facts of *Matter of Bennett v Jeffreys* fell outside the statute, and the Court was unrestrained by legislative prescription in defining the scope of the "best interests" inquiry, principles underlying that decision are also relevant here. It is plainly the case, for example, that a "child may be so long in the custody of the nonparent that, even though there has been no abandonment or persisting neglect by the parent, the psychological trauma of removal is grave enough to threaten destruction of the child" *(id.*, at 550), and we cannot discount evidence that a child may have bonded with someone other than the biological parent. In such a case, continued foster care may be appropriate although the parent has not been found unfit.

Under Social Services Law § 392, where a child has not been freed for adoption, the court must determine whether it is nonetheless appropriate to continue foster care temporarily, or whether the child should be permanently discharged to the biological parent (or a relative or "other suitable person"). In determining the best interest of a child in that situation, the fitness of the biological parent must be a primary factor. The court is also statutorily mandated to consider the agency's plan for the child, what services have been offered to strengthen and reunite the family, what reasonable efforts have been made to make it possible for the child to return to the natural home, and if return home is not likely, what ***315** efforts have been or should be made to evaluate other options (Social Services Law § 392 [5-a]). Finally, the court should consider the more intangible elements relating to the emotional well-being of the child, among them the impact on the child of immediate discharge versus an additional period of foster care.

While it is doubtful whether it could be found to be in the child's best interest to deny the parent's persistent demands for custody simply because it took so long to obtain it legally *(Matter of Sanjivini K.*, 47 NY2d, at 382, *supra)*, neither is a lapse of time necessarily without significance in determining custody. The child's emotional well-being must be part of the equation, parental rights notwithstanding *(Matter of Sheila G.*, 61 NY2d, at 390, *supra)*. However, while emotional well-being may encompass bonding to someone other than the biological parent, it includes as well a recognition that, absent termination of parental rights, the nonparent cannot adopt the child, and a child in continued custody with a nonparent remains in legal--and often emotional--limbo *(see, Matter of Bennett v Jeffreys*, 40 NY2d, at 551, *supra)*.[3]

The Appellate Division, applying an erroneous "best interest" test, seemingly avoided that result when it awarded legal custody to the foster parents. We next turn to why that disposition was improper. ***316**

AWARD OF LEGAL CUSTODY TO FOSTER PARENTS

([2]) The Appellate Division awarded legal custody of Michael to the foster parents pursuant to Social Services Law § 392 (6) (b), noting that the statute "permits a court to enter an order of disposition directing, *inter alia*, that a child, whose custody and care have temporarily been transferred to an authorized agency, be placed in the custody of a suitable person or persons." (180 AD2d, at 796.) The Court correctly looked to section 392 as the predicate for determining custody, but erroneously relied

on paragraph (b) of subdivision (6) in awarding custody to the foster parents.

As set forth above, there are three possible dispositions after foster care review with respect to a child not freed for adoption: continued foster care; release to a parent, guardian, relative or other suitable person; and institution of parental termination proceedings (Social Services Law § 392 [6] [a]-[c]).

As the first dispositional option, paragraph (a) contemplates the continuation of foster care, with the child remaining in the custody of the authorized agency, and the arrangement remaining subject to periodic review. As a result of 1989 amendments, disposition under paragraph (a) can include an order that the child be placed with (or remain with) a particular foster family until the next review (L 1989, ch 744). Under the statutory scheme, however, foster care is temporary, contractual and supervised.

Paragraph (b), by contrast, contemplates removal of the child from the foster care system by return to "the parent, guardian or relative, or direct[ion] that the child be placed in the custody of a relative or other suitable person or persons." The 1989 statutory revision added as a permissible disposition the placement of children with relatives or other suitable persons. The purpose of this amendment was to promote family stability by allowing placement with relatives, extended family members or persons like them, as an alternative to foster care *(see,* Sponsor's Mem in Support of Amended Bill, L 1989, ch 744, and 10 Day Bill Budget Report, A 7216-A, Governor's Bill Jacket; *see also, Matter of Peter L.,* 59 NY2d, at 519, *supra).*

Plainly, the scheme does not envision also including the foster parents--who were the subject of the amendment to paragraph (a)--as "other suitable persons." Indeed, reading paragraph (b) as the Appellate Division did, to permit removal of the child from foster care and an award of legal custody to ***317** the foster parents, exacerbates the legal limbo status. The child is left without a placement looking to the establishment of a permanent parental relationship through adoption, or the prospect of subsequent review of foster care status with the possibility of adoption placement at that time *(see,* Social Services Law § 384-b [4]; *Matter of Peter L.,* 59 NY2d, at 519, *supra),* yet has no realistic chance of return to the biological parent.

The terms of paragraph (c), providing for an order that the agency institute a parental termination proceeding, further buttress the conclusion that foster parents are not included in paragraph (b). Pursuant to paragraph (c), if the court finds reasonable cause to believe there are grounds for termination of parental rights, it may order the responsible agency to institute such proceedings. If the agency fails to do so within 90 days, the foster parents themselves may bring the proceeding, unless the court believes their subsequent petition to adopt would not be approved. Thus, in the statutory scheme the Legislature has provided a means for foster parents to secure a temporary arrangement under paragraph (a) and a permanent arrangement under paragraph (c)--both of which specifically mention foster parents. They are not also implicitly included in paragraph (b), which addresses different interests.

We therefore conclude that the Appellate Division erred in interpreting Social Services Law § 392 (6) to permit the award of legal custody to respondent foster parents.

NEED FOR FURTHER INQUIRY

We have no occasion to apply the proper legal test to the facts at hand, as the parties urge. New circumstances require remittal to Family Court for an expedited hearing and determination of whether appellant is a fit parent and entitled to custody of Michael.

The Court has been informed that, during the pendency of the appeal, appellant was charged with--and admitted--neglect of the children in his custody (not Michael), and that those children have been removed from his home and are again in the custody of the Commissioner of the Social Services. The neglect petitions allege that appellant abused alcohol and controlled substances including cocaine, and physically abused the children. Orders of fact finding have been entered by Family Court, Queens County, recognizing appellant's ***318** admission in open court to "substance abuse, alcohol and cocaine abuse." Moreover, an Order of Protection was entered prohibiting appellant from visiting the children while under the influence of drugs or alcohol.

([3]) Appellant's request that we ignore these new developments and simply grant him custody, because matters outside the record cannot be considered by an appellate court, would exalt the procedural rule--important though it is--to a point of absurdity, and "reflect no credit on the judicial process." (Cohen and Karger, Powers of the New York Court of Appeals § 168, at 640.) Indeed, changed circumstances may have particular significance in child custody matters *(see, e.g., Braiman v Braiman,* 44 NY2d 584, 587, 590; *Matter of Angela D.,* 175 AD2d 244, 245; *Matter of Kelly Ann M.,* 40 AD2d 546). This Court would therefore take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining appellant's fitness and right to custody of Michael, and remit the matter to Family Court for a new hearing and determination of those issues. The Appellate Division concluded that the hearing should take place before a different Judge of that court (180 AD2d, at 796), and we see no basis to disturb that determination. Pending the hearing, Michael should physically remain with his current foster parents, but legal custody should be returned to the foster care agency.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the matter remitted to Family Court, Kings County, for further proceedings in accordance with this opinion.

50 N.Y.2d 707, 409 N.E.2d 876, 431 N.Y.S.2d 400

In the Matter of Hearst Corporation et al.,
Appellants,
v.
John J. Clyne, as Judge of the County Court of Albany County, et al., Respondents.

1980

OPINION OF THE COURT

Wachtler, J.

The petitioners in this article 78 proceeding are the publisher of the Albany *Times-Union*, a daily newspaper, and Shirley Armstrong, a reporter for that newspaper. The respondent, John J. Clyne, is a Judge of the Albany County Court.

In March of 1979 Judge Clyne was conducting a joint suppression hearing in the criminal case of Alexander Marathon and William Du Bray, who had been indicted for the crimes of robbery in the first degree, burglary in the first degree and grand larceny in the second degree. The hearings were closed to the public and press on the motion of the defendants, without objection by the prosecutor and without a hearing. Armstrong, the court reporter for the *Times-Union*, knew the hearings were closed and the courtroom doors locked, but was sufficiently interested in the proceedings to periodically walk by the courtroom to observe whatever she could.

On March 7, during one of these periodic observations, Armstrong noticed the attorney for Du Bray, one of the codefendants, standing outside the courtroom door. On the assumption that something other than a suppression hearing was in progress Armstrong tried the courtroom door but found it locked. She then learned from Du Bray's attorney that Judge Clyne, behind closed doors, had heard and granted a motion to close a proceeding during which Marathon was expected to enter a plea. The reporter, Armstrong, then knocked on the courtroom door. There was no response. After about 15 minutes the doors opened and she learned from Judge Clyne that Marathon had indeed entered a guilty plea. ***713** The Judge, however, refused petitioners' request for a transcript of the plea proceeding or to direct the court stenographer to read back the minutes of the proceeding.

On March 12, prior to trial, the other defendant, Du Bray, also entered a plea of guilty before Judge Clyne. Thereafter Judge Clyne permitted the petitioners to obtain a copy of the transcript of the closed plea proceeding; that transcript has now been furnished to them and forms a part of the record on this appeal.

The transcript of the closed proceeding held March 7, which is the sole concern of this appeal, indicates that at the very commencement of the already closed suppression hearing which had been adjourned from March 5, Marathon's attorney orally moved to close the courtroom to all persons except Marathon, his attorney, and court personnel. The District Attorney joined the motion. Without taking evidence or hearing argument from anyone Judge Clyne immediately granted the motion, even excluding the codefendant Du Bray and his attorney from the courtroom, and had the doors secured. In sworn testimony Marathon then confessed his own participation in the crime for which he was indicted, inculpated his codefendant Du Bray, and was permitted to enter a plea of guilty to one count of the indictment.

The petitioners brought this proceeding seeking a declaration that the closure of the plea taking was illegal, and for an injunction prohibiting such closures in the future unless members of the press are afforded an opportunity to be heard.

The Appellate Division concluded that the closure was a proper exercise of the trial court's discretion and dismissed the petition. Petitioners appealed. We conclude that the case is moot and that there is no sufficient reason for this court to consider the merits of the appeal; however, for the reasons which follow, the order of the Appellate Division should be reversed and remitted for dismissal.

It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal *(Matter of State Ind. Comm.*, 224 NY 13, 16; *California v San Pablo & Tulare R. R.*, 149 US 308, 314-315). This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological ***714** strictures which inhere in the decisional process of a common-law judiciary.

Our particular concern on this appeal is with that facet of the principle which ordinarily precludes courts from considering questions which, although once live, have become moot by passage of time or change in circumstances. In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest

of the parties is an immediate consequence of the judgment. On the facts of the instant case, where the underlying plea proceeding had been long concluded and the transcript had been furnished to the petitioners at the time this action was commenced (cf. *Matter of Westchester Rockland Newspapers v Leggett*, 48 NY2d 430, 436) we conclude that the rights of the parties cannot be affected by the determination of this appeal and it is therefore moot. Because we conclude that the appeal is moot it may not properly be decided by this court unless it is found to be within the exception to the doctrine which permits the courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable (see *Roe v Wade*, 410 US 113, 125).

([1])In this court the exception to the doctrine of mootness has been subject over the years to a variety of formulations.[1] However, examination of the cases in which our court has found an exception to the doctrine discloses three common factors: (1) a likelihood of repetition, either between the ***715** parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues. After careful review we are persuaded that the case before us presents no questions the fundamental underlying principles of which have not already been declared by this court, and that this case is, therefore, not of the class that should be preserved as an exception to the mootness doctrine.

We acknowledge, as we have before, the very substantial character of the interests represented by the petitioners in this proceeding. We also note that questions such as the one posed may occasionally escape review. It is for this reason that on occasion we have entertained appeals even though the issues in the particular controversy have been resolved. However, as our court only recently has set forth in some detail the requirements that must be fulfilled before a judicial proceeding in this State may be closed to the public and press, no sufficiently useful purpose would be served in this instance by our retaining the appeal notwithstanding that the underlying controversy is now moot.

([2])It has, of course, long been the law in this State that all judicial proceedings, both civil and criminal, are presumptively open to the public (Judiciary Law, § 4; *Lee v Brooklyn Union Pub. Co.*, 209 NY 245) and that a proceeding at which a criminal defendant enters a plea of guilty is indisputedly a substitute for a trial *(People ex rel. Carr v Martin*, 286 NY 27, 32). Indeed, in *Matter of Gannett Co. v De Pasquale* (43 NY2d 370) it was only by distinguishing the pretrial and evidentiary nature of the proceeding at issue that this court could conclude that such a proceeding should ordinarily be closed to the public and press *(Gannett, supra,* at p 380). We were careful to note in *Gannett* (at p 378) that, "In the case now before us, the Trial Judge was not presiding over a trial on the merits".

In *Matter of Westchester Rockland Newspapers v Leggett*, (48 NY2d 430, supra.;*)*, which was decided by this court after the decision of the Appellate Division in the instant case and which was obviously not available to inform either the trial or the appellate court, the issue was closure of a pretrial competency hearing. In that case even the pretrial nature of the proceeding was considered insufficient to nullify the presumption that all judicial proceedings are to be open. Thus the dissent is flatly incorrect in its statement that by dismissing ***716** this appeal for mootness we are disposed to permit trials to be closed to the public on the same basis as pretrial proceedings. On the contrary, we have distinguished between pretrial and trial closures and expressed our consciousness of the danger inherent in permitting too casual a closure of even pretrial proceedings: "At the present time, in fact in most criminal cases, there are only pretrial proceedings. Thus if the public is routinely excluded from all proceedings prior to trial, most of the work of the criminal courts will be done behind closed doors" *(Matter of Westchester Rockland Newspapers v Leggett, supra,* at p 440).

([1])Our decisions in *Gannett (supra)* and *Leggett (supra)* laid down the procedural framework within which the possibility of closure must be considered.[2] We conclude, therefore, that inasmuch as the principles governing fair trial- free press issues which might have been developed by consideration of the instant case have already been largely declared by our decisions in *Gannett* and *Leggett*, in this instance there is no sufficient reason to depart from the normal jurisprudential principle which calls for judicial restraint when the particular controversy has become moot.

More than that, we are convinced that there is a good reason in the circumstances of this case not to entertain this appeal for the purpose of extrapolating or refining the principles which we have declared. The closing of the plea hearing here occurred while the appeal from our *Gannett* decision was pending before the United States Supreme Court and some months before our decision in the *Leggett* case.[3] We cannot conclude that the trial court would have followed the procedures which he did or that he would necessarily have reached the same conclusion had our decision in *Leggett* preceded the hearing. While we can anticipate that the implementation of the principles that we have declared will not always be easy, we have no reason to question the readiness or capacity of the ***717** Judges at nisi prius to seek to implement them appropriately with diligence, faithfulness and imagination. We conceive our jurisprudential role in this field as one of supervising and monitoring the dispositions made by our lower courts after we declare the applicable principles, rather than retrospectively appraising conduct of Trial Judges that preceded our declarations.

Other considerations also support our conclusion that this appeal should not be entertained. We are concerned with the vitality and fundamental soundness of our jurisprudence.

The engine of the common law is inductive reasoning. It proceeds from the particular to the general. It is an experimental method which builds its rules in tiny increments, case-by-case. It is cautious advance always a step at a time. The essence of its method is the continual testing and retesting of its principles in "those great laboratories of the law, the courts of justice" (Smith, Jurisprudence, p 21).[4]

Conscious judicial restraint is essential--its absence diminishes the craftsmanship of the courts and debases the judicial product. A common-law Judge will not reach to decide a question not properly before him. Nor will he attempt to state a broad rule except when absolutely required--and then it will be cast in terms which permit it to be moulded in light of the experience of those who must work with it. A newly articulated rule should not be immediately recast "for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible" *(Smith*, Jurisprudence, p 21).

Finally, it must be explicitly stated that in dismissing the present appeal as moot we express no view on the merits. Our disposition here is not to be read as any withdrawal from, addition to, or elaboration on our opinions in *Gannett* and *Leggett*. It is entirely incorrect to suggest otherwise. Nor should our dismissal be interpreted as presaging a disposition to decline on grounds of mootness to entertain appeals in future fair-trial, free-press cases. We recognize, of course, that cases in this area of the law, because of considerations of timing, would often, even usually, evade review if appeals were uniformly to be dismissed for mootness. We shall continue ***718** to resolve each case in this field on the basis of its individual characteristics and merits, only one aspect of which will be its mootness, if moot it is.

Concluding as we do that the appeal is moot and not of a character which should be preserved for review, the appeal should be dismissed. In this case, however, because the Appellate Division had no opportunity to consider the matter in light of our decision in *Leggett (supra)* we should reverse and remit with directions to dismiss solely on the ground of mootness, in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent (see *Matter of Adirondack League Club v Board of Black Riv. Regulating Dist.*, 301 NY 219, 223; cf. *United States v Munsingwear*, 340 US 36, 39; *United States v Alaska S. S. Co.*, 253 US 113, 115).

NYSBA PARTNERSHIP CONFERENCE

Albany, NY, September 15, 2016
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I. Free appellate legal services.

A. Assigned counsel under Family Court Act § 262 and Labor Law § 538 for employer appeals of unemployment insurance appeal board decisions in favor of the claimant.

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D. NYSBA efforts to launch Pro Bono Appeals Program in First and Second Departments.

E. Potential for attorney's fees, under CPLR article 86, to pro bono counsel for CPLR article 78 proceedings where the respondent's position was not substantially justified.

F. Potential for attorney's fees to pro bono counsel under Family Court Act §§ 438, 546, 651 and Domestic Relations Law § 237 fee-shifting statutes. (On appeal, fee applications are made to trial court judge.)

II. Six threshold appeals issues.

A. You can only appeal from an order or judgment, not a decision. (CPLR 5512).

B. There is no direct appeal from a default order or judgment; a motion to vacate must be made (CPLR 5511, 5015).

C. Family Court appeals as of right are from "orders of disposition" and, in abuse and neglect cases, from intermediate orders (FCA § 1112).

D. Trial counsel should explain the client's appeal rights (FCA § 1121).

E. The client's rights should be protected by the timely filing of a notice of appeal, which should not limit the issues to be pursued (CPLR 5513, 5515; FCA §§ 1113, 1115).

F. Often appeals from intermediate orders in Article 10 cases or from permanency orders are mooted, and no exception *Hearst v. Clyne*, 50 NY2d 707, exception applies to permit appellate review.

III. Six issues to consider in appeals to be prosecuted.

A. Appellate counsel may provide guidance on appeals that should not be pursued because of lack of appellate viability.

B. In proper cases, a stay of enforcement should be promptly sought. (CPLR 5519; FCA §§ 1112, 1114).

C. Consider seeking a preference (CPLR 5521; FCA § 1112).

D. Appellate counsel should identify issues, including inadequate evidence, but beware of deference given to credibility findings and the tension between the Appellate Division's vast powers vs. its tendency to affirm even mediocre or otherwise problematical decisions.

E. Counsel should also identify significant errors that were preserved or warrant invocation of interest of justice jurisdiction and that affect a substantial right (CPLR 2002, 4017, 5501).

F. Beware of how your Appellate Division Department handles matters outside the record on appeal: Judicial notice of subsequent orders? *Matter of Michael B.*, 80 NY2d 299, widely applied? Addenda to briefs permitted?

IV. Thinking outside the box.

A. If your case is ripe for settlement, and your Appellate Division provides a settlement program (but not for Article 10 cases), seek a settlement conference.

B. If your Family Court case presents extraordinary circumstances, and traditional orderly processes do not suffice, seek habeas corpus relief (CPLR article 70; Family Court Act § 651, Domestic Relations Law § 240).

C. If binding precedent does not meet today's meets, seek to change the law in the right case, to help your client and those similarly situated clients (Rule of Prof. Conduct 3.1: lawyer may advance claim unwarranted under existing law if it can be supported by good faith argument for change in law).

D. If your case presents novel issues, ones of statewide importance, or the Appellate Division Departments are split, and you do not prevail upon appeal, seek leave to appeal.

E. Especially in the Court of Appeals, enlist broad and strategic amicus curiae support.

F. Take advantage of the NYSBA moot court program for a diverse, expert, prepared panel; also the Albany and Erie County Bars have moot court programs.

V. QUESTIONS.

MATERIALS
Statutory provisions cited.
Cases and Rule of Prof. Conduct cited.
Appellate Division Rules.
Sample notices of appeal.
Sample motions for stay.
NYSBA Pro Se Appeals Manual.
Pro Bono Appeals Program brochures and applications.

CYNTHIA FEATHERS, ESQ.

Cynthia Feathers has 25 years of appellate experience and has done 500 appeals on varied civil and criminal topics, as appellate counsel at the Appeals & Opinions Bureau of the State Attorney General's Office and the Center for Appellate Litigation in New York City; as retained counsel; as Second Circuit C.J.A. counsel and pro bono counsel; and as 18B counsel.

Currently, Ms. Feathers serves as Legal Director for the Rural Law Center of New York, a nonprofit organization dedicated to improving and expanding legal services in the state's 44 rural counties. RLC's appeals program handles more than 100 mandated appeals each year for indigent Family Court and criminal defendants in four upstate counties. Feathers also serves on the New York CLE Board and the Third Department's Committee on Character and Fitness and its Civil Appeals Settlement Program Advisory Panel. She is a member of the State Bar Family Law Section Executive Committee, co-chair of the State Bar Seniors Section Pro Bono Committee, and co-chair of the Albany County Bar Association Moot Court Program.

A magna cum laude of Northwestern University School (B.S.J. 1976), Feathers spent many years in corporate communications in Boston and Chicago before graduating cum laude from Boston College Law School (J.D. 1987) and clerking at the Appellate Division, Third Department. In recent years, she has served as an Adjunct Professor of Appellate Practice at Albany Law School; has chaired the State Bar Association's appeals committee and Pro Bono Appeals Program and the ABA Appellate Section Pro Bono Committee; and has been a member of the State Office of Indigent Legal Services Working Groups on Appellate Standards and Family Court Representation. She was the State Bar's Pro Bono Affairs Director from 2003 to 2008.